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Statutes-Title--Service of Process on Non-Resident Motorists

STATUTES—TITLE—SERVICE OF PROCESS ON NON-RESIDENT MOTORISTS.—Action by appellee against appellant to recover damages occasioned by an automobile collision. Appellant is a nonresident of the State of Indiana and service of process was had upon the treasurer of state (secretary of state) under the provision of chapter 179, sec. 15, Acts 1931. By special appearance appellant moved to set aside the service and quash the return indorsed on the summons on the ground that he was not a resident of Indiana and was not personally served with summons. Appellant appeals from judgment for appellee, contending the provision of chapter 179, sec. 15, Acts of 1931, to be unconstitutional as in violation of sec. 19, article 4 of the Indiana Constitution which provides, "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." The title to the act in question is "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." Held, the provision authorizing service of process upon the treasurer of state as agent for a nonresident operator of motor vehicles is within the title of the act announcing that the act has to do with the financial responsibility of owners and operators of motor vehicles for damages caused by the operation of motor vehicles on the public highways.[1]

The interpretation of the Constitutional limitation upon legislative action, that the title to an act shall express the subject of the act and that every act shall have but one subject, is well settled in the United States and Indiana. The great weight of authority holds such constitutional provisions to be satis-

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[15] Hartford Accident and Indemnity Co. v. People of State of Ill. (1936), 56 S. Ct. 685.

[16] See Gavit, The Commerce Clause (1932), p. 40; Haines, Federal Restraints on the States' Power to Regulate House to House Selling (1934), 6 Rocky Mountain Law Rev. 85.

[1] Herman v. Dransfield (1936), 200 N. E. 612.

fied if the title states in general terms the subject, or object, of the act, and do not require the title to disclose the details of the legislation, or furnish an abstract, synopsis, or index of the contents of the act; to require such would unreasonably hamper legislation, and would necessitate the setting forth of the entire act in the title thereto. The courts declare that a reasonable interpretation should be given and consider the requirement met if the title fairly indicates the subject of the enactment so as to put interested persons upon inquiry as to the exact scope of the indicated subject of the enactment.[2]

Although there has been but little litigation on this phase of the validity of statutes providing for substituted service of process on non-resident motorists,[3] the few cases involving it have been determined according to the predominant, reasonable, and liberal interpretation of the title requiremtnts.[4] Indiana, by the holding in the principal case, has fallen in line in the application of the general rules of construction to this particular type of statute. As stated by the court, "Viewed in the light of these well-settled rules (concerning title of statutory enactments) the title under consideration seems to be devoid of difficulty. The title announces that the act has to do with the financial responsibility of owners and operators of motor vehicles for damages caused by the operation of motor vehicles on the public highways. A reading of the act discloses the means and method of making the financial responsibility for such damages effective. Section 15 provides the means of serving process on a non-resident in such cases. Service of process is germane to and properly connected with the subject of financial responsibility of owners and operators of motor vehicles for damages caused by the operation of motor vehicles on public highways."[5] Since the principal case is the first reported[6] case in

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[2] General authority: 99 A. L. R. 124; 8 R. C. L. Perm. Supp. s. 100; State ex rel. Cohran v. Lewis (1935), — Fla. —, 159 So. 792; Domenech v. Porto Rican Tobacco Co. (1931), 50 F (2d) 579 (Porto Rico); Commonwealth v. Kentucky Jockey Club (1931), 238 Ky. 739, 38 S. W (2d) 987, State v. Ward (1931), — Mo. —, 40 S. W (2d) 1074, Massie v. Court of Com. Pl. (1931), — N. J. —, 156 A. 377, Dolese Bros. v. Board Comrs. (1931), — Okla. —, 2 P (2d) 955, Brooks v. State (1931), — Okla. —, 3 P (2d) 814, Orlosky v. Haskell (1931), 304 Pa. 57, 155 A. 112. Indiana authority: Indiana Central Ry. v. Potts (1856), 7 Ind. 681, Hingle v. State (1865), 24 Ind. 28, Mull v. Indianapolis and C. Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; State v. Closser (1913), 179 Ind. 280, 99 N. E. 1059; Moore-Mansfield Co. v. Indianapolis, N. & R. Ry. Co. (1913), 179 Ind. 356, 101 N. E. 296, Crabbs v. State (1923), 193 Ind. 248, 139 N. E. 180; Sarlls v. State ex rel. Trimble (1929), 201 Ind. 88, 166 N. E. 270; Gillespie v. State (1857), 9 Ind. 380; Reed v. State (1859), 12 Ind. 641, Bright v. McCulloch (1866), 27 Ind. 223; Benson v. Christian (1891), 129 Ind. 535, 29 N. E. 26; Lewis v. State (1897), 148 Ind. 346, 47 N. E. 675, Chicago & I. R. Co. v. State ex rel. Ketcham (1899), 153 Ind. 134, 51 N. E. 924, Isenhour v. State (1901), 157 Ind. 517, 67 N. E. 40; State v. Paris (1913), 179 Ind. 446, 101 N. E. 497.

[3] The wording of the title of the acts of many states preclude litigation upon this point because of the impossibility of misinterpretation. The following representative acts expressly relate to the service of process upon non-resident motorists: Fla., Laws 1931, p. 509; Iowa, 44 G. A. 90; La., Acts 1932, p. 576; Ohio, Acts 1933, p. 36; Ore., Laws 1929, p. 3; Mass., Acts 1928 ch. 344, N. J., Laws 1924, p. 517, Mich., Comp. Laws 1929, sec. 4790.

[4] 99 A. L. R. 124; State ex rel. Cohran v. Lewis (1935), — Fla. —, 159 So. 792.

[5] Herman v. Dransfield (1936), 200 N. E. 613 (Ind.).

[6] There have been some trial court decisions on this point but the principal

Indiana involving the validity of this type of statute, it is well to note briefly the constitutional history and the scope of such.

Statutes providing for service of process in automobile accidents upon some state official as agent for a non-resident owner or operator of a motor vehicle have consistently been held to be constitutional with respect to the due process clause of the Federal Constitution.[7] Such statutes have been held to confer jurisdiction upon the courts over the person of the non-resident defendant on the ground of consent impliedly given to serve him through the agency of the state official.[8] However, the validity of the statute has consistently been held to depend upon the reasonableness of the notice afforded the non-resident defendant.[9] It has been upon this phase of the problem, rather than upon the title requirements, that most of the litigation has arisen. The power of the state to provide for the acquisition of jurisdiction in this manner has been unanimously sustained under its power to regulate its highways and the use thereof.[10]

Although it is undeniable that there is a great social interest in the protection of individuals from the hazards of modern traffic, there is also a great social interest in individual freedom and economic security. These interests are brought to the front in the event of service of process on non-resident motorists through the agency of a state official. The plaintiff may not have a worthy cause of action and the defendant may be put to considerable expense in procuring witnesses and protecting his interests. This difficulty has been met in some states by means of the requirement of a bond by the plaintiff.[11] Other states have made no attempt to meet it.[12] A further problem for con-

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case is apparently the first reported case involving it. See Burns Ind. Stats. 1933, sec. 47-1015, anno.

[7] Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 325-343, 57 A. L. R. 1230; 35 A. L. R. 951; Berry, Automobiles (1935), sec. 5.318; Hendrick v. Maryland (1915), 235 U. S. 610, 35 S. Ct. 140; holding that a state could enact reasonable police regulations for all motorists; Kane v. New Jersey (1916), 242 U. S. 160, 37 S. Ct. 30, holding that a state could require the appointment of a state official as the agent for service of process by a non-resident motorist; Hess v. Pawloski (1927), 274 U. S. 352, 47 S. Ct. 632, holding such statute which provided for notice to the non-resident defendant to be within the due process clause; 99 A. L. R. 131; Jones v. Paxton (1928), 27 F. (2d) 364 (Minn.); Dowling, Motor Vehicle Statutes; Hit and Run; Service of Process on Non-Residents (1931), 17 A. B. A. J. 798, 814. See also, 82 A. L. R. 768.

[8] Gavit, Casebook, Trial and Appellate Procedure (1935), 105.

[9] 99 A. L. R. 131; Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 337; Wuchter v. Pizzutti (1928), 276 U. S. 13, 48 S. Ct. 259; Jones v. Paxton (1928), 27 F (2d) 364 (Minn.); Hirsch v. Warren (1934), 253 Ky. 62, 68 S. W. (2d) 767; Shushereba v. Ames (1931), 255 N. Y. 490, 175 N. E. 187.

[10] 99 A. L. R. 131, Moore v. Payne (1929), 35 F. (2d) 232 (La.), Morrow v. Asher (1932), 55 F 2d) 365 (Tex.); Carr v. Tennis (1933), 4 F. Supp. 142 (Pa.); Grote v. Rogers (1930), 158 Md. 685, 149 A. 547; Rubin v. Goldberg (1931), 9 N. J. Mis. R. 460, 154 A. 535; Culp, Process in Actions Against Non-Rresident Motorists (1934), 32 Mich. L. Rev. 327; Cohen v. Plutschak (1930), 40 F. (2d) 727 (N. J.).

[11] Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 350; Ill. Rev. Stat. (Cahill 1933), c. 95a, sec. 21 (1); Me. Rev. Stat. 1930, c. 29, sec. 131; Mich. Comp. Laws 1929, sec. 4791; N. Y. Consol. Laws (McKinney 1929), bk. 62A, sec. 53.

[12] Culp, Process in Actions Against Non-Resident Motorists (1934), 32

sideration is the hesitancy of the law to give extraterritorial effect to state statutes.[13] Such is in effect done when a non-resident is placed under the jurisdiction of a state by means of this substituted service. However, this problem seems to be more of a superficial, than of a substantive nature and probably will be ironed out by provisions for the protection of the defendant. As to the extraterritorial effect of state statutes, the trend seems to be to permit such where private rights are concerned, and rightly so in view of the facility of modern communication and travel.[14] Thus, it appears that social convenience and social policy support the principles underlying the statutes permitting service of process on non-resident motorists through the agency of a state official.

Accepting the conclusion reached by the weight of authority as to the constitutionality and desirability of such statutes we are confronted with the question of the scope thereof. To whom do they apply? As a general rule, it has been held that ownership alone is not a sufficient basis upon which to hold an automobile owner liable for injury caused by his automobile.[15] Further, service of process statutes, being in derogation of the common law, have been strictly construed,[16] not only must the plaintiff comply with all the terms of the statute,[17] but the statute will not be extended to include by implication parties who are not expressly within the terms thereof.[18] In fact, in many instances the statute has been perhaps unreasonably limited.[19] Where the provision is as to the operation of an automobile, the word operation has been construed to mean the physical, personal act of manipulating

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Mich. L. Rev. 350. The author indicates that while there is certainly a legitimate place for the non-resident motorist statutes, they may allow opportunity for fraud against non-residents. To prevent such abuse, every statute should make some provision for the deposit of security by the plaintiff.

13 Goodrich, Conflict of Laws (1927), ch. 1.

14 Goodrich, Conflict of Laws (1927), 16-17; Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 325.

15 White v. McCabe (1935), 208 N. C. 301, 180 S. E. 704.

16 Day v. Bush (1932), 18 La. App. 682, 139 So. 42; Brown v. Cleveland Tractor Co. (1934), 265 Mich. 475, 251 N. W 557, Syracuse Trust Co. v. Keller (1932), — Del. —, 165 A. 327. These and other cases so holding, base their strict construction, as a general rule, upon the fact that the statute is in derogation of the common law. However, it is suggested that this is a rather insufficient reason since the fact that statutes are needed from time to time indicates that the common law is by no means perfect. For this reason —the imperfection of the common law—it would seem that the fact of a statute being in derogation of the common law might be a valid basis for liberal rather than strict interpretation.

17 Since this method of securing jurisdiction over the defendant is unusual, the plaintiff should show full compliance with the requirements of the act. Schilling v. Odlebak (1929), 177 Minn. 90, 224 N. W 694.

18 Day v. Bush (1932), 18 La. App. 682, 139 So. 42.

19 Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 345, "Jurisdiction of suits against non-resident motorists is grounded upon the policy of securing compensation for injuries to local residents. This policy is equally applicable whether the driving is done by the owner, or the agent, chauffeur, servant, or a third person with consent. The potential harm is as great whether the non-resident owner himself or another be driving his car, and the necessity for resorting to substituted service is just as pressing." Apparently the author disagrees with the tendency to apply principles of strict construction to statutes using the word "operate"

the controls; in other words, the act of driving.[20] Under such construction only a non-resident who was actually driving an automobile at the time of a collision would come within the statute. A better construction would admit of an agency relation between the non-resident owner and the actual operator or driver of the vehicle.[21] The latter construction would undoubtedly include corporations,[22] whereas there is some belief that the former does not.[23] However, the Indiana and many other state statutes obviate this difficulty by expressly providing for the provision to include the operation of the vehicle by an agent.[24]

The definition of non-resident—who is a non-resident—has been the subject of some litigation concerning the statutes under discussion.[25] Perhaps the answer is too obvious and in general too well-settled in the law to warrant much consideration of it here. However, it has been held that a resident of a foreign country is such a non-resident as to come within such statutory provision,[26] and that a person temporarily within the state for summer residence is still a non-resident within the meaning of such a statute.[27]

Although authority is not abundant as to the classification of the non-residents who may be involved under such statutes, or who are generally within the scope of them, there seem to be three general classes brought out by the cases so far. These are personal representatives of a deceased non-resident, infants, and corporations.

As heretofore suggested, statutes of the instant type have been strictly construed. Few of them have included the personal representativs or assigns or heirs of a deceased non-resident motorist; consequently the few cases on the subject hold that such statutes do not include the executor, or administrator of the non-resident motorist.[28] Two additional reasons for not extending the statute to a non-resident defendant who is deceased are the impossibility of notice and the revocation of the agency of the state official by the death of the non-resident. However, it is submitted that the inclusion of the personal rep-

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[20] Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 345; O'Tier v. Sell (1930), 252 N. Y. 400, 169 N. E. 624, (Repair man driving—non-resident owner held not to be within the terms of the statute), Morrow v. Asher (1932), 55 F. (2d) 365 (Tex.) (servant or employee).

[21] Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 345; Berry, Automobiles (1935), sec. 5.324; Zurich General Acc. & Liabil. Ins. Co. v. Brooklyn & Q. Transit Corp. (1930), 137 Misc. 65, 241 N. Y. S. 465.

[22] Bischoff v. Schnepp (1930), 139 Mis. 293, 249 N. Y. S. 49; Zurich Gen. Acc. & Liabil. Ins. Co. v. Brooklyn & Q. Transit Corp. (1930), 137 Misc. 65, 241 N. Y. S. 465, Berry, Automobiles (1935), sec. 5.322, sec. 5.324.

[23] 34 Harv. L. Rev. 950-951.

[24] Acts Ind. Gen. Assembly 1931, ch. 179, sec. 15; Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 345, 346, 347.

[25] Berry, Automobiles (1935), sec. 5.321.

[26] Hand v. Fraser (1931), 139 Misc. 446, 248 N. Y. S. 557.

[27] Bigham v. Foor (1931), 201 N. C. 14, 158 S. E. 518.

[28] Boyd v. Lemmerman (1933), 11 N. J. Misc. 701, 168 A. 47; Lepre v. Land Title Trust Co. (1932), 11 N. J. Misc. 887, 168 A. 858; State ex rel. Ledin v. Davison (1934), — Wis. —, 256 N. W. 718; Young v. Potter Title & Trust Co. (1935), 115 N. J. Law 518, 181 A. 44; Dowling v. Winters (1935), 208 N. C. 521, 181 S. E. 751.

resentative of the non-resident by express terms of the statute will be sufficient to bring such persons within the scope thereof.[29]

The class, infants, presents a two-fold problem. One aspect is that of the applicability of the statute to the infant operator himself; the other is that of the applicability of the statute to the parent owner. It has been held that the infant is bound by the statute and cannot avoid the agency of the state official because of his infancy.[30] It has also been held that the parent owner, though not within the state at the time of the accident, is subject to the application of the statute.[31] There is a divergence of authority on this latter point, however. Those states having the "Family Car Doctrine" of tort liability are in accord with the holding that the parent owner is subject to the statutory substituted service on non-resident owners of automobiles.[32] Those states denying the doctrine do not consider the parent owner liable except for his own tort—such as entrusting the car to a known incompetent member of the family[33]—or upon the grounds of agency.[34] Thus, in the former class of states the parent owner might well be held liable, or subject

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[29] Dowling, Motor Vehicle Statutes; Hit and Run; Service of Process on Non-Residents (1931), 17 A. B. A. J. 798, 814, indicates that the modern tendency is to favor plaintiffs in automobile collision cases: Harris v. Nashville Trust Co. (1914), — Tenn. —, 162 S. W. 584, wherein the court said that the tendency has been by decision and statute to limit and circumscribe the effect of the rule that actions abate by death of parties thereto, held that the estate of a deceased testator was liable for a libel contained in the testator's will: State ex rel. Leden v. Davison (1934), — Wis. —, 256 N. W 718, though holding the Wisconsin Statute inapplicable to the executor of the deceased non-resident, stated, "Had the legislature so intended, (for the executor, administrator, or personal representative to be within the statute) it would have been a simple matter to make manifest such intention ° ° °" The court then suggested possible statutory language to include this situation, such as "irrevocable appointment binding on his executor, administrator, or personal representative", "in actions against him, or his executor, administrator, or personal representative," or "process against him or his executor, administrator, or personal representative" The court declined to pass upon the question of the constitutionality of such a statute, but it seems reasonable to suppose that such a provision would be constitutional as a reasonable exercise of the police power of the state.

[30] Berry, Automobiles (1935), sec. 5.323; Gesell v. Wells (1930), 229 App. Div. 11 at p. 14, 240 N. Y. S. 628 at p. 632, "It is not contractual in a strict sense; it is an obligation imposed by the sovereign power of the state upon the act of coming into the state and using the state's highway. The obligation then becomes complete and binding because the statute so declares it. Its command and obligation cannot be evaded, disaffirmed, or repudiated because of infancy."

[31] Gesell v. Wells (1930), 229 App. Div. 11, 240 N. Y. S. 628; see, Culp, Process in Actions Against Non-Resident Motorists (1934), 32 Mich. L. Rev. 345-347, for policy behind such statutes; see also, Dowling, Motor Vehicle Statutes; Hit and Run; Service of Process on Non-Residents (1931), 17 A. B. A. J. 798, 814.

[32] See Harper, Law of Torts (1933), sec. 283, for a discussion of the 'Family Auto Doctrine of Tort Liability' and the policy behind such. See also, Berry, Automobiles (1935), sec. 5.05 on the same subject.

[33] Repczynoki v. Mikulak (1931), 93 Ind. App. 491, at 495, 157 N. E. 464; Harper, Law of Torts (1933), sec. 283, Berry, Automobiles (1935), sec. 5.05.

[34] Smith v. Weaver (1920), 73 Ind. App. 350, 124 N. E. 503, McGoran v. Cromwell (1927), 86 Ind. App. 107, 156 N. E. 413, Harper, Law of Torts (1933), sec. 283; Berry, Automobiles (1935), sec. 5.05.

to substituted service of process as a non-resident whether or not he had consented to the use of the car by the infant. In the latter group, the probability is that the parent owner will come within the terms of the statute only when he has authorized the infant to take the car, or to operate it, as his agent.[35] In view of the present trend towards vicarious liability in such cases it would seem advisable that the statutes in question be construed in that light.

The third class is that of corporations. It is obvious that a corporation as an entity cannot perform a physical act such as operating an automobile, but can do such only through the medium of human agents. Yet, a corporation can own an automobile and can direct, in a sense, its operation. Under our present corporate system of organization, as a result of which perhaps a majority of the motor vehicles using the highways of the states are corporate-owned and operated, there can be little doubt that non-resident corporations should be within the ambit of the statutes providing for service of process on a state official as agent for non-resident motorists or owners of motor vehicles. Such seems to be the rule[36] notwithstanding the strict interpretation given to those statutes which in their wording pertain only to the operation of motor vehicles.[37]

As stated before, the principal case is the first reported Indiana case involving the Indiana statute concerning service of process upon a state official as agent for a non-resident operator or owner of a motor vehicle. The court has followed the weight of authority in its interpretation of the title requirements of the state constitution. It has indicated a liberal attitude towards this statute, again according with the weight of authoriy and the modern trend. The wording of the statute, expressly including the situation wherein the vehicle is operated by one authorized by the owner, has obviated, to a great extent, the problem of construing the term "operation." The further problem of whether or not a non-resident, as well as a resident plaintiff may avail himself of the statute, may well be decided in accord with the weight of authority which permits such,[38] since the Indiana statute is not limited to resident plaintiffs.[39] As to the question of who is a non-resident

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35 Dowling, Motor Vehicle Statutes; Hit and Run; Service of Process on Non-Residents (1931), 17 A. B. A. J. 798, 814.

36 Berry, Automobiles (1935), sec. 5.322; Bischoff v. Schnepp (1930), 139 Misc. 293, 249 N. Y. S. 49; Zurich Gen. Acc. & Liabil. Ins. Co. v. Brooklyn & Q. Transit Corp. (1930), 137 Misc. 65, 241 N. Y. S. 465, Bessan v. Public Service Co-ordinated Transport (1929), 135 Misc. 368, 237 N. Y. S. 689; see, Culp, Process in Actions Against Non-Residents (1934), 32 Mich. L. Rev. 346, "There is every reason for jurisdiction over non-resident firms and foreign corporations which exist relative to the non-resident individual and it seems that jurisdiction over firms and corporations is properly maintained."

37 34 Harv. L. Rev. 950-951; Clesas v. Hurley Machine Co. (1931), 52 R. I. 69, 157 A. 426.

38 Fine v. Wencke (1933), 117 Conn. 683, 169 A. 58; Beach v. Perdue Co. (1932), — Del. —, 163 A. 265, Sobeck v. Koellmer (1933), 240 App. Div. 736, 265 N. Y. S. 778; State ex rel. Rush v. Dane County (1932), 209 Wis. 246, 244 N. W 766; Berry, Automobiles (1935), sec. 5.321. However, some statutes, New Jersey and Tennessee, are by their terms limited in their application to residents.

39 Burns, Ind. Stat. 1933, sec. 47-1015, Acts 1931, ch. 179, sec. 15.

within the meaning of the statute and other problems likely to arise in the future, the principal case indicates that the Indiana courts will base their decisions upon social policy and the modern trend of decisions. H. P C.