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Jurisdiction over Nonresidents by Service of Process upon a Contractually Appointed Agent

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excellent opportunity to correct the practices regarding recovery in the slant-well suit. Use of the conversion theory of recovery and the attendant measure of damages produces unfair results, either by over-compensating a sole plaintiff or by subjecting a defendant to multiple liability. It is time to replace the conversion theory with a realty theory which will produce just and equitable results for all parties.

Don C. Nix

Jurisdiction Over Nonresidents by Service of Process Upon a Contractually Appointed Agent

I. INTRODUCTION

In personam jurisdiction over a defendant usually is acquired by service of process upon the defendant within the territorial jurisdiction of the court or by his appearance in the proceedings before the court.¹ Jurisdiction over the person is necessary to the rendition of a judgment which personally binds the defendant.² A party may confer jurisdiction over his person by express or implied consent.³ Consent may be implied from certain acts such as driving an automobile,⁴ committing a tort,⁵ or "doing business" within a state.⁶ Express consent may be given by the appointment of an agent to receive service of process in order to comply with a statute⁷ or by the appointment

¹ *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Cooper v. Reynolds*, 77 U.S. 308 (1870); *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963); *Stanley v. Columbus State Bank*, 258 S.W.2d 840 (Tex. Civ. App. 1953) *error ref. n.r.e.*; 21 C.J.S. *Courts* § 83b (1940).

² *McDonald v. Mabec*, 243 U.S. 90 (1916); *Pennoyer v. Neff*, *supra* note 1; 14 Am. Jur. *Courts* § 167 (1938); 49 C.J.S. *Judgments* § 19b (1940); Restatement, *Judgments* § 14 (1942).

³ *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); *Federal Underwriters Exch. v. Pugh*, 141 Tex. 539, 174 S.W.2d 598 (1943); 21 C.J.S. *Courts* § 85c (1940); Restatement, *Conflict of Laws* § 77d (1934). See Anderson, *Personal Jurisdiction Over Outsiders*, 28 Mo. L. Rev. 336 (1963); The rule is contra with respect to jurisdiction over the *subject matter*. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1950); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); 21 C.J.S. *Courts* § 85a (1940).

⁴ The leading case regarding nonresident motorist statutes is *Hess v. Pawloski*, 274 U.S. 352 (1926). See, e.g., Tex. Rev. Civ. Stat. Ann. art. 2039a (1963). See generally Comment, *Non-Resident Motorist Statutes—Their Current Scope*, 44 Iowa L. Rev. 384 (1959).

⁵ *Gray v. American Radiator & Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Hearne v. Dow-Badische Chem. Co.*, 224 F. Supp. 90 (S.D. Tex. 1963). Cf. Tex. Rev. Civ. Stat. Ann. art. 2031b(4) (1963).

⁶ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); Note, *Jurisdiction Over Foreign Corporations—An Analysis in Due Process*, 104 U. Pa. L. Rev. 381 (1955).

⁷ See, e.g., Tex. Rev. Civ. Stat. Ann. art. 2031a (1963).

of such an agent in a freely negotiated contract.⁸ The scope of this note is limited to the case in which a nonresident consents to the jurisdiction of a foreign court over his person by express contractual agreement.

Rule 4(d)(1) of the Federal Rules of Civil Procedure⁹ and many state statutes¹⁰ expressly authorize the appointment of an agent for the receipt of service of process. Service upon a *lawfully appointed* agent is sufficient to give a court jurisdiction over the person of the principal whether the principal has actual notice of the service or not.¹¹ This result is reached with the aid of two legal fictions: (1) the "legal identity" of the principal and agent and (2) the conclusive presumption that the agent has communicated his notice or knowledge of the service to the principal.¹² The usual justifications advanced for these fictions are that the principal should not be allowed to avoid service of process by acting vicariously¹³ and that third parties dealing with the agent are entitled to rely upon his knowledge and notice.¹⁴ It has been held that if the principal fails to extract a promise from the agent to forward notice, he assumes the risk of not receiving actual notice.¹⁵ Under elementary principles of contract law, if

⁸ *Kenny Constr. Co. v. Allen*, 248 F.2d 656 (D.C. Cir. 1957); *Bowles v. J. J. Schmitt & Co.*, 170 F.2d 617 (2d Cir. 1948); *Emerson Radio & Phonograph Corp. v. Callander Distrib. Corp.*, 116 F. Supp. 926 (S.D.N.Y. 1953); *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); *Green Mountain College v. Levine*, 120 Vt. 332, 139 A.2d 822 (1958).

⁹ Fed. R. Civ. P. 4(d) "Summons: Personal Service. . . . Service shall be made as follows: (1) . . . by delivering a copy of the summons and of the complaint to an agent authorized by appointment . . . to receive service of process."

¹⁰ See, e.g., Cal. Civ. Proc. Code § 1018(a); Minn. Stat. Ann. § 508.07 (1905); Mo. Rev. Stat. Ann. § 506.150(1) (1949); N.Y. Civ. Prac. Law § 318.

¹¹ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Szabo v. Keeshin Motor Express Co.*, 10 F.R.D. 275 (E.D. Ohio 1950); 2 *Mechem*, Agency § 1803 (2d ed. 1914); 2 *Moore*, Federal Practice § 4.12 (2d ed. 1953); Restatement (Second), Agency § 275 (1958); Restatement, Judgments § 18 (1942); Restatement, Conflict of Laws § 81, Illustration 5 (1934): "A appoints an agent in state X and authorizes him to receive service of process in any action brought against A in a court of X. B brings an action against A in a court of X and process is served upon the agent. The court has jurisdiction over A." See *Burdick, Service as a Requirement in Actions In Personam*, 20 Mich. L. Rev. 422 (1921).

¹² *Victory v. State*, 138 Tex. 285, 158 S.W.2d 760 (1942); 3 *Am. Jur. 2d Agency* § 262 (1962); *Ferson*, Principles of Agency § 100 (1954). *Ferson* terms the doctrine of imputed notice or knowledge an aspect of respondeat superior. *Ferson op. cit. supra* at § 101. See *Seavey, Notice Through an Agent*, 65 U. Pa. L. Rev. 1 (1916).

¹³ *Bowen v. Mt. Vernon Sav. Bank*, 105 F.2d 796 (D.C. Cir. 1939); *Annot.*, 104 A.L.R. 1246 (1936).

¹⁴ *In re Distilled Spirits*, 78 U.S. 356 (1870); 3 *Am. Jur. 2d, Agency* § 274 (1962) and cases cited therein.

¹⁵ *Kenny Constr. Co. v. Allen*, 248 F.2d 656 (D.C. Cir. 1957); *Green Mountain College v. Levine*, 120 Vt. 332, 139 A.2d 822 (1958). See *Phillips v. Garramone*, 36 Misc. 2d 1041, 233 N.Y.S.2d 842 (Sup. Ct. 1962).

the principal does extract such a promise and the agent fails to forward notice, he has recourse against the agent.¹⁶

II. NATIONAL EQUIP. RENTAL, LTD. V. SZUKHENT¹⁷

Plaintiff was a corporate lessor of farm machinery with its principal place of business in New York City. The defendants, two farmers who resided in Michigan, leased farm machinery from the plaintiff under an agreement which contained a specific and unconcealed provision that "the Lessee hereby designates Florence Weinberg, . . . Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York." Nothing in the lease required the agent to notify the defendants of any service of process which might be made upon her. At the time the defendants signed the lease they had never "met, seen, or heard of"¹⁸ Mrs. Weinberg, and afterwards it was discovered that she was the wife of one of the officers of plaintiff corporation.

Later, the plaintiff sued the defendants in the United States District Court for the Eastern District of New York for an alleged default in rental payments. Copies of the summons and complaint were served upon the designated agent, Florence Weinberg, who promptly forwarded them to the defendants by certified mail. The district court admitted that "abundant, actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to defendants at a glance," but quashed the service on the ground that no agency had been created.¹⁹ The district judge held that in order to appoint Mrs. Weinberg agent for service of process the defendants should have dealt directly with her and not just with the plaintiff. The court of appeals affirmed, stating that the agency was invalid because the defendants had no fair indication of Mrs. Weinberg's undertaking to act as their agent.²⁰ Both courts also appeared to base their decisions on the lack of an express provision in the contract requiring the agent to give notice to the defendants of the service of process. Both courts, however, disclaimed the applicability of *Wuchter v. Pizzutti*²¹ (concerning a statutory agency) to

¹⁶ 8 Williston, Contracts § 1288 (2d ed. 1937).

¹⁷ 375 U.S. 311 (1964).

¹⁸ Black, J. dissenting in the principal case, 375 U.S. at 319.

¹⁹ National Equip. Rental, Ltd. v. Szukhent, 30 F.R.D. 3 (E.D.N.Y. 1962).

²⁰ National Equip. Rental, Ltd. v. Szukhent, 311 F.2d 79 (2d Cir. 1963).

²¹ 276 U.S. 13 (1928). *Wuchter* held that a state nonresident motorist statute which provided for service on the secretary of state but which contained no provision requiring the secretary of state to forward notice to the nonresident defendant was a violation of due process. The Court stated that the enforced acceptance by the defendant of service of

contracts which are freely negotiated. The Supreme Court reversed the holding of the lower courts, holding that if process is served upon an unknown but expressly designated agent who, upon receipt of such process, promptly transmits it to the principal, a valid agency arises and requirements of due process are met even though the agency agreement contains no provision requiring notification of the principal.

III. RATIONALE OF THE DECISION

It was necessary for the court to overcome four obstacles in the determination of this case: (1) the questionable validity of the agency itself, (2) the agent's possible conflict of interest, (3) the "adhesive" nature of the contract, and (4) the failure of the contract to provide for notice to the principal.

A. *Validity Of The Agency*

The problem which received the most attention from the lower courts and the dissenters in the Supreme Court was the validity of the agency itself. The dissenters, in two separate opinions, asserted that the agency was invalid for a variety of reasons—conflict of interest, the "adhesive" nature of the contract, the failure of the contract to provide for notice to the principal, and the questionable acceptance of the agency by Mrs. Weinberg.

The majority of the Court disposed of the problem with a statement by Professor Williston: "The principal's authorization may neither expressly nor impliedly request any expression of assent by the agent as a condition of the authority, and in such a case any exercise of power by the agent within the scope of the authorization, during the term for which it was given, or within a reasonable time if no fixed term was mentioned, will bind the principal."²² Even though the agent had not previously assented to the relationship, the Court felt that her prompt transmittal of the summons and complaint was an acceptance of her role as agent and made the agency valid. This seems to be in conformity with the general rule that an agency relationship may be created by acts or words of the parties which are consistent with an intent to form such a relationship.²³

process upon a state officer would not comply with the due process clause unless the statute by its terms made it at least reasonably probable that the defendant would receive actual notice.

²² 2 Williston, *Contracts* § 274 (3rd ed. 1959).

²³ *Leidy v. Taliaferro*, 260 S.W.2d 504 (Mo. 1953); *Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E.2d 884 (1953); *Restatement (Second), Agency* § 26 (1958); 3 *Am. Jur.* 2d *Agency* § 21 (1962); 2 *C.J.S. Agency* § 21 (1940).

B. Agent's Conflict Of Interest

Mrs. Weinberg's dual role as both an agent for the defendants and as a volunteer who performed this service under an agreement with the plaintiff raised the question of a possible conflict of interest. The majority view in the principal case was that no conflict was present because of the limited authority given to the agent and the interest which both parties had in seeing that timely notice was given to the defendants. This mutual interest, however, must be evaluated in light of the questionable validity of the agency because, under the aforesaid "notice to the agent is notice to the principal" fictions, a valid judgment could be had after service upon a *duly appointed* agent acting within the scope of his authority even though the principal had no notice of the proceedings.²⁴ It is important to note here, however, that if an agent has a conflict of interest the vicarious notice presumptions usually are negated and the principal is not charged with the agent's knowledge.²⁵

C. Adhesive Nature Of The Contract

The court of appeals called the lease a contract of "adhesion"²⁶ and Mr. Justice Black in his dissent termed it a "standardized form contract."²⁷ These contracts derive the label "adhesive" from their character. They are unilaterally drafted and offered on a "take it or leave it" basis to a party who has little, if anything, to say about the terms.²⁸

Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms

²⁴ See note 12 *supra* and accompanying text.

²⁵ *Jacobs v. Metropolitan Life Ins. Co.*, 39 So.2d 346 (La. Ct. App. 1949); *In re Duro's Estate*, 236 Iowa 165, 18 N.W.2d 199 (1945). "Interest adverse to the principal in such a case clearly should and does disqualify the service agent. To hold otherwise would manifestly open a door to fraud." *Id.* at 201; Annot., 104 A.L.R. 1246 (1936); 2 Mechem, *Agency* § 1815 (2d ed. 1914). *But see Bowen v. Mt. Vernon Sav. Bank*, 105 F.2d 796 (D.C. Cir. 1939), holding that the presumption is irrebuttable and cannot be avoided by showing that the agent did not in fact communicate his knowledge nor by showing that the agent had such an adverse interest that he would not be likely to communicate his knowledge.

²⁶ *National Equip. Rental, Ltd. v. Szukhent*, 311 F.2d 79 (2d Cir. 1963).

²⁷ 375 U.S. at 324.

²⁸ Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Colum. L. Rev. 1072,1075 (1953); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943). "It is hardly likely that these Michigan farmers, hiring farm equipment, were in any position to dicker over what terms went into the contract they signed." Black, J. dissenting in the principal case, 375 U.S. at 326.

understood only in a vague way if at all. Thus, standardized contracts are frequently contracts of adhesion. . . .²⁹

It has been said that freedom of contract is the inevitable counterpart of a free enterprise system, but that it now is becoming a one-sided privilege enabling large concerns to "legislate by contract."³⁰ Despite the principle that courts cannot make contracts for the parties but only can interpret them, courts sometimes have resorted to the guise of interpretation to protect a contracting party.³¹ Generally, however, courts are reluctant to strike down clauses such as the one involved in the principal case in the face of settled principles of contract law.³² A party whose signature appears on a contract is presumed to have read it and to understand its terms.³³ Business expediency requires a signed instrument to bind a party.³⁴

Mr. Justice Black, in a forceful dissent, emphasized that the contract was not negotiated and afforded no basis for supposing that the defendants had consented to travel hundreds of miles to New York to defend a lawsuit brought against them there. Mr. Justice Brennan, joined by Chief Justice Warren and Justice Goldberg, noted in a separate dissent the apparent lack of real consent to the agreement and added that in the case of so fundamental a right, it should be made abundantly clear, signatures notwithstanding, that the parties "knowingly and intelligently consented to be sued in another state." There is little authority on the point at present, but it seems inevitable that with the increase in the use of standardized contracts situations will arise which will require the courts to deal with this fundamental problem in contract law.

²⁹ Kessler, *supra* note 28, at 632.

³⁰ *Id.* at 630.

³¹ *Id.* at 633; Ehrenzweig, *supra* note 28, at 1082. See Trammel v. Brotherhood of Locomotive Firemen & Enginemen, 126 Mont. 400, 253 P.2d 329 (1953).

³² Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).

Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. . . . Unless their stipulations have a tendency to entangle national or state affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. *Id.* at 707.

Cf. Kenny Constr. Co. v. Allen, 248 F.2d 656 (D.C. Cir. 1957); Green Mountain College v. Levine, 120 Vt. 332, 137 A.2d 822 (1958). *But see* Frankfurter, J. dissenting in United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942).

³³ 1 Williston, Contracts § 90A (3rd ed. 1959).

³⁴ "[T]o accommodate the business community the ceremony necessary to vouch for the deliberate nature of a transaction has to be reduced to the absolute minimum." Kessler, *supra* note 28, at 629.

D. Absence Of Contract Provision Requiring Notice

With regard to the lack of a provision requiring the agent to notify the principal, the majority concluded that neither state nor federal law compelled the insertion of such a clause in a freely negotiated contract. The lack of a notice provision, therefore, would not go to the validity of the agency;³⁵ but a cautious principal should include such a provision in his agency agreement so that he will have recourse against the agent if the agent should fail to forward notice.³⁶ In the case of a judgment rendered against a principal after service upon his agent, appointed in a contract of adhesion, who had not promised to forward notice and who in fact did not forward it, the majority opinion indicates that the judgment would be valid. However, the strong dissents by four members of the Court indicate that in the future the Court may be willing to look behind the agreement to see if it was freely negotiated and if it was not, to hold such service a denial of due process.

IV. CONCLUSION

Whether service upon a "purported" agent will be binding upon the principal depends upon two factors—the validity of the agency and the requirement of due process of law. If at some time before service is made a valid agency is created, then service upon the agent is sufficient to bind the principal, at least in a case in which there is no due process question.³⁷ Even if no agency exists before service, one may be created by the very act of the agent giving actual notice of service to the principal. Furthermore, in a case in which a valid agency exists, the fact that the principal receives actual notice satisfies the requirements of due process.

However, the case in which a valid agency has been created before service but the agent has not agreed to forward notice and gives no actual notice of the service to the principal presents serious problems. In this situation, the defendant may not be bound because of a denial of due process. This might occur either if the contract which created the agency was one of adhesion³⁸ or if the agent had a con-

³⁵ Cf. *Bass v. American Prods. Export & Import Corp.*, 124 S.C. 346, 117 S.E. 594 (1923) in which an agency by estoppel was under consideration and it was held that while the lack of a provision for notice to the principal is not decisive of the validity of the agency, it is an important consideration in determining the legality of service upon an agent whose very status as an agent is brought into question.

³⁶ See note 16 *supra* and accompanying text.

³⁷ See note 11 *supra* and accompanying text.

³⁸ See text following note 36 *supra*.