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Civil Procedure - Nonresident Motorist Statutes - Extent to which Jurisdiction May Be Acquired

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of creditors as long as recovery can be had from that party. If the trustee is unable to collect against the transferee, there is a stronger argument that the creditor should be held; however, if the transferee is available and solvent, the present court's imposition of liability upon the creditor seems to be opposed to the policy expressed in *Dean*. This is probably what the court was considering when it gratuitously suggested that the creditor might still be able to collect back against the transferee on his indorsement.[12] However, carrying such a suggestion into effect raises several serious collateral problems. If the note which the third-party indorsed has been cancelled, as presumably it had been when payment was made, it is difficult to see how any action could be maintained. Indeed, nonproduction of the instrument would appear to render the entire claim valueless under the Statute of Frauds.[13] Further, it is possible that the recorded satisfaction of the judgment already rendered against the third-party on his indorsement would preclude another proceeding for the same relief. In any event, a much easier and more economic solution can be obtained merely by ordering the transferee to retransfer the shares to the trustee and by allowing the creditor to keep the payment of the note. Such a result could even be said to benefit the estate and the other creditors since the paid creditor's claim would have been satisfied.

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CIVIL PROCEDURE—NONRESIDENT MOTORIST STATUTES—EXTENT TO WHICH JURISDICTION MAY BE ACQUIRED.

Davis v. St. Paul-Mercury Indemnity Co. (4th Cir. 1961).

A resident of Texas purchased an automobile for her son to use while stationed in North Carolina on military duty. The defendant insurance company issued a liability insurance policy on the car which

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future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this title by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto."

12. Aulick v. Largent, 295 F.2d 41, 52 n.13 (1961).

13. There seems to be no possibility of restitution here for it can hardly be said that Lemley was unjustly enriched since everyone was returned to the same position as before the questioned transaction.

covered anyone driving with the permission of the named insured owner. The owner told her son "to be careful how he drove and who he let drive".[1] The son subsequently loaned the car to a fellow serviceman who negligently struck and killed plaintiff's intestate. Plaintiff administratrix sued both the driver and the owner in a North Carolina court, substituted service being had on the owner in accordance with the state's nonresident motorist statute.[2] Judgment was entered against both defendants in that suit, although the defendant owner elected not to defend. The plaintiff then brought suit in the United States District Court against the insurance company on its policy. Defendant insurance company claimed that the state court did not have jurisdiction over the defendant owner in the first action because the North Carolina statute did not reach her, or, if it did so, that it denied her due process of law. Judgment was entered against the defendant in the district court, and she appealed. The United States Court of Appeals for the Fourth Circuit affirmed, *holding* that the statute authorized service against the nonresident owner and afforded her due process of law. *Davis v. St. Paul-Mercury Indemnity Co.*, 294 F. 2d 641 (4th Cir. 1961).[3]

The nonresident motorist, or "longarm", statute first appeared in 1908 in New Jersey.[4] That rather primitive legislative attempt required under penalty of prosecution that any nonresident motorist using New Jersey's roads expressly designate the secretary of state as his agent for service of process in any suit arising from an accident on the highway. The statute was upheld by the United States Supreme Court against arguments that it was in violation of due process and an interference with interstate commerce.[5] The classic case in this field, however, is *Hess v. Pawloski*,[6] in which the Supreme Court upheld a Massachusetts statute under which any nonresident motorist was deemed, by his use of the state's roads, to have appointed a state official his agent for service of process.[7] The rationale of *Hess* was that motor vehicles are inherently

1. Davis v. St. Paul-Mercury Indemnity Co., 294 F.2d 641, 643 (1961).
2. N.C. GEN. STAT. § 1-105 (Supp. 1959):
§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles. — The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, . . . shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles . . . to be his true and lawful attorney . . . upon whom may be served all summonses or other lawful process in any action or proceeding . . . growing out of any accident or collision in which said 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 such public highways of this State . . . .
3. There were two other questions on appeal: (1) whether the nonresident defendant was the owner of the automobile; and (2) whether she had consented to the driver's use of the car. These questions were answered by the court in the affirmative. 249 F.2d 641, 649 (1961).
4. N.J. Auto Law of 1908 (N.J. LAWS, 1908, p. 613).
5. Kane v. New Jersey, 242 U.S. 160, 37 S. Ct. 30 (1908).
6. 274 U.S. 352, 47 S. Ct. 632 (1927).
7. *Id.*

dangerous machines, the use of which the state can regulate in the public interest, and that, by use of the state's highways, the driver had impliedly consented to substituted service. It was recognized in a later Supreme Court case that the theory of "consent" employed in *Hess* is a fiction.[8] *Hess*, however, remains the only case involving the precise question of what jurisdictional nexus is necessary to satisfy due process in the area of nonresident motorist statutes to be heard by the Supreme Court. A New Jersey statute was questioned subsequently as to the notice required by due process, but *Hess* was cited as controlling the jurisdictional question.[9] It thus clearly states the accepted doctrine on this constitutional aspect.[10] Since its decision, however, there has been a considerable development concerning the constitutionally permissible means of acquiring jurisdiction over foreign business entities, and these cases, as will be seen, bear on the rationale of *Hess* indirectly in that they have developed the theory of "minimum contacts" between the forum and the defendant necessary for a jurisdictional nexus satisfactory to the due process clause.[11]

At the present time, every state except Alaska, and the District of Columbia as well, has a nonresident motorist statute.[12] Originally, these statutes dealt exclusively with owners who were operating their vehicle at the time of the accident.[13] Now, however, they are usually written or interpreted as subjecting the owner to substituted service if the driver involved in the accident was driving with his permission either expressed[14] or implied,[15] and thus do not require the physical presence of the owner in the state. There is authority to the effect that the owner must in some way consent to the driver's use of the car in order for substituted service to be in accord with due process.[16] It is, of course, for the state to decide whether a particular driver fits within its nonresident motorist statute. Thus, the court in the instant case based its decision as to statutory interpretation on two North Carolina cases, in both of which permission of some kind was found to be necessary under the

8. Olberling v. Ill. Cent. R.R., 346 U.S. 338, 74 S. Ct. 83 (1953).

9. Wuchter v. Rizzutti, 276 U.S. 13, 48 S. Ct. 259 (1928).

10. See Olberling v. Ill. Cent. R.R., *supra* note 8; Wuchter v. Rizzutti, *supra* note 9.

11. McGee v. International Life Insurance Co., 355 U.S. 220, 78 S. Ct. 199 (1957); Olberling v. Ill. Cent. R.R., *supra* note 8; Travelers Health Ass'n v. Virginia, 339 U.S. 643, 70 S. Ct. 927 (1950); International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154 (1945); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 S. Ct. 553 (1935). *But see* Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228 (1958).

12. See Note, *Nonresident Motorist Statutes — Their Current Scope*, 44 IOWA L. REV. 384 (1959), where the statutes are collected.

13. See the Massachusetts statute in Hess v. Pawloski, *supra* note 6.

14. MINN. STAT. ANN. § 170.55 (Supp. 1957); NEB. REV. STAT. § 25-530 (Supp. 1956); UTAH CODE ANN. § 41-12-8 (1953); WYO. COMP. STAT. ANN. § 60-1101 (Supp. 1955).

15. ALA. CODE tit. 7, § 199 (1940); DEL. CODE ANN. tit. 10, § 3112 (Supp. 1957); N.Y. VEHICLE & TRAFFIC LAW § 52 (1960); PA. STAT. ANN. tit. 75 § 1201 (Supp. 1957); TENN. CODE ANN. § 20-224 (Supp. 1958).

16. Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

statute.[17] In one case, the permission was based upon the "family purpose" doctrine,[18] and, in the other, it was found under a statute which authorizes a presumption of control of the driver by the owner.[19] North Carolina would thus seem to be in accord with other jurisdictions in requiring permission of some sort running from owner to driver in order to subject the owner to substituted service.

Generally, the use of "longarm" statutes as a basis of personal jurisdiction is subject to two due process requirements.[20] First, the statute must afford the nonresident adequate notice of the institution of suit against him. This requirement has been fairly standardized today by a statutory provision for notice by registered letter to the nonresident in addition to substituted service on a state official.[21] The second, and more nebulous, requirement is a nexus or connection between the nonresident and the state attempting to acquire jurisdiction sufficient to justify such assertion of jurisdiction. Although cases dealing with jurisdiction over corporations not domiciled within a state and cases concerning jurisdiction over nonresident motorists are factually distinguishable, in some ways they present similar problems; consequently, the discussion of the nexus problem in *International Shoe Co. v. Washington*[22] is not without bearing on this problem. There the Court said, in discussing the nexus problem:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" . . . . Whether due process is satisfied depends rather upon the *quality and nature of the activity* in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[23] (Emphasis added).

Prior to *International Shoe,* an important point in establishing nexus was the *number* of contacts with the state,[24] but *International Shoe* emphasized the "quality and nature" of the contacts as a basis for obtaining jurisdiction if "fairness" warranted it, so that a single contact with the state under proper circumstances would be a sufficient connection to satisfy due process and confer jurisdiction.[25]

17. Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).
18. Ewing v. Thompson, *supra* note 17.
19. Howard v. Sasso, *supra* note 17.
20. Hess v. Pawloski, *supra* note 6; Wuchter v. Rizzutti *supra* note 9.
21. See note 2 *supra.*
22. 326 U.S. 310, 66 S. Ct. 154 (1945).
23. International Shoe Co. v. Washington, 326 U.S. 310, 316, 319, 66 S. Ct. 154, 158, 160 (1945).
24. St. Louis S. W. Ry. v. Alexander, 227 U.S. 218, 33 S. Ct. 245 (1913).
25. In McGee v. International Life Insurance Co., 355 U.S. 220, 78 S. Ct. 199 (1957), the assertion of jurisdiction by California over a Texas company was upheld

Prior to *International Shoe,* the Massachusetts' "longarm" statute applied in *Hess* was interpreted to mean that the nonresident motorist "consented" to be sued. The fiction of "consent" was used as a convenient solution to a growing national problem. The automobile, ever-increasing in speed, size and number, was involving residents of different states in serious accidents.[26] Each state saw the need for protection of its citizens from the "unsuable" nonresident by affording a convenient forum for redress. The inadequacy of the "consent" rationalization as a basis for the solution of this problem, however, is obvious. That it is absurd to say that one "consents" to being sued in a foreign jurisdiction was pointed up by Mr. Justice Frankfurter in *Olberling v. Ill. Cent. R.R.*[27] "But to conclude . . . that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland."[28] As to the policy upon which he really believed these statutes rested Justice Frankfurter continued, "[T]he potentialities of damage by a motorist in a population as mobile as ours, are such that those whom he injures must have opportunity of redress against him, provided only that he has an opportunity to defend himself."[29] Justice Frankfurter's opinion disposes of the fiction of "consent" as a basis for these statutes and places emphasis on their "reasonableness."

A more realistic and workable justification than the fiction of consent would be one placing emphasis on legal control of the automobile from an ownership standpoint. While it is unreasonable to expect an owner to consent to suit, it is eminently reasonable to expect him to control his automobile, both while driving it himself, and permitting others to drive it. Both the "family purpose doctrine,"[30] and the presumption that one proven to be an agent was driving within the scope of his authority,[31] are based on the theory that one who owns an automobile and who knows the potentially serious consequences of its use, should be responsible for the activity of those whom he authorizes to drive. As the instant case acknowledges, "[I]t is not pushing the matter too far to recognize that the state may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the state's high-

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where the only act by the company was mailing a policy to, and receiving payments from, the insured, who resided in California.

26. The Pennsylvania Bureau of Traffic Safety Report, in regard to the total number of annual motor vehicle accidents in that state, shows (1) 1958 — 156,825; (2) 1959 — 157,191; (3) 1960 — 159,051. Statistics on the percentage of nonresident motorists involved are not available. Whatever the percentage may be, however, it is safe to assume that it is increasing in proportion to the total accident rate.

27. See note 8 *supra.*

28. Olberling v. Ill. Cent. R.R., 346 U.S. 338, 341, 74 S. Ct. 83, 85 (1953).

29. *Ibid.*

30. Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

31. Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

ways."[32] To illustrate the extent to which this control doctrine could be used to acquire jurisdiction, we may consider the following five situations.

The first situation is that of *Hess* where the defendant is both owner and driver; since the owner is physically controlling his vehicle the control theory would obviously cover this type of situation.

In the second situation, the owner, a resident of state X, gives *unlimited* permission to the driver to use his automobile *anywhere;* the driver injures plaintiff in state Y. This is essentially the instant case. The North Carolina statute states that service of process on the Commissioner of Motor Vehicles is to be as binding as personal service on the nonresident, for any suit "growing out of any accident . . . in which said nonresident may be involved by reason of the operation by him, *for him,* or *under his control or direction, express or implied* . . ." involving a motor vehicle.[33] (Emphasis added.) Permission, running from the nonresident owner to her son, to allow others to drive was established as a matter of fact at trial, so the court properly concluded that the automobile was being impliedly orperated under the "control" of the nonresident owner. "The words 'express or implied' suggest only a minimal connection between the driver and the owner which is satisfied if the owner has a legal *right to control* the operation of the automobile."[34] (Emphasis added.) Thus the court is properly subjecting the nonresident registered owner to jurisdiction for accidents involving anyone using the automobile with the owner's permission.

In the third situation, the owner, a resident of X, gives *limited* permission to the driver, also a resident of X, to use his automobile *only in X;* the driver injures the plaintiff in Y. Judge Learned Hand, in *Sheer v. Rockne Motors Corp.,*[35] concluded that the owner could not be reached on these facts. That case, however, was decided in 1934, and since then, as has been noted, jurisdictional standards have been broadened consisderably. Moreover, the problems in this area, and hence the state's interest in securing jurisdiction, have increased considerably. The *Sheer* holding would seem therefore, to be of questionable vitality under present conditions and also to be inconsistent with a "control" as opposed to a "consent" theory. Even though the driver had no express permission to operate the automobile in the state where the accident occurred, to be consistent, jurisdiction should be imposed on the nonresident owner since he placed the automobile in the hands of the driver and had a *"legal right to control"* at the time of the accident. Policy reasons support jurisdiction on these facts, since the unique instrumentality of the automobile is involved and since the owner allowed the negligent individual to use the car.

The fourth situation involves theft of the automobile through the fault of the owner; for example, the owner left the key in the ignition and there

32. Davis v. St. Paul-Mercury Indemnity Co., 294 F.2d 641, 648 (4th Cir. 1961).
33. See note 2 *supra.*
34. Davis v. St. Paul-Mercury Indemnity Co., 294 F.2d 641, 645 (4th Cir. 1961).
35. 68 F.2d 942 (2d Cir. 1934).