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Article 20

Motor Vehicles--Service of Process on Non-Resident Defendant--Jurisdiction of City Court (Bessan v. Public Service Co-ordinated Transport, 135 Misc. 368 (1930))

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previous cases to mean within the limits of the principal's business and within the extent of the owner's permission.[2] Some time back the courts inclined toward the view that the owner of a motor vehicle was responsible for the manner in which it was driven,[3] tending to favor plaintiffs in negligence actions against owners. Even in those cases, however, it was held to be no more than a presumption that the owner was responsible for the operation of the auto and the presumption disappears where there is substantial evidence to the contrary.[4] Whether the evidence in this case was substantial remained to be determined. A defendant should have an opportunity to introduce evidence tending to refute the presumption of his control. Operation contrary to instructions vitiates the owner's control as completely as though the car were operated by one who had converted it to his own use. In Rolfe v. Hewett,[5] an owner was sued for injuries resulting in death caused by the negligence of his chauffeur who had been forbidden by the owner to take riders. It was held that the act of the chauffeur in taking the deceased as a rider contrary to his express instructions relieved the owner from liability. The holding in this case, it was thought,[6] would be overruled by the force of Section 282-e enacted in 1924, but judicial construction has limited the application of the legislative enactment to those cases where the operator is acting within the limitations of the permission granted by the owner of the car.

J. C.

MOTOR VEHICLES—SERVICE OF PROCESS ON NON-RESIDENT DEFENDANT*—JURISDICTION OF CITY COURT.—Action in City Court of New York for personal injuries and property damage sustained in the alleged negligent operation by defendant of one of its buses in the city of New York. The defendant is a foreign corporation, operating a fleet of buses through New York City. It has its place of business in the state of New Jersey and has no office for the transaction of business in this state. The summons and complaint were served on the Secretary of State at Albany pursuant to Section 52 of the Vehicle and Traffic Law. The defendant contends that it was not served within the city of New York. the territorial jurisdiction of the City Court and moves to dismiss the summons and complaint.

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[2] O'Brien v. Stern Bros., 223 N. Y. 290, 119 N. E. 550 (1918); Coyne v. Kennedy, 229 N. Y. 550, 129 N. E. 911 (1920); Fioco v. Carver, 234 N. Y. 219, 137 N. E. 309 (1922); Fleugel v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927); Psota v. Long Island R. R. Co., 246 N. Y. 388, 159 N. E. 180 (1927).

[3] Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915).

[4] Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917).

[5] 227 N. Y. 486, 125 N. E. 804 (1920).

[6] See Plaumbo v. Ryan, 213 App. Div. 517, 210 N. Y. S. 225 (2nd Dept. 1925).

* See Current Legislation Section, *infra* p. 333.

Held, motion denied. Bessan v. Public Service Co-ordinated Transport, 135 Misc. 368, 237 N. Y. Supp. 689 (1930).**

When an action is brought in a court of limited jurisdiction, such as the City Court, service of process cannot be made without the territorial jurisdiction of that court. Under the Vehicle and Traffic Law,[1] in actions growing out of accidents and collisions in which a non-resident is involved while operating a motor vehicle within the state, he has appointed the Secretary of State his agent to accept service for him. "Service of such summons shall be made by leaving a copy thereof with a fee of two dollars with the Secretary of State, or in his office." [2] The United States Supreme Court, in sustaining the constitutionality of such statutes, has held them to be a valid exercise of the police power of the state and that they do not violate the due process clause.[3] The purpose of the statute is to protect travelers on our highways and to encourage greater care in the operation of motor vehicles; it provides an effective civil remedy for negligence against non-resident operators of cars who were heretofore practically immune. In determining the liability of the non-resident, the question should not turn on the effectiveness of the service—whether it was made on the Secretary of State at Albany or in New York City, where he maintains a branch office. To so construe the statute and limit it to actions brought in courts of general jurisdiction would be to read into it words of limitation and overlook the benefits and salutary results to be derived from it. The Secretary of State, as a state officer, exercises his duties throughout the state; he may be deemed to be constructively present within the city limits in the discharge of those duties,[4] and, therefore, jurisdiction may be obtained by depositing the summons and complaint in a mail-box in the city of New York.

** See Tannenbaum v. Wehrle, 133 Misc. 577 (1929), which was an action against a non-resident owner in the Municipal Court of the City of New York. The summons was served on the Secretary of State under the provisions of Sec. 285-a of the Highway Law. The service was held to be irregular and set aside on the ground that the Municipal Court had no power to direct the service of the summons outside the city limits. There is no doubt but that the holding in the principal case which is *contra* is a better interpretation and application of the statute.

[1] Sec. 52 (L. of 1929, Ch. 54), formerly Sec. 285-a of the Highway Law.

[2] *Ibid.* To guard against an abuse of the remedy provided by that section, the statute further provides that a plaintiff must provide security for costs in the sum of $250, and that the attorney for the plaintiff shall be liable to the defendant for costs in an amount not exceeding $100 unless and until such security shall be given.

[3] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. Rep. 632 (1926); Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. Rep. 259, 72 L. Ed. 446 (1927).

[4] Matter of Travis, 184 App. Div. 505, 171 N. Y. Supp. 1052 (1918); People *ex rel.* Firemen's Ins. Co. v. Justices of City Court of New York, 11 N. Y. Supp. 773 (1890); McKeever v. Supreme Ct. of Ind. Order of Foresters, 122 App. Div. 465, 106 N. Y. Supp. 1041 (1907).

In addition, the section under consideration, as distinguished from the provisions of the General Corporation Law,[5] does not contemplate personal service on the Secretary of State. The decision is encouraging and indicates an appreciation for the necessity of eliminating delays incidental to litigation.

S. H.

PARTNERSHIP — LIABILITY OF SPECIAL PARTNER TO CREDITORS.—Plaintiff was a creditor of the limited partnership in which defendant was a special partner. The partnership was dissolved and defendant received the amount of his contribution, leaving sufficient assets to satisfy the plaintiff's claim. These assets were dissipated, a judgment against one of the general partners was unsatisfied and the other general partner was out of the jurisdiction and not amenable to process. This action in equity was brought to charge the special partner with liability to the extent of his capital contribution withdrawn from the partnership at or about the time of dissolution. *Held*, judgment for plaintiff. Where legal remedies against general partners are exhausted, an action will lie against a former special partner whose liability is limited to the amount of his contribution as long as it is left at the risk of the business. Kittredge v. Langley, 252 N. Y. 405, 169 N. E. 626 (1930).

Under the law in force when this partnership was organized, a special partner was held to be a true partner, but with limited liability.[1] The courts required a substantially full and exact compliance with statutory requirements and failure to comply with the same made the special partner liable to third persons as a general partner.[2] In order to discharge himself from his liabilities as a partner, every partner has a right to have the property of the partnership applied in payment of partnership debts; he may be said to have an equitable lien on the partnership property for this purpose. On the other hand, if the partnership is insolvent at the time of withdrawal, a partner is bound to respond to the extent of his withdrawn contribution since the liability of each partner for the payment of partnership debts continues *in solido* after dissolution as before. The question here presented is a new one—whether a special partner may be charged at the instance of a creditor where at the time of the withdrawal of his capital contribution, the assets left with the general

[5] Sec. 217: "Service of process against a corporation upon the Secretary of State shall be made by personally delivering to and leaving with him or a deputy Secretary of State duplicate copies of such process."

[1] L. 1897, Ch. 420; Ames v. Downing, 1 Bradf. Sur. 326; Casola v. Kugelman, 33 App. Div. 428, 54 N. Y. Supp. 89 (1st Dept. 1898).

[2] Van Ingen v. Whitman, 62 N. Y. 513 (1875); Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; *id.* 97 N. Y. 132 (1884); Manhattan Co. v. Laimbeer, 108 N. Y. 578. 15 N. E. 712 (1888); White v. Eiseman, 134 N. Y. 101, 31 N. E. 276 (1892).