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Civil Procedure - Service of Process Under Nonresident Motorist Statute - Effect of Death of Nonresident Defendant

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CIVIL PROCEDURE—SERVICE OF PROCESS UNDER NONRESIDENT MOTORIST STATUTE—EFFECT OF DEATH OF NONRESIDENT DEFENDANT—A wife sued for the wrongful death of her husband, which was allegedly caused by a nonresident defendant's negligent operation of his automobile on a Wisconsin highway while the plaintiff's husband was a passenger therein. Service of process was made on the Commissioner of the Motor Vehicle Department in Wisconsin, and copies of the summons and complaint were mailed to defendant in Illinois in accordance with the Wisconsin nonresident motorist statute.¹ Shortly thereafter, before a judgment was rendered, defendant died. Plaintiff sought to revive the action against defendant's administrator by serving notice of the filing of a petition for revival on the Commissioner of the Motor Vehicle Department in Wisconsin and by serving upon the nonresident administrator by registered mail a copy of the petition. On special appearance by the administrator the circuit court ordered the petition for revival and the notice set aside and vacated. On appeal, *held*, reversed. By virtue of the nonresident motorist statute a user of the highway makes an irrevocable appointment of a state official as his agent for the purpose of receiving process. The appointment is binding on the nonresident's administrator, and an action pending against the decedent at the time of his death may be revived against the administrator. *Tarczyński v. Chicago, Milwaukee, St. Paul & Pacific R. R.*, 261 Wis. 149, 52 N. W. (2d) 396 (1952).

Encouraged by *Kane v. New Jersey*² and *Hess v. Pawloski*,³ all forty-eight states and the District of Columbia now have nonresident motorist statutes by which a state through substituted service may obtain jurisdiction over persons who commit liability-creating acts while driving upon the highways of the forum state.⁴ In their initial form, however, the statutes made no specific provision for obtaining jurisdiction over the personal representative⁵ of the motorist, so that if the wrongdoer died prior to or pending suit, substituted service was not available.⁶ Several legislatures have amended their statutes to

120 Colo. 454, 210 P. (2d) 985 (1949). As to the possibility of splitting a cause of action in re a declaratory judgment proceeding compare *New Haven Water Co. v. New Haven*, 131 Conn. 456, 40 A. (2d) 763 (1944), and *Union Light, Heat & Power Co. v. City of Bellevue*, 284 Ky. 405, 144 S.W. (2d) 1046 (1940).

¹ Wis. Stat. (1951) §85.05(3).

² 242 U.S. 160, 37 S.Ct. 30 (1916), upholding a New Jersey statute which provided that a nonresident could not use the state's highways unless he first executed a written instrument designating the secretary of state as attorney for the service of process.

³ 274 U.S. 352, 47 S.Ct. 632 (1927). The statute involved did not require the motorist's actual consent for the appointment.

⁴ For a compilation of all the nonresident motorist statutes as of 1947, see *Knoop v. Anderson*, (D.C. Iowa 1947) 71 F. Supp. 832.

⁵ In this note "personal representative" is used to include executor and administrator, unless otherwise indicated.

⁶ Courts uniformly held that in absence of a specific provision the personal representative of a deceased motorist was not reached by substituted service. Usually this result was by construction of the statute. *Downing v. Schwenck*, 138 Neb. 395, 293 N.W. 278 (1940); *Donnelly v. Carpenter*, 55 Ohio App. 463, 9 N.E. (2d) 888 (1936); *Ledin v. Davison*, 216 Wis. 216, 256 N.W. 718 (1934). Some relied in part upon revocation of

provide that a motorist's appointment of a public official as his agent for purposes of service is to be binding on the motorist's personal representative in any proceeding against the motorist or the personal representative growing out of the former's use of the highway.⁷ Since any judgment recovered in the forum will have to be enforced, if at all, in the state of the decedent's domicile, the validity of these amendments will probably be raised by the issue of constitutional full faith and credit, which involves the question of the forum's jurisdiction. Thus far the United States Supreme Court has not spoken on the matter. Four other courts, however, had considered the problem prior to the principal case.⁸ Two arguments against the validity of these amended statutes have generally been advanced: (1) Since the statutes are framed in terms of agency between the nonresident motorist and the public officer, the agency is terminated by the death of the motorist; and (2) although jurisdiction can be acquired over the motorist himself in an in personam action under *Hess v. Pawloski*, an action against the personal representative is an action in rem, and since the decedent's property is outside the forum, no jurisdiction is acquired over the res by substituted service on the personal representative. The usual answer to the first argument has been that the appointment of the agent is an act of the forum's police power, and the police power is not limited by common law rules of agency and contract.⁹ That the agency is not revoked by death would seem to be clear, inasmuch as *Hess v. Pawloski* is grounded upon the idea that the appointment is in truth made by the state, not by the motorist.¹⁰ Furthermore, the real basis of jurisdiction over the motorist is not the agency of the public officer, but rather the doing of a liability-creating act by the motorist and the giving of notice to him.¹¹ Furthermore, as long as it is constitutional for the state to make the appointment while the motorist lives, no reason is perceived why the appointment may not in accordance with due process be made to continue after the death of the motorist. But whether the statute ought to be permitted to confer jurisdiction over the personal representative is

the agency of the public officer by death of the motorist. *Young v. Potter Title & Trust Co.*, 114 N.J.L. 561, 178 A. 177 (1935); *Donnelly v. Carpenter*, *supra* this note.

⁷ Note 1 *supra*.

⁸ The cases holding that these provisions give the forum jurisdiction over the personal representative are *Leighton v. Roper*, 300 N.Y. 434, 91 N.E. (2d) 876 (1950); *Plopa v. Du Pre*, 327 Mich. 660, 42 N.W. (2d) 777 (1950); and *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W. (2d) 287 (1943). *Contra*: *Knoop v. Anderson*, note 4 *supra*. Although the principal case is the first to raise the issue on revivor, it would seem to be subject to the same analysis as cases based on an action brought against the personal representative in the first instance. *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925); *Heath v. Santa Lucia Co.*, (D.C. N.Y. 1924) 3 F. (2d) 326; *Giampalo v. Taylor*, 335 Pa. 121, 6 A. (2d) 499 (1939).

⁹ *Plopa v. Du Pre*, note 8 *supra*, *Oviatt v. Garretson*, note 8 *supra*, *Leighton v. Roper*, note 8 *supra*, stated that the agency was created for the benefit of third persons and the state, and so was not revoked by death.

¹⁰ This appears to be the primary distinction between the statute involved in *Kane v. New Jersey*, 242 U.S. 160, 37 S.Ct. 30 (1916), and the one involved in *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632 (1927). See notes 2 and 3 *supra*.

¹¹ *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259 (1928).

another question. As to the second argument, it would seem that no valid ground has been advanced for considering this action an *in rem* proceeding. No right to possession or title to specific property is being asserted or adjudicated. Only a judgment that can be asserted against the decedent's personal representative in a subsequent probate proceeding is being sought.¹² In any event it is clear that the personal representative must be before the court in his official capacity in order to have a judgment that is enforceable in the state of domicile. The issue, then, is whether such jurisdiction can be obtained by substituted service.¹³

Traditionally it has been the rule that a personal representative cannot be sued in a state other than the one appointing him,¹⁴ even though he makes a general appearance,¹⁵ nor can an action pending at the decedent's death be revived against the personal representative.¹⁶ It is said that this is so because in the contemplation of the law the personal representative exists in his official capacity only because of the act of appointment by the state of the decedent's domicile.¹⁷ Since the appointing state has given him all his powers and has not consented to his being recognized elsewhere, he cannot cross the boundary of that state in his official capacity.¹⁸ Thus, the forum in reaching out to grasp the personal representative cannot lay hold upon him in his official capacity,¹⁹ which is necessary for reaching the estate, the real purpose of the action. Furthermore, it is said that the personal representative by accepting his office has agreed to be subject only to the laws of the place that has control of the decedent's estate. For an outside sovereign to impinge upon his duties would be to require him to pay the debts of another man against his will.²⁰ A state's

¹² *Leighton v. Roper*, note 8 *supra*. See also *Markham v. Allen*, 326 U.S. 490, 66 S.Ct. 296 (1946). This fact is sometimes used to support the argument that no interference with the administration of estates would result from permitting the forum to acquire jurisdiction. 61 *HARV. L. REV.* 355 (1948); Scott, "Hess and Pawloski Carry On," 64 *HARV. L. REV.* 98 (1950).

¹³ The argument favoring the obtention of jurisdiction is necessarily dependent upon the police power for several reasons: *Hess v. Pawloski* appears to rest upon the forum's police power; any fiction that consent of the decedent binds the personal representative is exploded by *Brown v. Fletcher's Estate*, 210 U.S. 82, 28 S.Ct. 702 (1908); and consent of the personal representative would not be sufficient, note 15 *infra*.

¹⁴ 1 *WOERNER, AMERICAN LAW OF ADMINISTRATION* §160 (1923); *CONFLICT OF LAWS RESTATEMENT* §512 (1934); citations in 3 *BEALE, CONFLICT OF LAWS*, 3d ed., 1552, n. 3 (1935).

¹⁵ *CONFLICT OF LAWS RESTATEMENT* §513 (1935); *Jefferson v. Beall*, 117 Ala. 436, 22 S. 44 (1897); *First Nat. Bank v. Pancake*, 172 N.C. 513, 90 S.E. 515 (1916). *Contra*: *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252 (1823).

¹⁶ *McMaster v. Gould*, note 8 *supra*; *Nat. Bank of Topeka v. Mitchell*, 154 Kan. 276, 118 P. (2d) 519 (1941).

¹⁷ *CONFLICT OF LAWS RESTATEMENT* §512, comment *a* (1948 Supp.); Goodrich, "Conflict of Laws Since the Restatement," 23 *A.B.A.J.* 119 (1937); 21 *CORN. L.Q.* 458 (1936).

¹⁸ *In re Cowham's Estate*, 220 Mich. 560, 190 N.W. 680 (1922); *Nash v. Benari*, 117 Me. 491, 105 A. 107 (1918).

¹⁹ Nor would he be reached in his personal capacity, inasmuch as he has no basic relationship with the forum upon which to base jurisdiction.

²⁰ 3 *BEALE, CONFLICT OF LAWS*, 3d ed., 1553 (1935).

police power seems unable to exist to this extent without overturning many established rules of the administration of estates and diminishing any concept of the sovereignty of states. Although a state may reach the motorist himself because of his liability-creating act, it has never been considered that a personal representative "steps into the shoes" of the decedent. The personal representative acquires no rights or duties from the decedent; all come from the appointment by the domiciliary state. He is in the nature of a trustee, taking nothing in his own right.²¹ Being separate from the deceased, he has no basic relationship with the forum upon which the forum can base jurisdiction. Even the police power of a state should not be able to create a basic relationship where none in fact exists. If the concept of sovereignty has any meaning, it must mean this much: A state has the power to limit the duties and rights of its own legal creations, and no other state can impose liabilities upon that creature when no connection between the latter state and the creature has ever existed, unless the creating state consents to the impositions. These considerations would seem to outweigh the arguments that fairness and expediency ought to permit an injured person to sue where the accident occurred.²² It is submitted that the principal case reached an improper result.

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²¹ This is a relatively modern concept. In the older law the executor, if not the administrator, took full title to the property and could thus be sued anywhere. Holmes, "Executors," 9 HARV. L. REV. 42 (1895); Judge Pound in *McMaster v. Gould*, note 8 *supra*.

²² This is not to suggest that it is undesirable to have the suit tried where the accident occurs. But the result ought to be achieved through reciprocal statutes or similar devices whereby the state of domicile consents to having the personal representatives appointed by it sued elsewhere.