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Conflict of Laws: Constitutionality of Substituted Service on Foreign Executors and Administrators under Non-resident Motorist Statutes

CONFLICT OF LAWS

CONSTITUTIONALITY OF SUBSTITUTED SERVICE ON FOREIGN EXECUTORS AND ADMINISTRATORS UNDER NON-RESIDENT MOTOR STATUTES

With the advent of interstate travel by automobile, legislative action regulating the use of the highways by non-resident motorists became necessary.[1] Due to the transitory presence of the out-of-state motorist following an accident, a resident plaintiff, in order to bring suit, was forced to transport witnesses and evidence into the domiciliary state of the non-resident. In many cases this either precluded recovery or, where the claim was small, made such action impractical. Early attempts to alleviate this situation culminated in the passage of the first modern non-resident motorist statute by Massachusetts in 1923.[2] Proceeding on the theory that by using the highways a non-resident impliedly consents to the appointment of a state official as his agent for service of process, the Act permitted an injured party to obtain jurisdiction over an out-of-state motorist in the courts of Massachusetts. The United States Supreme Court, recognizing the state interest in the enforcement of regulations reasonably calculated to promote care on the part of those who use its highways, upheld the constitutionality of this statute in *Hess v. Pawloski*.[3] Within a few years all of the states enacted similar legislation.[4]

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tions to mislead are immaterial and the error is prejudicial no matter how good the judge's intentions. State v. Nelson, 181 Mo. 346, 80 S.W. 947 (1904).

34. An Indiana statute, though it has apparently not been used in the problem of coercion, might be of some aid in solving the problem in criminal cases. "The court shall grant a new trial to the defendant for the following causes, or any of them: . . . Fifth: When the verdict has been found by means other than a fair expression of opinion on the part of all the jurors." IND. STAT. ANN. (Burns Repl. 1942) § 9-1903. This statute would certainly seem to outlaw coercive instructions and possibly ones stating erroneous methods of deliberation.

1. For example, in 1915, the state's power to require that non-resident motorists have a driver's license was upheld. Hendrick v. Maryland, 235 U.S. 610 (1915). Then, in 1916, a New Jersey law requiring that non-residents *appoint* a state officer as agent for service of process, prior to use of the state highways, was upheld as a valid exercise of the power of the state to regulate the use of its highways. Kane v. New Jersey, 242 U.S. 160 (1916).

2. GEN. LAWS OF MASS., c. 90 (1921), as amended by c. 431, § 2 (1923) (MASS. ANN. LAWS, c. 90, §§ 3-3B (1933)).

3. 274 U.S. 352 (1927).

4. The Indiana non-resident motorist statute, IND. STAT. ANN. § 47-1043 (Burns Supp. 1949) is typical and provides as follows: "The operation by a non-resident, or by his duly authorized agent, of a motor vehicle upon a public street or highway of this state

It was soon discovered, however, that existing statutes failed to provide relief where it was most sorely needed. The serious accident, where injury, property damage, and the resulting public interest is greatest, is most likely to result in the death of the non-resident motorist. As highway carnage multiplied, attempts to bring an action against the legal representative of a deceased non-resident were unsuccessful. The courts uniformly refused to extend the statutes to furnish a means of acquiring jurisdiction over a foreign executor or administrator.[5] Recent amendments to non-resident motorist statutes evince legislative attempts to solve this problem.[6]

The New York statute, as amended, provides for substituted service of process upon the legal representative of a deceased non-resident motorist.[7] In *Leighton v. Roper*[8] the plaintiff, a resident of New York, was injured when the automobile in which she was a passenger collided with an automobile operated by one Allen, a resident of Indiana. The accident occurred in New York and following Allen's death the plaintiff brought an action for negligence in a New York court against the Indiana administrator of Allen's estate. After service of process in accordance with the statute, defendant administrator appeared specially and moved to vacate the service and dismiss

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shall be deemed equivalent to an appointment of the Secretary of State, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of an accident or collision in which such a non-resident may be involved while so operating or permitting to be operated a motor vehicle on any such street or highway, . . ." For compilation of statutory citations see Knoop v. Anderson, 71 F. Supp. 832, 836 (N.D. Iowa 1947).

5. The most common theory used is based on the agency doctrine that the death of the non-resident motorist (principal) revokes the agency created by the statute. Buttson v. Arnold, 4 F.R.D. 492 (D.C. Pa. 1945); Brogan v. Macklin, 126 Conn. 92, 9 A.2d 499 (1939); Harris v. Owens, 142 Ohio St. 379, 52 N.E.2d 522 (1943); Young v. Potter Title & Trust Co., 114 N.J.L. 561, 178 Atl. 177 (1935); Dowling v. Winter, 208 N.C. 521, 181 S.E. 751 (1935).

The courts have also held that legislation of this nature is in derogation of the common law and will be strictly construed. Thus, in the absence of express statutory provision, the courts will not extend the statute to allow substituted service of process upon executors or administrators. Rogers v. Edwards, 164 Kan. 492, 190 P.2d 857 (1948); Riggs v. Schneider's Ex'r., 279 Ky. 361, 130 S.W.2d 816 (1939); Downing v. Schwenck, 138 Neb. 395, 293 N.W. 278 (1940); State *ex rel.* Ledin, Adm'x. v. Davison, 216 Wis. 216, 256 N.W. 718 (1934).

A few courts have refused to extend these statutes on the theory that a foreign representative is immune from suit within the state in the absence of a res of the estate within the jurisdiction of the court. Balter v. Webner, 175 Misc. 184, 23 N.Y.S.2d 918 (1941); Vecchione v. Palmer, 249 App. Div. 661, 291 N.Y.S. 537 (1936).

6. Prior to 1949, six states had amended their non-resident motor statutes to include executors and administrators of deceased non-resident motorists. ARK. STAT. § 1375 (Pope Supp. 1944); IOWA CODE ANN. §§ 321.498, 321.499 (1946); MD. ANN. CODE, Art. 66½ § 106 (e) (Flack Supp. 1947); MICH. STAT. ANN. § 9.2103 (Henderson Supp. 1949); N. Y. VEHICLE AND TRAFFIC LAW § 52; WIS. STAT. § 85.05 (3) (1947).

In 1949, three additional states amended their statutes. NEB. ACTS 1949, c. 54, § 1; S. C. ACTS 1949, No. 223, § 22; TENN. CODE ANN. § 8671 (Williams Supp. 1949).

7. N. Y. VEHICLE AND TRAFFIC LAW § 52.

8. 300 N.Y. 434, 91 N.E.2d 876 (1950).

the complaint. The New York Court of Appeals affirmed the decision of the lower court upholding the substituted service, and sustained the statute as a valid exercise of the state's police power.

The validity of legislative provisions similar to those in the *Roper* case has been tested in two previous cases. In 1943, the Arkansas Supreme Court sustained a similar amendment and allowed recovery against the administrator of a deceased resident of Ohio.[9] In 1947, however, a federal district court declared an Iowa statute, permitting substituted service of process on a foreign administrator, invalid.[10] In reaching this conclusion the court blandly discussed, as admitting of no exception, the general rule that the jurisdiction of the courts of each state is limited to the property of the decedent located within the state.[11] On this premise the court held that in the absence of such property the Iowa legislature could not grant jurisdiction over foreign executors or administrators to the Iowa courts.[12]

However, legal concepts are not susceptible to application with mathematical certainty. And like all general rules this jurisdictional concept has been excepted to in those instances where the state interest is sufficient to so warrant.[13] As the number of accidents involving out-of-state motorists increases, the state interest in overcoming those burdens which frequently preclude recovery by its citizens becomes of primary importance. It was the recognition of these obstacles to recovery and the concomitant state interest in supervising the use of its highways that prompted the Supreme Court to uphold the non-resident motorist statute in *Hess v. Pawloski.* By permitting an action against the legal representative of a deceased non-resident, the recent amendments to these statutes constitute a legislative response to this perplexing problem.[14] Since actions against residents survive death in most states, the fact that the deceased is a non-resident should not, without more, alter the result.

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9. The court held that the police power of the state is not limited by arbitrary rules of agency and, therefore, the legislature could validly create an irrevocable agency binding upon the administrator of a non-resident motorist. Oviatt v. Garretson, 205 Ark. 792, 171 S.W.2d 287 (1943).

10. Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947), 15 U. OF CHI. L. REV. 451 (1948), 61 HARV. L. REV. 355 (1948), 57 YALE L. J. 647 (1948).

11. Pennoyer v. Neff, 95 U. S. 714 (1877); McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556 (1925).

12. The court then reasoned that since the Iowa courts were without jurisdiction a decision by them need not be given full faith and credit by the courts of the state where the deceased non-resident resided. Knoop v. Anderson, 71 F. Supp. 832, 852 (N.D. Iowa 1947).

13. An exception to the prevailing rule that foreign administrators have no standing in courts of another state may be made as a matter of comity in the interest of justice. Cooper v. American Airlines, 57 F. Supp. 329, 330 (S.D. N.Y. 1944); Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E.2d 852 (1937); Helme v. Buckelew, 299 N.Y. 363, 128 N.E. 216 (1920); See Note, 27 L.R.A. (n.s.) 101, 112 (1895).

14. See note 5 *supra.*

These statutes do not constitute a naked assumption of control over matters which are in the exclusive jurisdiction of another state, for unquestionably an appropriate action could be brought in the state where the decedent resided. They simply overcome those burdens which obstruct recovery in the domiciliary state of the non-resident motorist. In the principal case the New York Court of Appeals recognizes the general rule applicable to actions brought against foreign representatives, but points out that in this narrow area the state interest is of sufficient importance to warrent an exception. Thus, if these statutes constitute a valid exercise of the state's police power, jurisdiction is proper and the courts of the state of the deceased motorist should give full faith and credit to the judgment rendered.[15] When considered with the trend in analogous fields,[16] it seems highly probable that the courts will accept this extension of the non-resident motorist statutes.[17]

The Indiana survival statute, which limits the permissible amount of recovery against a decedent's estate to $1,000 and incidental expenses, presents an additional problem.[18] In deciding whether or not an action for injury or wrongful death survives the death of the tortfeasor, the courts have held that the survival statutes do not create an action; they merely allow an action which

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15. Morris v. Jones, 329 U.S. 545 (1947); Rouche v. McDonald, 275 U.S. 449 (1928); Hess v. Pawloski, 274 U.S. 352 (1927); Fauntleroy v. Lum, 210 U.S. 230 (1908).

16. Despite the general rule that no recognition need be given a judgment entered in a sister state against a corporation after its dissolution, the Supreme Court has held that a Missouri judgment against an Illinois receiver was conclusive as to the nature and amount of the claim. Morris v. Jones, *supra* note 15. For discussion of the analogy between this trend and the non-resident motorist statutes, see 2 ARK. L. REV. 457 (1948); 15 U. OF CHI. L. REV. 453 (1948).

17. In view of the theories used in refusing to extend existing non-resident motorist statutes, note 5 *supra,* careful consideration ought to be given to the wording when drafting an amendment to present statutes. Such an amendment might be patterned after the New York statute which seems to effectively defeat attack both upon the theories of strict construction and agency: "A non-resident operator or owner of a motor vehicle or motorcycle which is involved in an accident or collision in this state shall be deemed to have consented that the appointment of the Secretary of State as his true and lawful attorney for the receipt of service of process pursuant to the provisions of this section *shall be irrevocable and binding upon his executor or administrator.* Where the non-resident motorist has died prior to commencement of an action brought pursuant to this section, *service of process shall be made on the executor or administrator* of such non-resident motorist in the same manner and on the same notice *as is provided in the case of a non-resident motorist.* Where an action has been duly commenced under the provisions of this section by service upon a defendant who dies thereafter, the court must allow the action to be continued against his executor or administrator upon motion with such notice as the court deems proper." N. Y. VEHICLE AND TRAFFIC LAW § 52.

18. IND. STAT. ANN. § 2-403 (Burns Repl. 1946). This statute permits an action to survive the death of either party, but limits the amount of recovery for injury or wrongful death as follows: ". . . In any action for personal injuries or wrongful death surviving because of this section, the damages, if any recovered, shall not exceed the reasonable medical, hospital or funeral expenses incurred, and a sum not to exceed one thousand dollars for any and all other loss, if sustained." Only one other state limits the amount of recovery under its survival statute. ORE. COMP. LAWS ANN. § 8-904 (1940).

has accrued to survive.[19] As a result, survival statutes have been considered as part of the substantive law and whether a claim for damages survives the death of the tortfeasor is determined by the law of the place of the wrong.[20]

In view of this, the basic problem is to determine what effect the New York court should give to the Indiana survival statute[21] when determining the measure of damages in an action which accrued in New York. Is the law of the place of the wrong applicable, or must the court restrict recovery in conformance with the law of the state in which the decedent's estate is located? In determining this issue it is necessary to look to the state interest as reflected by the statutory purpose.[22] The primary purpose of survival statutes is to allow personal actions, which at common law abated upon the death of either party, to survive. It might be argued that since Indiana has expressly limited the amount which may be recovered against an Indiana estate, a recovery in excess thereof would be against the public policy of Indiana even though the action accrued in New York.[23] This argument is predicated upon the theory that the objective of this statute is to prevent dissolution of a decedent's estate. However, this restriction on recovery is apparently founded on nothing more than an illogical reluctance to overcome the archaic reasoning of the common law.[24] And in view of the fact that exemption statutes may be utilized to protect the surviving family of a decedent,[25] the state's interest would seem to be insufficient to preclude the New York court from awarding damages in excess of the statutory amount allowed in Indiana.[26] Thus, the

19. Ormsby v. Chase, 290 U.S. 387 (1933); *Ex parte* Schrieber, 110 U.S. 76 (1884); Herzig v. Swift & Co., 146 F.2d 444 (2d Cir. 1945); Chubbock v. Holloway, 182 Minn. 225, 234 N.W. 314 (1931); Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1934); RESTATEMENT, CONFLICT OF LAWS § 390 (1934).

When the question arises as to what law shall govern the right of action for injury or wrongful death, the courts in most situations have adopted the rule that the action accrues to the injured party at the time of injury and the law of the place of wrong determines the right of action for death or injury. Coffman v. Wood, 5 F. Supp. 906 (N.D. Ill. 1934); Wabash R. R. v. Hassett, Adm'x., 170 Ind. 370, 83 N.E. 705 (1907); Clark v. Southern Ry., 69 Ind. App. 697, 119 N.E. 539 (1918); Gray v. Gray, 87 N. H. 82, 174 Atl. 508 (1934); RESTATEMENT, CONFLICT OF LAWS § 391 (1934).

20. Ormsby v. Chase, 290 U.S. 387 (1933); *Ex parte* Schrieber, 110 U.S. 76 (1884); Herzig v. Swift & Co., 146 F.2d 444 (2d Cir. 1945); Chubbock v. Holloway, 182 Minn. 225, 234 N.W. 314 (1931); Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1934); RESTATEMENT, CONFLICT OF LAWS § 390 (1934).

21. See note 18 *supra*.

22. Industrial Comm'n. of Wisconsin v. McCartin, 330 U.S. 622 (1947); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1934); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

23. London Guarantee & Accident Co. v. Balgowan, S. S. Co., 161 Md. 145, 155 Atl. 334 (1931); Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934); Hughes v. Fetter, 257 Wis. 35, 42 N.W.2d 452 (1950).

24. For a discussion of the historical development of the Indiana survival statute see Stuckey v. Stanley, 97 Ind. App. 345, 181 N.E. 382 (1933).

25. Examples of such statutory provisions are the widow's rights provisions in IND. STAT. ANN. § 6-711 (Burns Supp. 1949) and IND. STAT. ANN. § 6-1122 (Burns 1933).

26. See note 19 *supra*.

general rule as to measure of damages should be followed and the law of the state in which the action accrued applied.[27]

Such a result would have the effect of permitting recovery against the Indiana resident in the New York court, unfettered by the limitation in the Indiana survival statute, while the statute continues to limit recovery in an action which accrues in Indiana. Since no valid purpose exists for imposing this limitation,[28] the Indiana legislature should remove it and permit unlimited recovery against a decedent's estate.[29]