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Pleading--Nonjoinder of Contract Plaintiffs

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licensed and registered vehicle. Rhode Island, on identical facts, has held that the resident owner-agent's right to operate the vehicle is conferred by the state and is not dependent upon the consent of the employer.[3] Other jurisdictions, construing slightly different statutes,[4] have concurred in result by holding that the statute does not apply to a nonresident employer where the car is being operated by its owner who is a resident,[5] or a nonresident.[6]

The problem has not yet arisen in West Virginia. Legislation of the type involved is generally regarded as in derogation of the common law and the rule of strict construction applied.[7] Assuming that West Virginia would so regard it, the further question arises whether our court would concur with the principal case. Comparison of the statutes of West Virginia[8] and Georgia[9] reveals a striking similarity of nature and design, such that a different construction by our court could not well be reconciled. The statute obviously aims at relieving local citizens from the inconvenience attendant on the necessity of resorting to other jurisdictions for relief for injuries resulting from the operation of automobiles by nonresidents. When the operator is a local citizen driving his own automobile, duly licensed and registered under state laws, can his being an agent for a nonresident be deemed sufficient to call into operation a statute designed to benefit an aggrieved citizen, but not to prejudice the rights of a nonresident? The decisions so far answer in the negative, thus furnishing West Virginia persuasive precedent for adopting that construction.[10]

G. S. B.

PLEADING — NONJOINDER OF CONTRACT PLAINTIFFS. — *A* and *B* were the joint promisees of an insurance policy issued by *D*. A right of action accrued under the policy and *A* prosecuted the action in his own name after *B* refused to join with him. *Held*, that

[3] Clesas v. Hurley Mach. Co., 52 R. I. 69, 157 Atl. 426 (1931).
[4] N. Y. VEHICLE & TRAFFIC LAW § 52; MICH. COMP. LAWS (Mason Supp. 1935) § 4790.
[5] Wallace v. Smith, 238 App. Div. 599, 265 N. Y. Supp. 253 (1933).
[6] Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N. W. 557 (1933).
[7] Flynn v. Kramer, 271 Mich. 500, 261 N. W. 77 (1935).
[8] W. VA. REV. CODE (Michie, 1937) c. 56, art. 3, § 31 (in substance providing that operation by a nonresident, or his agent, of a motor vehicle in West Virginia shall be deemed equivalent to appointment of the state auditor as attorney to receive service of process).
[9] *Supra* n. 2.
[10] The constitutionality of such statutes was sustained in Hess v. Pawloski, 274 U. S. 90, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

the demurrer to the declaration for nonjoinder be sustained and that the trial court transfer the case to the chancery docket under the statute[1] with leave to make the other promisee a party defendant. *Vinson v. Home Insurance Co.*[2]

It was the general rule at common law that all joint promisees, if living, must join in the action, otherwise the nonjoinder would be fatal.[3] Early, however, it was recognized, as an exception, that if one party refused to join in the action, the other parties could use the recalcitrant party's name to prosecute the suit upon indemnifying him against costs.[4] The obvious purpose of this exception was to prevent one joint promisee from capriciously defeating the action of all parties.[5] If the court in the instant case had invoked this doctrine, the plaintiff would have had an adequate remedy at law by using the credit company's name after indemnifying it against costs. This being so, there would be no ground for equitable jurisdiction, and the party would have to pursue his legal remedy.

B. D. T.

PRINCIPAL AND SURETY BY IMPLICATION OF LAW. — *P* seeks recovery from *D* by notice of motion for judgment to recover the amount of a judgment paid by her upon a negotiable promissory note on which she was an accommodation indorser. *D* had wrongfully pledged the note as collateral to secure a note given by it to *X*. *X* was a holder in due course and *P* was forced to pay this note. *P* seeks to recover under the provisions of our statute giving a surety the right to proceed by notice of motion for judgment.[1]

[1] W. VA. CODE (Michie, 1937) c. 56, art. 11, § 8.
[2] 16 S. E. (2d) 924 (W. Va. 1941).
[3] Sandusky v. Oil Co., 63 W. Va. 260, 59 S. E. 1082 (1907); Baker v. Peterson, 300 Ill. 526, 133 N. E. 214 (1921); Spencer v. McGuffin, 190 Ind. 308, 130 N. E. 407 (1921); Sweigart v. Berk, 8 S. & R. 308 (Pa. 1822).
[4] Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 So. 48 (1908); Bolton v. Cuthbert, 132 Ala. 403, 31 So. 358 (1902); Harris v. Swanson Bros., 62 Ala. 299 (1878); Wright v. McLemore, 10 Yerg. 234 (Tenn. 1837); see also 1 BATES, PLEADING, PRACTICE, PARTIES (2d ed. 1908) 65-66; 47 C. J. § 127 (4), p. 62, n. 4; 2 PAGE, CONTRACTS (1909) § 1143; STEPHENS, PLEADING (2d ed. 1901) § 31, p. 57.
[5] 1 ENG. RUL. CAS. 156, 162 (1902); Note (1920) 26 W. VA. L. Q. 189.

[1] W. VA. CODE (Michie, 1937) c. 45, art. 1, § 4, provides that any person liable as bail, surety, guarantor or indorser, or any sheriff liable for not taking sufficient bail, or heir, or personal representative of any so liable upon the payment of judgment rendered on account of such liability may proceed by motion against any person against whom a right of action exists for the amount paid.