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COURTS--PROCESS--RETROACTIVE OPERATION OF STATUTES PROVIDING FOR SUBSTITUTED SERVICE

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COURTS—PROCESS—RETROACTIVE OPERATION OF STATUTES PROVIDING FOR SUBSTITUTED SERVICE—Plaintiff, a stockholder of a South Carolina corporation, commenced a derivative suit against former directors of the corporation by serving a summons and complaint on the Secretary of State of South Carolina. Plaintiff relied on a statute providing that nonresident directors of domestic corporations, by acceptance of election or appointment as directors, should be held to have appointed the Secretary of State their agent for service of process.[1] The statute

[1]Act of May 19, 1947, 45 S.C. Stat. L. 561 (1947) §§1-6.

became effective in May, 1947. Defendants, residents of New Jersey and Maryland, had resigned as directors of the corporation in December, 1946. On appeal from a judgment vacating the service of process, *held,* affirmed. A statute will not be construed to have a retroactive effect unless such a construction is required by the express words of the statute or must necessarily be implied from the language used. *Johnson v. Baldwin,* (S.C. 1949) 53 S.E. (2d) 785.

Judicial aversion to the retroactive application of statutes is of ancient origin,[2] and is based on the assumption that retroactive laws generally operate unfairly.[3] This has given rise to a strict rule of construction, both in England[4] and the United States,[5] which presumes that statutes affecting substantive rights are intended to operate prospectively only, in absence of strong statutory language to the contrary.[6] Procedural or remedial statutes, however, are not subject to the rule, and are generally held to apply retroactively if this is consistent with legislative intent.[7] Although these rules have been continually reaffirmed by the courts, the dividing line between substance and procedure remains hazy,[8] both courts and writers taking varying positions on the question.[9] The court in the principal case considers the acquisition of jurisdiction by substituted service of process to affect a substantive right of the defendant. Other courts have taken the same view with respect to statutes providing for substituted service on state officials in negligence actions against nonresident motorists. One basis for these decisions is the theory that the relation between the nonresident and the official is contractual, and that contractual rights and obligations are substantive.[10] Other courts, however, have held these statutes purely procedural, maintaining that the relation arises solely

[2] It was known to Roman law and entered English law through the writings of Bracton. Smead, "The Rule Against Retroactive Legislation," 20 MINN. L. REV. 775 (1936).

[3] There is a judicial premonition that retroactive statutes are characterized by want of notice, lack of knowledge of past conditions, and that they disturb feelings of security in past transactions: 2 SUTHERLAND, STATUTORY CONSTRUCTION §2201 (1943).

[4] 31 HALSBURY, LAWS OF ENGLAND 513 (1938).

[5] The rule originated in the United States in Kent's dictum in Dash v. Van Kleek, 7 Johns (N.Y.) 477, 5 Am. Dec. 291 (1811). For a compilation of cases, see 50 AM. JUR. 478 (1944).

[6] While retroactive laws are not prohibited per se, they are limited by the contracts, ex post facto, and due process clause of the U.S. Constitution. Smead, "The Rule Against Retroactive Legislation," 20 MINN. L. REV. 775 (1936); Smith, "Retroactive Laws and Vested Rights," 5 TEX. L. REV. 231 (1927); 6 TEX. L. REV. 409 (1928). Several state constitutions expressly prohibit retroactive legislation: 2 SUTHERLAND, STATUTORY CONSTRUCTION §2204 (1943).

[7] Shielcrawt v. Moffet, 294 N.Y. 180, 61 N.E. (2d) 435 (1945); 50 AM. JUR. 505, §482 (1943) and cases cited.

[8] Boyd v. Bell (D.C. N.Y. 1945) 64 F. Supp. 22; Shielcrawt v. Moffet, supra, note 7.

[9] That there is no distinction, see CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE §171 (1911). That the distinction has practical value, see Ailes, "Substance and Procedure in Conflict of Laws," 39 MICH. L. REV. 392 (1941). That no mechanical test should be applied and that the distinction should depend on the purpose for which it is being made, see Cook, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 (1933).

[10] Paraboschi v. Shaw, 258 Mass. 531, 155 N.E. 445 (1927); Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930).

by operation of law, and not by contract.[11] Another argument against retroactive operation, made in some nonresident motorist cases,[12] as well as in the principal case, is that consent to the service of process on the state official is inferred from conduct of the defendant, and cannot be inferred from acts occurring before the statute gave them that significance. This consensual theory of jurisdiction, like the contractual relation theory, is purely fictional,[13] and if the view is taken that service on the official is authorized solely by operation of law,[14] the question again becomes whether the statute will be given retroactive operation. If, as has been suggested, the precise meaning to be given to "substance" and "procedure" should be determined on the basis of fairness to the parties involved,[15] the principal case seems bad as a matter of policy. The South Carolina statute has no effect on the right of the plaintiff to bring suit, nor the liability of the defendant to be sued. It merely affects the place where the plaintiff's right may be enforced. Under the circumstances, it would seem more just to require the defendant to defend the present action than to require the plaintiff to sue again in another jurisdiction. It is this view which has been the basis of decisions that statutes giving the right to sue corporations in the venues or judicial districts where they are doing business, but are not domiciled and have no agent, are procedural and may operate retroactively,[16] and of cases which have given retroactive application to statutes increasing the jurisdiction of courts.[17]

Robert H. Frick, S.Ed.

[11] Gessel v. Wells, 134 Misc. 331, 236 N.Y.S. 381 (1929); Dwyer v. Volmar Trucking Corp., 105 N.J.L. 518, 146 A. 685 (1929). See note, 4 UNIV. CIN. L. REV. 393 (1930).

[12] Schaefer v. Alva West & Co., 53 Ohio App. 270, 4 N.E. (2d) 720 (1936).

[13] Scott, "Jurisdiction over Non-resident Motorists," 39 HARV. L. REV. 563 (1926).

[14] Gessel v. Wells, supra, note 11.

[15] Cook, "'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 (1933).

[16] Hadlich v. American Mail Line, (D.C. Cal. 1949) 82 F. Supp. 562; Central Georgia Power Co. v. Stubbs, 141 Ga. 172, 80 S.E. 636 (1913); Payne v. Walmsley, (La. App. 1938) 185 S. 88. *Contra:* Vaughn v. Empresas Hondurenas, S.A., (C.C.A. 5th, 1948) 171 F. (2d) 46.

[17] International Longshoremen's and Warehousemen's Union v. Ackerman, (D.C. Hawaii 1948) 82 F. Supp. 65; Larkin v. Saffarans, (Cir. Ct. Tenn. 1883) 15 F. 147; 59 C.J. 1176 (1932) and cases cited. *Contra:* Singer v. The King, [1932] 1 Dom. L.R. 279.