Michigan Law Review

Volume 47 | Issue 4

1949

PROCESS--SUBSTITUTED SERVICE ON NONRESIDENT MOTORISTS

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PROCESS—SUBSTITUTED SERVICE ON NONRESIDENT MOTORISTS—While in Missouri, defendant, a nonresident, lent his automobile to two minors who were later involved in a collision in which plaintiff was injured. Although defendant was not present at the accident, the act of lending the vehicle to the minors was alleged by plaintiff to be negligent. Jurisdiction over defendant was sought by service upon the Secretary of State of Missouri in reliance on statute.[1] In a motion to quash service, defendant claimed that his use of the vehicle did not result in plaintiff's injury, and that the operator was not his agent at the time of the injury. Defendant thus contended that he was not using or operating the auto as required by the act. *Held*, motion denied. Lending of an automobile was "use and operation" within the meaning of the statute. *McGuire v. Parker*, (D.C. Mo. 1948) 78 F. Supp. 199.

Since *Hess v. Pawloski*[2] was decided in 1927, nearly all states have adopted substituted service statutes to render the resident plaintiff's remedy against the nonresident motorist more convenient.[3] The years since 1927 have been productive of a multitude of cases construing and applying the language of these acts,[4] and the principal case presents a type of fact situation which has given rise to much difficulty. To what degree are persons not actually driving automobiles subject to

[1] Mo. Rev. Stat. Ann. (1943), § 8410.1 et seq. "The use and operation of a motor vehicle . . . in this State on the public highways thereof by a person who is a nonresident . . ." constitutes appointment of the secretary of state as his agent to receive service of process in all actions "arising out of such use and operation."

[2] 274 U.S. 352, 47 S.Ct. 632 (1927).

[3] Culp, "Process in Actions against Non-Resident Motorists," 32 MICH. L. REV. 325 (1934); Culp, "Recent Developments in Actions Against Non-Resident Motorists," 37 MICH. L. REV. 58 (1938).

[4] For collections of the cases see: 82 A.L.R. 768 (1933); 96 A.L.R. 594 (1935); 125 A.L.R. 457 (1940); 138 A.L.R. 1464 (1942); 148 A.L.R. 1217 (1944); 155 A.L.R. 333 (1945).

service under the acts?[5] The defendant's contention that he was not liable to statutory service unless the driver was his agent has support in the decisions of other jurisdictions.[6] However, the court distinguished the cases turning on the actual operator's agency relation to the auto owner, on the ground that the use alleged to have caused the injury in the principal case was the act of lending the vehicle to one incompetent to operate it; this made way for the unique holding that lending a vehicle is "use *and* operation" on the "public highway" within the meaning of the statute. There still remains the problem, not alluded to in the principal case, of construing the word "and" as disjunctive rather than conjunctive,[7] since it would seem obvious that lending is not operation in the sense in which the word is used elsewhere in the Missouri statutes.[8] The problem of the locus of the use, not raised in the principal case since use on the highway was alleged, would prove interesting if the lending should be found to have taken place off the highway.[9]

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[5] The Michigan Supreme Court ruled that a corporation could not be served in a suit arising out of an accident involving its employee, driving his own car on company business, but expressly refrained from deciding what result would have ensued if the company had owned the auto. Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N.W. 557 (1933). The court relied on a ruling in O'Tier v. Sell, 252 N.Y. 400, 169 N.E. 624 (1930), that the word "operate," unless qualified expressly, means "a personal act in working the mechanism of the car." Other courts have construed statutes which use the word "operate" without expressly referring to operation by agents to include such operation. Jones v. Pebler, 371 Ill. 309, 20 N.E. (2d) 592 (1939); McLeod v. Birnbaum, 14 N.J. Misc. 485, 185 A. 667 (1936); Skutt v. Dillavou, 234 Iowa 610, 13 N.W. (2d) 322 (1944). Still other states have expressly included operation by agents in the statutes. Mo. Rev. Stat. Ann. (1943) § 8410.3.

[6] It has frequently been held that mere operation with consent by one not an agent or employee is not enough to subject a nonresident owner to service under these acts. Kern v. Maryland Casualty Co., (C.C.A. 6th, 1940) 112 F. (2d) 352; Brassett v. U.S. Fidelity and Guaranty Co., (La. App. 1934) 153 S. 471; Zurich General Accident & Liability Co. v. Brooklyn and Queens Transit Co., 137 Misc. 65, 241 N.Y.S. 465 (1930). In Duncan v. Ashwander, (D.C. La. 1936) 16 F. Supp. 829, it was held that a son operating his father's auto in his father's presence for his purposes was the agent of his father.

[7] In Skutt v. Dillavou, 234 Iowa 610, 13 N.W. (2d) 322, it was held that "and" should be interpreted as "or" in this situation. See also 50 AM. JUR., Statutes, § 282.

[8] Mo. Rev. Stat. Ann. (1943), § 8443 et seq.; see also Witherstine v. Employers' Liability Assurance Co., 235 N.Y. 168, 139 N.E. 229 (1923).

[9] The place of injury as distinguished from the place of use, is not a critical factor, but it is necessary that the injury result proximately from use on the highway in order to be within the terms of statutes similar to the one in Missouri. Finn v. Schrieber, (D.C. N.Y. 1940) 35 F. Supp. 638; Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E. (2d) 836 (1943). But Galloway v. Wyatt Metal and Boiler Co., 189 La. 837, 181 S. 187 (1938), held that a privately owned road leading to a pumping station used by the public was a public highway.