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The Validity of the 1945 Amendment to Section 52 of the New York Vehicle and Traffic Law

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Conclusion

If the corporation could not change its structure by amending its certificate, it could resort only to dissolution. Today, as we have seen, flexibility in the corporation's capital structure has replaced the static vested rights concept of the past. There may be, and have been, abuses by the majority toward the few; but, to a large extent, they have been minimized by giving the dissenter: (1) the right of appraisal, and (2) access to courts of equity in certain instances. Still, the minority stockholder may not be amply protected. In the *McNulty* case the court recognized such difficulty, but said that: "The problem was one of balancing intertwining and conflicting interests and of determining what was conducive to the good of society." [63] This the legislature has determined.

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THE VALIDITY OF THE 1945 AMENDMENT TO SECTION 52 OF THE NEW YORK VEHICLE AND TRAFFIC LAW

Although the invention of the automobile has been instrumental in bringing about the high standard of living that exists in America today, nevertheless, it has created serious problems that counteract this good. Although the gravest of these are in the social field, perplexing problems have arisen in the legal field as well. The everyday use of the automobile, in which the crossing of state lines is continuous and commonplace, has made our concept of statewide jurisdiction cumbersome, if not impossible. The prime instance of this is the difficulty in acquiring jurisdiction over a non-resident motorist, the tort-feasor in an accident, so that he can be forced to account for the damage done to the person and property of a resident.

Originally the only manner of obtaining jurisdiction over the non-resident was through service of a summons on him while he was temporarily in the state. This was inadequate, though, for the non-resident left the state as soon after the accident as he could; and he made sure that he did not return while there was any possibility of action being brought against him. Of course the injured party could always bring the action in the state of the non-resident; but this was

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[63] McNulty v. W. & J. Sloane, 184 Misc. 835, 844, 54 N. Y. S. 2d 253, 261 (Sup. Ct. 1945).

costly, time-consuming, and, at times, impossible since necessary witnesses could not be forced to journey to other states to give testimony. Consequently New York [1] and all the other states [2] enacted legislation that enabled the injured party to obtain jurisdiction over the non-resident. The New York statute provides that the operation of a motor vehicle in this state by a non-resident motorist or by another with the consent of a non-resident owner shall be equivalent to the appointment of the Secretary of State to be his true and lawful agent upon whom may be served the summons in any action against the non-resident growing out of any accident or collision in which he may have become involved while operating the motor vehicle in this state. Such service shall be of the same legal force and validity as if served on him personally. The statute also provides for mailing a copy of the summons to the non-resident by registered mail thus affording him notice.[3] The validity of this type of statute has been upheld by the United States Supreme Court as a proper exercise of the state's police power which does not violate due process of law.[4] To a great extent these statutes solved the indicated problem; however, no provisions were made for commencing or continuing an action against the estate of the non-resident in the event that he died before an action had been commenced or after it had been commenced but prior to judgment.

To remedy this situation Arkansas,[5] Iowa,[6] Maryland,[7] Michigan,[8] New York [9] and Wisconsin [10] have extended their statutes to include similar provisions for commencing or continuing an *in personam* action against the executor or administrator of a deceased

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[1] N. Y. VEHICLE AND TRAFFIC LAW § 52.

[2] For a collection of the pertinent statutes, *see* Knoop v. Anderson, 71 F. Supp. 832 (N. D. Iowa 1947).

[3] The statutes in the other jurisdictions are substantially similar, varying only in details.

[4] Hess v. Pawloski, 274 U. S. 352 (1927).

[5] ARK. STAT. § 1375 (Pope, Supp. 1944).

[6] IOWA CODE §§ 5038.01, 5038.02 (Supp. 1943).

[7] MD. ANN. CODE, Art. 66½, § 106-(e) (Flack, Supp. 1943).

[8] MICH. STAT. ANN. § 9.1701 (Henderson, Supp. 1944).

[9] N. Y. VEHICLE AND TRAFFIC LAW § 52: ". . . A nonresident operator or owner of a motor vehicle or motor cycle 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 nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as is provided in the case of a nonresident 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."

[10] WIS. STAT. § 8505-(3) (1943).

non-resident motorist. There are grave doubts as to the efficacy of these provisions,[11] for foreign executors and administrators have long been held immune from suit outside the state of their appointment when an *in personam* judgment was sought.[12]

The immunity of an executor or administrator from suit *in personam* outside of the state of his appointment, flows from the nature of his position and the relationship of this position to his appointing state. As a representative he is a trustee of the property of the deceased [13] and, as such, an officer of the court that appoints him.[14] The property he has in his possession is constructively in the possession of the court.[15] Interference with him by another state, whether through legislative or judicial action, is, therefore, interference with the sovereignty of the appointing state. This is in harmony with the Restatement view [16] and is borne out by a review of attempts

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[11] 10 N. Y. JUDICIAL COUNCIL REPORT 239, 253, 1944 LEG. DOC. No. 15. "The hardship of the present rule . . . is believed to justify the proposed amendment even though its validity is not unquestioned." *Accord:* "The weight of authority would seem to indicate that notions of jurisdiction over property and control of the res in actions in rem serve to invalidate extensions of non-resident motorist acts to executors and administrators." 15 U. OF CHI. L. REV. 451, 455 (1948).

"Until the United States Supreme Court passes on this point of constitutionality any attempt to amend section 52 of the Vehicle and Traffic Law to make service on the Secretary of State binding on the personal representative of the foreign tort feasor will be surrounded with danger." Note, 21 CORN. L. Q. 458, 462 (1936).

"It is doubtful, however, that legislative action by the forum could now change the prevailing general rule that an administrator cannot be sued in a foreign jurisdiction." 61 HARV. L. REV. 355, 357 (1948).

Contra: "The argument that a suit against a foreign administrator is an interference with the domiciliary court . . . furnishes no justification for a contrary result since the court does not attempt to enforce the rights of the injured party by dealing directly with the assets of the estate, but merely establishes the existence of such rights." 36 COL. L. REV. 681, 683 (1936).

"There is no constitutional objection to reviving an action against the foreign executor of a nonresident who was personally subject to the jurisdiction of the court." Culp, *Recent Developments in Actions Against Nonresident Motorists,* 37 MICH. L. REV. 58, 73 (1938).

"Restriction of an administrator to the jurisdiction of his appointment no longer appears necessary for the orderly and efficient administration of decedent's estates. Particularly is this true in the narrow terms of the instant case where the even-handed enforcement of nonresident motorist statutes would seem of greater moment than the outworn protective policy which underlies common law territorial limitations of the administrator." Note, 57 YALE L. J. 647, 653, 654 (1948).

[12] GOODRICH, CONFLICT OF LAWS 488 (2d ed. 1938).

[13] Michoud v. Girod, 4 How. 503, 553 (U. S. 1845).

[14] Byers v. McAuley, 149 U. S. 608 (1893).

[15] *Ibid.*

[16] RESTATEMENT, CONFLICT OF LAWS § 512 (1934): "No action can be maintained against any administrator outside the state of his appointment upon a claim against the estate of the decedent. . . . The administrator holds the assets of the decedent which come into his possession subject to the directions of the court which appointed him, and is responsible only to that court. For

in the past to bring action against foreign executors and administrators.

In a leading case personal service was obtained upon the foreign representative while he was in the District of Columbia where an action was brought. The Supreme Court held that this was not sufficient to give the court jurisdiction.[17] At times a general appearance was entered by the foreign representative. This was relied upon to show waiver of the jurisdictional requirement. It was decided that the foreign representative could not waive the jurisdictional requirement whether an action had already been commenced against the decedent during his lifetime [18] or not.[19] In another leading Supreme Court case the non-resident had expressly consented to the continuance of the action against his representative upon his death. This, too, was held to be insufficient to confer jurisdiction over the representative.[20]

At times these attempts to circumvent the immunity took the form of legislation. In 1911 the New York legislature enacted Section 1836-A of the Code of Civil Procedure [21] which permitted actions to be brought by or against foreign representatives. The efficacy of this statute was considered by the Court of Appeals. Judge Cardozo, writing for a unanimous court, stated by way of dicta, "If the purpose of the statute was to permit the recovery of a judgment which irrespective of the consent of the jurisdiction of the domicile or of the presence of assets within this jurisdiction, would bind foreign administrators and executors everywhere as a judgment in personam, the statute registers a futile effort." [22] In 1925 the legislature amended Section 160 of the Decedent Estate Law [23] so as to permit the continuance of actions against foreign representatives. The constitutionality of this, too, was passed on by the Court of Appeals. Judge Pound, speaking for the court, said, "The reasoning in *Helme v. Buckelew* . . . clearly indicates that the law is unconstitutional as to foreign administrators. Following the leading case, consistency requires us to say that the statute registers a futile effort to bind the foreign administrators by a judgment *in personam* and as to him is unconstitutional in its inception. The foreign administrator as the official of another sovereignty exists only by virtue of the statute of

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a court in another state to order payment from assets of the decedent in the hands of the foreign administrator would be an improper interference with the administration by the court of the first state." (The term administrator includes executors unless specifically stated otherwise. *Ibid.* at 560.)

[17] Vaughan v. Northrup, 15 Pet. 1 (U. S. 1841).

[18] Judy v. Kelley, 11 Ill. 211 (1849); RESTATEMENT, CONFLICT OF LAWS § 513 (1934).

[19] See Note, 27 L. R. A. 101 (1895).

[20] Brown v. Fletcher's Estate, 210 U. S. 82 (1908).

[21] Laws of N. Y. 1911, c. 631.

[22] Helme v. Buckelew, 229 N. Y. 363, 368, 128 N. E. 216, 217 (1920).

[23] Laws of N. Y. 1925, c. 253.

another State and has no legal existence in this State. . . . Even as to foreign executors, there must be a domicile or possession which gives to the *res* to be administered a situs in New York. . . . It, therefore, follows that, on the authority of recent and persuasive dicta in *Helme v. Buckelew* (*supra*), as herein enlarged, the constitutional requirement of due process of law precludes the Legislature from providing generally for continuing actions for judgments *in personam* against the foreign executors or administrators of deceased defendants." [24] In 1935 the legislature passed Section 118 of the Decedent Estate Law [25] which permits commencing or continuing all actions for injury to person or property against an executor or administrator. Shortly thereafter an attempt was made by an injured party to combine this section with Section 52 of the Vehicle and Traffic Law [26] and thus to commence an action against a foreign executor. It was the opinion of the court that Section 52 should be strictly construed; thus construed, it did not contemplate such an action, and the court stated, "Chapter 795 of the Laws of 1935 (section 1), which adds section 118 to the Decedent Estate Law, is not efficient legally to enlarge the scope of Vehicle and Traffic Law § 52 so as to permit the questioned service of process. *Indeed, even if section 52 were to be amended in terms to permit such service upon a foreign executor, it would be futile in that respect, for it would assume to subject such an executor to a suit in personam in our courts.*" [27] A few years later a similar attempt, relying upon the same statutes, was made to continue an action against a foreign executor. The court held, "It is the well settled law of this state that foreign executors, executrices, or administrators are not subject to suit in the courts of this state." [28]

Other states have had similar statutes enacted. The history there is the same as it is in New York, for the courts have uniformly held that an *in personam* judgment is not procurable against a foreign executor or administrator.[29]

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[24] McMaster v. Gould, 240 N. Y. 379, 385, 386, 388, 148 N. E. 556, 558, 559 (1925).

[25] Laws of N. Y. 1935, c. 795, § 1.

[26] See note 1 *supra* together with text to which it applies.

[27] Vecchione v. Palmer, 249 App. Div. 661, 291 N. Y. Supp. 537, 539 (2d Dep't 1936). (Italics ours.)

[28] Balter v. Webner, 175 Misc. 184, 185, 23 N. Y. S. 2d 918, 919 (City Ct. 1940).

[29] See Notes, 27 L. R. A. 101 (1895); 40 A. L. R. 796 (1926); 77 A. L. R. 251 (1932); 82 A. L. R. 768 (1933); 96 A. L. R 594 (1935); 125 A. L. R. 457 (1940); 138 A. L. R. 1464 (1942); 34 C. J. S., Executors and Administrators § 1013; RESTATEMENT, CONFLICT OF LAWS § 514 (1934): "A judgment against a foreign administrator in his representative capacity under a statute allowing a foreign administrator to be sued does not create an obligation which can be proved in any other state as a claim against the estate of the decedent. . . . To allow the judgment rendered under a statute such as that described in this Section to be proved against the estate elsewhere would

The foregoing would seem to discourage further attempts to acquire jurisdiction over foreign representatives. Yet, as indicated above, six states have enacted legislation that would permit service of process on the foreign executor or administrator of a non-resident motorist. In three of these states the validity of this type of statute has been tested. The Arkansas statute was upheld by the highest court of that state solely on the basis of police power.[30] The New York statute was upheld by a lower court.[31] This court relied upon the consent to service through the use of the highways, waiver of any constitutional immunity through use of the same, and the fact that the immunity of a foreign representative was a matter of comity that the state in which the action was being brought could legislate away. The Iowa statute was considered by a federal district court in an excellent, complete, and well-reasoned opinion which held the statute invalid as a violation of due process of law.[32] In considering the Arkansas case and the reasoning therein involved Judge Graven commented, "It would seem that a state could not under the exercise of police power project itself into another state and assume jurisdiction over matters which are in the jurisdiction of such other state. An attempt by a state to prescribe as to the duties and liabilities of an executor or administrator appointed under the laws of another state is an attempt to prescribe as to matters which are within the exclusive jurisdiction of the appointing state." [33]

It appears that the conclusion of the federal district court is sound; in fact, it is the only possible conclusion that can be reached on the basis of past decisions. The statute can not be validated on the basis of police power. It can not be confirmed by waiver or consent. It can not be authenticated by a statute passed in a state other than the appointing state as a matter of comity since *it is a matter of comity only as to the state of his appointment.* Herein, it is believed, lies the solution to the problem.

It is submitted that New York should insert a provision in its statute to the effect that if a New York resident is involved in a motor vehicle accident or collision in another state and dies before or after an action is commenced in that state, New York will waive the immunity of the executor or administrator of its resident provided that the other state has a similar statute waiving the immunity of an executor or administrator appointed in that state.[34] If the

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in effect allow the state where the judgment was rendered to control the disposition of the estate of the decedent in another state. This it cannot do."

[30] Oviatt v. Garretson, 205 Ark. 792, 171 S. W. 2d 287 (1943).

[31] Leighton v. Roper, — Misc. —, 87 N. Y. S. 2d 527 (Sup. Ct. 1948).

[32] Knoop v. Anderson, 71 F. Supp. 832 (D. C. Iowa 1947).

[33] *Id.* at 851.

[34] A somewhat analogous problem existed with respect to actions for the support of dependents, in those cases in which the delinquent party was outside the jurisdiction. In New York a recently enacted statute solved this problem by a provision for cooperation with those other states having a similar provision on

other states respond to such an enactment, and there is a strong likelihood that they will do so because of the acuteness of the problem, there can no longer be any objection that a state's sovereignty is being violated.

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DISABILITY BENEFIT LAW — DEVELOPMENT OF EMPLOYER'S LIABILITY FROM COMMON LAW, NEW YORK EMPLOYER'S LIABILITY ACT AND NEW YORK WORKMEN'S COMPENSATION ACT

The most recent achievement in the development of the New York Workmen's Compensation Act is the Disability Benefits Law, which provides for an insurance system permitting weekly payments to employees who are absent from work due to disability not arising out of their employment. Before venturing a detailed analysis of the Disability Benefits Law a brief review of the steps in the development of this phase of the law will be made so as to indicate the lines of demarcation between the common-law liability of the employer to the employee and the employee's rights under the presently existing statutes enacted for his benefit.

Common Law

At common law the employer's obligation to the employee was limited to the use of reasonable care in providing a safe place to work and safe equipment.[1] If these conditions were met, it was virtually impossible for the employee to recover damages for injuries sustained in the absence of active negligence on the part of the employer. But even where the employer failed to use reasonable care or was actively negligent, the "unholy trinity" [2] of defenses, *i.e.*, contributory negligence, assumption of risk and the fellow servant rule—were available to him. Where he failed to exercise reasonable care the defense of assumption of risk enabled him to escape liability in many cases for the employee not only assumed all of the risks inherent in the performance of his duties, but if he continued working with

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a reciprocity basis so that jurisdiction could be obtained over the delinquent. Laws of N. Y. 1949, c. 807, §§ 4, 5. For a discussion of this enactment, see Legis., 24 ST. JOHN'S L. REV. 162 (1949).

[1] Indermaur v. Dames, L. R. 1 C. P. 274 (1866); Dobbie v. Pacific Gas & Electric Co., 95 Cal. App. 781, 273 Pac. 630 (1928); Byrne v. Eastmans Co., 163 N. Y. 461, 57 N. E. 738 (1900); Toy v. United States Cartridge Co., 159 Mass. 313, 34 N. E. 461 (1893).

[2] PROSSER, TORTS 512 (1941).