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Conflict of Laws - Jurisdiction under Non-resident Motorist Statute Does Not Extend to Agent

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employee acting, and was it with the intention of serving the purposes of the employer.[21]

In the instant case, the court practically disregarded the requirement that, in order to impose liability upon a corporation, the act of its agent must be within the *scope* of employment as well as in the *course* thereof. As was said in *Comfort v. Monteleone*:[22] "If an employee whose duties are limited to peaceful functions undertakes to perform others of a different character . . . the master is not responsible. . . ." The defendant company in the principal case could not have contemplated that their salesman would so far depart from his peaceful duties as to slander the salesman of a rival company. Undoubtedly, the company did not *intend* to authorize its agent to defame. Liability should not be imposed for abnormal acts of the agent or for an act committed by the agent with no intention to perform it as a part of, or incident to, a service on account of which he was employed.[23].

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CONFLICT OF LAWS—JURISDICTION UNDER NON-RESIDENT MOTORIST STATUTE DOES NOT EXTEND TO AGENT—A non-resident corporation was sued for an injury caused by the negligent operation of its automobile by its agent. Substituted service was made upon the Secretary of State of Illinois under a statute[1] which provided that the operation by a non-resident of a motor vehicle within the state shall be deemed an appointment of the Secretary of State as attorney for the service of process. *Held*, that the statute should be construed strictly, confining its operation to cases in which the vehicle is personally operated by its non-resident owner, and that operation by an agent of the non-resident corporation is not such "personal" operation. *Jones v. Pebler*, 16 N.E. (2d) 438 (Ill. App. 1938).

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21. See McDermott v. American Brewing Co., 105 La. 124, 126, 29 So. 498 (1901).

22. Comfort v. Monteleone, 163 So. 670, 672 (La. App. 1935).

23. 1 Restatement, Agency (1933) § 235. In *Comfort v. Monteleone* the court said: "An employee is never vested with authority to exercise force in the venting of personal animosity." (163 So. at 673). See 13 A. L. R. 1142 (1921) (Liability of insurance company for libel or slander by its agents or employees); and Comment (1936) 20 Minn. L. Rev. 805 (discussion of existing jurisprudence regarding a master's liability for defamation published by servant, and a suggested solution of certain problems).

1. Ill. Rev. Stats., c. 95½, § 23.

Although non-resident motorist statutes have frequently been subjected to litigation wherein violation of the due process clause[2] and the privileges and immunities clause[3] of the Federal Constitution is alleged, the courts have unanimously held such statutes constitutional.[4] The basis of jurisdiction over non-resident motorists lies in implied consent;[5] the explanation of their constitutionality is founded upon the theory that to require the non-resident motorist to "consent" to service upon a statutory agent is a reasonable exercise of the police power of the state whose highways the non-resident motorist uses.[6] It should be remembered that the statutes must contain provisions for notification reasonably calculated to inform the defendant of the pending action,[7] otherwise the judgment obtained thereunder would be a nullity, as a denial of "due process of law."[8]

Courts have been practically uniform in their unwillingness to construe non-resident motorist statutes liberally.[9] In spite of the well-known doctrine that the act of the agent within the scope of his authority is the act of the principal, the rule of the instant case that the words "operation by a non-resident" refer only to personal operation of the motor vehicle by the non-resident owner is

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2. U.S. Const. Amend. XIV.

3. U.S. Const. Art. IV, § 2.

4. Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); Hartley v. Vitiello, 113 Conn. 74, 154 Atl. 255 (1931); Schilling v. Odlebak, 177 Minn. 90, 224 N.W. 694 (1929); Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930); State v. Belden, 193 Wis. 145, 211 N.W. 916, 57 A.L.R. 1218 (1927). See Stumberg, Conflict of Laws (1937) 92-95.

5. 1 Beale, Conflict of Laws (1935) 359, § 84.2; Restatement, Conflict of Laws (1934) §§ 81-94. See Doherty v. Goodman, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097 (1933), discussed in Goodrich, Conflict of Laws Since the Restatement (1937) 23 A.B.A.J. 119.

6. Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222 (1916); Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); Galloway v. Wyatt Metal & Boiler Works, 189 La. 837, 181 So. 187 (1938); Spearman v. Stover, 170 So. 259 (La. App. 1936); Schilling v. Odlebak, 177 Minn. 90, 224 N.W. 694 (1929).

7. Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927).

8. Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446, 57 A.L.R. 1230 (1928); Spearman v. Stover, 170 So. 259 (La. App. 1936); Restatement, Conflict of Laws (1934) § 75 and Restatement, Conflict of Laws, Louisiana Annotations (1937) § 75. Cf. Charry v. Heffernan, 182 So. 427 (Fla. 1938).

9. Day v. Bush, 18 La. App. 682, 139 So. 42 (1932); Schilling v. Odlebak, 177 Minn. 90, 224 N.W. 694 (1929); O'Tier v. Sell, 252 N.Y. 400, 169 N.E. 624 (1930). Contra: Salzman v. Attrean, 142 Misc. 245, 254 N.Y. Supp. 288, 290 (Munic. Ct. 1931): "This law is one of general scope, being directed to a matter of procedure, and, being remedial in character, is to be liberally, rather than rigidly, construed." See also, Young v. Masci, 289 U.S. 253, 53 S.Ct. 599, 77 L.Ed. 1158 (1933), where the non-resident lender of an automobile was held liable, although, by the law of the state in which the loan was made, he would have been exempt from liability for the borrower's negligence.

well supported by authority.[10] It is, nevertheless, submitted that such a strict construction is unfortunate in that it disregards the true intent of the law-makers and the public policy which prompted these enactments. A liberal construction of such statutes should particularly be applied where the non-resident owner is a corporation, because a corporation can act only through its agents and servants.[11] To hold that the non-resident owner must personally operate the motor vehicle clothes the corporation with judicial immunity from substituted service under the non-resident motorist statutes. Any but a liberal construction defeats the purpose for which such statutes are enacted—for the same reasons of public policy exist in the case of a corporation as that of any other non-resident owner.[12]

The Louisiana non-resident motorist act,[13] prior to its amendment in 1932,[14] was much broader in scope than the Illinois Act[15] in the principal case, in that the Louisiana statute includes a "non-resident or his authorized chauffeur." Nevertheless, the same strict construction has been applied to it, and the word "chauffeur" was held to be used in a narrow sense and to have no application to an agent operating his employer's automobile within the scope of his employment.[16] In the following session of the legislature the word "chauffeur" was changed to "employee,"[17] and the Supreme Court immediately leaned toward the much needed liberal construction.[18]

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10. Morrow v. Asher, 55 F. (2d) 365 (N.D. Tex. 1932); Brown v. Cleveland Tractor Company, 265 Mich. 475, 251 N.W. 557 (1933); Flynn v. Kramer, 271 Mich. 500, 261 N.W. 77 (1935); O'Tier v. Sell, 252 N.Y. 400, 169 N.E. 624 (1930). See in particular Jones v. Newman, 135 Misc. 473, 239 N.Y. Supp. 265 (1930).

11. Poti v. N.E. Road Mach. Co., 83 N.H. 232, 140 Atl. 587 (1928); Bessan v. Public Service Co-ordinated Transport, 135 Misc. 368, 237 N.Y. Supp. 689 (1929); Bischoff v. Schnepp, 139 Misc. 293, 249 N.Y. Supp. 49 (1930).

12. See cases cited in note 6, supra.

13. La. Act 86 of 1928.

14. La. Act 184 of 1932 [Dart's Stats. (1932) §§ 5296-5298].

15. Ill. Rev. Stats., c. 95½, § 23, cited in note 1, supra.

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

17. La. Act 86 of 1928, as amended by La. Act. 184 of 1932 [Dart's Stats. (1932) §§ 5296-5298]; in Brassett v. United States Fidelity & Guaranty Co., 153 So. 471 (La. App. 1934), it was held that the word "employee" did not cover a gratuitous bailee.

18. In Galloway v. Wyatt Metal & Boiler Works, 189 La. 837, 181 So. 187 (1938), it was held that the term "public highways" as employed in the 1928 act, as amended, is broad enough to include every way for travel by persons on foot or with vehicles which the public has the right to use: "Courts are not required to construe, and will not construe, a statute so as to defeat its purpose or to produce a result that is not within the legislative intent. On the contrary, the courts will construe a statute so as to accomplish the purpose for which it was enacted and to give effect to the legislative will." (189 La. at 845, 181 So. at 189).

Although incorporated under the laws of another state, a non-resident corporation, that has complied with all the statutory requirements relative to doing business in Louisiana and has appointed an agent upon whom service of process may be made,[19] becomes a "domestic" corporation as contradistinguished from a "foreign" corporation.[20] Therefore, such a corporation would not be a "non-resident" within the intendment of the 1928 act (as amended) and service of process would be made upon the agent appointed by the corporation, or upon the Secretary of State (if the agent so appointed should have removed from the state, or died).[21]

In order to avoid strict constructions by the courts, other states have amended their original laws and have extended the application of the statute to others than operators.[22] It is unfortunate that, in their present attitude, the courts persist in interpreting non-resident motorist statutes so narrowly as to defeat the legislature's evident intent to make all who use the roads of the state, whether residents or non-residents, amenable to suit within the state for injuries occasioned within its borders. The argument that non-resident motorist statutes are in derogation of common law[23] or of "common right"[24] is merely a judicial device the result of which is to hamper effective regulation by the state of a universally recognized evil. It is submitted that, with the constitutional safeguards adequately provided for, there is no longer any reason why statutes providing for substituted service of process should not be liberally construed. If they are not, we shall continually witness the unfortunate spectacle of the legislature being forced to correct one narrow decision after another.

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19. La. Act 267 of 1914, § 23, as amended by La. Act 120 of 1920, § 1 [Dart's Stats. (1932) § 1246].

20. Burgin Bros. & McCane v. Barker Baking Co., 152 La. 1075, 95 So. 227 (1922).

21. La. Act 184 of 1924, § 3 [Dart's Stats. (1932) § 1252]. Cf. State v. American Ry. Express Co., 159 La. 1001, 106 So. 544 (1924); State v. Southern Bell Telephone & Telegraph Co., 171 La. 1088, 133 So. 166 (1931).

22. La. Act 86 of 1928, as amended by La. Act 184 of 1932 [Dart's Stats. (1932) §§ 5296-5298] (operation by a non-resident or his authorized employee); Minn. Acts (1933), c. 351, § 4 (any operator other than the owner, with the express or implied consent of the owner shall in case of accident, be deemed the agent of the owner); Tenn. Code (Williams 1934) § 8671 (any owner, chauffeur or operator).

23. Morrow v. Asher, 55 F. (2d) 365, 367 (D.C.N.D.Tex. 1932).

24. Day v. Bush, 18 La. App. 682, 684, 139 So. 42, 44 (1932); Spearman v. Stover, 170 So. 259, 262 (La. App. 1936). "Derogation of common right" is nothing more than a maxim which is an expansion of the "derogation of common law" doctrine at common law and has no place in Louisiana jurisprudence. "Derogation of common law" is fundamentally common law and arose