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Notes and Comments

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adopting a modern, rational method of procedure with the primary object of seeking the truth rather than providing a larger playing field for the practice of technical common law rules of evidence.

However, some progress has been made. In most of the states, the courts permit the commissions to give probative weight to hearsay if it is corroborated by some other evidence which would indicate its trustworthiness. In Virginia and California, the courts have left the probative value of hearsay in the discretion of the Commission. Maryland has recognized that in certain cases hearsay may be sufficient to sustain an award.

From a review of the cases, it is clear that hearsay does in some instances have definite probative value often times sufficient to sustain a claim. It would be erroneous to make an all inclusive statement that hearsay is always incompetent or, on the other hand that it always has probative weight.

Perhaps the answer lies in a clear, well-defined expression of legislative intent permitting flexibility on the part of the tribunal and leaving to their discretion the probative weight to be given hearsay evidence. And if it is of the type that men of affairs customarily rely on in serious matters, an award based thereon would be valid and within the requirements of due process.

The success of such a policy would be dependent on the experience and qualifications of the commissioners under the Act, but in the end, so does justice in a court of law depend largely upon the qualifications of the judges and attorneys who practice there.

NOTES AND COMMENTS

EVIDENCE: INCOMPETENCY v. INSUFFICIENCY—The recent decision of the Colorado Supreme Court in the case of *Wheelock v. Lindner Packing Co.*,[1] deals with an elusive distinction between incompetency and insufficiency in the law of evidence. The facts are not complicated. The plaintiffs delivered a shipment of frozen meat to the carrier for delivery to Ft. Worth. The shipment was refused by the receiver due to the spoiled condition of the meat at the point of delivery. The plaintiffs disposed of the meat at considerable loss and brought this action to recover damages. The plaintiff established by competent evidence that the meat was in proper condition upon delivery to the carrier, that the meat was rejected at the point of delivery, and that it was subsequently sold at a loss. Under the cases on interstate shipments, a shipper need only prove that the goods were in proper condition when delivered to the carrier and spoiled when received. The burden then rests upon the defendant carrier.

In the instant case, the plaintiff's only evidence as to the condition of the goods when received was clearly hearsay. This testi-

[1] — Colo. —, 273 P. (2d) 730.

mony was not objected to when given, but the fact of its being hearsay was brought out during cross-examination. At the close of the plaintiff's case, the defendant moved to dismiss for failure to prove a cause of action. The trial court ruled that the hearsay would stand as evidence of the spoiled goods upon receipt. Since the defendant offered no evidence to show lack of negligence the judgment was given for the plaintiff.

In reversing the above judgment, the Supreme Court followed a rule set out in *Skinner & Andrews v. Satterfield,*[2] which held that for purposes of a motion for directed verdict, a court should entirely disregard hearsay testimony whether objected to or not, and that the rule applies as well to a motion to dismiss.

The Court held that the plaintiff fell short of proving the cause for rejection of the goods by the receiver, but in so holding did not state whether this was due to a lack of evidence entirely or to the incompetency of the evidence presented. Certainly there was evidence, admittedly hearsay, but nevertheless part of the record due to an untimely objection. This would appear to mean that hearsay evidence even though sustained over an untimely objection, was still incompetent for purposes of ruling on motions for either a directed verdict or dismissal. If this case does turn on competency rather than the sufficiency of the evidence, then the distinction narrows between this case and other cases holding that incompetent evidence unless objected to may be considered as a basis for decision.[3]

In stating that the plaintiff fell short of proving his cause of action, the Court must be referring to the sufficiency of the evidence and not to its competency. This rule then would seem to follow very closely the rule laid down in *Hill v. Grosbeck,*[4] which held that the failure of a party to object to the admissibility of evidence does not preclude him from questioning its weight or sufficiency when admitted to establish a fact in issue.

It would seem then that the Court is saying even though testimony of negligence and improper refrigeration was admitted without timely objection, its hearsay quality renders it insufficient in weight to establish the facts it states.

J. BELKNAP

CIVIL PROCEDURE: ONLY THOSE PERSONS WHO ARE NON-RESIDENTS AT THE TIME OF AN ACCIDENT MAY BE SERVED THROUGH THE SECRETARY OF STATE: *William Warwick v. The District Court of the City and County of Denver,* .... Colo....., 269 P. 2d 704, 1953-54 C.B.A., Adv. Sh. No. 12 p. 281.

This was an action for damages arising from an automobile accident which occured March 7, 1951. On July 7, 1952, plaintiff

[2] 121 Colo. 365, 216 P. (2d) 431.
[3] Woods v. Siegrist, 112 Colo. 257, 149 P. (2d) 241.
[4] 29 Colo. 161, 67 P. 167.

served process upon the Secretary of State in compliance with section 48, chapter 16, '35 C.S.A., as amended by the Session Laws of 1937, page 323, sections 1 to 4. Commonly known as the Non-Resident Motor Vehicle Statute, this statute provides for service of process upon the Secretary of State, as the true and lawful agent of any non-resident involved in an accident upon the public highways of this State. Notice of the suit was given to the defendant in California, and the defendant appeared specially to contest the validity of the service. In his affidavit the defendant set forth the following facts: first, at the date of the accident, the defendant was a resident of the City and County of Denver; second, that he had moved to Colorado on October 9, 1950 and had remained here until some time after the date of the accident; third, that his contract of employment had subsequently terminated; and Fourth, that he had moved from the state on March 21, 1951, in an effort to find other employment. He further stated that he had filed both the federal and state income taxes, giving his residence as Denver, and that he had obtained both a 1951 automobile license and a 1951 operator's license in Colorado.

On these facts, the Court held: first, defendant was a bona fide resident at the time of the accident, and, secondly, the Colorado statute does not apply to that class of persons who are residents of the State at the time of the accident.

The holding in this case is in accordance with the weight of authority. In *Carlson v. District Court of the City and County of Denver,*[1] a pastor of a church in Leadville, Colorado, was involved in an automobile accident. By the time suit was commenced, he had moved to New York. Taking judicial notice that pastors of necessity are moved about the country, the Court quashed the service upon the Secretary of State. Where the person is not a non-resident at the time of the accident, service may not be had upon him by means of the Colorado statute.

It was contended in *Suit v. Shailer* [2] that the term "non-resident" in a similar Maryland statute [3] referred to persons who were non-residents at the time of the service of process. To this contention, the court replied, ". . . it was not the intention of the Maryland Legislature to authorize this special form of substituted service on defendants who were bona fide residents of the State at the time of the occurrence, but who afterwards changed their residence to some other State or place."[4]

Several cases involve military personnel who were stationed in the State at the time of the accident, but who had been transferred by the time service of process was attempted. Uniformly, the courts have held that, while the service men may have retained their domicile in their home State, they were bona fide residents

[1] 116 Colo. 330, 180 P. (2d) 525 (1947).
[2] 18 F. Supp. 568 (D. C. Md. 1937).
[3] Flack's Supp. to the Ann. Code of Md., Art. 56, §190 A.
[4] Also, note Wood v. White, 68 App. D. C. 341, 97 F. (2d) 646 (1938).

of the State where the accident occurred. Therefore, the statute providing for substituted service was inapplicable.[5]

Perhaps the most striking decision is *Northwestern Mortgage and Security Co. v. Noel Construction Co.*[6] One Carter intended to abandon his residence in North Dakota. Without having made a choice of new residence, he started on a visit to Minnesota. While traveling in North Dakota, he was involved in an accident. After repairing his automobile, he continued his trip, never returning to North Dakota, and finally taking up residence in the State of Washington. The North Dakota court held that Carter's residence at the time of the accident was in North Dakota since he had not arrived at his new residence. Therefore, jurisdiction over him could not be gained by means of substituted service under the North Dakota statute.[7]

While not so extreme as the Northwestern case, other courts have followed the general rule of these decisions.[8]

The only case which could be found which deviated from the preceding decisions was *State ex rel. Thompson v. District Court of the Fourth Judicial District in and for Missoula County.*[9] This statute differed from Colorado's in that it applied to "any person who operates,"[10] and the court interpreted this to include those who were residents at the time of the accident, but who subsequently became non-residents.

Under the majority of the present statutes, while it is possible to obtain jurisdiction over present residents, and those who use the public highways but who were never residents, it is not possible to gain jurisdiction over one-time residents who move from the state after an accident, but before start of suit.

Ten states [11] have cured this defect in their statutes by making their statutes specifically applicable to both non-residents and to residents who leave the State after an accident.[12] While the United States Supreme Court has yet to decide the constitutionality of these statutes, several state courts have held them valid.[13] Moreover, the basis for holding the statutes valid in cases of non-residents, i.e., the states' authority to regulate travel on public high-

[5] Berger v. Superior Court in and for Yuba County, 79 Cal. App. (2d) 425, 179 P. (2d) 600 (1947); Suit v. Shailer, *supra.*

[6] 71 N. D. 256, 300 N. W. 28 (1941).

[7] North Dakota has since amended its statute to include such a class of persons. See 1951 Session Laws of the State of N. D., section 28-0611, as amended by 1953 Laws of N. D., chapter 204.

[8] Welsh v. Ruopp, 228 Iowa 70, 289 N. W. 760 (1940); Mann v. Humphrey's Adm'x, 257 Ky. 647, 79 S. W. (2d) 17 (1935).

[9] 108 Mont. 362, 91 P. (2d) 422 (1939).

[10] Revised Code of Mont., 1947, Title 53, chapter 2, sections 201-206.

[11] Illinois, Iowa, Maryland, Minnesota, New York, North Dakota, Ohio, Oregon, Pennsylvania, and Virginia.

[12] Compare Ill. Rev. Stat., 1949, chapter 95½, section 22, with Minn. Stat., 1945, section 170.55 (c), as amended by Laws of Minn., 1949, chapter 582.

[13] State ex rel. Thompson v. District Court of the Fourth Judicial District in and for Missoula County, *supra;* Hendershot v. Ferkel, 140 O. St. 112, 56 N. E. (2d) 205 (1944); Joseph Palozzolo v. Harold J. MCord, 7 Ohio Op. 159 (1936).

ways,[14] can with equal validity be applied to residents.[15]

It is submitted that in light of the decision in the principal case, a similar amendment to Colorado's Non-Resident Motor Vehicle Statute is needed to assure the residents of Colorado, damaged in automobile accidents, an opportunity to have their day in the courts of their own jurisdiction.

JOHN CRISWELL

[14] Hendrikick v. Maryland, 235 U. S. 610 (1915); Kane v. New Jersey, 242 U. S. 160 (1916); Hess v. Pawloski, 274 U. S. 352 (1927).

[15] Hendershot v. Ferkel, *supra*, note 13.