Opinion No. 58-213

October 28, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Mr. W. R. Kegel, District Attorney, First Judicial District Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does a county sheriff of New Mexico have the authority to serve civil process on an Indian on the Navajo Reservation?

2. In the event of judgment and issuance of execution, does a county sheriff of New Mexico have the authority to levy such execution on the personal property of an Indian who lives and whose property is on the Navajo Reservation?

CONCLUSIONS

1. No.

2. No.

OPINION

ANALYSIS

For purposes of this opinion, it is assumed that the civil process in question is intended to give a state court jurisdiction to render a judgment in personam. This assumption must be made in view of the fact that personal service on a defendant is not necessary in a proceeding in rem inasmuch as the judgment is against the property, and not the defendant. Assuming then, that the state court has jurisdiction over the subject matter, the object or purpose of service of process is to give to the party to whom it is addressed notice of the proceeding against him. It is this notice which gives the court personal jurisdiction over the defendant to proceed. (See 42 Am. Jur., Process, Sec. 3, pp. 6-7).

It is well established that jurisdiction over the person of a nonresident of the State, sufficient to authorize the court to render personal judgment against such nonresident, can be acquired only by personal service of process **within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed,** unless he waives service of process by his voluntary appearance or consents to or accepts some form of service other than personal service. **Hess** v.

Pawloski, 274 U.S. 352; **New York L. Ins. Co.** v. **Dunlevy,** 241 U.S. 518; **Western Life Indem. Co.** v. **Rupp,** 235 U.S. 261.

This general rule of law becomes important when we consider the holding of our Supreme Court in the case of **State** v. **Begay,** 63 N.M. 409 (1958) (certiorari to the Supreme Court of the U.S. denied, 1958). In the **Begay** case, our Supreme Court held that the State of New Mexico lacked jurisdiction over Indian lands within the State until and unless the title of the Indian or Indian Tribes shall have been extinguished. That until such extinguishment of title, the lands involved are subject to the absolute jurisdiction and control of the Congress of the United States, citing Art. XXI, Sec. 2, of the New Mexico Constitution. The Court in reaching this conclusion strongly relied on the case of **In re Fredenberg,** D.C., 65 F. Supp. 4. The Supreme Court of Arizona has likewise reached the same conclusion in **Application of Denetclaw,** 83 Ariz. 299, 320 P. 2d 297 (1958).

We presume that the holding in the **Begay** case is limited to "Treaty Indians" in view of the Court's previous holding in **Tenorio** v. **Tenorio,** 44 N.M. 89 (1940) to the effect that "Non-Treaty Indians" are to be considered territorially a part of the State of New Mexico. The Court in the **Tenorio** case, however, refused to rule on the question of whether the same rule would apply to reservations of "Treaty Indians". There is no question but that the Navajo Indians are "Treaty Indians" as that term is used in **Tenorio** v. **Tenorio,** supra, Sec 15, Statutes at Large 667.

In view of our Court's position in this matter, this office has no alternative but to conclude that Navajo Indian lands are outside of the territorial jurisdiction of our State courts and that, therefore, any attempt to make service of process on a Navajo defendant within the territorial limits of said lands would be a useless act.

Please note that this opinion deals exclusively with service of process on Navajo Indians on the Navajo Reservation. We do not express an opinion on non-Indians. Clearly, the **Begay** case does not specifically cover that situation.

Mention should be made at this point to a contrary holding in the Arizona case of **Williams** v. **Lee,** 319 P. 2d 998. In that case, the Arizona Court held that if the subject matter of the litigation was one that the state court had jurisdiction to try and determine **and the federal government had not reserved sole and exclusive jurisdiction over the territory involved,** the state officers might enter such territory **under the state's sovereign authority** and serve the necessary process to enable it to exercise its legitimate jurisdiction. It is obvious from the Arizona ruling, that the court assumed that the State of Arizona had concurrent jurisdiction with the federal government over the Indian lands in question. This assumption was made possible by a previous holding of the same court in **Porter** v. **Hall,** 271 P. 411, to the following effect:

"We have no hesitancy in holding, therefore, that all Indian reservations in Arizona are within the political and governmental, as well as geographical, boundaries of the state, **and that the exception set forth in our Enabling Act applies to the Indian lands**

considered as property, and not as a territorial area withdrawn from the sovereignty of the state of Arizona. * * *" (Emphasis ours)

Our Supreme Court has made no such holding. To the contrary, it has said time and time again in the **Begay** case, supra, that the State of New Mexico lacked jurisdiction over Indian lands; that such lands are subject to the **absolute jurisdiction** of the Congress of the United States. For this reason, the **Williams** case is not in point, and cannot be said to be authority in this State for the proposition that civil process issuing out of district court in New Mexico can be served on an Indian on the Navajo Reservation.

Before passing on to question No. 2, we feel compelled to briefly refer to Attorney General's Opinion No. 146, dated June 20, 1934. In that opinion, this office held that an officer of this State could, with the permission of the Indian agent, go upon the Jicarilla Apache Indian Reservation and serve a subpoena upon an Indian for the purpose of securing his presence as a witness in a state court. To the extent that such conclusion is in conflict with the position now taken by this office, it is hereby expressly overruled.

An execution is void when the court whence it issues has no jurisdiction. **Newburg** v. **Munshower,** 29 Ohio St. 617 **Houston Oil Co.** v. **Randolph,** 251 S.W. 794; **Com.** v. **Magee,** 8 Pa. 240. With this rule of law in mind and in view of the conclusion we have reached in question No. 1, your second question becomes important only in those cases where a state court, having jurisdiction of the subject matter, has rendered a valid judgment against a defendant who has either been lawfully served outside of the territorial limits of the Navajo Indian Reservation, or who has voluntarily submitted to the jurisdiction of the court.

It is but the exercise of sound logic to conclude that if the Federal Government has retained exclusive and absolute jurisdiction over Navajo Indian lands to the exclusion of the State, then any State officer would be without authority to go upon such lands and levy execution on property located thereon. (For a complete citation of authorities to this effect, see 21 Am. Jur., Executions, Sec. 86, p. 49).

The Arizona court in **Williams** v. **Lee,** supra, reaches the same conclusion, but not on the ground that the State of Arizona lacks territorial jurisdiction over Indian lands. The Arizona decision on this point would appear to be grounded on a personal jurisdiction basis. It in effect held that enactments of the Federal Government passed to protect and guard its Indian wards take precedence over the operation of such State laws within the Reservation as conflict therewith.