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COURTS--PROCESS--NONRESIDENT MOTORIST SERVICE STATUTE--SERVICE ON "DRIVER" AS WITHIN PROVISION PERMITTING SERVICE ON "OWNER"

C. C. Grunewald S.Ed.
University of Michigan Law School

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COURTS—PROCESS—NONRESIDENT MOTORIST SERVICE STATUTE—SERVICE ON “DRIVER” AS WITHIN PROVISION PERMITTING SERVICE ON “OWNER”—While in Arkansas, appellee, an Illinois resident, drove a third party’s automobile and was involved in a collision in which plaintiff’s intestate was killed. Plaintiff instituted a negligence action in an Arkansas court against appellee, who had previously returned to Chicago, by service and notification pursuant to the Arkansas nonresident motorist service statute.¹ Appellee appeared specially and moved to quash the service as ineffective under the statute. On appeal from the lower court’s decision sustaining the motion, *held*, affirmed. The statutory language which permitted service on a nonresident “owner” did not allow service on a nonresident “driver.” *Kerr v. Greenstein*, (Ark. 1948) 212 S.W. (2d) 1.

The constitutionality of a nonresident motorist service statute which gives reasonable notice to the defendant is no longer questioned.² Litigation has shifted from an attack on the jurisdictional basis of the statutes³ to questions concerning the proper construction of their terms.⁴ Generally, the state court in construing its statute will treat it as being in derogation of the common law, and will not extend it by implication to persons not coming within its specific provisions.⁵ All states now have such statutes, but the class of nonresident motorists affected differs.⁶ The Arkansas statute specifies that use of the highways by the “non-resident owner, chauffeur, operator, driver of any motor vehicle . . . shall be deemed equivalent to the appointment by *such non-resident owner* . . . of the Secretary of

¹ Ark. Dig. (Pope 1937) §§ 1375, 1376.

² *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632 (1927); *Culp*, “Process in Actions Against Non-Resident Motorists,” 32 MICH. L. REV. 325 (1934).

³ *Scott*, “Jurisdiction Over Nonresident Motorists,” 39 HARV. L. REV. 563 (1926).

⁴ *Culp*, “Recent Developments in Actions Against Nonresident Motorists,” 37 MICH. L. REV. 58 (1938); 20 IOWA L. REV. 654 (1935).

⁵ *Day v. Bush*, 18 La. App. 682, 139 S. 42 (1932); *Brown v. Cleveland Tractor Co.*, 265 Mich. 475, 251 N.W. 557 (1933); *Flynn v. Kramer*, 271 Mich. 500, 261 N.W. 77 (1935); *Jermaine v. Graf*, 225 Iowa 1063, 283 N.W. 428 (1939); 5 AM. JUR., Automobiles, § 591.

One court, treating the statute as procedural and remedial, held that it should be liberally construed. *Saltman v. Attrean*, 142 Misc. 245, 254 N.Y.S. 288 (1931).

⁶ All states provide for service upon the owner at least for action arising from his own operation of the vehicle. Some states permit service on owner for operation by his agent or servant: Iowa Code (1946) § 321.498-9; Me. Rev. Stat. (1944) c. 19, § 59; Mass. Gen. Laws (1932) c. 90, § 3A; 5 Tex. Civ. Ann. (Vernon, 1948 Supp.) § 2039a. Other statutes allow service on a nonresident, whether operator, owner or chauffeur: Fla. Stat. Ann. (1943) § 47.29; N.J. Rev. Stat. (1937) § 39:7-2; N.M. Stat. Ann. (1941) § 68-1003; Tenn. Code (Williams, 1934) § 8671; N.C. Gen. Stat. (1943) § 1-105 discussed in *Smith v. Haughton*, 206 N.C. 587, 174 S.E. 506 (1934).

the State of Arkansas . . . to be the attorney . . . upon whom may be served all lawful process."⁷ In construing nonresident "owner" not to include nonresident "driver," the court relied on *State v. Latourette*,⁸ a decision interpreting a similar Oregon statute. The title of the Oregon act⁹ mentioned only nonresident "owners," and the court held that the narrow scope of the title controlled the body of the statute which purported to include both owners and drivers,¹⁰ so that service under the statute could not be made on nonresident "drivers." The problem of interpretation under the Arkansas statute would seem to be distinguishable. Here the title and the body of the statute were worded similarly, with the question remaining whether to give effect to the first phrase of both the title and body—"owner, chauffeur, operator, driver"—or whether the subsequent use of the term, "such nonresident owner," should limit the application of the statute to a nonresident "owner." Granting that the court is bound by the strict construction dogma,¹¹ should this principle be carried so far that it defeats the purpose of the statute? The statute is based on the policy of protecting local residents from the negligence of nonresident motorists who may leave the state before legal process can reach them.¹² Since the primary liability in collision cases rests with the driver rather than the owner, it would seem that the statute was directed at least as much against the nonresident driver as against the nonresident owner. This was the assumption of the Arkansas court in *Oviatt v. Garretson*,¹³ although the statement there was clearly dictum. Just as the Oregon legislature found it necessary to correct the result of *State v. Latourette*,¹⁴ so probably will Arkansas amend its statute to correct the deficiency resulting from the instant case.

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⁷ Ark. Dig. (Pope 1937) §§ 1375, 1376. (Italics supplied.)

⁸ 168 Ore. 584, 125 P. (2d) 750 (1942).

⁹ Ore. Laws (1929) c. 359: "To grant to nonresident owners . . . and providing for the appointment by such nonresident users . . . of the secretary of state as attorney in fact for such nonresident owners. . . ."

¹⁰ Ore. Laws (1929) c. 359; Ore. Code (1930) § 55-402. The term "nonresidents" was used.

¹¹ 5 AM. JUR., Automobiles, § 591.

¹² 20 IOWA L. REV. 654 (1935).

¹³ 205 Ark. 792, 171 S.W. (2d) 287 (1943).

¹⁴ Ore. Laws (1943) c. 145, §§ 1, 5; Ore. Laws (1947) c. 464, § 5. These repealed the previous statute and amendments.