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FEDERAL PROCEDURE-REMOVAL OF CAUSES-MEANING OF "RECEIPT BY DEFENDANT" WHEN SERVICE IS ON A NONRESIDENT MOTORIST

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FEDERAL PROCEDURE—REMOVAL OF CAUSES—MEANING OF "RECEIPT BY DEFENDANT" WHEN SERVICE IS ON A NONRESIDENT MOTORIST—As a result of an automobile accident in Missouri, the plaintiff, a resident of Missouri, brought a damage action in Missouri against the defendant, a resident of Illinois. Service was had on the defendant by serving the Secretary of State of Missouri and sending notice by registered mail to the defendant, pursuant to the Missouri nonresident motorist statute.[1] Service was received by the Secretary of State on January 13, 1951, and notice was received by the defendant on January 20, 1951. The defendant removed the cause to the federal district court on February 9, 1951. The plaintiff moved to remand on the ground that the petition for removal was untimely, having been made after the twenty day period allowed

[1] Mo. Rev. Stat. (1949) §§506.210(2, 3), 506.240 et seq.

for removal by section 1446(b) of Title 28 U.S.C.[2] *Held,* the petition was timely as the twenty day period is to be measured from "receipt by the defendant" of the notice, and not from the time of service on the Secretary of State. *Welker v. Hefner,* (D.C. Mo. 1951) 97 F. Supp. 630.

All of the forty-eight states and the District of Columbia have made provision for constructive or substituted service of process upon nonresident motorists becoming involved in automobile accidents upon the highways of the state where the action for personal injuries or damages is brought.[3] These statutes are not in conflict with the due process clause of the Fourteenth Amendment[4] provided that there is reasonable provision made for notice to the defendant.[5] However, except where the statute requires proof of actual receipt of notice by the defendant, the majority of the courts appear to be of the opinion that service is complete when the designated state official is served.[6] Under the removal provision of the U.S.C. as it stood before the present amendment, this interpretation was of little importance.[7] But under section 1446(b), providing that the petition for removal must be filed by the defendant within twenty days after receipt by him of a copy of the original pleading, whether that twenty days is to be measured from the time of service on the designated state officer or whether it is to be measured from the date of actual receipt of notice by the defendant becomes a question of prime importance. It has been held by a district court in Minnesota, where proof of actual receipt is not required, that the time for removal begins to run from the date service is received by the statutory agent. This decision is based on a desire to maintain the uniformity which the twenty day removal period is meant to accomplish.[8] Reasoning of this nature, as pointed out in the principal case, circumvents a literal interpretation of the removal provision that there must be "receipt by the defendant."[9] Admittedly, where

[2] "The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading. . . ." 28 U.S.C. (Supp. IV, 1951) §1446(b).

[3] 18 A.L.R. (2d) 544 (1951).

[4] Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927).

[5] Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259 (1928).

[6] Bessan v. Public Service Co-ordinated Transport, 237 N.Y.S. 689 (1929); Allen v. Campbell, (La. App. 1932) 141 S. 827; State ex rel. Stevens v. Grimm, 192 Wis. 601, 213 N.W. 475 (1927); Youngson v. Lusk, (D.C. Neb. 1951) 96 F. Supp. 285; Boss v. Irvine, (D.C. Wash. 1939) 28 F. Supp. 983. But cf. LeManquais v. Glick, (D.C. Tex. 1936) 17 F. Supp. 347.

[7] Removal was previously controlled by 28 U.S.C. §72, which provided that a petition for removal might be filed at any time before defendant is required by the laws of the state or a rule of the state court in which suit is brought to answer or plead to the complaint of the plaintiff. For exemplary cases applying this provision, see McCallum v. General American Oil Co. of Texas, (D.C. Ark. 1937) 21 F. Supp. 401; Boss v. Irvine, supra note 6.

[8] Helgeson v. Barz, (D.C. Minn. 1950) 89 F. Supp. 429. *Accord:* Youngson v. Lusk, supra note 6. In the Helgeson case, the court felt that if the time is measured from date of receipt by defendant, the result will be twenty days plus an uncertain number of days required for such receipt.

[9] Principal case at 632. See also Merz v. Dixon, (D.C. Kan. 1951) 95 F. Supp. 193 which is generally in accord.

there is service upon or notice to one's designated agent, it is as notice to the principal, and any delay would be attributable to that principal who appointed the agent. But under a nonresident motorist statute, the agency is merely fictional and forced upon the defendant.[10] If the designated official should delay in notifying the defendant, or if the distance is great or the mail service slow, the defendant may be precluded from removal without fault on his part. A true agent might notify the defendant by a quicker means of communication, or might contact a lawyer to arrange for removal immediately. The fictional agent will not. Where a nonresident motorist statute provides that actual receipt of the notice by the defendant must be shown, it is held that service is not complete until proof of the receipt of notice is made.[11] By analogy, under the removal provision of the U.S.C. calling for "receipt by the defendant," the process of service should not be complete until actual notice is received by him, and the period for removal should not begin to run until then.

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[10] Principal case at 632; Merz v. Dixon, supra note 9, at 197.

[11] Hess v. Pawloski, supra note 4; Smyrnios v. Weintraub, (D.C. Mass. 1933) 3 F. Supp. 439.