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Meaning of Operate in Statutes Allowing Substituted Service on State Officer as Agent of Nonresident Motorist

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NOTES AND COMMENTS

Meaning of "Operate" in Statutes Allowing Substituted Service on State Officer as Agent of Nonresident Motorist

The last decade has witnessed many legislative enactments throughout the United States which provide for substituted service on nonresident motorists. These acts, with some variations, declare in effect that the operation by a nonresident of a vehicle on the highways of the state in question constitutes the appointment of some officer of that state as agent to receive service of process in the event of damage done as a result of the negligent operation of the vehicle. The constitutionality of such statutes, although questioned for a time, is now a generally accepted fact,[1] and construction of the statutes now furnishes a source of litigation. The meaning of the words "operate," "operating," and "operator," as applied to parties defendant who may be reached under such provisions, furnishes the principal issue. Whether a nonresident defendant is amenable to process by reason of the operation of his machine by bailee, independent contractor, or agent has brought forth the decisions which constitute the subject matter of this note.

Behind these decisions rests the inevitable background of policy, as well as the intention of the legislators. But the courts are not prone to stress policy even if it constitutes the most important basis of determination.[2] For example, the New York City Court, in construing the substituted service statute[3] of that state, held that "this law is one of general scope, being directed to a matter of procedure, and, being remedial in character, is to be liberally, rather than rigidly, construed. . . ."[4] On the other hand, the Supreme Court of Michigan, in construing a similar provision,[5] has said, "The statute is in derogation of common right, must be strictly construed, and cannot be extended by implication. . . ."[6] Such contradictions are a

[1] Wuchter v. Pizzutti, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1927); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1926); State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916 (1927).

[2] Holmes, The Common Law, pp. 35, 36.

[3] "The operation by a nonresident of a motor vehicle or motorcycle on a public highway in this state (or the operation on a public highway in this state of a motor vehicle or motorcycle owned by a nonresident if so operated with his consent, express or implied) shall be deemed equivalent to an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him. . . ." Vehicle & Traffic Law of N. Y., §52, as amended by Laws of 1930, Ch. 57. The brackets were inserted here to indicate the portion that was added in 1930, presumably to take care of bailee cases.

[4] Salzman v. Attrean, 254 N. Y. S. 288 (1931).

[5] "The operation by a nonresident of a motor vehicle upon a public highway of this state shall be deemed equivalent to an appointment by such nonresident of the secretary of state to be his true and lawful attorney, upon whom may be served the summons in any action against him. . . ." Comp. Laws of Michigan, 1929, §4790.

[6] Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N. W. 557 (1933).

source of confusion. However, it should be recognized that such statements are not expressions of policy but are merely superficial phrases behind which the courts conceal policies. What then are the motivating forces behind these decisions of construction? It is submitted that each court has selected one of two opposing policies. The Supreme Court of the United States has revealed the first of these by a reference to "the undoubted right of a state to protect its own citizens and property. . . ."[7] The other and opposing influence has been expressed by the New York City Court in the following language: "The law permitting service by the means suggested may be necessary in certain cases and may bring about a very just result. If it is to be extended . . . it may be subject to great abuse. A person . . . may be called to some distant state to defend a personal injury action. . . . To permit such a practice would result in very great injustice."[8] As will be seen later, the factual situation of a particular case may inject other considerations into the picture, and these additional influences may prove to be the deciding factors controlling the decision. However, these two policies, the one to protect the citizens of the state from reckless nonresident motorists and the other to defend nonresidents against groundless and vexatious suits, are inherent in every case.

When the statute in question provides for service on several classes of nonresidents, of which the operator is but one, there is a justifiable tendency toward a strict construction of the word. The courts seem to feel that such a provision indicates that the legislature has considered the possibility of operation by another than the nonresident owner and has provided for substituted service in such cases so far as has been deemed expedient. Thus, the Supreme Court of New Jersey[9] has refused service on a corporation where the agent owned and drove the car. The decision was placed on the ground that the corporation was not an "owner, chauffeur, or operator" as provided by the statute.[10] Following the same vein of thought is the Louisiana decision of *Day* v. *Bush*,[11] where service was held invalid as to the owner of a car which was driven by a duly authorized agent. The enactment in question[12] referred to "operation by a nonresident or his authorized chauffeur," and the court felt that the specification excluded persons not mentioned. These decisions represent the proclivity toward strict interpretation despite the undoubted intention of the legislature to reach nonresidents for the purpose of indemnifying the state's own citizens.

There has been an attempt[13] to hold the personal representative of a

7 Hendrick v. State of Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385 at 389 (1914).

8 Wallace v. Smith, 265 N. Y. S. 253 (1933).

9 Josephson v. Siegel, 110 N. J. L. 374, 165 A. 869 (1933). A later case, McLeod v. Birnbaum, 14 N. J. Misc. 485, 185 A. 667 (1936), allowed service under the same statute where the nonresident corporation was also owner of the machine. To the same effect is the case of Producers' & Refiners' Corporation v. Illinois Cent. R. Co., 168 Tenn. 1, 73 S. W. (2d) 174 (1934).

10 New Jersey Pamph. Laws of 1930, Ch. 69, p. 295 (Comp. St. Supp. § 135—96a(1).

11 18 La. App. 682, 139 So. 42 (1932).

12 Act No. 86 of 1928, §1 (La.).

13 Donnelly v. Carpenter, 55 Ohio App. 463, 9 N. E. (2d) 888 (1936).

deceased nonresident tortfeasor under the substituted service provision of Ohio.[14] The plaintiff apparently proceeded upon the theory that the administrator was the constructive operator of the vehicle, in that he stood in the position of the deceased. The court neatly exploded the proposition of the plaintiff by reminding him of a rather fundamental principle of agency, to wit, that the death of the principal amounts to revocation of the authority of the agent, unless the power be coupled with an interest.[15] This decision makes it readily apparent that the authority of the Secretary of the State of Ohio to receive service was revoked by the death of the nonresident tortfeasor, since the authority was based on agency. It is very likely, however, that the court was also governed by the inexpediency of compelling an administrator or executor of an estate to travel into another jurisdiction for the purpose of defending such a law suit.

Perhaps the most quoted and misquoted case in the United States on the doctrine of strict construction of substituted service provisions is the decision of *O'Tier* v. *Sell.*[16] The defendant had been having trouble with his vehicle, which he intrusted to a mechanic for the purpose of repair. The mechanic, with the permission of the owner, drove around the block to determine the source of difficulty. An accident occurred, and service was sought and denied under the typical New York statute.[17] The court seemed to feel that to consider the operation of an independent contractor as the operation of the defendant would do violence to the rules of agency without authority in the statute and would jeopardize, without justification, the rights of nonresident owners. This decision has been correctly followed in a line of cases where the automobiles involved were driven by mere bailees.[18] In such situations, the policy seems to be strongly in favor of strict interpretation because substantive liabilities are necessarily involved. But unfortunately this type of case, and especially the O'Tier decision, has been cited as authority in situations where it is entirely inapplicable.

In *Morrow* v. *Asher,*[19] the Texas court was confronted with a situation in which the vehicle involved was operated by a duly authorized agent of the defendant nonresident owner. The agent was acting within the scope of his authority, and the statute was typical,[20] but service was refused. Throughout this decision runs a note of sympathy for nonresident automobile owners as well as a mistaken notion of the position of the New York authority. Curiously enough, while the Texas court supported its holding with a citation of the O'Tier case, a later New York opinion stated: "The effect of this authority [*O'Tier* v. *Sell*] is that, to become amenable

14 Gen. Code of Ohio, §6308-1.

15 Hunt v. Rousmanier's Adm'rs, 21 U. S. 174, 8 Wheat. 174, 5 L. Ed. 589 (1823).

16 252 N. Y. 400, 169 N. E. 624 (1930).

17 See footnote 3. The phrase, "or the operation on a public highway in this state of a motor vehicle or motorcycle owned by a nonresident if so operated with his consent, express or implied," was presumably added by the legislature as a result of this decision.

18 Zurich G. A. & L. Ins. Co. v. Brooklyn & Queens T. Corp., 241 N. Y. S. 465 (1930); Jones v. Newman, 239 N. Y. S. 265 (1930); Gesell v. Wells, 240 N. Y. S. 628 (1930); Flynn v. Kramer, 271 Mich. 500, 261 N. W. 77 (1935).

19 55 F. (2d) 365 (1932). 20 Vernon's Ann. Civ. St. Tex., Art. 2039a.

to process in this state, a nonresident must either be operating the automobile personally or the operation thereof must be through an agent or employee of such nonresident acting within the scope of his employment."[21]

A different aspect of the same problem is met where the defendant upon whom service is sought is a corporation whose agent owns the machine. The tendency is again toward strict construction. The Rhode Island decision of *Clesas* v. *Hurley Machine Company*[22] denied service under these circumstances. The opinion of the court laid considerable stress upon the wording of the Rhode Island statute,[23] which provides that the acceptance by a nonresident of the privilege of using the highways of the state without going through certain formalities required of resident motorists shall constitute the appointment of the secretary of state as agent to receive process. The court said that the privileges had not been accepted by the defendant, since the actual owner and operator, as resident of the state, was rightfully using the car and had gone through the prescribed formalities of licensing the same. The argument is plausible but limited in its scope because of the peculiarity of the provision in question. However, it is easy to believe that the court was considering policy, as was the New York court in *Wallace* v. *Smith*,[24] where it was said: "A person or corporation which is neither the owner nor operator of a car may be called to some distant state to defend a personal injury action on the allegation that the person operating the car in that state was doing so as the agent of the person or corporation sought to be made defendant. . . . To permit such a practice would result in very great injustice."[25]

It is not to be denied that abuse of the statute may create vexation and injustice to nonresidents. In many cases of substituted service, it might turn out that there was in fact no agency or that the agent was acting on his own behalf rather than within the scope of his agency. The harassing effect is obvious. Michigan has followed this view,[26] and there is reason to believe that it will be generally accepted; although an inquiring mind might well wonder if the courts have not overstressed the evils involved in permitting service under such circumstances.

The tendency shifts toward a more liberal construction where the automobile is owned by the corporation. In *Bessan* v. *Public Service Coordinated Transport*,[27] service was allowed under the New York provision where the car belonging to the corporation was driven by an agent acting within the scope of his authority. The decision was approved in this regard by the same court in a later case,[28] in which Justice Koch said, "I am of the opinion that the section applies to a corporation as well as to a natural person. A corporation acts only through its agents or servants, and operation by them of a motor vehicle is operation by the corporation. A corporation can be a resident of the state, and I believe a fair interpretation

21 Zurich G. A. & Ins. Co. v. Brooklyn & Queens T. Corp., 241 N. Y. S. 465. (1930).

22 52 R. I. 69, 157 A. 426 (1931).

23 Gen. Laws 1923, Ch. 98, §14, as amended by Pub. Laws 1927, Ch. 1050.

24 265 N. Y. S. 253 (1933). 25 Ibid., p. 256.

26 Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N. W. 557 (1933).

27 237 N. Y. S. 689 (1929). 28 Bischoff v. Schnepp, 249 N. Y. S. 49 (1930).

of the language would make the section apply to a corporation." This statement indicates a realization that a corporation can act only through its agents because of its artificial nature. To refuse service under these facts would involve the necessity of construing the intent of the legislature to the effect that such a provision was not meant to apply to a corporation at all. In view of the prominent part played by such business devices in modern times, such an interpretation would be, to say the least, a bit strained. Furthermore, the probability of abuse of substituted service to the inconvenience of distant corporations is materially lessened when the defendant corporation actually owns the car. There is greater probability that the driver is acting within the scope of his agency than can be inferred where he is the owner of the vehicle. The New Hampshire court[29] has adopted these views in an opinion which seems to take the matter more or less for granted.

The Illinois Appellate Court decision of *Jones* v. *Pebler*[30] recently has passed upon this proposition in the first case arising under the Illinois provision.[31] The amended complaint alleged that one Pebler, the driver of the car in question, was operating the machine "for and on behalf of John H. Cownie and J. M. Schlitz, doing business as the J. H. Cownie Company, and for and on behalf of the J. H. Cownie Company, a Corporation." Service was quashed, and the suit was dismissed as to the partnership and the corporation. The Appellate Court affirmed and held that the car was not "used or operated" by the partnership or the corporation within the meaning of the Illinois statute.[32] The court cited the O'Tier case, *Brown* v. *Cleveland Tractor Company*,[33] *Flynn* v. *Kramer*,[34] and *Morrow* v. *Asher*,[35] all of which have been dealt with in this note and none of which is precisely in point. The court then reached the conclusion that "liability . . . is confined to personal operation of a motor vehicle by a nonresident owner . . . . "[36] If by this decision the court meant to hold that service will not be allowed on a nonresident corporation where the driver of the car is the owner thereof, the case is supported by the authorities. If, on the other hand, the court meant to say that service will be refused in every case where an agent is in control, even where the machine is owned by the corporation and the agent is acting within the scope of his authority, the decision is out of line with the New York and the New Hampshire authorities.[37] It is to be hoped that, upon the appeal which is pending, the Supreme Court of Illinois will hand down a clarifying and definitive opinion.

Decisions construing the meaning of the word "operate" may be reconciled, for the most part, on the grounds of factual distinction. Whether the actual operator of the machine is bailee, agent, or independent contractor is a material point. Whether the party sought to be reached does

29 Poti v. New England Road Machinery Co., 83 N. H. 232, 140 A. 587 (1928).
30 296 Ill. App. 460, 16 N. E. (2d) 438 (1938).
31 Ill. Rev. Stat. 1937, Ch. 95½, §23. 32 Ibid.
33 265 Mich. 475, 251 N. W. 557 (1933). 34 271 Mich. 500, 261 N. W. 77 (1935).
35 55 F. (2d) 365 (1932).
36 Pebler v. Jones, 296 Ill. App. 460 at 468, 16 N. E. (2d) 438 at 442 (1938).
37 Bessan v. Public Service Co-ordinated Transport, 237 N. Y. S. 689 (1929); Poti v. New England Road Machinery Co., 83 N. H. 232, 140 A. 587 (1928).

or does not own the vehicle is a motivating force. Despite variable factors in the individual cases, however, policy seems to have entered into the courts' construction of substituted service statutes and at times seems to have defeated or limited the intention of the legislature.

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CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—DECISIONS REVIEWABLE—WHETHER ORDER GRANTING OR DENYING JUDGMENT NON OBSTANTE VEREDICTO IS AN APPEALABLE ORDER. —In the recently decided case of *Le Menager* v. *Northwestern Barb Wire Company*,[1] the Illinois Appellate Court was called upon to construe the Illinois Civil Practice Act with reference to appealable orders.[2] In this case, the appellant's sole assignment of error was the refusal of the trial court to grant his motion for a judgment non obstante veredicto. The abstract of the case fails to disclose whether any final judgment on the verdict for the appellee was ever entered. The court held that an order either granting or denying a motion for a judgment non obstante veredicto is not a final order or determination of the cause and hence is not appealable under the provisions of the act.[3] The court, in properly dismissing the appeal, pointed out that an appeal lies only from a final order or judgment of a cause, duly entered by the court on the record.[4] Thus, with but one express exception,[5] the Civil Practice Act of 1933 continues the former procedure under the Practice Act of 1907 with reference to appealable orders.

B. M. FELDMAN

APPEAL AND ERROR—NOTICE—WHETHER FAILURE TO INCLUDE PRAYER FOR RELIEF IN NOTICE OF APPEAL IS JURISDICTIONAL.—In the recent case of *National Bank of the Republic of Chicago* v. *Kasper American State Bank*,[1]

1 16 N. E. (2d) 824 (Ill. App., 1938).

2 "Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgments, orders or decrees. . . ." Ill. Rev. Stat. 1937, Ch. 110, § 201(1).

3 Statutes of other states vary on this point. Accord with Illinois decision, Johnson v. Burmeister, 176 Minn. 302, 223 N. W. 146 (1929); Gunderson v. Anderson, 190 Minn. 245, 251 N. W. 515 (1933); Gray v. Elder, 61 N. D. 672, 240 N. W. 477 (1932). Contra, Lewis v. Shell Oil Co., 220 Cal. 80, 29 P. (2d) 413 (1934).

4 For supporting cases under Act of 1907, see Hutchinson v. Ayres, 117 Ill. 558, 7 N. E. 476 (1886); Metzger v. Morley, 184 Ill. 81, 56 N. E. 299 (1900); Bailey v. Conrad, 271 Ill. 294, 111 N. E. 105 (1915); People ex rel. Wilcox v. Drainage Com'rs. of Union Dist. No. 1 of Towns of Pana & Assumption, 282 Ill. 514, 118 N. E. 742 (1918); Peabody Coal Co. v. Industrial Commission, 287 Ill. 407, 122 N. E. 843 (1919); Orwig v. Conley, 322 Ill. 291, 153 N. E. 371 (1926); People ex rel. Carr v. Mitchell, 325 Ill. 472, 156 N. E. 341 (1927); People ex rel. Nelson v. Stony Island State Savings Bank, 355 Ill. 401, 189 N. E. 267 (1934). For supporting cases under Act of 1933, see Eglin v. Glatz, 287 Ill. App. 44, 4 N. E. (2d) 259 (1936); Lipovsek v. Supreme Lodge of Slovene National Benefit Society, 284 Ill. App. 656, 3 N. E. (2d) 158.

5 "An order granting a new trial shall be deemed to be a final order. . . ." Ill. Rev. Stat. 1937, Ch. 110, § 201. In this respect the act of 1933 differs from the former practice. See Tone v. Halsey, Stuart & Co., 286 Ill. App. 169, 3 N. E. (2d) 142 (1936).

1 369 Ill. 34, 15 N. E. (2d) 721 (1938).

the Illinois Supreme Court held that, under the Civil Practice Act,[2] the failure to include a prayer for relief in the notice of the appeal is merely a formal defect and is not jurisdictional,[3] the words of the act being exclusive and controlling.[4]

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2 "An appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court. After being duly perfected no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected shall be deemed jurisdictional." Ill. Rev. Stat. 1937, Ch. 110, § 200 (2). This section is taken from Michigan Court Rule 56, § 1, (1931), which was construed the same way by the Michigan Supreme Court. Hoffman v. Security Trust Co. of Detroit, 256 Mich. 383, 239 N. W. 508 (1931); Puffer v. State Mutual Rodded Fire Ins. Co. of Mich., 257 Mich. 75, 240 N. W. 99 (1932).

3 In the case of Trust Co. of Chicago v. Iroquois Auto Ins. Underwriters, Inc., 285 Ill. App. 317, 2 N. E. (2d) 338 (1936), this provision has already been construed to the effect that the absence of a formal assignment of error in the brief is no longer jurisdictional. See also note, 14 CHICAGO-KENT REVIEW 365.

4 This provision has been strictly construed to mean that a failure to file notice of appeal is jurisdictional. Hunter v. Hill, 284 Ill. App. 655, 2 N. E. (2d) 388 (1936); Wishard v. School Directors, 279 Ill. App. 333 (1935); Veach v. Hendricks, 278 Ill. App. 376 (1935). See also 13 CHICAGO-KENT REVIEW 265.