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Substituted Service on Resident Motorists

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State organization furnishes the speakers and meets their expenses. A variety of subjects is made available as well as a considerable number of speakers—sometimes 25 or more in some States. After the main speaker concludes his part of the program a general discussion of the legal problem or subject is entered into by the lawyers attending. The value of these Legal Institutes in the States where they have operated has been found to be considerable.

The Citizenship Day committee of the Montana Bar Association has presented to the Supreme Court a petition requesting that under the direction of the Supreme Court and the District Courts of the State a day be set aside each year to mark the coming of age of the youth of the State. Exercises and instruction for the purpose of impressing upon these new citizens the rights and duties incident to citizenship are planned. The entire bar of the State will be asked to participate in this activity.

Some definite action to curb the unauthorized practice of the law is contemplated by the association. A committee on Bar Integration is active. The committee on Uniform District Court Rules recently prepared a set of uniform rules and submitted them to the district judges for their consideration. Uniform practice in the various district courts has been advocated by the bar for several years and now the individual lawyers are urged to make their views known to the district judges with respect to uniform rules.

It has been proposed to make the office of the Secretary of the association a clearing bureau for corrective and remedial legislation which lawyers of the State might suggest. By this means defects and ambiguities in the substantive and procedural statutory law may be remedied through the influence and as a result of the efforts of the bar.

To carry on any kind of a constructive program takes money. Inasmuch as the Montana Bar Association is dependent solely on the dues voluntarily paid by members the membership campaign is always in progress. The present officers of the association hope to see a record breaking membership this year.

SUBSTITUTED SERVICE ON RESIDENT MOTORISTS

The Montana Supreme Court has, apparently for the first time in any State, passed upon the constitutionality of a statute authorizing substituted service of process upon a *resident* motorist. Such service was upheld in *Thompson v. District Court.*[1] The

[1]State *ex rel.* Thompson v. District Court, *et al.*, 108 Mont. 362, 91 P. (2d) 422 (1939). The Court said at p. 367 of 108 Mont., "In arriving at our decision we have not had the benefit of direct precedent on the question involved. Neither briefs of counsel nor our own independent search have revealed a case where the constitutionality of an act as broad as ours has been passed upon."

novelty of the ruling justifies an effort to determine the scope of the statute and the decision.

The leading case of *Pennoyer v. Neff*[2] established that, unless there is consent to another mode of service, due process of law requires personal service within the State in all actions *in personam*. Exceptions, real or apparent, were from time to time engrafted upon this rule[3] and in *Hess v. Pawloski*[4] the United States Supreme Court upheld a Massachusetts statute which provided that use of the highways of the State by a *non-resident* motorist "shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him growing out of any accident or collision in which said non-resident may be involved while operating a vehicle on such a way * * * ." The Court relied chiefly upon two earlier cases, one upholding a highway regulatory measure on grounds of public safety,[5] the other upholding, on similar reasoning, a requirement that non-resident motorists file consent to service on a local agent as a condition precedent to use of the highways.[6] Today all but two or three of the States have statutes authorizing service on non-resident motorists[7] and, although some have been held invalid as to procedural details,[8] no serious question exists as to their

[2]95 U. S. 714, 24 L. Ed. 565 (1877). See also Roller v. Holly, 176 U. S. 398, 44 L. Ed. 520, 20 S. Ct. 410 (1900).

[3]Entrance of a foreign corporation into a State was made conditional upon consent to substituted service. International Harvester Co. v Commonwealth, 234 U. S. 579, 58 L. Ed. 1479, 34 S. Ct. 944 (1914). But it is recognized that such consent is a fiction. Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 61 L. Ed. 610, 37 S. Ct. 344 (1914). Service on an individual outside the State through an agent who was in the State selling corporate securities was upheld in Doherty & Co. v. Goodman, 294 U. S. 623, 79 L. Ed. 1097, 55 S. Ct. 553 (1935), but in Flexner v. Farson, 248 U. S. 289, 63 L. Ed. 250, 39 S. Ct. 97 (1918), service on an agent of a foreign partnership doing business within the State was invalidated.

[4]274 U. S. 352, 71 L. Ed. 1091, 47 S. Ct. 632 (1927). For a general history of such statutes, see annotations in 35 A. L. R. 951, 57 A. L. R. 1239, and 99 A. L. R. 130.

[5]Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385, 35 S. Ct. 140 (1914).

[6]Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222, 37 S. Ct. 30 (1916).

[7]Maurice S. Culp, *Recent Developments in Actions Against Non-Resident Motorists*, 37 MICH. L. REV. 58 (1938). "Today, out of the forty-eight States and the District of Columbia, apparently only Missouri, Nevada and Utah do not make some provision for such service."

[8]Wuchter v. Pizzutti, 276 U. S. 13, 72 L. Ed. 446, 48 S. Ct. 259 (1928), held invalid a statute which made no provision for communication to the proposed defendant, it being stated that substituted service is valid only "if the statutory provisions in themselves indicate that there is a reasonable probability that if the statutes are complied with the defendant will receive actual notice." The Montana statute requires service by registered mail as well as upon the Secretary of State.

basic constitutionality. In *Charette v. District Court*[9] the Montana statute, Chap. 10, Laws of 1937, was upheld insofar as it applies to non-residents.

But the novel portion of the Montana statute is Sec. 3, which provides that the operation by *any person* of a motor vehicle on the highways of the State shall be deemed equivalent to an appointment by him of the Secretary of State to be his attorney to accept service of process in any action against him resulting from a highway accident, provided that such substituted service shall not be sufficient as against any person who may with due diligence be found and personally served within the State.[10] In the *Thompson* case, which upheld this Section, defendant was a minor and a resident of Montana at the time of the accident but had left the State and taken employment in Arizona prior to institution of the action. Inasmuch, however, as his parents continued to reside in Montana, no reason is apparent why his domicil did not follow theirs nor, consequently, why the decision should not have been limited to the case of one who remains a resident.[11] But, although the Court took cognizance of defendant's minority, the decision rather clearly appears to have proceeded on the assumption that he was a non-resident. Mr. Justice Stewart, referring to the application of the Act, spoke of one who "prior to the institution of an action against him, removes from the State to live somewhere else," and again, of "residents who leave the State, prior to institution of suit against them, to live elsewhere." But whether this supposed non-residence was intended as a ground of the decision is another matter. Was the Act upheld, then, insofar only as it applies to those who are non-residents at the time of service or is the rationale of the case broad enough to cover those who remain residents but, due to temporary absence or unknown address, cannot with due diligence be found and personally served within the State?

The Court upheld the service in the *Thompson* case upon exactly the same grounds as it upheld the service in the *Charette* case, stating that "the reason for upholding the Act with respect to non-residents temporarily in the State exists with like force and effect in the case of a resident tort-feasor, who prior to suit leaves the State permanently or for an indefinite time." The latter clause suggests recognition of the issue as to defendant's domicil and intention to uphold the Act irrespective thereof. But the cases relied upon in the *Charette* case, like others sustaining non-resident motorist statutes, rest upon grounds pe-

[9]107 Mont. 489, 86 P. (2d) 750 (1939).

[10]Similar provisions exist in Arizona, New York, Pennsylvania, Wisconsin, Massachusetts, and Ohio. Culp, 37 MICH. L. REV. 58, at 68; 108 Mont. at 367.

[11]"During minority the domicile of an infant continues to be the same as that of the person from whom he took his domicile of origin, and changes only with the domicile of that person." 19 C. J. 411.

culiarly applicable to the non-resident. Those cases, recognizing that under *Pennoyer v. Neff* either personal service or consent to a different service must be shown, have purported to find, in the State's supposed power to exclude the non-resident,[12] authority for requiring that he consent to substituted service. It has been easy, then, to consider use of the highways as manifesting consent. But it seems unlikely that the State would be found to have power to exclude a resident taxpayer from the use of the highways unless he consent to a form of service which would otherwise be in violation of due process. And, although probably it is true that such consent is fictitious and that the real basis for the legislation and the decisions is found in the general authority of the State, under its police power, to regulate motor traffic, there is less reason for extending this sort of regulation to residents. There is doubtless much force to the argument, accepted as an additional ground for requiring consent to substituted service, that amenability to suit at the situs of the accident will lead to caution by the non-resident who is speeding through the State,[13] but the argument is much weaker as applied to a resident who is subject to such suit anyway. True, he might later leave the State, but the expense and sacrifice involved would surely discourage him from doing so in most cases, and, in any event, this possibility of escape would hardly operate upon his mind to make him less cautious prior to an accident. It is not believed that there is the practical need for resident motorist statutes or that they would be nearly so widely used as is true of non-resident statutes.[14]

It follows that the extension of this doctrine to resident motorists, as in the *Thompson* case, cannot realistically depend either upon the theory of consent or upon the theory of pub-

[12]The most natural construction of the leading cases cited in notes 4, 5 and 6 is that the "power to exclude" is the result of, rather than the reason for, the power to regulate. But under either view, it does not follow, as the Montana Court apparently assumed it did, that a resident can be forced to consent to substituted service merely because a non-resident can be.

[13]"We know that ability to enforce criminal and civil penalties for transgression is an aid in securing observance of laws. And in view of the speed of the automobile and habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of non-resident owners, was essential to public safety." Kane v. New Jersey, *supra*, note 6, 242 U. S. at p. 167.

[14]"In the following States the number of services which have been made under their respective statutes since they were adopted are: California, 456; Florida, 480; Nebraska, 606; Ohio, 2,894; Oregon, 398. This represents a substantial number annually because all of these statutes are of fairly recent date. Since 1933, 250 summons have been served in Michigan; in Texas, 266. 7,803 summons have been served from August 1, 1935, to January 30, 1938, under Section 52, 52a, of the New York Vehicle and Traffic Law." Culp, 37 MICH. L. REV. 58 (1938).

lic safety. This can be said of all motorists who are resident at the time of the accident, regardless of whether they later become non-residents, leave the State temporarily, or stay in the State. But another theory or ground of decision, not much stressed in the cases involving non-residents, but possibly very important, is that the State may under its police power protect injured plaintiffs by making all motorists amenable to suit at the situs of the accident. And this basis does apply in like manner to a resident who becomes a non-resident as it does to one who at all times is a non-resident. It would even support, although to a lesser extent, extension of the statute to a resident who is temporarily absent or merely cannot be found.

But, putting aside considerations of consent and police power, there is a quite independent ground for upholding substituted service upon a resident defendant in any action *in personam* even though he be outside of the State. That is by virtue of the extraterritorial authority of a State over her domiciliaries. Statutes authorizing the taking of personal jurisdiction by giving notice to a resident outside of the State have been upheld.[15] Though the United States Supreme Court has not as yet passed upon them, the opinion has been expressed[16] that, by analogy to the cases holding that Congress has jurisdiction over citizens abroad,[17] that Court will uphold them provided they require actual notice. Furthermore, it should be pointed out that, with the relaxation of the strict rule of *Pennoyer v. Neff* and the resulting emphasis upon reasonableness and probability of defendant receiving actual notice as the criterion of due process,[18] decisions such as that of the *Thompson* case are really within the spirit of the concept. The danger, originally much feared, that fraud and oppression would be practiced upon defendants who were unaware that suit had been begun against them, is reduced to a minimum.

It appears, therefore, that the Montana Supreme Court, by assuming that defendant had become a non-resident, upheld the statute in its most doubtful application. There was no disposition to limit the decision to the case of a resident temporarily absent. The conclusion must be that the Court meant to hold the statute constitutional for all purposes.

The observation has been made[19] that, while these statutes have been of much public benefit, legislation is now needed to insure good faith plaintiffs and to protect defendants who are

[15]Becker v. Becker, 218 S. W. 542 (Tex. Civ. App., 1920); In re Hendrickson, 40 S. D. 211, 167 N. W. 172 (1918).
[16]Arthur A. Morrow, *Jurisdiction in Personam Acquired by Extraterritorial Service of Notice*, 20 IOWA L. REV. 9 (1934).
[17]Blackmer v. United States, 284 U. S. 421, 76 L. Ed. 375, 52 S. Ct. 252 (1918).
[18]McDonald v. Mabee, 243 U. S. 90, 61 L. Ed. 608, 37 S. Ct. 343 (1917).
[19]Culp, 37 MICH L. REV. 58 (1938), at p. 76.

faced with the problem of letting a judgment go by default or traveling some distance to litigate a groundless claim.[20]

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CONFLICT OF LAWS GOVERNING ANNULMENT OF MARRIAGE

H and W, domiciled in Montana, are married in Idaho and return at once to Montana. By the law of one State or the other, the marriage is invalid.[1] Two questions arise: (1) The Courts of which State should take jurisdiction to annul this marriage? (2) What law should those Courts apply to determine whether an annulment should be granted?

The cases are by no means in agreement as to the answer to the first of these questions. This uncertainty is amply illustrated by reference to the decisions of one jurisdiction, New Jersey. In *Blumenthal v. Tannenholz,*[2] the Court refused to take jurisdiction to annul a marriage contracted within the State; in *Avakian v. Aviakian,*[3] the Court granted an annulment although neither party was domiciled within the State and the marriage did not take place there; and in *Capasso v. Colonna,*[4] the Court refused to annul a marriage contracted in New York when the parties were domiciled in New Jersey at all times.

Some Courts, distinguishing between void and voidable marriages, have held that, whereas a void marriage may be annulled in either the State of domicil at time of suit or the State where it was celebrated, a marriage which is voidable merely can be annulled only in the State where it was celebrated[5]. The majority of Courts today, however, in the interest of certainty and uniformity, are inclined to give exclusive jurisdiction to the Courts of the State wherein the parties are domiciled at the

[20]While the Montana statute, drafted carefully in the light of earlier test cases, answers most questions, some are left unanswered. E. g., may a non-resident plaintiff take advantage of the act? That he may, see Beach v. Perdue Co., 35 Del. 285, 163 Atl. 265 (1932). It was held in State *ex rel.* Ledin v. Davidson, 216 Wis. 216, 256 N. W. 718 (1934), that plaintiff may not sue the executor or administrator of the deceased non-resident.

[1] Cross v. Cross, —— Mont. ——, 99 P. (2d) (1940), involved similar facts. It was decided, however, after this note was written.

[2] 31 N. J. Eq. 194 (1879).

[3] 69 N. J. Eq. 89, 60 Atl. 521 (1905).

[4] 95 N. J. Eq. 35, 122 Atl. 378 (1923) aff'd., 96 N. J. Eq. 385, 124 Atl. 760 (1924).

[5] Levy v. Downing, 213 Mass. 334, 100 N. E. 638 (1913); Sutton v. Warren, 10 Met. 451 (Mass., 1845); Hiram v. Pierce, 45 Me. 367, 71 Am. Dec. 555 (1858); Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355 (1912); JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935), Sec. 115.1.