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Jurisdiction of Non-Resident Motorist

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The enactment of the proposed amendment to Section 354 of the Civil Practice Act would restore the rule of the common law as it existed before the first codification, by providing:

> "* * * But nothing contained in this section shall be construed to disqualify an attorney or his employees in the probate of a will * * * from becoming a witness as to its preparation and execution, *whether such attorney is, or is not, one of the subscribing witnesses thereto,* * * *."

When a client executes a will it is undoubtedly his intention that the execution and especially the contents of the will be kept secret during his life. Obviously such an intent does not prevail after his death—it is his desire that the will then be established, published and its provisions carried out.[11] No one is in a better position to effectuate the desires of the testator than the attorney who drew the will. When the reason for the rule of privilege ceases to obtain, the application of the rule should cease. The state endows its citizens with the privilege of testamentary disposition. The burden of proving the proper exercise of the privilege is on the proponents of the will who thus represent the testator. Obstacles should not be placed in the way when there is no justification for their existence. However, the statute or its application should be qualified so as to apply only to those cases where the evidence to be adduced is in support of the will. Otherwise a dangerous weapon will be placed in the hands of unscrupulous attorneys who may be induced, by bribe or otherwise, to use the knowledge obtained through their position of confidence so as to favor interests detrimental to their erstwhile clients.

SIDNEY MOERMAN.

JURISDICTION OF NON-RESIDENT MOTORIST.—By the former provisions of Section 52 of the Vehicle and Traffic Law [1] it was provided that a non-resident operator of a motor vehicle or motorcycle should be deemed by such operation on a public highway in this state to have appointed the secretary of state to be his attorney upon whom summons might be served in any action against him, growing out of any accident or collision in which he might have been involved while engaged in such operation. Further details of the method of effecting such service were contained in the section. The constitutionality of a Massachusetts statute, similar to ours, was upheld by the Supreme Court of the United States in Hess v. Pawloski.[2]

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testamentary cases are not included within the meaning of the statute; Iowa, Conway v. Rock, 139 Iowa 162, 117 N. W. 273 (1908); and in Arkansas the common law rule prevails despite a statute similar to the one in New York, Broadway v. Thompson, 139 Ark. 542, 214 S. W. 27 (1919). See cases collected in American Digest "Witnesses" Key 202 and 217.

[11] 5 Wigmore, Evidence (1923), Sec. 2314.

[1] Laws of 1929, Ch. 54.

[2] 274 U. S. 13, 47 Sup. Ct. Rep. 632 (1927).

A casual reading of the former section will reveal the omission by the Legislature of wording which would make the statute broad enough to be effective in situations where some one other than the owner was in fact operating the car, for, as a practical matter, in nearly every case it is the owner of the vehicle who is sought to be charged with liability for the negligence, regardless of whether or not he is the operator; yet the statute clearly provided for service only in cases of actual operation. Although the enactment of that section was commendable for its result in adding increased protection to the rights of our citizens by the abridgement of legal formulæ, the law was of a very limited value because of what it failed to accomplish.

In O'Tier v. Sell[3] the Court of Appeals specifically decided that Section 52 was limited in its scope as indicated above. In that case the defendant was not operating the vehicle which he owned, it being driven by another with his consent. Service having been made on the defendant as provided by the statute, it was held that the section was not sufficiently broad to cover this situation, the owner not being the *operator* of the vehicle. The term "operate" as used in the statute was said by the Court to contemplate the personal act of working the mechanism.[4] O'Tier v. Sell practically nullified the statute, for it not only settled by implication the inapplication of this section to corporate defendants and other employers owning vehicles operated by their employees at their direction, but further made it plain that the owner of a vehicle, although himself operating it, might make certain his immunity from the effect of the statute by transferring the occupation of the driver's seat to another upon commencing the run over our highways.

Since this decision of the Court of Appeals was handed down, the Legislature has enacted an amendment to Section 52 which adds to the former effect of the statute by making "* * * * the operation on a public highway in this state of a motor vehicle or motorcycle owned by a non-resident if so operated with his consent, express or implied, * * * equivalent to an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons * * *."

The statute as amended apparently remedies all the defects which made the former section so limited in practical effectiveness. Whether the new section is repugnant to any Constitutional guarantees is not altogether free from doubt. The amendment is not in any sense a mere addition of words to render more workable a statute made ineffective by inaccurate wording. It presents an entirely different situation, wherein by its terms it makes possible the service of summons on a non-resident in the manner specified, who at no time *personally* enters the jurisdiction of the state.

SIDNEY HABER.

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[3] 252 N. Y. 400, 169 N. E. 624 (1930).
[4] *Ibid.* at 403, 169 N. E. at 625.