

SUBSTITUTION OF FOREIGN EXECUTORS:
THE NEED FOR LEGISLATION

State ex rel. Mercantile Nat'l Bank v. Rooney, 402 S.W.2d 354 (Mo. 1966)

The problem raised here is whether a plaintiff in a Missouri court, suing a nonresident defendant, may substitute the defendant's nonresident executor upon the death of the nonresident. Charles F. Curry & Company, a Missouri corporation, had purchased an airplane from Wyatt Hedrick, a Texas resident. The plane failed to meet the Federal Aviation Agency's standards, contrary to Hedrick's alleged representations, and was grounded. Hedrick made the necessary adjustments at his field in Texas, but refused to return the plane unless Curry & Company waived any claim for loss of the use while the plane was being repaired. The company declined to do so and demanded its aircraft; Hedrick again refused to return it.

Curry & Company, after attaching¹ Hedrick's Missouri property, commenced suit in a Missouri county court seeking ordinary and punitive damages for conversion of the airplane and damages for breach of warranty. Hedrick appeared, dissolved the attachment,² and successfully defended the suit. The effect of dissolution in Missouri is to change the nature of the action from *in rem* to *in personam*.³ The plaintiff appealed to the Missouri Supreme Court, which found on plaintiff's behalf that there had been a conversion. A new trial was ordered to determine damages.⁴ Before the new trial could commence, Hedrick died. Curry & Company moved to substitute the defendant's executor, a Dallas, Texas bank, as the "proper party."⁵ Appearing specially,⁶ the executor moved to quash process and to deny the substitution. When the trial judge notified the parties that he would overrule the motion and allow the substitution, the

1. *See* MO. REV. STAT. § 521.010 (1959).

2. MO. REV. STAT. § 521.480 (1959). In order to dissolve an attachment, unless there is a defect in the attachment papers, the owner must put up a bond for twice the value of the attached property.

3. MO. REV. STAT. § 521.490(2) (1959):

When any attachment shall be dissolved, all proceedings touching the property and effects attached, and the garnishee summoned, shall be vacated, and the suit shall proceed as if it had been commenced by summons only.

4. *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522 (Mo. 1964).

5. *See* note 39 *infra* and accompanying text.

6. In Missouri, a party may appear specially to question service of process and jurisdiction. "The special appearance of defendant did not confer on the court jurisdiction of his person, or waive jurisdiction defects." *Beckmann v. Beckmann*, 358 Mo. 1029, 1034, 218 S.W.2d 566, 570 (1949).

executor sought a writ of prohibition to prevent the trial judge from proceeding. The Missouri Supreme Court granted the writ on the ground, in part, that express statutory authority is necessary to substitute a foreign executor as party defendant,⁷ and for those cases in which the nonresident defendant dies no such authority exists in Missouri.

This Missouri decision is consistent with the long established rule that an administrator,⁸ in the absence of some ancillary proceeding, could neither sue nor be sued outside the state that appointed him.⁹ Today, however, the foreign administrator's immunity is not sacrosanct, particularly under nonresident motorist statutes. Faced with the economic realities and inconvenience of residents' having to sue in a foreign state, most legislatures have provided a means by which a local plaintiff could sue in a local forum a nonresident who used the forum's highways and was involved in an accident. These early statutes made no provision for substituting a decedent defendant's administrator. This produced the anomalous result of allowing suit against a living nonresident but not against his estate. A majority of states have now revised their statutes to provide for substitution of, and service upon, the administrator.¹⁰ Nearly all of these statutes either by in-

7. *State ex rel. Mercantile Nat'l Bank v. Rooney*, 402 S.W.2d 354, 357 (Mo. 1966). Many courts take this position, although they fail to explain why this is so. *See, e.g., National Bank v. Mitchell*, 154 Kan. 276, 118 P.2d 519 (1941); *Riggs v. Schneider's Ex'r*, 279 Ky. 361, 130 S.W.2d 816 (1939); *Conley v. Huntoon*, 37 R.I. 343, 92 A. 865 (1915); *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 512, Comment b (Tent. Draft No. 11, 1965).

8. For purposes of this comment, the term "administrator" will be used to include executor and personal representative of a decedent.

9. *E.g., Vaughnan v. Northrup*, 40 U.S. (15 Pet.) 1 (1841); *Jefferson v. Beall*, 117 Ala. 436, 23 So. 44 (1898); A. EHRENZWEIG, *CONFLICT OF LAWS* § 23 (1962); H. GOODRICH, *CONFLICT OF LAWS* § 190 (4th ed. Scoles 1964); R. LEFLAR, *CONFLICT OF LAWS* § 194 (1959); G. STUMBERG, *CONFLICT OF LAWS* 405 (3d ed. 1963). For an excellent review of the reasons, both real and fancied, for the immunity rule, see Currie, *The Multiple Personality of the Dead: Executors, Administrators, and Conflict of Laws*, 33 U. Chi. L. Rev. 429, 447 (1966).

10. ALA. CODE tit. 7, § 199 (Supp. 1965). ARK. STAT. ANN. §§ 27-342.1, -342.3 (Supp. 1965); CAL. VEHICLE CODE §§ 17450-56 (Deering 1959); CONN. GEN. STAT. REV. § 52-62 (Supp. 1965); DEL. CODE ANN. tit. 10, § 3112 (Supp. 1966); D.C. CODE ANN. § 40-423 (1967); FLA. STAT. ANN. § 47.29(2) (Supp. 1966); GA. CODE ANN. § 68-810 (1957); IND. ANN. STAT. § 47-1043 (1965); KAN. GEN. STAT. ANN. §§ 8-401, -402 (1963); KY. REV. STAT. ANN. § 188.020 (1963); LA. REV. STAT. ANN. § 13-3474 (Supp. 1966); MD. ANN. CODE art. 66½, § 115 (1967); MASS. GEN. LAWS ANN. ch. 90, § 3A (Supp. 1966); MICH. STAT. ANN. § 9.2103 (1960); MINN. STAT. ANN. § 170.55 (1960); MISS. CODE ANN. § 9352-61 (Supp. 1966); MO. REV. STAT. § 506.210 (Supp. 1966); NEB. REV. STAT. § 25-530(3) (1964); N.J. STAT. ANN. § 39:7-2 (1961); N.M. STAT. ANN. § 64-24-3 (1960); N.Y. VEH. TRAF. LAW § 253 (McKinney 1960); N.C. GEN. STAT. § 1-105 (Supp. 1965); N.D. CENT. CODE § 39-01-11 (1960); OHIO REV. CODE ANN. § 2703.20 (Page 1966); OKLA. STAT. ANN.

terpretation or explicit coverage, include *foreign* administrators and have been upheld when so applied.¹¹

Some state legislatures have recently enacted general "long-arm" statutes; these bind the nonresident and his administrator to jurisdiction for a variety of acts of the nonresident in the state in addition to use of the highways. These statutes typically cover: transacting business within the state; contracting to supply services or goods in the state; causing tortious injuries in the state by either acts or omissions occurring outside the state; having an interest in, using, or possessing real property in the state.¹² Illinois' version of this type of statute was recently upheld in a case evidencing the Illinois court's favorable attitude towards this statute.¹³ The court stated that the old immunity rule "must give way to legislative enactments."¹⁴

The arguments made to extend jurisdiction over nonresident motorists and their administrators, essentially convenience and fairness, have been applied with considerable success to other acts of nonresidents within the forum state. In spite of the due process problems¹⁵ and the traditional arguments in favor of unified administration of estates and immunity,¹⁶ legislatures continue to extend the jurisdiction of their courts. Missouri is not unusual in this regard.

Although Missouri does not have a general "long-arm" statute, its legislature has by separate acts provided for jurisdiction over, and service upon,

tit. 47, § 391 (1962); PA. STAT. ANN. tit. 75, § 2001 (1960); S.D. CODE § 33.0809 (Supp. 1960); TENN. CODE ANN. §§ 20-224 to -226 (Supp. 1965); TEX. REV. CIV. STAT. art. 2039a (1964); VA. CODE ANN. § 8-67.1 (Supp. 1966); WIS. STAT. ANN. § 345.09 (Supp. 1967); WYO. STAT. ANN. § 1-52 (Supp. 1965).

11. *E.g.*, *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943); *Plopa v. DuPre*, 327 Mich. 660, 42 N.W.2d 777 (1950); *State ex rel. Sullivan v. Cross*, 314 S.W.2d 889 (Mo. 1958); *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876 (1950). *Contra*, *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947).

12. *E.g.*, ARK. STAT. ANN. §§ 27-2501-2507 (Supp. 1965); IDAHO CODE ANN. § 5-514 (Supp. 1967); ILL. ANN. STAT. ch. 110, § 17 (Supp. 1966); KAN. GEN. STAT. ANN. § 60-308 (b) (1964); MICH. STAT. ANN. § 27A.705 (1962).

13. *Hayden v. Wheeler*, 33 Ill. 2d 110, 210 N.E.2d 495 (1965).

14. *Id.* at 113, 210 N.E.2d at 497.

15. That the states' power over nonresidents has been expanding is a proposition familiar to us all from a historic line of cases: *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Hess v. Pawloski*, 274 U.S. 352 (1927); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see *Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958). For an analysis of how Missouri courts have handled the various tests such as "minimum contacts," see *Anderson, Personal Jurisdiction Over Outsiders*, 28 Mo. L. REV. 336, 368 (1963).

16. See note 9 *supra*.

the following nonresidents: foreign savings and loan associations,¹⁷ foreign corporations legally qualified to do business in the state,¹⁸ authorized and unauthorized foreign insurance companies,¹⁹ foreign fraternal benefit societies,²⁰ foreign mutual insurance companies,²¹ nonresident securities issuers,²² foreign banking corporations,²³ foreign corporate fiduciaries,²⁴ adjacent-state rural electric cooperatives,²⁵ nonresident milk manufacturers and processors,²⁶ nonresident motor carriers,²⁷ nonresident motorists,²⁸ and nonresident watercraft owners.²⁹ Although most of these statutes apply only to corporations, the last two represent explicit extensions of jurisdiction over individual nonresidents. In spite of these statutes, however, Missouri residents have experienced some difficulties in trying to utilize the extended jurisdiction of the courts.

When the first Missouri nonresident motorist statute³⁰ reached the supreme court in *Harris v. Bates*,³¹ it was found unconstitutional because: 1) the statute failed to subject explicitly the nonresident's administrator to jurisdiction, and 2) the statute failed to provide for service upon the nonresident administrator. The court said that, in order to satisfy due process requirements, statutory provisions must expressly subject a person to the jurisdiction of the court and provide for service of process calculated to reach the party subjected to jurisdiction.³² Subsequently revised, the statute explicitly included administrators and provided for service of process.³³ In *State ex rel. Sullivan v. Cross*,³⁴ the revision was held to meet the standards set forth in the *Harris* case.

17. MO. REV. STAT. § 369.580 (1959).

18. MO. REV. STAT. § 351.630 (1959).

19. MO. REV. STAT. § 375.210 (1959) (authorized); MO. REV. STAT. § 375.160 (1959) (unauthorized).

20. MO. REV. STAT. §§ 378.400-.410 (1959).

21. MO. REV. STAT. § 379.280 (1959).

22. MO. REV. STAT. § 409.100 (1959).

23. MO. REV. STAT. § 362.435 (1959).

24. MO. REV. STAT. § 363.205 (1959).

25. MO. REV. STAT. § 394.200 (1959).

26. MO. REV. STAT. §§ 416.510-.560 (1959).

27. MO. REV. STAT. § 508.070 (Supp. 1965).

28. MO. REV. STAT. § 506.210 (1959).

29. MO. REV. STAT. §§ 506.330-.340 (1959).

30. MO. LAWS 1941, 435 § 1.

31. 364 Mo. 1023, 270 S.W.2d 763 (1954).

32. *Id.* at 1028, 270 S.W.2d at 767.

33. MO. REV. STAT. § 506.210 (Supp. 1966). This provided in part: "[a]n agreement by him [the nonresident motorist] that he, his executor, administrator or other legal representative shall be subject to the jurisdiction of the courts. . . ." Subsection (2) provides that service may be made upon these persons through the Secretary of State.

34. 314 S.W.2d 889 (Mo. 1958).

A lack of specificity in another statute brought about a similar sequence of events. The statute allowed a suit to be brought against an unregistered corporate tortfeasor;³⁵ process was to be mailed by the Secretary of State according to the address in his records. Of course, there would be no record of an unregistered foreign corporation, so that plaintiffs would have to supply the needed address. The supreme court held that "even actual notice, gratuitously furnished under a statute which does not contain adequate requirements for notice, is insufficient."³⁶ The legislature has now amended the statute so that if the Secretary does not have an address, plaintiffs shall provide it by consulting the official registry of the state that incorporated the alleged tortfeasor.³⁷

Given the fact that the Missouri Supreme Court consistently has required specification of who is subject to jurisdiction and how service is to be made, one could have easily predicted the result of the executor's motion for a writ of prohibition in this case. The plaintiff in *Rooney* argued that the decedent had submitted to jurisdiction, thereby conferring jurisdiction over his administrator, and that the administrator was a "proper party" for substitution.³⁸ The latter contention could have been argued by relying on the fact that the Missouri substitution rule is modeled after the federal rule.³⁹ Both provide that if a party dies, the court may substitute the "proper party." The federal courts have applied their rule to foreign administrators.⁴⁰ The Missouri court's power to construe procedural rules⁴¹ should be employed to effectuate the rules' purpose—"to sim-

35. Mo. Laws 1943, 410 § 105.

36. State *ex rel.* Pressner v. Scott, 387 S.W.2d 539, 542 (Mo. 1965).

37. Mo. REV. STAT. § 351.633 (Supp. 1965). The validity of this provision has not yet been litigated, but a North Carolina statute that is substantially the same has been upheld. N.C. GEN. STAT. §§ 55-145, 146 (1965). Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E. 2d 3 (1965).

38. See note 39 *infra* and accompanying text.

39. Compare FED. R. CIV. P. 25(a)(1):

If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. . . . The motion for substitution may be made by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served . . . upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district,

with MO. REV. STAT. § 507.100-1 (1959):

If a party dies and the claim is not thereby extinguished, the court shall on motion order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by the successors or representatives of the deceased party or by any party and, together with the notice of the hearing, shall be served . . . upon persons not parties in the manner provided for the service of a summons.

40. Neiman-Marcus Co. v. Lait, 17 F.R.D. 119 (S.D.N.Y. 1954); Commercial Solvents Corp. v. Jasspon, 92 F. Supp. 20 (S.D.N.Y. 1950).

41. Wheaton, *The New General Code for Civil Procedure and Supreme Court Rules*

plify and liberalize procedure, to the end that litigation shall be expedited and justice be administered with a minimum of technical procedural hinderance⁴²—by giving the Missouri rule the same reading as the federal rule. Given the court's requirement of specific statutory coverage, however, it is doubtful that this argument would have succeeded.

Whether one considers the court to be unreasonably restrictive or not, its position is clear. If the harsh result in *Rooney* is to be prevented, the burden falls on the legislature. By now the legislature should be aware of this.

Interpreted, 13 Mo. L. Rev. 433 (1948). Professor Wheaton was the chief drafter of the Missouri rules.

42. *John A. Moore & Co., Inc. v. McConkey*, 240 Mo. App. 198, 203, 203 S.W.2d 512, 514 (1947).