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Automobiles - Injuries from Operation or Use of Highway - Whether It Is Possible to Obtain Substituted Service upon the Personal Representative of a Deceased Non-Resident Automobile Owner under a Statute Providing for Such Service upon a Non-Resident Owner or Operator

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for denying rescission[34] or as subjecting the minor to a countersuit for damages arising from the deceit.[35]

After all factors are considered, therefore, it would seem to be the better view that a surgeon should be allowed to introduce evidence as to an actual consent by a minor, particularly one approaching maturity and the age of discretion, if not as an absolute defense then at least for the purpose of providing a mitigating factor to be considered by the jury when awarding damages. To do otherwise would be to allow a minor to make a profit from participating in the very tort itself.

J. E. EDMONDSON

AUTOMOBILES—INJURIES FROM OPERATION OR USE OF HIGHWAY—WHETHER IT IS POSSIBLE TO OBTAIN SUBSTITUTED SERVICE UPON THE PERSONAL REPRESENTATIVE OF A DECEASED NON-RESIDENT AUTOMOBILE OWNER UNDER A STATUTE PROVIDING FOR SUCH SERVICE UPON A NON-RESIDENT OWNER OR OPERATOR—The extent to which substituted service may be utilized in automobile accident cases was put in issue in the recent Ohio case of *In Re Wilcox' Estate*.[1] Therein, a resident of Colorado had been involved in an automobile accident in Ohio after which he returned home and died shortly thereafter. The present claimants sought an adjudication of this matter before an Ohio tribunal and, for this purpose, they attempted to obtain jurisdiction over the personal representative of the deceased under the so-called substituted service statute.[2] The Court of Appeals of Ohio, in reversing the trial court, held that a statute providing for substituted service upon a non-resident owner or operator of an automobile by serving process upon the Secretary of State did not authorize such service upon the personal representative of one who was subject to this statute.

Since the adoption in 1908 of the first statute subjecting non-resident

34 Young v. Daniel, 201 Ky. 65, 255 S. W. 854 (1923), noted in 72 U. of Pa. L. Rev. 450.

35 Berryman v. Highway Trailer Co., 307 Ill. App. 480, 30 N. E. (2d) 761 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 302.

1 —Ohio App.—, 137 N. E. (2d) 301 (1955).

2 Ohio Rev. Code, 1953, § 2703.20, which provides: "Any non-resident of this state, being the operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to non-resident operators and owners, of operating a motor vehicle or of having the same operated within this state . . . by such acceptance or licensure and by the operation of such motor vehicle within this state makes the secretary of state of the state of Ohio his agent for the service of process in any civil suit or proceeding instituted in the courts of this state against such operator or owner of such motor vehicle, arising out of. any accident or collision occurring within this state in which such motor vehicle is involved."

motorists to the jursidiction of the state whose highways they use,[3] all the rest of the American states, as well as the District of Columbia, have enacted such statutes.[4] Such statutes were at first held unconstitutional,[5] but since the decision in the case of *Hess* v. *Pawloski*,[6] they have consistently been sustained.

This determination, plus others fortifying its position, led to the cases, such as the instant case, where substituted service was attempted upon the personal representative of a non-resident motorist.[7] In construing the statute here involved, the court took the position that an agency was created with the Secretary of State as agent, and the non-resident motorist as principal. Applying a well recognized principle of law, the court decided that this agency was revoked by the death of the principal. Once holding that the Secretary of State is no longer an agent, it then appears that there is no one within the jurisdiction of the Ohio courts who is amenable to service of process in this action. Other courts, in construing similar statutes, have taken the view that they must be strictly construed and, therefore, have not permitted such service upon the personal representative of the deceased non-resident motorist. No matter which view was taken, the courts have unanimously held that such service was not proper. Therefore, it is easily seen that the death of a non-resident motorist defeated the purpose of these statutes in that residents of the state in which the accident occurred were forced to go to other states to seek redress for their injuries. To remedy this defect several states have amended such laws by binding the deceased motorist's personal representative to service of process in the same manner as the motorist could have been served had he survived or by providing for the survival of a pending action *in personam* against said foreign personal representative.[8]

[3] New Jersey Laws 1908, Ch. 304, p. 613.

[4] A collection of these statutes appears in Knoop v. Anderson, 71 F. Supp. 832 (1947), and also in 27 CHICAGO-KENT LAW REVIEW 231.

[5] Hendrich v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385 (1915); Shusareba v. Ames. 255 N. Y. 490, 175 N. E. 187 (1931).

[6] 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

[7] Brown v. Hughes, 136 F. Supp. 55 (1955); Fazio v. Amer. Auto Ins. Co., 136 F. Supp. 184 (1955); Hendrix v. Jenkins, 120 Supp. 879 (1954); Warner v. Maddox, 68 F. Supp. 27 (1947); Buttson v. Arnold, 4 F.R.D. 492 (1945); Brogan v. Maclin, 126 Conn. 92, 9 A. (2d) 499 (1939); 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); Young v. Potter Title & Trust Co. 115 N. J. L. 518, 181 A. 44 (1935); Lepre v. Real Estate-Land Title Trust Co., 11 N. J. Misc. 887, 168 A. 858 (1933); Vecchione v. Palmer, 249 App. Div. 661, 291 N. Y. S. 537 (1936); Dowling v. Winters, 208 N. C. 521, 181 S. E. 751 (1935); Harris v. Owens, 142 Ohio St. 379, 52 N. E. (2d) 522 (1944); Donnelly v. Carpenter, 55 Ohio App. 463, 9 N. E. (2d) 888 (1936); Quinn v. Revoir, 3 D. & C. (2d) 682 (1955); McElroy v. George, 76 D. & C. 231 (1951); State ex rel. Ledin v. Davidson, 216 Wis. 216, 256 N. W. 718 (1934), 96 A. L. R. 589.

[8] For example, Pope's Ark. Stat. 1944, Supp.. § 1375; Fla. Stat. Ann., 1949 Supp. Ch. 47, § 47.29(2); Iowa Code 1946, Vol. 1, Ch. 321, §§ 321.498-9; Md. Ann. Code (Flack),

A possible solution to the problem in the instant case was given in the case of *Furst* v. *Brady*,[9] where the deceased non-resident motorist carried an insurance policy which protected him from loss due to his automobile accident. The court there treated the policy as an asset in the state where the suit was brought and allowed recovery against an ancillary administrator. In the case at hand, the deceased had a similar policy, and the claimants attempted to have an ancillary administrator appointed for purposes of reaching this policy to satisfy their claims in their home state. The court did not allow this appointment, and refused to treat the policy as an asset in the state where suit was brought, thereby turning away from the above suggested solution.

The increasing use of automobiles and accidents connected therewith seems to point to the necessity of a new concept in the law, especially since the more violent the accident the greater the chance of death for those involved. Therefore, the frequency of these deaths will give rise to more and more actions similar to the instant case. The legislature of Ohio, appreciating these facts and recognizing the need for conferring such jurisdiction, has followed the modern trend and passed an amendment to its so-called substituted service statute and personal representatives of deceased non-resident motorists may now be served in that manner.[10] The most salient aspect of this case lies in the fact that the legislature recognized the inadequacy in its state law and immediately stepped into the breach and remedied the situation.

N. A. ZIMMERMAN

CORPORATIONS—ACTIONS BETWEEN SHAREHOLDERS AND OFFICERS OR AGENTS—WHETHER PERSONAL RECOVERY BY FORMER SHAREHOLDER IS ALLOWABLE IN ACTIONS AGAINST OFFICER FOR MISAPPROPRIATION OF CORPORATE ASSETS—The United States Court of Appeals for the Ninth Circuit was recently faced with the problem of whether a former shareholder might be allowed an individual recovery against an officer of the corporation in the case of *Watson* v. *Button*.[1] Therein, the former owner of one-half of the corporate stock brought an action against the former gen-

1939, Art. 56, § 186.189; Mich. Stat. Ann., 1949 Cum. Supp., § 9.2103; Neb. Rev. Stat. 1943, Vol. 2, Ch. 25, Art. 5, § 25-530 as amended in 1949; Thompson's Laws N. Y., 1945 Supp., Vehicle and Traffic Law, § 52, p. 725; Wis. Stats. 1949, Ch. 85 § 85.05(3). The constitutionality of these statutes has been upheld in such cases as: Plopa v. DuPre, 327 Mich. 606, 42 N. W. (2d) 777 (1950); Leighton v. Roper, 300 N. Y. 434, 91 N. E. (2d) 876 (1950).

9 375 Ill. 425, 31 N. E. (2d) 606 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 293.

10 Legislative Acts and Joint Resolutions of the State of Ohio, 1955-56, p. 49.

1 235 F. (2d) 235 (1956).