Conflict of Laws -- Nonresident Motorists' Statute -- Applicability to Executor of Deceased Nonresident Motorist

F. T. Dupree Jr.
Edwin Marvin Perkins, who for the last two years has been Lecturer in Taxation in the Law School, has been awarded a graduate fellowship for the year 1936-1937 at the Harvard Law School.

James Harmon Chadbourn, who has been Assistant Professor in the Law School for the past four years, has been awarded a graduate fellowship next year at the Columbia Law School. Mr. Chadbourn's courses will be taught during his absence by Donald William Markham. Mr. Markham completed his work for the J. D. degree in January, after serving as Student Editor-in-Chief of the Law Review, and is now associated with the General Counsel to the United States Treasury in Washington. As faculty editor of the Law Review, Mr. Chadbourn has been succeeded by Frank William Hanft, Associate Professor of Law.

NOTES AND COMMENTS

Conflict of Laws—Nonresident Motorists' Statute—Applicability to Executor of Deceased Nonresident Motorist.

Plaintiff was injured in North Carolina through the alleged negligence of defendant's intestate with whom she was riding as a guest. All the parties were residents of New Jersey. In the suit brought in North Carolina service of process was had on defendant through the Commissioner of Revenue. A motion to quash the summons was allowed. Held, judgment affirmed. Since the statute makes no provision for service on a deceased nonresident motorist's personal representative and since the agency created by the statute is not one coupled with an interest so as to make it irrevocable, there could be no valid service under the statute in the present case.

3 N. C. CODE ANN. (Michie, 1935) §491 (a) provides in substance that the acceptance by a nonresident of the rights and privileges conferred by the laws permitting operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the highways of this state, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Revenue to be his attorney upon whom may be served process in any action against him growing out of any accident in which such nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on any public highway of this state. The statute has been held constitutional. Ashley v. Brown, 198 N. C. 369, 151 S. E. 725 (1930); cf. Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632, 71 L. ed. 1091 (1927). The statute contains a provision for mailing a copy of the summons to the defendant by registered mail as required in Wuchter v. Pizzutti, 276 U. S. 13, 48 Sup. Ct. 259, 72 L. ed. 446 (1928).

Dowling v. Winters, 208 N. C. 521, 181 S. E. 751 (1935); see Note (1936) 36 CoL. L. Rev. 681. No mention is made of the fact that the plaintiff in this case is also a nonresident. It is uniformly held, however, that nonresident plaintiffs may avail themselves of the statute. Fine v. Wincke, 117 Conn. 683, 169 Atl. 58 (1933); Sobeck v. Koellmer, 240 App. Div. 736, 265 N. Y. Supp. 778 (1933); State ex rel. Rush v. Circuit Court, 209 Wis. 246, 244 N. W. 766 (1932). Three states have statutes which by their terms exclude suits by nonresidents. FLA.
Although thirty-five states have enacted statutes similar to the one involved in the present case, no statute has made provision for service on the personal representative of a deceased nonresident motorist. The question of whether or not the statutes can be construed to permit such service has arisen in only three jurisdictions, and in each instance the statute has been held not to permit service on a nonresident personal representative. The arguments advanced in support of this conclusion are: (1) that the statute contains no provision for such service, and since it is in derogation of the common law it must be strictly construed; (2) that the agency relationship created by the statute is terminated by the death of the principal; and (3) that in the absence of an enabling statutory provision a foreign personal representative may not be sued outside the state in which he is appointed.

That the statute is in derogation of the common law and therefore must be strictly construed has been held in several cases. Thus it is said that in the absence of words showing an intention that the statute should apply to personal representatives, it should not be so construed. On the other hand, since there are statutes providing for the survival of actions generally, would it not be just as reasonable to assume that


An argument which has not been made in the cases is that in many instances it may be impossible to enforce the judgment obtained against the foreign personal representative against the estate of the deceased motorist at his domicile. Such action will often be necessary, for in most cases the nonresident will not have assets at the forum. It is generally held that a foreign judgment against a resident personal representative may not be sued on at his domicile. In re Cowham's Estate, 220 Mich. 560, 190 N. W. 680 (1922); 3 Beale, Conflict of Laws (1935) §514.1. For a collection of cases see Note (1923) 27 L. R. A. 101. This holding does not violate the full faith and credit clause. 3 Freeman, Judgments (5th ed. 1925) §1419. There is an indication that North Carolina would allow such a suit. Moore v. Smith, 116 N. C. 667, 21 S. E. 506 (1895). It was held in an early Pennsylvania case that judgments taken against a resident executor in a foreign state would be enforced by comity. Evans v. Tatem, 9 S. & R. 352 (Pa. 1823), but the effect of this ruling seems to have been nullified by a later case, Magraw v. Irwin, 87 Pa. 139 (1878). It has been suggested, however, that the possibility of an ineffective judgment is a matter of concern for the plaintiff rather than a defense for the defendant. Dewey v. Barnhouse, 75 Kan. 214, 88 Pac. 877 (1907).


State ex rel. Ledin v. Davison, 216 Wis. 216, 256 N. W. 718 (1934).

the legislature did not think it necessary to specifically mention personal representatives in the nonresident motorist statute. The argument that the agency relationship created by the statute ceases with the death of the principal is likewise faulty. It has been suggested that the true basis of jurisdiction in these cases is not the fictional contract of agency but the power of the state to regulate the use of the highways. But at any rate, may it not be argued that since the legislature created the agency, it must have intended to create one that would be most effective, and that therefore it intended it to be irrevocable?

Perhaps the best argument in favor of the court's construction of the statute is the fact that generally no suit may be brought against a foreign administrator or executor in the absence of an enabling statute, and there is some doubt as to the constitutionality of such enabling statutes. In North Carolina, however, while a nonresident administrator has no standing in the courts, a nonresident executor may sue or be sued when a copy of the will has been filed and he has received an appointment in this state. These two prerequisites are for the protection of local creditors, but when, as in the instant case, there are no local creditors or assets, it is believed that a compliance with them should not be necessary.

It would seem, therefore, that the objections raised by the court are more apparent than real and that the policy behind the statute is sufficient to warrant its being construed to apply to the personal representatives of nonresident motorists. As the law now stands the plaintiff may be without remedy in this state if the nonresident motorist is himself killed in the accident. Thus the more serious the accident, the less chance there is of the plaintiff's being able to use the statute. It is submitted, therefore, that we should enact an amendment to our statute to

6 The statute providing for service of process by publication does not refer to service on nonresident executors and administrators. N. C. Code Ann. (Michie, 1935) §474. Yet it has never been suggested that they were exempt from the operation of the statute.
11 New York had such a statute, but it was held to give a nonresident representative only the right to sue and not to remove his immunity from suit. Helme v. Buckelew, 229 N. Y. 363, 128 N. E. 216 (1916). An amendment to the statute providing for substitution of the personal representative in case of death of a nonresident defendant was held unconstitutional. McMaster v. Gould, 240 N. Y. 379, 148 N. E. 556 (1925).
13 Id. §8, 34; First National Bank v. Pancake, 172 N. C. 513, 90 S. E. 516 (1916).
make it apply to executors and administrators of deceased nonresident motorists.\textsuperscript{14}

F. T. Dupree, Jr.

\textbf{Contracts—Effect of Duress Exerted Against Guilty Person and Against Third Parties.}

To complainant's action for separate maintenance and support of herself and minor child, defendant claimed that the marriage was void as being induced by duress. The facts indicate that prior to the marriage, defendant, about to leave the state, was arrested and jailed upon a charge of statutory rape, said arrest being caused by complainant's father. The warrant falsely stated that complainant was below the age of consent. To avoid prosecution, defendant married complainant, as a result of advice given to him by friends of complainant's father to the effect that the criminal prosecution would be "pushed to the fullest extent." The license was procured by complainant's and defendant's brother-in-law. There was no subsequent cohabitation. However, a child, of which the defendant was the admitted father, was born about a month after the marriage. Held for the plaintiff; the duress, if any, was insufficient to invalidate the marriage.\textsuperscript{3}

The degree of coercion requisite to constitute duress has undergone three stages of development: (1) The early common law required such undue pressure as would intimidate a courageous man.\textsuperscript{2} (2) A later group of cases used the test that the will of a man of ordinary firmness be overcome.\textsuperscript{3} (3) The modern trend, in words at least, takes the view that duress exists if the threats overcame the will of the particular promisor.\textsuperscript{4} By inference, the court in the principal case would apply the last named test.

\textsuperscript{14} Since no statute at present makes such provision, the question of its constitutionality has not come before the courts. It is believed, however, that there should be no constitutional difficulty. Most statutes provide for service on the nonresident owner though he was not operating the car at the time of the accident, and these provisions are held constitutional. It has been suggested that by analogy a provision for service on the personal representative would be constitutional. Legis. (1935) 20 Iowa L. Rev. 654, 664; cf. Note (1936) 36 Col. L. Rev. 681.

\textsuperscript{1} Zeigler v. Zeigler, 164 So. 768 (Miss. 1935).
\textsuperscript{2} 1 BL. COMM. 131; 3 WILLISTON, CONTRACTS (1st ed. 1920) §1605.
\textsuperscript{3} Fonville v. State Bank, 161 Ark. 93, 255 S. W. 561 (1923); Flannagan v. Minneapolis, 36 Minn. 406, 31 N. W. 359 (1887); Edwards v. Bowden, 107 N. C. 58, 12 S. E. 58 (1890) (adopts the ordinary firmness test, saying further, that a mere threat of unlawful imprisonment is not enough to constitute duress); Ford v. Englemen, 118 Va. 89, 86 S. E. 852 (1915); cf. Bond State Bank v. Vaughan, 241 Ky. 524, 44 S. W. (2d) 527 (1931); see United States v. Huckabee, 83 U. S. 414, 21 L. ed. 457 (1873); 1 PAGE, CONTRACTS (2nd ed. 1922) §482; 3 WILLISTON, loc. cit. supra note 2.
\textsuperscript{4} Guardian Trust Co. v. Meyer, 19 F. (2d) 186 (C. C. A. 8th, 1927); Williamson-Halzell-Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807 (1908); Riney v.