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Section 25-530—Venue or Jurisdiction?

R. H. Beatty*

On October 26, 1957, the writer of this paper received a letter from the Chairman of the Judicial Council enclosing a copy of a communication sent to all the members of the Judicial Council suggesting the consideration by the Council of the advisability of seeking an amendment to Section 25-530 of the Nebraska Revised Statutes[1] to provide for venue of actions against nonresident defendants growing out of damages caused by the operation of motor vehicles by such nonresidents of Nebraska while using the public highways of this state in the county in which the accident and damages occurred. The letter suggests that under present Nebraska laws, such a nonresident, when not physically present in Nebraska, can only be found in Lancaster County, Nebraska, where the Secretary of State of the State of Nebraska, his statutory agent, resides.

The letter further states that several district judges in this state have held that such actions may be brought only in Lancaster County, Nebraska.[2]

A determination of the question as to whether an action against a nonresident of the State of Nebraska for damages caused by such nonresident in the operation of a motor vehicle upon the public streets or highways of Nebraska can be brought in any county other than Lancaster County, the residence of the statutory agent of the nonresident requires the examination and consideration of five sections of Nebraska statutes, to-wit: Sections 25-408, 25-409, 25-504, 25-521, and 25-530.[3]

These sections of the statutes, so far as material to a discussion herein are as follows:

Section 25-408 provides:

> An action, other than one of those mentioned in sections 25-401 to 25-403, against a nonresident of this state or a foreign corporation may be brought in any county in which there may be property

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[1] (Reissue 1956).

[2] The letter cites the case of *White v. March*, 147 Me. 68, 83 A.2d 296 (1951) as supporting such position.

[3] Neb. Rev. Stat. (Reissue 1956).

of, or debts owing to said defendant, *or where said defendant may be found* but if such defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose.

Section 25-409 provides:

Except as may be otherwise more specifically provided by law, every action for tort brought against a resident or residents of this state must be brought in the county where the cause of action arose, or in the county where the defendant, or some one of the defendants, resides, or in the county where the plaintiff resides and the defendant, or some one of the defendants may be summoned. Every other action must be brought, in the county in which the defendant, or some one of the defendants, resides *or may be summoned.*

Section 25-504, provides:

When the action is rightly brought in any county, according to the provisions of this code, a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request.

Section 25-521 provides:

In all cases where service may be made by publication, *and in all other cases where the defendants are nonresidents, and the cause of action arose in the state, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the state by the sheriff or some person appointed by him for that purpose.* In all cases where service of a summons is made on a person without the state, proof of such service must be made by affidavit, stating the time and manner of service. *Such service shall be made in the same manner as summonses are served on parties residing within this state.*

Section 25-530, so far as material, provides:

The use and operation by a nonresident of the State of Nebraska or his agent of a motor vehicle over or upon any street or highway within the State of Nebraska, shall be deemed an appointment by such nonresident of the Secretary of State of the State of Nebraska as his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him, growing out of such use or operation of a motor vehicle over or upon the streets or highways within this state, resulting in damages or loss to person or property, *and said use or operation shall be a signification of his agreement that any such process which is so served in any action against him shall be of the same legal force and validity as if served upon him personally within this state.* The appointment of agent thus made shall not be revocable by death but shall continue and be binding upon the executor or administrator of such nonresident. Service of such process shall be made by serving a copy thereof upon the Secretary of State, personally in his office in the State Capitol *or elsewhere* or if the Secretary of State is absent from or is not found in his office in the State Capitol

> at the time of the attempted service, by leaving a copy of all legal processes served in the office of the Secretary of State with any person employed in the office of the Secretary of State who, previously to such service, has been designated in writing by the Secretary of State as the person or one of the persons with whom such copies may be left for such service upon the Secretary of State, together with a fee of two dollars, and such service shall be sufficient service upon the said nonresident. . . . [Emphasis supplied.]

Section 25-409 was amended in 1937 and prior to the amendment read as follows:

> Section 25-409, 1929: Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned.

Now prior to the 1937 amendment to the above statute, the statute applied where an action was rightfully brought, to nonresidents of the state as well as to residents of the state, and service could be had upon such nonresidents of the state in any county wherein they might be found or summoned.[4]

There is now a question in the writer's mind as to whether the last sentence of Section 25-409, to-wit:

> Every other action must be brought in the county in which the defendant or some one of the defendants resides or may be summoned.

has application to service upon nonresidents of the State of Nebraska for the reason that said statute purports to deal with the venue of actions for tort brought against a resident or residents of the state.

The Supreme Court in the case of *Grosc v. Bredthauer*[5] said:

> We are committed to the rule, vis: "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." State v Hevelone, 92 Neb. 748, 139 N.W. 636.

It may be that the Supreme Court will hold that the last sentence of Section 25-409 does, at this time, have reference to actions against nonresidents as well as residents of the state. The Legislature, at the time of amending Section 25-409, is presumed to have had in mind that the last sentence of Section 25-409, as it existed prior to the amendment, had reference to nonresidents as well as residents of the state and by adopting the identical language of Section 20-409, 1929 Comp. Stat., as a part of the amendment, intended that said last sentence of 25-409 still applied to nonresidents

[4] See Adair County Bank v. Forrey, 74 Neb. 811, 105 N. W. 714 (1905); Lamb v. Finch, 87 Neb. 565, 127 N.W. 903 (1910).

[5] 136 Neb. 43, 284 N.W. 869 (1939).

as well as residents of the state. If the last sentence of Section 25-409 applies to nonresidents as well as residents of the state, then an action against a nonresident of the state under Section 25-408 and 25-409 may be brought against such nonresident where the defendant may be found or where such defendant may be summoned. It is clear that the last sentence of the act providing that every other action must be brought in the county in which the defendant or some one of the defendants resides can have no application to a nonresident of the state because a nonresident does not reside within the state and it may be that the Legislature, in amending Section 20-409, 1929 Comp. Stat., intended the amended statute to have reference only to tort actions brought against a resident or residents of the state, and to actions other than for tort against nonresidents of the state.

Now Section 25-521 found under the chapter with reference to constructive service of process provides *that in all cases other than cases where service by publication may be made, where the defendants are nonresidents of the state and the cause of action arose in the state, suit may be brought in the county where the cause of action arose and that personal service of summons may be made out of the state by the sheriff or some person appointed by him for that purpose.*

Section 25-521 seems to be a combination of venue and service statute but it does provide that in cases where service by publication cannot be had and where the defendants are nonresidents of the state and where the cause of action arose in the state, suit may be brought in the county where the cause of action arose *and that personal service of summons may be made out of the state by the sheriff or some person appointed by him for that purpose.*

It is quite clear that prior to the enactment of Section 25-530 where a nonresident defendant had an automobile accident and caused damage while using the public streets or highways of Nebraska and had left Nebraska, either prior to or after the bringing of a suit against him and where no service of summons was had upon him while within Nebraska, personal service outside of the state would not confer upon the court in which the action was brought, jurisdiction over such nonresident under which a personal judgment could be rendered against him. This does not, however, lead to the conclusion that if, under Section 25-521, an action against a nonresident of the state can be brought in the county wherein a cause of action arose, that subsequent legislation could not be enacted such as Section 25-530 providing for service of process upon a statutory agent of such nonresident. If the Legislature in the enactment of Section 25-521 meant what it said, to-wit, that in all cases where service cannot be had upon a nonresident by publica-

tion and where the cause of action arose in Nebraska against such nonresident, suit may be brought in the county where the cause of action arose, then construing Section 25-521 with Section 25-530, suit can be brought against such nonresident of Nebraska in any county where the cause of action arose and service had upon such nonresident statutory agent under Section 25-530.

In consideration of the question before us, it must be recognized that Section 25-530 is in no sense a venue statute, it is only a process statute.

In *Courtney v. Meyer*[6] it is said:

> It is clear that a non-resident motorist does not by the mere statutory appointment of an agent to accept service for him, acquire a fixed residence in the county of such agent. *The non-resident statute is only a process statute.* It does not place the venue of actions against non-resident motorists in the county of the residence of the Director of the Motor Vehicle Division; in our opinion, it makes the latter the agent of a non-resident in any county of the state in which the action is otherwise properly brought.[7]

In *Thomas v. Hector*[8] the Minnesota court said:

> Statutes providing for substituted service relate simply to service of process as a means of obtaining jurisdiction of the defendant and are not construed as extending or restricting the places where by law an action may be brought.[9]

It is also true that venue statutes relate wholly to procedure, are remedial in nature, are to be liberally construed and are not

[6] 25 S.E.2d 481 (S.C. 1943).

[7] See also Carter v. Schackne, 114 S.W.2d 787 (Tenn. 1938); Kennedy v. Lee, 113 S.W.2d 1125 (Ky. 1938); Export Ins. Co. v. Womack, 165 Ga. 815, 142 S.E. 851 (1928); Roman v. Champion, 104 N.E.2d 92 (Ohio 1952); Inter Insurance Exchange v. Wagstaff, 59 N.E.2d 373 (Ohio 1945); Audubon Ins. Co. v. Schoell, 77 So.2d 53 (La. 1955).

[8] 12 N.W.2d 769 (Minn. 1944).

[9] See also Crawford v. Carson, 78 S.E.2d 268 (W.Va. 1953); Thomas v. Altsheler, 235 S.W.2d 806 (Tenn. 1951); Schaeffer v. Alva West & Co., 4 N.E.2d 720 (Ohio 1936). In *Crawford v. Carson* the court held that the statute providing that operation by nonresident of motor vehicle upon public road in state is equivalent to appointment of state auditor to be nonresident's attorney upon whom may be served process in action against nonresident in state court growing out of accident or collision in state, concerns service of process only and does not relate to fixing of venue, and does not modify or extend statutes or common law principles concerning venue.

In *Schaeffer v. Alva West & Co.* the court held that the place for instituting actions against nonresident motorists arising out of automobile accidents within the state was governed by venue statutes and not by statute permitting service of process in such actions upon secretary of state.

restricted in their operation to causes of action thereafter arising;[10] that in the interpretation of venue statutes, such an interpretation should be adopted as to serve and provide for the convenience of the parties involved.

Attention has heretofore been called to the fact that Section 25-530 is in no sense a venue statute. Said Section does not purport to deal with or fix venue in any respect and the law is that where such a statute makes no provision as to venue, general rules and statutes apply as to the venue of actions; process statutes generally do not change or control the place of bringing or trial of actions.[12]

The aforementioned letter cites the case of *White v. March*[13] as holding that under a statute in all respects similar to Section 25-530 an action against a nonresident motorist who has caused damages in some county in Nebraska and is not personally present in Nebraska so that service can be had upon him in the county where the cause of action arose but has left the state after the accident and before service upon him, can be sued only in Lancaster County, Nebraska, the residence of his statutory agent.

A careful study of the above case leads the writer to conclude that the above case is not authority for the position taken. In that case, a resident of Bridgeport, Connecticut, brought a suit against a resident of St. John, Newfoundland, for personal injuries growing out of a collision of two automobiles in the state of Maine on a road between Stockton Springs which is in Waldo County and Bucksport in Hancock County. The opinion does not show in which of these counties the accident occurred. The action was brought in Augusta, the state capitol of Maine, where the Secretary of State had his residence and service was had on the Secre-

[10] Gergen v. The Western Union Life Ins. Co., 149 Neb. 203, 30 N.W.2d 558 (1948); Grosc v. Bredthauer, 136 Neb. 43, 284 N.W. 869 (1939); Inter Insurance Exchange v. Wagstaff, 59 N.E.2d 373 (Ohio 1945); Snavely v. Wilkinson, 138 Ohio St. 125, 33 N.E.2d 999 (1941); Blankholm v. Fearing, 22 N.W.2d 853 (Minn. 1946); Mutzig v. Hope, 158 P.2d 110 (Ore. 1945); 61 C.J.S., p. 140, § 498(b); 92 C.J.S., p. 673, § 5(b).

[11] State v. Cote, 58 A.2d 749 (N.H. 1948); Snyder v. Pitts, 241 S.W.2d 136 (Tex. 1951); Blankholm v. Fearing, 22 N.W.2d 853 (Minn. 1946); 92 C.J.S., p. 676 § 6.

[12] Lloyd Adams Inc. v. Liberty Mut. Ins. Co., 10 S.E.2d 46 (Ga. 1940); Courtney v. Meyer, 25 S.E.2d 48 (S.C. 1943); Carter v. Schackne, 114 S.W.2d 787 (Tenn. 1938); Roman v. Champion, 104 N.E.2d 92 (Ohio 1952); Carroll v. Matthews, 113 S.W.2d 742 (Tenn. 1938) (in which a process statute similar to 25-530 was involved); 92 C.J.S., p. 808, § 99; 61 C.J.S., p. 142, § 498(b).

[13] 147 Me. 68, 83 A.2d 296 (1951).

tary of State. The lower court dismissed the action for want of jurisdiction for the reason that the Maine statute providing for service on the Secretary of State was not complied with in that a copy of the process served on the Secretary of State was not forthwith sent by registered mail by the plaintiff to the defendant and the defendant's return receipt and plaintiff's affidavit of compliance with the statute appended to the writ and filed with the clerk of courts in which the action was pending.

The court then said:

> We have given this discussion as this plaintiff may again seek to use the statute here in question to obtain jurisdiction of this defendant. If he does so we will say that the venue of this action was properly laid in the County of Kennebec. The statute does not restrict the venue of the action to the county where the accident happens or to any other particular county within the state. In the absence of any specific designation of venue, the normal place to bring the action was the County of Kennebec where service of process would normally be made. A statute as important as this does not fail because no provision is made as to venue.

All the court said in the above case was that the venue was properly laid in Kennebec County at Augusta, the state capitol. The question was not discussed as to whether or not the action might be brought elsewhere under Maine statutes. The writer does not believe the case is authority for the proposition that venue could only be laid in the residence of the statutory agent of the defendant.

The case of *Rose v. Gisi*[14] is much more indicative as to what Nebraska law is than the Maine case.

In this case, the plaintiff Rose sued Gisi doing business as Gisi Produce Company, Victor Wascher, and Floyd Carter, and others, in the District Court for Dundy County, Nebraska, for damages growing out of an automobile accident occurring in Dundy County, Nebraska. Gisi, Carter and Wascher were residents of Colorado at the time the accident happened. Service of process was had on the Secretary of State in accordance with the provisions of Section 20-530, 1929 Laws, now as amended 25-530. The question raised was whether the court obtained jurisdiction over the persons of the defendants and if so, whether liability attached to the defendants Carter and Gisi. Gisi was the owner of the truck, and Carter was a regular employee of Gisi. Wascher was sent on the trip to assist in loading and unloading the cargo on the truck. The evidence was that Carter was told by Gisi not to permit Wascher to drive the

[14] 139 Neb. 593, 298 N.W. 333 (1941).

truck but Carter did permit Wascher to drive the truck and the accident happened while Wascher was so driving. The opinion by Judge Carter found that all of the defendants were liable under the evidence and said:

> We therefore hold that each of the defendants was properly subjected to the jurisdiction of the district court for Dundy County under the provisions of section 20-530, Comp. St. 1929.[15]

The law is well established in Nebraska that in the construction of statutes the following rules apply:

> The object of the court in construing an act of the Legislature is to ascertain the intention of the lawmakers. That intention, when ascertained, will prevail over the literal sense of the words used.
>
> That which is implied in a statute is as much a part of it as that which is expressed.
>
> In construing a statute the legislative intent may be gathered from the reason for its enactment.
>
> In construing a statue, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
>
> In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject.[16]

It is the writer's opinion that where a nonresident of the state in the use of the public streets or highways of the state causes damage to another person by a motor vehicle, that the venue of an action against such nonresident can be laid in the county where the cause of action arose and that Lancaster County is not the only county in which suit can be brought against said nonresident in cases where the nonresident has left the state prior to the institution of an action against him and service made personally upon him in the state.

The statutes of Nebraska have at least attempted to fully cover and provide for the venue of actions in every possible situation. Section 25-530 is not a venue statute, it is a process statute and nothing else. It does not in any manner change the place where actions could be brought prior to its enactment. It merely provides

[15] The author did not have access to the record in the *Rose* case and does not know whether the question of the right to bring the action in Dundy County was raised and briefed.

[16] In re Petition of Rose Roy v. Bladen School Dist., 165 Neb. 170, 84 N.W.2d 119 (1957).

for an additional method of service of process upon nonresident defendants in the situations covered by the provisions of the act.

It seems beyond doubt that the Legislature did not intend, in the enactment of Section 25-530, that if a nonresident caused damage by the use of the public highways in Banner County or Scotts Bluff County, Nebraska, in the use of his automobile upon those highways and the plaintiff lived in one of those counties, that he was obliged to start his suit in Lancaster County, Nebraska, and litigate his cause of action there, when possibly all witnesses and evidentiary facts were available and present in one of those counties and none of them present or available in Lancaster County. It takes no strained construction of Nebraska statutes to impute to the Legislature an intent in the enactment of the various venue statutes in this state to permit an action to be brought against a nonresident in the county where the cause of action arose and to permit service of process upon his statutory agent under Section 25-530.

This opinion is apparently in conflict with the opinion of several district judges in this state on this question, although the Supreme Court of Nebraska has probably not directly passed upon and settled the question. Until the question is settled by the Supreme Court of Nebraska, no one can rest assured as to whether or not the action must be brought alone in Lancaster County or whether it can be brought in the county where the cause of action arose and that disastrous consequences could be encountered by the bringing of such an action in the wrong venue.

It is submitted, therefore, that it would be best to seek an amendment of the venue statutes and possibly Section 25-530 to set the matter completely at rest.