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Legislation--Service of Process on Nonresident Motorists

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LEGISLATION — SERVICE OF PROCESS ON NONRESIDENT MOTORISTS

In 1935 the Legislature of West Virginia enacted a statute providing for substituted service of process on nonresidents in actions growing out of accidents or collisions in which they may be involved while operating motor vehicles on the highways of this state. Unfortunately, the original Senate bill containing this provision was consolidated with another and, when passed, appeared as section 15 of an act[1] the title of which reads:

> "An Act to amend chapter seventeen of the Code of West Virginia one thousand nine hundred thirty-one, by adding thereto article twenty, relating to the protection of the public against reckless and irresponsible persons on public highways, the operation of motor vehicles on public highways and the financial responsibility of owners and operators of motor vehicles for damages caused by such operation and providing penalties."

[1] W. Va. Acts 1935, c. 61.

In the case of *Elliott v. Hudson*,[2] decided in April of last year, the Supreme Court of Appeals held that section 15 "embraces a matter not stated in the title of said act, nor germane to the matters stated in the title, and is therefore unconstitutional and void because violative of section 30, article 6 of the Constitution of West Virginia, which provides that no legislative act 'shall embrace more than one object, and that shall be expressed in the title.' "[3] Judges Litz and Woods dissented. Only a few weeks before, the Supreme Court of Indiana, in which state title requirements are substantially the same as in our own,[4] had said that "service of process is germane to and properly connected with the subject of financial responsibility of owners and operators of motor vehicles"[5] and therefore held that the subject of service of process on a nonresident contained in the body of a statute was embraced in the title of an act[6] which read:

> "An Act concerning the financial responsibility of owners and operators of motor vehicles for damages caused by the operation of motor vehicles on public highways."

While the more liberal attitude of the Indiana court will no doubt commend itself to many, it would seem that if practical meaning and effect are to be given to the constitutional requirements there was ample justification for the conclusion reached by the West Virginia court. Careless draftsmanship should be neither encouraged nor condoned. The difficulty experienced in finding this provision in the published Acts of the Legislature lends support to the court's contention that it was "buried in the midst of a voluminous statute on other subjects" and that the title was "insufficiently informative".[7] Its disposition of the case was not unexpected.

The more usual grounds of attack upon statutes of this nature —that they are violative of the privileges and immunities[8] and the due process[9] clauses of the Federal Constitution — were also urged in the case of *Elliott v. Hudson*.[10] Having decided the case on an-

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[2] 185 S. E. 465 (W. Va. 1936).
[3] *Id.* syllabus.
[4] IND. CONST. art. 4, § 19.
[5] Herman v. Dransfield, 200 N. E. 612, 613 (Ind. 1936).
[6] Ind. Acts 1931, c. 179, § 15.
[7] Elliott v. Hudson, 185 S. E. 465, 467 (W. Va. 1936).
[8] U. S. CONST. Art. IV, § 2.
[9] U. S. CONST. Amend. XIV.
[10] 185 S. E. 465, 466 (W. Va. 1936).

other ground, these questions were not considered by the court. In view of the consistent upholding of such statutes as constitutional when attacked on these grounds,[11] it is highly improbable that a different view would now be taken by any court. Similar statutes are in effect in at least three-fourths of the states and, apparently, extensive use is being made of this type of service.[12]

At the recent session of the Legislature a new act[13] was passed to take the place of the one declared void by the court. It is entitled

> "An Act to amend article three, chapter fifty-six of the Code of West Virginia, one thousand nine hundred thirty-one, by adding thereto section thirty-one, to provide for the service of process on non-resident operators of motor vehicles in legal actions involving accidents or collisions on the streets or highways of West Virginia by appointing the auditor as attorney for the service of process upon such non-resident operators."

While the subject matter is the same as that of the 1935 Act,[14] a number of important changes from the provisions of the earlier act have been made, to some of which it may be helpful to call attention. No attempt will be made to discuss the more general aspects of such legislation. Whether the constitutional basis for this kind of process is to be found in implied consent,[15] in the power of the state to legislate for the general welfare, namely, the police power,[16] or, as the American Law Institute would have it, in the doing of an act within the state,[17] has been discussed fully in this[18] and other legal periodicals.[19] This discussion will be confined to a few of the questions which the provisions of the new act suggest.

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[11] Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632 (1927); Jones v. Paxton, 27 F. (2d) 364 (D. C. Minn. 1928); Morrow v. Asher, 55 F. (2d) 363 (N. D. Tex. 1932); Barbieri v. Pandiscio, 116 Conn. 48, 163 Atl. 469 (1932).

[12] See Culp, *Process in Actions Against Non-Resident Motorists* (1934) 32 MICH. L. REV. 325, notes 3 and 4.

[13] House Bill No. 189. Passed March 1, 1937; in effect from passage.

[14] W. Va. Acts 1935, c. 61, § 15.

[15] O'Donnell v. Slade, 5 F. Supp. 265 (D. C. Pa. 1933).

[16] Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760 (1924); State v. Belden, 193 Wis. 145, 211 N. W. 916 (1927); Cohen v. Plutschak, 40 F. (2d) 727 (D. C. N. J. 1930).

[17] RESTATEMENT, CONFLICT OF LAWS (1934) § 84.

[18] Note (1928) 34 W. VA. L. Q. 283.

[19] Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 HARV. L. REV. 563; Culp, *supra* n. 12. See also Notes (1935) 20 IOWA L. REV. 654, and (1936) 12 IND. L. J. 73.

The title of the act is, of course, new and appears to be free from objection on constitutional grounds. That it embraces only one "object" and that that "object" is clearly expressed cannot be seriously questioned. The change by which this new form of service, which, under the former statute was made a part of a chapter pertaining to roads and highways,[20] will now appear as a part of Article 3 of Chapter 56 which deals with writs, process and order of publication, should also receive general approval. It will be noted also that the state auditor now becomes the attorney for the service of process upon nonresident operators. In the former act the state road commissioner was designated as such attorney.

Of more importance, are the changes to be found in the body of the new act. Some of these have been made apparently for the purpose of settling questions which have been raised by similar provisions in the laws of other states. Others have been inspired by experience gained in administering the former statute. A number of these changes were made by way of amendment after the introduction of the new bill.

Among the many questions presented by these statutes, perhaps the most vital is that of the method of giving notice to the defendant. Without adequate provision for notice, the constitutional requirement of due process is not satisfied.[21] A variety of methods of giving notice are found in the statutes of the different states. These include notice by registered mail to the defendant,[22] by first class mail to the last known address of the defendant,[23] and by personal notice to the defendant.[24] The former West Virginia statute provided:

> "Service of such process shall be made by leaving a copy thereof, with a fee of two dollars with said commissioner in his office . . . and such service shall be sufficient service upon said non-resident, provided that notice of such service and a copy of the process shall forthwith be sent by registered mail by said commissioner to the defendant, and the defendant's return receipt is appended to the original process and filed therewith in court."

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20 W. VA. REV. CODE (1931) c. 17.
21 Wuchter v. Pizzutti, 276 U. S. 13, 48 S. Ct. 259 (1928).
22 For statutes providing for this method of giving notice, see Culp, *supra* n. 12, at 338, note 56.
23 See Jones v. Paxton, 27 F. (2d) 364 (D. C. Minn. 1928).
24 N. Mex. Laws 1931, c. 127, § 2.

This would seem to be a reliable means of giving notice to the defendant, and the courts have uniformly upheld such statutory provisions as constitutional.[25] A practical difficulty, however, has arisen in the states whose statutes provide for this method of giving notice. It has been the tendency of the courts to construe strictly the provisions of these statutes and a literal compliance has been required. Accordingly, it has been held that the return receipt for the registered letter must be filed as prescribed before the action may proceed,[26] and in one instance, service was held to be invalid where the receipt was not filed although notice was actually received and receipted for.[27] Since it is to be expected that a defendant, aware of the likelihood of suit, will refuse to sign a return receipt such strict construction places a serious obstacle in the way of this method of service of process.

This difficulty was among the first that arose in the few instances in which substituted service was attempted under the former West Virginia statute. To prevent a defendant from thus defeating its purpose, the new act provides that the service shall be sufficient if "the registered mail so sent by said auditor is refused by the addressee and the registered mail is returned to said auditor, or to his office, showing thereon the stamp of the post-office department that delivery has been refused, [and] is appended to the original process and filed therewith. . . ."

In other states this difficulty has been met by providing an alternative method of service in case a return receipt cannot be obtained. For instance, the Texas statute[28] provides that notice may be given by any disinterested person by leaving a copy of the notice in person if notice sent by registered mail is not delivered or is refused. This personal notice would add to the cost of the service and for that reason would appear to be less desirable than the substitute provided for in the West Virginia statute. The constitutionality of the latter provision would not seem to be open to

[25] Moore v. Payne, 35 F. (2d) 232 (D. C. La. 1929); Cohen v. Plutschak, 40 F. (2d) 727 (D. C. N. J. 1930).

[26] Dwyer v. Shalck, 248 N. Y. S. 355 (1931); Smyrnios v. Weintraub, 3 F. Supp. 439 (D. C. Mass. 1933).

[27] Syracuse Trust Co. v. Keller, 5 Harr. 304, 165 Atl. 327 (Del. 1932). But see Creadlick v. Keller, 5 Harr. 169, 171, 160 Atl. 909 (Del. 1932), in which the court held the service valid where the defendant was given the contents of the envelope but refused to sign a receipt, saying: "It would create an intolerable situation if the defendant could, by his own wilful act, or refusal to act, prevent the plaintiff from maintaining his action."

[28] Tex. Gen. Laws 1933, c. 70, § 2.

question since a refusal by a defendant to accept service does not prevent a court from acquiring jurisdiction in other cases.[29]

Another question raised under the former West Virginia act concerned the signing of the return receipt. Must it be signed by the defendant personally? It has been held that the requirement is fully complied with by filing a "return receipt" given in accordance with the rules or customs of the Post Office Department by the defendant or by some other person authorized to receive registered mail addressed to the defendant.[30] The new act provides for the filing of the defendant's return receipt "signed by himself or his duly authorized agent"; and provides further that duly authorized agent shall "include among others a member of the family of such non-resident or a person who, at the residence, place of business or post office of such non-resident usually receives and receipts for mail addressed to such non-resident."

The former West Virginia statute also left open the question whether the privilege to employ this form of service of process was limited to residents. While it would seem that the primary purpose of such legislation is the protection of inhabitants of the state against the hardship of travelling long distances to sue nonresidents, in the absence of a specific limitation the courts have uniformly held that nonresidents as well as residents may avail themselves of this statutory method of service.[31] This view has been taken where both plaintiff and defendant were residents of the same state.[32] The new act specifically includes an "action or proceeding brought by non-resident plaintiff or plaintiffs. . . ."

The question of the extent of the application of these statutes also has been the source of much litigation. The early acts referred only to a "nonresident who operates a motor vehicle on any public street or highway of the State." Following their practice of construing these statutes strictly,[33] the word "operate" was given its

[29] Borden v. Borden, 63 Wis. 374, 23 N. W. 573 (1885); Boggs v. Inter-American Mining & Smelting Co., 105 Md. 371, 66 Atl. 259 (1907).

[30] Shushereba v. Ames, 255 N. Y. 490, 175 N. E. 187 (1931). *Accord*: Gesell v. Wells, 229 App. Div. 11, 240 N. Y. S. 628, 633 (1930); Syracuse Trust Co. v. Keller, 5 Harr. 304, 165 Atl. 327 (Del. 1932).

[31] State v. Circuit Court of Dane County, 209 Wis. 246, 244 N. W. 766 (1932); Sobeck v. Koellmer, 240 App. Div. 736, 265 N. Y. S. 778 (1933); Garon v. Poirier, 86 N. H. 174, 164 Atl. 765 (1933).

[32] State v. Circuit Court of Dane County, 209 Wis. 246, 244 N. W. 766 (1932).

[33] Syracuse Trust Co. v. Keller, 5 Harr. 167, 165 Atl. 327 (Del. 1932); Morrow v. Asher, 55 F. (2d) 265 (N. D. Tex. 1932); Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N. W. 557 (1934).

literal meaning by the courts[34] with the result that the statute was held to apply to the nonresident operator no matter to whom the car belonged, but not to apply to a nonresident owner if his car was being operated at the time of the accident by his employee[35] or child.[36] The doctrine of vicarious liability was not permitted to extend the operation of the statute by implication to persons who were not clearly within its terms. This obvious defect has been corrected in later statutes, which generally extend the application to "a nonresident or his agent";[37] "a nonresident owner, chauffeur, operator or driver",[38] or to an action against a nonresident "growing out of any accident or collision in which the nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on a public highway of this State."[39]

The former West Virginia statute applied to "the operation by a non-resident or by his duly authorized agent . . . while so operating or so permitting to be operated a motor vehicle on any such street or highway." This language was clearly intended to make this statutory service applicable to the nonresident owner although his car was being operated by another at the time of the collision; but it left somewhat uncertain who was and who was not a "duly authorized agent". An employe or servant acting within the scope of his employment would clearly be such; but would a child, using the car for his own purpose be a "duly authorized agent" under the "Family Car" doctrine? The new act follows the language of the old in this respect, but it provides further that:

> " 'Duly authorized agent' shall mean and include among others a person who operates a motor vehicle in this State for a non-resident as defined in this section and act, in pursuit of business, pleasure, or otherwise, or who comes into this state and operates a motor vehicle therein for, or with the knowledge or acquiescence of, such non-resident. . . ."

If a nonresident parent is liable under our "Family Car" doctrine for damage done by his child while driving in this state, this

[34] Morrow v. Asher, 55 F. (2d) 365 (N. D. Tex. 1932); O'Tier v. Sell, 252 N. Y. 400, 169 N. E. 624 (1930). *Contra*: Poti v. New England Road Machinery Co., 83 N. H. 232, 140 Atl. 587.

[35] Morrow v. Asher, 55 F. (2d) 365 (N. D. Tex. 1932); O'Tier v. Sell, 252 N. Y. 400, 169 N. E. 624 (1930).

[36] Geseli v. Wells, 229 App. Div. 11, 240 N. Y. S. 628 (1930).

[37] Neb. Comp. Stat. (1929) c. 20-530.

[38] Ark. Acts 1933, act. 39.

[39] N. C. Code Ann. (Michie 1935) § 491(a).

definition of "duly authorized agent" is clearly broad enough to include such child. That the parent is liable if the law of the place of wrong makes him so although by the law of the state where the permission was given to use the automobile no such liability exists, is the rule of conflict of laws set out in the Restatement of that subject.[40]

Neither the former statute nor the new one indicates whether the "duly authorized agent" who was operating the car at the time of the accident, as well as the nonresident owner, is subject to this statutory form of service. Under similar statutes in other states it has been assumed that he is.[41]

It is generally agreed that these statutes should be applicable to nonresident corporations as well as individuals. However, where an act did not apply expressly to a nonresident corporation, it was construed as not applying to such a corporation whose resident agent was operating the car.[42] A contrary result was reached by a New York court.[43] The present West Virginia statute provides expressly that " 'non-resident' shall mean any person who is not a resident of this state, and among others includes a non-resident firm, partnership, corporation or voluntary association." Corporations were included also under the former West Virginia statute.

A significant change is the reduction of the amount of the bond required to be executed by the plaintiff "conditioned that on failure of the plaintiff to prevail in the action that he will reimburse the defendant . . . the necessary expense incurred by him in and about the defense of the action in this state. . . ." The former statute required a bond of $500.00. This has been reduced to $100.00 by the new act. The need for such a bond became evident soon after statutes of this nature came into general use. Devised for the purpose of saving a plaintiff the expense of travelling a long distance to maintain his action, they have become a temptation to the bringing of groundless actions on the chance that the defendant would not travel such a distance with his witnesses to make a defense. The $500.00 bond required under the former West Virginia statute was greatly in excess of that usually required in such statutes and may have been a factor in keeping down the number

[40] RESTATEMENT, CONFLICT OF LAWS (1934) § 387 (d).
[41] Barbieri v. Pandiscio, 116 Conn. 48, 163 Atl. 469 (1933).
[42] Clesas v. Hurley Machine Co., 52 R. I. 69, 157 Atl. 426 (1931).
[43] Besson v. Public Service Co-ordinated Transport, 135 Misc. 368, 237 N. Y. S. 689 (1929).

of cases in which this form of service was used under the former statute.[44] A $100.00 bond as now required, should check the evil at which it is aimed and at the same time not unduly discourage a plaintiff who might hesitate to incur a possible expense of $500 although reasonably sure that he has a meritorious case.

Another important change restricts the use of this form of service of process to actions or proceedings "in any court of record in this state. . . ." Under the former act it could be employed in a proceeding before a justice of the peace. This change makes possible the further provision for the execution of the bond before the clerk of the court, with surety to be approved by said clerk. The requirement of the former act, that sureties be approved by the commissioner in every case, imposed a considerable burden on that office.

In general the changes made by the act are to be commended. Not all the questions which these statutes present have been settled, but enough has been done to lessen substantially the number that will have to be litigated.

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[44] This form of service was used in only six cases during the year the former act was in force.