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JUDGMENTS-SETTING ASIDE-FAILURE OF "LOCAL AGENT" TO NOTIFY CORPORATION OF SERVICE OF SUMMONS

Lloyd J. Tyler, Jr.
University of Michigan Law School

JUDGMENTS—SETTING ASIDE—FAILURE OF "LOCAL AGENT" TO NOTIFY CORPORATION OF SERVICE OF SUMMONS—Service of summons was made upon a ticket agent employed by a lessee of the defendant coach line in accordance with a North Carolina statute which provides that any person receiving or collecting money within the state for a corporation is a "local agent" for the purpose of service of process.[1] This agent did not notify the defendant corporation of the summons, and a default judgment was entered. On appeal it was held that the judgment should not be set aside for want of service of summons, since the ticket agent was within the statutory definition of "local agent."[2] The defendant then succeeded in having the judgment set aside under a North Carolina statute allowing a default judgment to be set aside in the discretion of the trial judge where the defendant can show mistake, inadvertence, surprise or excusable neglect.[3] On the second appeal, *held,* the trial judge correctly found excusable neglect where the defendant had no notice due to the neglect of the statutory agent. To hold as a matter of law that no relief could be granted under these circumstances would be a denial of due process of law. *Townsend v. Carolina Coach Co.,* (N.C. 1949) 56 S.E. (2d) 39.

While ordinarily the lack of notice from an agent is not a basis for excusable neglect,[4] the trial court has been accorded such a wide discretion in opening default judgments under statutes like that in the principal case, that it would be difficult to hold as a matter of law that he incorrectly found excusable neglect on the facts before him.[5] The philosophy that every man should have his day in court, implicit in a judicial concept of "fair play," is reason enough. But, on

[1] 1 N.C. Gen. Stat. (1943) 161, §1-97.
[2] Townsend v. Carolina Coach Co., 229 N.C. 523, 50 S.E. (2d) 567 (1948).
[3] 1 N.C. Gen. Stat. (1943) 252, §1-220.
[4] 1 FREEMAN, JUDGMENTS, 5th ed., §§241-3, 247 (1925); 49 C.J.S. 726, Judgments §367; Postal Ben. Ins. Co. v. Johnson, 64 Ariz. 25, 165 P. (2d) 173 (1946); Lynch v. Arizona Enterprise Mining Company, 20 Ariz. 250, 179 P. 956 (1919).
[5] 3 FREEMAN, JUDGMENTS, 5th ed., §1295 (1925). See 5 ALA. L.J. 69 (1929); Stub v. Harrison, 35 Cal. App. (2d) 685, 96 P. (2d) 979 (1940).

the second appeal in the principal case, the court further holds that not to permit a finding of excusable neglect where the "local agent," as defined by statute, has failed to notify the corporation of the summons would be a denial of due process.[6] If this were so, it would have been logical to find that the original service upon the agent had not satisfied due process either, since the criterion for determining the validity of service upon any given agent is whether that agent stands in such a representative position to the corporation that notice to him would reasonably be calculated to reach the corporation.[7] If such service satisfied due process requirements,[8] then the fact that the corporation did not actually receive the notice should be immaterial insofar as due process is concerned. Thus, it would seem that the court on this appeal is actually finding a lack of due process in the statutory definition of "local agent." Once the trial court has properly acquired jurisdiction,[9] its finding as to excusable neglect would not be a matter of due process at all. In approving minimum requirements of procedural due process in statutes providing for service of summons, it has been recognized that there will be hardship in some cases, and a remedial procedure has been provided. But, it is doubtful whether the use or non-use of this procedure concerns due process. It is simply a matter of finding and relieving hardship on the facts before the court.

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[6] Principal case at 41. The court's argument is supported by cases concerning lack of due process in service on a public official as agent, without notice to the corporation. See 89 A.L.R. 658 (1934).

[7] Eulette, "Service of Process Upon Foreign Corporations—Constitutional Limitations Imposed by Judicial Construction of the Due Process Clause," 20 CHI-KENT L. REV. 287 at 311-14 (1942); Culp, "Constitutional Problems Arising From Service of Process on Foreign Corporations," 19 MINN. L. REV. 375 at 383 (1935); 113 A.L.R. 9 at 53, 83 (1938); Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 19 S.Ct. 308 (1899); Farmers and Merchants Bank of Catlettburg, Kentucky v. Federal Reserve Bank of Cleveland, Ohio, (D.C. Ky. 1922) 286 F. 566; Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co., (C.C. Pa. 1903) 124 F. 259; Atchison, T. & S.F. Ry. Co., (D.C. Tex. 1918) 248 F. 970 at 980.

[8] The North Carolina statute satisfies due process when the "local agent" is representative. Steele v. Western Union Telegraph Co., 206 N.C. 220, 173 S.E. 583 (1934); McDonald Service Co. v. Peoples National Bank of Rock Hill, South Carolina, 218 N.C. 533, 11 S.E. (2d) 556 (1940).

[9] Iwer Wold v. J. B. Colt Co., 102 Minn. 386, 114 N.W. 243 (1907); State ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361, 53 S.Ct. 624 (1933).