Michigan Law Review

Volume 46 | Issue 8

1948

PROCESS-APPLICABILITY OF NONRESIDENT MOTORIST STATUTES TO ACCIDENTS ON PRIVATE PROPERTY

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PROCESS—APPLICABILITY OF NONRESIDENT MOTORIST STATUTES TO ACCIDENTS ON PRIVATE PROPERTY—Defendant, a nonresident combine operator, in the course of performance of a contract to harvest plaintiff's wheat crop, drove his vehicle into the plaintiff's wheat field thereby causing a fire which destroyed part of the crop. Plaintiff began an action against defendant by service in accordance with a nonresident motorist statute. The applicable statute read in part: ". . . the acceptance by a nonresident . . . of the rights and privileges . . . to operate motor vehicles on the public highways of the state . . . shall be deemed equivalent to an appointment . . . of the secretary of state . . . to be his . . . agent . . . [for] . . . process in any action . . . growing out of any accident . . . in which *said motor vehicle* may be involved, while *same* is operated in the state . . . by *said nonresident.*" [1] Defendant's motion to quash service was sustained by the trial court. On appeal, *held*, affirmed. The statute does not authorize such service in cases where the accident occurs other than on the public highways. The court stated that the italicized words clearly demonstrate the legislative intent to limit the application of the statute to accidents upon the highways of the state. One justice dissented. *Kelley v. Koetting*, (Kan. 1948) 190 P. (2d) 361.

The majority of the decided cases indicate that nonresident motorists statutes do not apply to accidents which occur off the highways, not because of inherent jurisdictional limitations, but because the plain wording of the statutes involved limits the availability of this method of service to where the accident

[1] Kan. Gen. Stat. (1935) § 8-401. (Italics supplied.)

occurs "on the public highway." [2] Where the statute is, in terms, applicable to accidents arising out of, or growing out of the use of the public highways, it may well apply to such off-the-road accidents as are a direct consequence of highway use.[3] Expansion of the scope of the statute to accidents not on state-owned roads has been achieved by construing the term "public highways" to include privately owned ways habitually subject to public use.[4] Where the statute is less specific in limiting its application, there is a conflict in the few reported cases as to whether it applies to accidents on private property. Those courts rejecting the extension [5] are influenced in their construction, first, by the concept that all such statutes are to be strictly construed because in derogation of the common law [6] and, second, by doubt as to the constitutionality of such an extension in view of the seeming limitations of *Hess v. Pawloski*,[7] the leading case on the point. In the instant case, the court adheres to the strict construction rule to such a degree that a rather overly-mechanical process of construction is employed. Though the constitutional point was not specifically passed on, it is obvious that the court was influenced thereby.[8] However, it has been pointed out that the *Hess* case justified the finding of jurisdiction on two concepts: (1) the fictional creation of an agent for process through the use of state-owned roads,[9] and (2) the lawful exercise of police power by the state.[10] No logical reason seems to exist why, once the fiction has operated to create the agency, the

[2] Dworkin v. Spector Motor Service, (D.C. Conn. 1944) 3 F.R.D. 340; Haughey v. Mineola Garage, 174 Misc. 332, 20 N.Y.S. (2d) 857 (1940); Catalano v. Maddux, 175 Misc. 24, 22 N.Y.S. (2d) 149 (1940).

[3] Finn v. Schreiber, (D.C. N.Y. 1940) 35 F. Supp. 638; Brauer Machine Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E. (2d) 836 (1943), 148 A.L.R. 1217 (1944).

[4] Clarke v. Ackerman, 154 Misc. 267, 276 N.Y.S. 833 (1934) reversed on other grounds, 243 App. Div. 446, 278 N.Y.S. 75 (1935); Galloway v. Wyatt M. & B. Works, 189 La. 838, 181 S. 187 (1938); Zielinski v. Lyford, 175 Misc. 517, 23 N.Y.S. (2d) 489 (1940); Finn v. Schreiber, (D.C. N.Y. 1940) 35 F. Supp. 638.

[5] Brauer Machine Co. v. Truck Co., 383 Ill. 569, 50 N.E. (2d) 836 (1943).

[6] Flynn v. Kramer, 271 Mich. 500, 261 N.W. 77 (1935); Jermaine v. Graf, 225 Iowa 1063, 283 N.W. 428 (1939); Kentucky v. Maryland Casualty Co., (C.C.A. 6th, 1940) 112 F. (2d) 352.

[7] 274 U.S. 352, 47 S.Ct. 632 (1927). Justice Butler made continued reference to the power of the state to regulate and promote the proper use of its highways.

[8] The court cited at length Brauer Machine Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E. (2d) 836 (1943), which specifically stated that any construction other than a limited one would be unconstitutional. But compare Sipe v. Moyers, 353 Pa. 75, 44 A. (2d) 263 (1945), involving a similar question under a similar statute. The court adopted a construction opposed to that of the instant case and supported its constitutionality.

[9] See Culp, "Process in Actions against Non-Resident Motorists," 32 MICH. L. REV. 325 at 326-331 (1934).

[10] The CONFLICTS RESTATEMENT suggests that the implied consent for service may be found in the doing of acts "which endanger the public safety" which would include the mere fact of operation of a motor vehicle within the state. CONFLICTS RESTATEMENT, § 85d (following § 85b) (1934). See also JUDGMENTS RESTATEMENT, § 23 (1942). But no case seems to have gone that far. In Sipe v. Moyers, 353 Pa. 75, 44 A. (2d) 263 (1945) (see note 8, supra), the statute involved stated that the act

amenability to substituted service cannot apply in any subsequent motor accident regardless of where in the state such accident may occur.

Chester Lloyd Jones, S. Ed.

which creates the agency for process was simply the operation of the motor vehicle within the state rather than the operation on the highways of the state. In supporting the constitutionality of the statute the court emphasized the fact that in the case there at hand the highways had been used prior to entry on the private property where the accident occurred.