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Article 27

Pleading and Practice--Jurisdiction over Non-Resident Motorist (Shushereba v. Ames, 255 N.Y. 490 (1931))

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The employer is here sought to be joined under section 193, subdivision 2, of the New York Civil Practice Act.[1] But, it is claimed, since the indemnity sought arises from a separate instrument, outside the action, that the statute does not apply. This calls for an interpretation of the phrase "for the claim made against such party in the action." This legislative ambiguity, if strictly construed, limits the application to parties liable upon the exact complaint in the action [2] and the rule would be rendered nugatory. But following a line of cases [3] which have given some breadth to the law the court here broadly interprets the statute as applying to all claims related to the same subject matter. This despite the fact that the third person's liability to defendant is based on contract while the original action was for negligence.[4] Such a construction appears to carry out the purpose of the legislature by accepting "common questions of law or fact" as the basis for joinder [5] rather than the old outmoded requirement of liability directly to the plaintiff, or failing that, to the defendant for contribution or indemnity directly under the plaintiff's claim.[6]

D. J. R.

PLEADING AND PRACTICE—JURISDICTION OVER NON-RESIDENT MOTORIST.—Defendant, a non-resident, while operating an automobile within the state collided with the plaintiff. Process was served in accordance with section 52 of the Vehicle and Traffic Law.[1] Upon the receipt appears the name of another. Defendant did not deny she received a copy of the summons by registered mail, nor did she allege she did not sign the receipt either personally or by her agent. Defendant appeared specially to contest the jurisdiction of the Court on the sole ground that the return receipt was insufficient upon its face, *Held,* the statute as construed does not require the return receipt to be signed personally by the defendant, and in

[1] N. Y. Laws, 1923, c. 250, where any party to an action shows that some third person * * * is or will be liable to such party * * * for the claim made against the party in the action, the Court, on application of such party, may order such person to be brought in as a party to the action * * *.

[2] 2 Carmody's New York Practise (1930) 874.

[3] Travlos v. Commercial Union of America, 217 App. Div. 352, 217 N. Y. Supp. 459 (1st Dept., 1926); Prescott v. Nye, 223 App. Div. 356, 228 N. Y. Supp. 156 (3rd Dept., 1928; Wichert & Co. v. Gallagher & Asher, 201 N. Y. Supp. 186 (1923); Driscoll v. Corwin, 133 Misc. 788, 233 N. Y. Supp. 483 (1929).

[4] But *cf.* Krombach v. Killian, 215 App. Div. 19, 213 N. Y. Supp. 138 (2nd Dept., 1925).

[5] Rothschild, *The Consolidated Action,* (1930) 4 St. John's L. Rev. 151, 167.

[6] May v. Mott Ave. Corp., 121 Misc. 398, 401, 201 N. Y. Supp. 189, 191 (1923).

[1] N. Y. Cons. Laws, Ch. 71.

the absence of actual proof of lack of notice the return receipt will suffice to give the Court jurisdiction. Shushereba v. Ames, 255 N. Y. 490, 175 N. E. 187 (1931).

The general rule is that process whether served outside of the state or published within the state is without force to compel a non-resident to present himself in a proceeding to establish a personal liability.[2] Jurisdiction over one is obtained by personal service of process upon him within the state,[3] or upon some one authorized to receive service for him.[4] Where the statute authorizes a different method of service upon the resident the judgment is valid if the method is one reasonably calculated to give him notice of the action and an opportunity to be heard,[5] and the same test of "reasonable probability" of notice has been applied in the case of non-resident.[6] It is universally conceded that a statute can not discriminate in a hostile manner against a non-resident. Hence, in a recent case the Court held, that where a statute provided for service upon the secretary of the state in suits against non-residents, but provided for no notice to the non-resident it was unconstitutional.[7] In such a case it is obvious that when the test of "reasonable probability" of notice is applied the statute must fall. The statute must make a reasonable provision for such probable communication.[8] Courts in other jurisdictions are not in harmony with each other. Where the statute provided that the process was to be mailed to the defendant at his last known address it was held to be constitutional,[9] yet where the statute provided that a copy of the process was to be sent to the defendant's address as specified in the process it was held invalid, since the address as specified may not be the true address and may lead to a perpetration of fraud.[10] The Court in the latter case said that the statute fails to meet the test of "reasonable probability" that a compliance with its terms would give the defendant actual knowledge of the suit. It is to be noted that although the defendant had received actual notice, the efficacy of the notice to make her amenable to the suit for a personal judgment in this Maryland case was made to depend on the constitutionality of the statute and held that the validity of a statute is determined by what may be done and not by what was done thereunder.[11] The state's

[2] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[3] Scott, *Jurisdiction Over a Non-Resident Motorist* (1925), 39 Harv. L. Rev. 563.

[4] Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559 (1894).

[5] *Supra* note 3.

[6] Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259 (1927).

[7] *Ibid.*

[8] *Ibid.*

[9] Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916 (1927); Schilling v. Odlebak, 177 Minn. 90, 224 N. W. 694 (1929).

[10] Grote v. Rogers, 149 Atl. 547 (Md. 1930).

[11] *Ibid.*

power to regulate the use of its highways extends to their use by non-residents as well as by residents,[12] and by virtue of such power a state may condition a non-resident's privilege to operate an automobile within its territorial limits upon his appointment, express or implied, of an agent to receive process.[13] The statute in instant case requires that the return receipt shall be filed along with the affidavit of compliance and the summons and complaint in the court in which the action is commenced. It is to be noted that it is the return receipt and not the ordinary post office receipt that must be filed. The return receipt is something of an admission of service. It is not necessary that the receipt shall bear his personal signature.[14] It is substantial compliance if the person signing had authority.[15] The statute in question is constitutional.[16] It appears that defendant had knowledge of the receipt of such papers. There has been substantial compliance. The aperture through which the defendant is trying to escape is too narrow.

J. M. P.

REAL PROPERTY—LAND HELD UNDER PASSIVE TRUST NOT SUBJECT TO LIEN FOR FRANCHISE TAX.—Charter Construction Company, pursuant to an agreement whereby plaintiffs, its stockholders, surrendered to it their stock, transferred certain real property to the Glenbrook Company which took an undivided interest for the benefit of plaintiffs. The state levied a franchise tax on the Glenbrook Company. Plaintiffs seek to bar the state from asserting a lien on the property in question. On appeal, from a judgment for defendant, *Held,* reversed. A property tax assessed on a corporation cannot become a lien upon land as to which it was a mere depositary of the legal title. Plaintiffs herein sustained the burden imposed by section 501 of the Real Property Law of establishing their legal title. Bing v. People, 254 N. Y. 484, 173 N. E. 687 (1930).

Where no trust duty is imposed by the deed upon the grantee it is a mere passive trust and the fee passes directly to the beneficiaries named therein.[1] A person who claims an interest in real property not less than a ten-year term must set forth in his complaint the estate he claims to have.[2] A franchise tax is not a prop-

[12] Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385 (1914).

[13] Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916).

[14] Gesell v. Wells, 229 App. Div. 11, 240 N. Y. Supp. 628 (3rd Dept. 1930).

[15] *Ibid.*

[16] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1926).

[1] Fisher v. Hall, 41 N. Y. 416 (1869); Dennison *et al* v. Dennison, 185 N. Y. 438, 78 N. E. 162 (1906); Jacoby v. Jacoby, 188 N. Y. 124, 80 N. E. 676 (1907); N. Y. Real Property Law (1909) Ch. 52, Sec. 93.

[2] Best Renting Co. v. City of N. Y., 248 N. Y. 491, 162 N. E. 497 (1928); N. Y. Real Property Law (1920) Ch. 930, Sec. 501.