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Constitutional Law: Constitutionality of Chapter 94, Session Laws of Wisconsin for 1925, regarding substituted service on non-residents

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NOTES AND COMMENT

Constitutional Law: Constitutionality of Chapter 94, Session Laws of Wisconsin for 1925, regarding substituted service on nonresidents.—A new subsection is added to section 85.15 of this state, the statute (85.15–3) reading: "The use and operation by a nonresident of a motor vehicle over the highways of Wisconsin shall be deemed an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation resulting in damage or loss to person or property, and said use or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by serving a copy upon the secretary of state or by filing such copy in his office, together with a fee of two dollars, and such service shall be sufficient service upon the said nonresident; provided, that notice of such service and a copy of the process are within ten days thereafter sent by mail by the plaintiff to the defendant, at his last known address and that the plaintiff's affidavit of compliance herewith is appended to the summons. The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action, not exceeding ninety days from the date of the filing of the action in such court. The fee of two dollars paid by the plaintiff to the secretary of state at the time of the service shall be taxed in his costs if he prevails in the suit. The secretary of state shall keep a record of all such processes which shall show the day and hour of service."

This statute, if valid, is certainly a revolution in the method of obtaining jurisdiction of nonresident defendants in transitory actions.

Service by publication upon citizens of other states has been held constitutional. The reasoning is well and concisely stated in *Morris v. Graham.*[1] "It is beyond the power of a state to grant the same privileges and immunities in the matter of service of process to those outside of its jurisdiction as it can to those within its limits; its powers are limited by its boundaries. All residents, or those found within its limits, are to be served personally. All others who cannot be so reached must necessarily be served by publication, both methods being regardless of their citizenship." It seems, at first glance, that such reasoning should also sustain this new amendment to the statute.

It may well be argued, on the other hand, that this section of the statute violates several United States constitutional provisions, namely: Article 4, Section 2. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and the Fourteenth Amendment, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

[1] 51 Federal Rep. 57 (1892).

of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The first question to be considered is whether it violates the "privilege and immunities" clause of the United States Constitution. Statutes enacted in Florida and Delaware very similar to the one under consideration have been held unconstitutional.

A Delaware statute provided "that whenever suit shall be brought against any person or persons not residing in this state, but doing business therein, either by a branch establishment or agency, it shall be sufficient service of a writ of summons to leave a copy thereof with any agent, or at the usual place of business of such person or persons, or his or her or their agent ten days before the return thereof." The Superior Court of Delaware held this statute unconstitutional because repugnant to Article 4, Section 2 of the United States Constitution, giving the citizens of each state all the privileges and immunities of citizens in the several states, in so far as it attempted by such manner of service to confer money judgments, since it provided a mode of serving process in personal actions on nonresidents essentially different from that prescribed for residents.[2] A Florida statute provided that "in actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent of or person in charge of such business in this state in the county where the business is carried on, or in the county where the cause of action occurred." The Federal Court held that a judgment *in personam,* obtained against a nonresident on a service made upon an agent under the statute, violated the rights of the defendant by depriving him of an immunity or exemption allowed to citizens of the several states. Citizens of a foreign state have entire immunity from being subjected to personal judgments for money upon such a service of process in actions at law.[3]

It may be noticed that the statute discriminates not between citizens but between residents and nonresidents. The Supreme Court of Ohio in an action in which the constitutionality of a statute, excluding from the jurisdiction of the state courts of Ohio, all causes against the persons and companies therein referred to for injuries to person or property or for wrongful death occuring without the state of Ohio unless such claimant is a resident of that state, ruled that the statute was not unconstitutional because the purpose of the constitution is to prevent arbitrary and unreasonable discrimination in each state in favor of its own citizens and against the citizens of other states, and since this statute discriminated only between residents and nonresidents it was constitutional. This is the only case making such a distinction, however, and a number of cases can be found where statutes discriminating

[2] *Caldwell v. Armour,* (1899) 1 Penn. (Del) 545. 43 Atl. Rep. 517.

[3] *Moredock v. Kirby,* (1902) 118 Fed. Rep. 182.

between residents and nonresidents and not between citizens and noncitizens have been held unconstitutional.[4]

The statute reads: "The use and operation by a nonresident of a motor vehicle over the highways of Wisconsin shall be deemed an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served all legal process." It is very plain that this provision is modeled after the provision that corporations by doing business within the state constitute the secretary of state their agent for the service of process. This presents the question as to whether every nonresident who uses our highways, assents to the secretary of state becoming his agent for the service of process, a question which must be answered in the negative, A corporation of one state cannot do business in another state without the latter's consent, expressed or implied, and that consent may be accompanied by such conditions as it may think proper to impose, because a corporation is not a person within the meaning of the privileges and immunities clause of the Fourteenth Amendment.[5] The circumstances under which a natural person, a citizen of another state, carries on business or uses the highways in this state, are essentially different. He uses the roads here, not by virtue of the consent of this state, but by virtue of a right secured to him by the Constitution of the United States; and from the exercise of that right no assent can be implied that he will submit to a mode of service in personal actions different from that provided in case of citizens of this state.[6]

The next question to be considered is whether the statute violates the constitutional provision that no state shall deprive any person of life, liberty, or property without due process of law. In other words, the specific question is whether the provision for substituted service upon the secretary of state with a mailing of notice of service to the defendant is due process and will give the court jurisdiction of an action *in personam.* Such a service has been held to be due process in the case of foreign corporations.[7] In the case of domestic corporations and citizens of the state it is a question as to how far substituted or constructive service will be allowed. Wisconsin holds that a statute authorizing service of summons on corporations which neglect to file lists of the names of officers on whom process might be served, by leaving copies with the register of deeds where the corporation has its principal office. is invalid as not providing due process of law.[8] Service is allowed upon residents in this state, however, by leaving the summons with a member of the defendant's family of suitable age and discretion at his usual place of abode, and by publication in case the defendant departs from

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[4] *Loftus v. Pennsylvania Railroad Co.,* 16 Ohio App. 371, 107 Ohio State 352, 140 N.E. 94.

[5] *St. Clair v. Cox.* 106 U. S. 350, 27 L. ed. 222.

[6] *Ins. Co. v. French,* 18 Hos. 404.

[7] *Societe Fonciere et Agricole des Estate Univ. v. Milliken,* 138 U. S. 304, 34L. ed. 208, Sec. 2637 (13) Wis. Stats., 10 Sup. Ct. Rep. 823.

[8] *N. C. Pinney v. Providence Loan and Investment,* 106 Wis. 396, 82 N.W. 308. Sec. 2637 (13) Wis. Stats.

the state or conceals himself within the state with intent to defraud his creditors.[9]

In case of nonresidents, a judgment obtained in an action *in personam* where there has only been substituted or constructive service provided by statute upon the defendant, has never been held valid in other jurisdictions, other than that in which it was rendered although held to be valid there.[10] And the case of *Pennoyer v. Neff* (1877) 95 U.S. 714, 24L. ed. 565, has been uniformly regarded as placing beyond question the doctrine that a personal judgment against a nonresident who was not served within the state, and who did not appear or assent, expressly or impliedly, to the mode of constructive or substituted service adopted, is invalid, even in the state where rendered.[11]

In the face of the authorities and the doctrine of *stare decisis* it is very improbable that this chapter 94 of the session laws of 1925 will be upheld as constitutional. This is most regrettable, for there is no doubt the result sought to be accomplished by this statute is highly desirable.

EVERETT P. DOYLE

Courts: Contrasting the exterior features of the English and American courts.—One often hears, from interested American lawyers, questions regarding the external forms surrounding the administration of British justice. It is a subject which intrigues the average attorney, partly because of our heritage of the English common law, and partly because of lack of cultural, educational, and social understanding between the two countries.

The differences between the administration of justice in the British Empire and this country may be said to consist chiefly of ceremony, dignity, and atmosphere. British courts have about them an elusive aroma of medievalism, archaic, yet pleasing, which would be almost theatrical were it not for the background of centuries which support it. American courts, less formal, contrive to combine dignity with the urgent dispatch of business.

The English court room is, on the average, smaller and less ostentatious than the American. The decoration usually follows the squat lines of Anglo-Saxon Gothic, rather than the classic purity of most American public buildings. The judges' throne, a most imposing piece of furniture, is always placed at that end of the room which faces the formal entrance. It is occasionally surmounted by a canopy. Either the throne or canopy invariably supports the royal coat of arms, symbol of authority, approximated in this country by the American flag.

In the space or "well" in front of the judicial dais are the barrister benches, and one is struck by the absence of tables. The jury box to

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[9] Secs. 2636 (4), 2639 (2), Wis. Stats.

[10] *Galpin v. Page,* 18 Wall. 350, 21 L. ed. 959; *Thompson v. Emmett,* 4 McLean, 96 Fed. Cos No. 12, 953.

[11] *Lutz v. Kelly,* 47 Iowa 307; *Eliot v. McCormick,* 144 Mass. 10, 10 N.E. 705; *McKinney v. Collins,* 88 N. Y. 217.