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CONSTRUCTIVE SERVICE OF PROCESS IN NEW YORK

JOHN F. X. FINN†

DOES service of process by publication in an equity action against a domiciliary of the state yield *in personam* jurisdiction in the absence of attachment, sequestration or garnishee procedure? Three recent cases in New York highlight the observation of a Federal Circuit Court of Appeals that "a person who is domiciled within a country and a citizen thereof is, of course, subject to the jurisdiction of its courts *wherever he may be,* since both domicil and national allegiance are recognized bases of jurisdiction over a person."[1] These cases are:

1. *Dirksen v. Dirksen;*[2] service by publication upon a domiciliary yields *in personam* jurisdiction without sequestration or like procedure.
2. *Cohen v. Cohen;*[3] service personally without the state upon a domiciliary yields complete *in personam* jurisdiction so that the New York court can validly issue an injunction punishable by contempt upon defendant's re-entry into New York.
3. *Doty v. Doty;*[4] jurisdiction over a defendant served personally without the state is only *in rem* if he is not a domiciliary, but *in personam* if he is a domiciliary.[5]

The *Dirksen* case calls attention to the doctrine of *May v. May,*[6] and to the amendments to the New York Civil Practice Act, Sections 232, 232a, and 235, enacted after that decision was handed down. The conclusion is then reached that "the legislature has in effect overruled *May v. May, supra.*"

With respect to non-domiciliaries, the law is quite clear that an

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1. United States v. Stabler, 169 F. 2d 995, 997 (3d Cir. 1948) (italics supplied). See also Milliken v. Meyer, 311 U. S. 457 (1940); Blackmer v. United States, 284 U. S. 421 (1932); RESTATEMENT, CONFLICT OF LAWS § 47 (1934). *Cf.* Pennoyer v. Neff, 95 U. S. 714 (1877).

2. 72 N. Y. S. 2d 865 (Sup. Ct. 1947).

3. 193 Misc. 1023, 86 N. Y. S. 2d 168 (Sup. Ct. 1948).

4. 194 Misc. 907, 88 N. Y. S. 2d 328 (Sup. Ct. 1949).

5. See also Ellsworth v. Ellsworth, 189 Misc. 776, 71 N. Y. S. 2d 522 (Sup. Ct. 1947); Carnegie v. Carnegie, 274 App. Div. 887, 83 N. Y. S. 2d 252 (1st Dep't 1948); Geary v. Geary, 272 N. Y. 390, 399, 6 N. E. 2d 67, 71 (1936); ELEVENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 198 (1945); TWELFTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 58 (1946); 23 N. Y. U. L. Q. REV. 340 (1948).

6. 233 App. Div. 519, 520, 253 N. Y. Supp. 606, 608 (1st Dep't 1931). The court there stated: "Even in the case of a resident of this state leaving the jurisdiction to evade its process, the court in such an action founded upon constructive service may go no further than to adjudicate with respect to the marital status, and notwithstanding the provisions of the Civil Practice Act, may not award alimony or costs so as to charge such absent resident personally therewith."

in personam judgment cannot be validly based upon mere service by publication, especially where an "incorporeal interest" has no situs in New York "apart from the domicile of the owners".[7]

With respect to domiciliaries, it is interesting to recall that in "money only" actions up to 1920 the New York statutes did not require a prior attachment and levy against a domiciliary.[8] A 1920 amendment requiring a warrant of attachment to be procured and levied as a condition precedent to obtaining an order for service by publication "was not explained by any authoritative draftsman of or commentator on the revision. Even the fact that a change had been made does not seem to have been mentioned."[9] Hence in 1945 the Judicial Council proposed "a return to the law of New York as it existed prior to 1920 by eliminating the requirement for obtaining a warrant of attachment and levy as a condition precedent to obtaining an order for service by publication in actions for a sum of money only against a resident defendant."[10] A bill to accomplish this purpose passed both houses of the legislature but was vetoed by the Governor.[11] The next year (1946) the Judicial Council made a recommendation which "eliminates the provisions which caused the veto last year."[12] This proposal was enacted.[13] Hence, at the present time in a "money only" action the levy of an attachment is a prerequisite to valid service by publication upon a domiciliary.[14] But what is a "money only" action?[15] The inquiry is academic where a domiciliary is served personally outside the state without an order.[16] But in an equity action for specific per-

7. Cardozo, C. J., in Ebsary Gypsum Co. v. Ruby, 256 N. Y. 406, 410, 176 N. E. 820, 823 (1931). See also Bryan v. University Pub. Co., 112 N. Y. 382, 19 N. E. 825 (1889); Paget v. Stevens, 143 N. Y. 172, 38 N. E. 273 (1894).

8. N. Y. Code of Procedure § 114 (1848) (Field Code) and Commissioner's note thereto. (In 1849, § 114 was renumbered as § 135 and amplified.)

9. Eleventh Annual Report of the New York Judicial Council 197 (1945).

10. Eleventh Annual Report of the New York Judicial Council 194, 197 (1945).

11. 1945 Sen. Int. 241, ¶ 2294, Assembly Int. 404, ¶ 2382; Twelfth Annual Report of the New York Judicial Council 58 (1946).

12. Twelfth Annual Report of the New York Judicial Council 58 (1946).

13. N. Y. L. 1946, c. 144.

14. N. Y. Civ. Prac. Act, § 232 (3).

15. Brainard v. Brainard, 272 App. Div. 575, 74 N. Y. S. 2d 1 (1st Dep't 1947), *aff'd on other grounds,* 297 N. Y. 916 (1948); Note, 22 St. John's L. Rev. 87 (1947); 23 N. Y. U. L. Q. Rev. 340 (1948); Fifteenth Annual Report of the New York Judicial Council 61 (1949). [Complaint asks divorce and alimony or foreclosure of mortgage and deficiency. This presents a "most serious question." Fifteenth Annual Report of the New York Judicial Council 61 (1949)].

16. N. Y. Civ. Prac. Act, § 235 (Supp. 1949); Fifteenth Annual Report of the New York Judicial Council 62 (1949): "Experience under the present limited provisions has indicated the desirability of extending, as to a domiciliary, the provisions of section

formance with or without damages, or for an injunction with or without damages, in which process is served upon domiciliaries or non-domiciliaries by pure publication, there are procedural gremlins abroad which befog the eye of scholarship.[17] In such actions there is need for a definitive appellate decision which will come to grips with the problem in *Dirksen v. Dirksen*.[18] When that decision is written the appellate court will undoubtedly hark back to the thought expressed in *Continental Bank v. Thurber*: "A citizen of a state is bound by its laws, both substantive and those regulating judicial procedure. Acquiring jurisdiction of resident defendants by constructive service of process . . . is due process of law."[19] Perhaps the legislature may be induced to re-fashion Section 232, sub-division 3, of the CIVIL PRACTICE ACT.

It may help to clear the ground for comprehensive and penetrating exploration of the subject if a "bird's eye view" of its ramifications is tersely presented. Toward that end there is here set forth a chart entitled: "Constructive Service of Process in New York." [This is printed on the "foldout" page which follows.]

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235 to *all* types of cases . . . for *any* type of relief." (italics supplied). *Cf.* English rule, R. S. C. O. XI, r. 1(c) Eng., which is even broader.

17. Jackson v. Jackson, 290 N. Y. 512, 515: "Possibly a holding that this complaint really states but one hybrid cause of action might lead to a granting of defendant's motion to vacate the service of the summons." Compare McLaughlin v. McLaughlin Real Estate Co., 162 App. Div. 644, 147 N. Y. Supp. 959 (2d Dep't 1914) and Hanna v. Stedman, 230 N. Y. 326, 130 N. E. 566 (1921) with Feuchtwanger v. Central Hanover Bank, 288 N. Y. 342, 43 N. E. 2d 434 (1942) and Mondin v. Mondin, 274 App. Div. 69, 80 N. Y. S. 2d 176 (1st Dep't 1948). See also 22 COL. L. R. 152, 154.

18. 72 N. Y. S. 2d 865 (Sup. Ct. 1947).

19. 74 Hun. 632, 633, 26 N. Y. Supp. 956, 957 (Sup. Ct. 1893), *aff'd*, 143 N. Y. 648 (1894).

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