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**PROCESS OF SERVICE—ON RESIDENTS ABSENT FROM STATE
IN ACTIONS IN PERSONAM**

Section 419 of the Kentucky Civil Code provides that, "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this state as is provided in Section 56, and who has not appeared in the action". Thus a personal judgment cannot be rendered against a resident and citizen of Kentucky who was summoned while outside the state.¹ In fact, actual personal service within the state is necessary in proceedings in personam.²

X leaves state A, the place of his residence temporarily, and is sojourning in state B. While he is away suit is brought against him on a promissory note, and in accordance with a statute he is personally served with notice. The court held, that service of process upon a resident defendant, effected by actually handing him a copy of the summons while outside the state, in compliance with a statute, did not authorize the rendition of a personal judgment.³ The decision is based upon the ground that the statute is unconstitutional in that the defendant was deprived of due process of law as is guaranteed to him by the fourteenth amendment of the Federal Constitution.

The situation presented by the above case raises the following inquiries: First, whether a state can by statute authorize its courts to obtain service of process upon its residents while they are outside its boundaries in actions in personam; second, if so, what nature of process would be sufficient; and third, whether such a statute is desirable?

That process from the courts of one state cannot run beyond its own boundary lines and summons non-residents for the purpose of securing a personal judgment was definitely settled by the case of *Pennoyer v. Neff*.⁴ At common law, personal service upon residents of the state was indispensable and the process of its courts could not run beyond its own territorial jurisdiction and summons parties in proceedings in personam.⁵ There is a division of authority as to whether a state by statute can authorize its courts to assume jurisdiction over the person of a resident who is served with process while outside the state.⁶ The *Raher* case is not without support in holding that it cannot,⁷ but it is believed, both from authority and reason, that the better rule is otherwise.⁸ Professor Beale in his late treatise on

¹ *Highland v. Andas*, 32 Ky. Law Rep. 703, 106 S. W. 866 (1908).

² *Hughes v. Hughes*, 211 Ky. 799, 278 S. W. 121 (1925).

³ *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494 (1911).

⁴ 95 U. S. 714 (1877).

⁵ Beale, *Conflict of Laws*, Vol. I, Sec. 79 (1).

⁶ Note in 50 L. R. A. 586; 35 L. R. A. (n. s.) 292.

⁷ *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345 (1896); *Bernhart v. Brown*, 118 N. C. 700, 24 S. E. 527 (1896); *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477 (1887).

⁸ *Henderson v. Staniford*, 105 Mass. 504, 7 Am. Rep. 551 (1870); *Huntley v. Baker*, 33 Hun. 578 (1884); *Hammill v. Talbott*, 72 Mo. App. 22 (1897).

the conflict of laws says that a state has jurisdiction over its subjects or citizens even though they are outside its boundaries; that it can by legislation bind its absent subjects; and that it is for the state to determine whether and how far it will confer jurisdiction upon its courts over absent subjects or citizens." Another writer observes, "Nor is it destructive of the extraterritorial effect of a judgment based upon constructive service that the defendant being a citizen of the state, was temporarily absent therefrom."¹⁰

The power of a state to obtain process upon its citizens while they are outside its territory, in actions in personam, is placed upon the ground of the political status of citizenship. By establishing a residence in a state and becoming its citizen, by invoking the protection of its laws and all the privileges and immunities of its citizenship, there must of necessity be implied a consent to be bound by its laws, its forms of procedure and its method of process. A resident of a state, though physically absent therefrom, is ever constructively within the state at least for the purpose of enjoying certain privileges and rights of his citizenship. For instance, he may still exercise his right of local suffrage, his children may still patronize the public schools and he still has the right to have whatever property he may own protected by the laws of that state. If he is constructively within the state for the purpose of retaining his rights of citizenship, there is no valid reason why he should not at the same time be held amenable to the process of its courts. He should not be able to claim the benefits and immunities of citizenship on the one hand and escape the burdens exacted by the state upon its citizens, on the other hand.¹¹ It may be inferred from the opinion in the *Raher* case that the chief obstacle was the act of the state, *viz.*: service of the summons taking place outside its boundaries, and that some form of substituted service such as leaving a copy of the summons at defendant's last usual place of abode, would have been sufficient. But it would seem that actual personal service, regardless of where it takes place, is to be preferred to any form of constructive service which at the most makes it only probable that notice will actually be received.

Of course, a state could not get jurisdiction over every absent party who has ceased to be its resident and has established another domicile. The decisions seem to sustain the view that if the defendant leaves the state intending never to return, its courts then lose their jurisdiction over his person.¹² Technically, perhaps such party has so lost his residence as to render the state powerless to get jurisdiction over his person. The objection to this view is the extreme difficulty in determining the intention of the defendant at the time he

¹⁰ Beale, *Conflict Laws*, Vol. I, Sec. 80 (1).

¹¹ Freeman, *Judgments* (5th Ed.), Vol. 3, Sec. 1376.

¹² *Mabee v. McDonald*, 107 Texas 139, 175 S. W. 676 (1915).

¹³ *Amsbaugh v. Exchange Bank*, 33 Kan. 100, 5 Pac. 436 (1885); *Mastin v. Gray*, 19 Kan. 458 (1878); *McDonald v. Mabee*, 243 U. S. 90 (1917).

left the state. It would seem more practicable to hold him amenable to the process of the courts of the state from which he left until he has established another domicile.¹³ After all a person can have only one domicile and it should be more easily determined than the intention of the defendant.

Assuming that one may be absent from a state and still be a resident thereof and amenable to the process of its courts, then, any mode of service may be authorized provided it is reasonably calculated to notify the defendant and give him an opportunity to be heard.¹⁴ "And a state may by statute provide for some form of service of process other than personal service upon its citizens or subjects."¹⁵ Substituted service by leaving a copy of the summons at the defendant's residence has been upheld as sufficient.¹⁶ Even service upon a resident absent from the state has been upheld as due process in a few instances.¹⁷ In the case of *Mabee v. McDonald*,¹⁸ it was held that service upon an absent resident by publication in a local newspaper was sufficient to authorize the rendition of a personal judgment. That this decision tends to impose personal liability on an absent party upon process where the probability is that no actual notice will be received at all, is evidenced by the fact that this Texas case was reversed by the Supreme Court of the United States. That court through Justice Holmes said, "Perhaps in view of his technical position and the actual presence of defendant's family in the state, a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state not intending to return. To dispense with personal service, the substitute that is most likely to reach defendant is the least that ought to be required if substantial justice is to be done. It is going to the extreme to hold that jurisdiction was acquired by service at the last and usual place of abode."¹⁹ The dictum in this decision strongly suggests that substituted service by leaving a copy of the summons at defendant's last usual place of abode would have been sufficient. But it seems that service by publication in a local newspaper in such a case is inadequate because its tendency to notify the defendant is too remote. But it would seem that the jurisdictional efficacy of actual personal service should be beyond question.

The advisability of a statute providing for service upon an absent resident in proceedings in personam, is a matter of legislative policy. No citizen should be deprived of a just cause of action merely because

¹³ *Ayer v. Weeks*, 65 N. H. 248, 6 L. R. A. 716 (1889); *Cobb v. Rice*, 130 Mass. 231 (1881).

¹⁴ *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740 (1895); *Fleming v. West*, 98 Ga. 778, 27 S. E. 157 (1896).

¹⁵ Beale, *Conflict Laws*, Vol I, Sec. 80 (2).

¹⁶ *Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440 (1861).

¹⁷ *Supra*, Note 11.

¹⁸ *Supra*, Note 11.

¹⁹ *McDonald v. Mabee*, *supra*, Note 12.

the defendant saw fit to wander outside the territorial limits of the state, even for a legitimate business purpose, and until he establishes another domicile he should be considered a resident of the state which he left and therefore amenable to its laws. And such absent party should not be permitted to object to any form of process so long as it is reasonably calculated to notify him and give a chance to be heard. Would it not be better to provide a method of process whereby a plaintiff could reach the defendant, even though outside the state, rather than force him to follow up his adversary and submit his case to a foreign jurisdiction or else go without a remedy? Kentucky has seen the mischief arising from this type of situation in the case of non-resident automobilists who have an accident while driving through the state, and has provided for a method of constructive service upon such non-resident.²⁰ It is submitted that it is expedient for Kentucky to adopt similar legislation with respect to absent residents in all actions in personam.

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²⁰ Ky. Stat. (1933 Supp.) Sec. 12-1.