
New Jersey Court of Errors and Appeals

10

WALTER T. YOUNG, ADMINISTRATOR
AD PROSEQUENDUM OF EMMETT
E. YOUNG, DECEASED,

PLAINTIFF-APPELLANT,

VS.

POTTER TITLE AND TRUST COM-
PANY, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF D.
FORD HENRY, JR., DECEASED,

DEFENDANT-RESPONDENT.

ACTION AT LAW

ON APPEAL FROM
THE SUPREME
COURT.

20

STATE OF THE CASE

30

Gebhardt & Gebhardt, Attorneys for Plaintiff-Appellant.

Smith & Smith, Attorneys appearing specially
for the Defendant-Respondent.

40

INDEX

Order Permitting Administrator Ad Prosequendum To Institute Suit	9
Summons and Complaint	10
Sheriff's Return	13
Special Appearance of Defendant	16
Notice of Motion to Strike	17
Order of Reference	18
Stipulation of Facts	19
Opinion of Supreme Court	21
Rule to Set Aside Service of Summons and Complaint	28
Notice of Appeal	29
Grounds of Appeal	30

New Jersey Court of Errors and Appeals

WALTER T. YOUNG, ADMINISTRATOR
AD PROSEQUENDUM OF EMMETT
E. YOUNG, DECEASED,

PLAINTIFF-APPELLANT,

VS.

POTTER TITLE AND TRUST COM-
PANY, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF D.
FORD HENRY, JR., DECEASED,
DEFENDANT-RESPONDENT.

ACTION AT LAW

ON APPEAL FROM
THE SUPREME COURT. 10

NOTICE

Filed October 17, 1934.

A copy of this notice was served by registered mail on 20
the Potter Title and Trust Company, Executor of the
Last Will and Testament of D. Ford Henry, Jr., deceased,
on October 15, 1934.

TO POTTER TITLE AND TRUST COMPANY, Executor
of the Last Will and Testament of D. Ford Henry,
deceased.

SIRS:

YOU WILL PLEASE TAKE NOTICE that we will
make an application to Honorable Thomas W. Trenchard, 30
Justice of the New Jersey Supreme Court, at the State
House, Trenton, New Jersey, on Thursday, October 11,
1934, at 10 A. M., or as soon thereafter as counsel may be
heard, for an Order permitting Walter T. Young, Admin-
istrator Ad Prosequendum of Emmett E. Young, deceased,
to institute a suit in the New Jersey Supreme Court, War-
ren County, against the Potter Title and Trust Company,
Executor of the Last Will and Testament of D. Ford
Henry, Jr., deceased, for the recovery of damages claimed
to be due for the death of the said Emmett E. Young, 40

deceased, on July 6, 1934, as the result of injuries received in an automobile accident which occurred on July 6, 1934, as the result of the collision of the automobile in which the said Emmett E. Young, deceased, was riding with another automobile owned and operated by the said D. Ford Henry Jr., deceased, in his lifetime, which said accident occurred in the County of Warren and State of New Jersey, and, it is alleged, was caused by the careless, negligent and unlawful operation of the said automobile by
10 the said D. Ford Henry, Jr., deceased, in his lifetime, and which suit will be based upon the Death Act of the State of New Jersey, the death of the said Emmett E. Young having occurred in the County of Warren and State of New Jersey. The affidavits upon which we will rely on this application are hereunto annexed.

Dated October 5, 1934.

20 Gebhardt & Gebhardt,
Attorneys of Walter T. Young,
Administrator Ad Prosequendum
of Emmett E. Young, Deceased.

STATE OF NEW JERSEY, }
COUNTY OF HUNTERDON, } SS

Walter T. Young, being duly sworn on his oath according to law deposes and says:

30 That he is the duly appointed General Administrator of Emmett E. Young, deceased, and also Administrator Ad Prosequendum of Emmett E. Young, deceased.

That he is the brother of the said Emmett E. Young, deceased, and that Minnie C. Young, the widow of the said decedent, and the three sons of the said decedent, namely, LeRoy, Emmett, Jr., and Raymond, are in impecunious circumstances, and that therefore the deponent is desirous of having a speedy determination of his claim against the
40 said Potter Title and Trust Company, Executor of the Last

Will and Testament of D. Ford Henry, Jr., deceased, referred to in a Notice hereunto annexed, and that he believes that it is necessary to proceed with the suit against the said Potter Title and Trust Company, Executor as aforesaid, referred to in the said Notice, in order to collect the said claim.

Walter T. Young.

Subscribed and sworn to
before me this 4th day
of October, 1934

10

(SEAL)

Lester Wallack Oliver
Notary Public of New Jersey.

STATE OF PENNSYLVANIA, }
COUNTY OF NORTHAMPTON, } ss.

20

William A. Frack, being duly sworn on his oath according to law deposes and says:

That he is a practicing attorney-at-law of the State of Pennsylvania, practicing in Northampton County, Pennsylvania, with his office located at Easton, Pennsylvania.

That he is associated with Gebhardt & Gebhardt, Esqs., of Clinton, New Jersey, in representing Walter T. Young, General Administrator of Emmett E. Young, deceased, 30
and Walter T. Young, Administrator Ad Prosequendum of Emmett E. Young, deceased, in connection with his claim for damages against the Potter Title and Trust Company, Executor of the Last Will and Testament of D. Ford Henry, Jr., deceased, for the death of the said Emmett E. Young, deceased, as the result of an accident caused by the collision of an automobile in which the said Emmett E. Young, deceased, was riding, and another automobile owned and operated by the said D. Ford Henry, Jr., deceased, in his lifetime, which accident and 40

death occurred on July 6, 1934, in the County of Warren and State of New Jersey.

That he has been informed by Wayne Barber, Esq., of the firm of Fox & Fox, Esqs., attorneys-at-law of Easton, Pennsylvania, that the said firm represents the Western and Southern Indemnity Company of Cincinnati Ohio, which said company was the insurer of the said automobile of the said D. Ford Henry, Jr., deceased, against public liability, involved in the said accident, and that the
10 said firm represents the said company in connection with said claim against the Estate of the said D. Ford Henry, Jr., deceased, for the death of the said Emmett E. Young, as aforesaid.

That the deponent has endeavored to negotiate a settlement of the claim of the said Walter T. Young as General Administrator of Emmett E. Young, deceased, and as Administrator Ad Prosequendum of Emmett E. Young, deceased, against the Estate of the said D. Ford Henry, deceased, for the death of the said Emmett E. Young, deceased, as aforesaid, but has been unable to do so.
20

That the deponent verily believes that no settlement of the said claim will be made at least until after a suit has been brought against the said Executor of the said Estate of the said D. Ford Henry, Jr., deceased, for the said death.

That the said Emmett E. Young, deceased, left him surviving the following next of kin: Minnie C. Young, widow, and the following three sons: LeRoy Young, Emmett Young, Jr., and Raymond Young.

30 That the said next of kin are in impecunious circumstances and are desirous of having a speedy determination of the claim of the said Walter T. Young as General Administrator of Emmett E. Young, deceased, and as Administrator Ad Prosequendum of Emmett E. Young, deceased, against the said Potter Title and Trust Company, Executor of the Last Will and Testament of D. Ford Henry, Jr., deceased.

William A. Frack.

Subscribed and sworn to
before me this 4th day
of October, 1934.

(SEAL)

Claire G. LaVelle
Notary Public, Easton, Pa.
Commission Expires March 2, 1937.

10

STATE OF NEW JERSEY, }
COUNTY OF HUNTERDON, } SS.

W. Reading Gebhardt, being duly sworn on his oath
according to law deposes and says:

That he is a member of the firm of Gebhardt & Geb- 20
hardt, Esqs., attorneys of Walter T. Young, General Ad-
ministrator of Emmett E. Young, deceased, and Admin-
istrator Ad Prosequendum of Emmett E. Young, de-
ceased, and the person actually entrusted with the con-
duct of the said cause.

That he caused a Proof of Claim, a copy of which is
hereunto annexed, of the said Walter T. Young, General
Administrator of Emmett E. Young, deceased, and as
Administrator Ad Prosequendum of Emmett E. Young,
deceased, to be served upon the Potter Title and Trust
Company, Executor of the Last Will and Testament of D. 30
Ford Henry, Jr., deceased, by sending the same to the
said Potter Title and Trust Company, Executor of the
Last Will and Testament of D. Ford Henry, Jr., deceased,
by registered mail on October 1, 1934, and that a return
receipt thereon was requested of the post office author-
ities, and that the said receipt was received by him in due
course from the said post office authorities on October
4, 1934, signed by the said Potter Title and Trust Com-
pany.

W. Reading Gebhardt. 40

Subscribed and sworn to
before me this 4th day
of October, 1934.

(SEAL)

Lester Wallack Oliver
Notary Public of New Jersey.

COPY

10 TO POTTER TITLE AND TRUST COMPANY,
EXECUTOR OF THE LAST WILL AND TESTA-
MENT OF D. FORD HENRY, JR., DECEASED:

PLEASE TAKE NOTICE that the undersigned, Wal-
ter T. Young, General Administrator and Administrator
Ad Prosequendum of Emmett E. Young, deceased, hereby
claims there is due him from the Estate of the said D.
Ford Henry, Jr., deceased, the sum of Forty Thousand
Dollars (\$40,000.), the said sum being claimed by the
said Walter T. Young as General Administrator of the
20 said Emmett E. Young, deceased, and/or as Administra-
tor Ad Prosequendum of Emmett E. Young, deceased, for
damages for the death of the said Emmett E. Young, de-
ceased, on July 6, 1934, as the proximate result of injuries
sustained by him on July 6, 1934, as the result of an
accident caused by the collision of an automobile in which
the said Emmett E. Young, deceased, was riding, and an-
other automobile operated by the said D. Ford Henry, Jr.,
deceased, in his lifetime, on the road leading from Wash-
ington to Phillipsburg, both in the County of Warren and
30 State of New Jersey; the said accident being caused by
the careless, negligent and unlawful operation of his said
automobile by the said D. Ford Henry, Jr., deceased.
Dated September 29, 1934.

Walter T. Young,
General Administrator of
Emmett E. Young, deceased.

Walter T. Young,
Administrator Ad Prosequendum
of Emmett E. Young, deceased.

STATE OF NEW JERSEY, }
COUNTY OF HUNTERDON, } ss.

Walter T. Young, being duly sworn upon his oath according to law, deposes and says:

That he is the duly appointed General Administrator of Emmett E. Young, deceased, and also the duly appointed Administrator Ad Prosequendum of Emmett E. Young, deceased.

That the claim set forth in the foregoing statement of 10
claim is due and owing from the Estate of D. Ford Henry,
Jr., deceased, and that the same is true and correct, that
no part of said claim has been paid, but that the whole
thereof is justly due and owing from the Estate of the
said D. Ford Henry, Jr., deceased.

Walter T. Young.

Subscribed and sworn to
before me this 29th day
of September, 1934.

(SEAL)

20

Albert M. Reading
Notary Public of New Jersey.

**ORDER PERMITTING ADMINISTRATOR AD
PROSEQUENDUM TO INSTITUTE SUIT.**

Filed October 17, 1934.

30

Application having been made for an Order permitting
Walter T. Young, Administrator Ad Prosequendum of
Emmett E. Young, deceased, the above-named plaintiff,
to institute a suit in the New Jersey Supreme Court, War-
ren County, against the Potter Title and Trust Company,
Executor of the Last Will and Testament of D. Ford
Henry, Jr., deceased, for the recovery of damages claimed
to be due for the death of the said Emmett E. Young, de-
ceased, on July 6, 1934, which suit will be based upon the 40

Death Act of the State of New Jersey and the amendments and supplements thereto, and it appearing that due notice of the said application has been served upon the said Potter Title and Trust Company, Executor of the Last Will and Testament of D. Ford Henry, Jr., deceased, and the matter coming on to be heard in the presence of Gebhardt & Gebhardt, Esqs., attorneys of the said plaintiff, and no appearance being made for the said Potter Title and Trust Company, Executor as aforesaid, and the
10 Court having considered the same;

It is on this 16th day of October, 1934, ORDERED that permission is hereby granted to Walter T. Young, Administrator Ad Prosequendum of Emmett E. Young, deceased, to institute a suit forthwith, in the New Jersey Supreme Court, Warren County, against the Potter Title and Trust Company, Executor of the Last Will and Testament of D. Ford Henry, Jr., deceased, for the recovery of damages claimed to be due for the death of the said Emmett E. Young, deceased, on July 6, 1934, the said
20 action to be based on the Death Act of the State of New Jersey and the amendments and supplements thereto.

Thomas W. Trenchard,
Justice of the New Jersey
Supreme Court.

SUMMONS AND COMPLAINT

Filed October 26, 1934.

30 THE STATE OF NEW JERSEY TO POTTER TITLE
AND TRUST COMPANY, Executor of the Last Will and
Testament of D. Ford Henry, Jr., deceased:

You are summoned to answer the annexed
Complaint of Walter T. Young, Administrator Ad Prosequendum of Emmett E. Young, deceased, in an action at law in the
(SEAL) New Jersey Supreme Court. And take
40 notice that unless you file your Answer to the said Com-

plaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after the service upon you of this writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, THOMAS J. BROGAN, Esquire, Chief Justice of the New Jersey Supreme Court, at Trenton, this 18th day of October Nineteen Hundred and Thirty-four.

Gebhardt & Gebhardt
Attorneys.

Fred L. Bloodgood
Clerk.

10

The plaintiff, Walter T. Young, Administrator Ad Prosequendum of Emmett E. Young, deceased, who resides in the Borough of Washington, County of Warren and State of New Jersey says that:—

1. On the 6th day of July, 1934 the plaintiff's intestate, Emmett E. Young, was riding as a passenger in a certain automobile which was then and there owned by, 20 and being operated by, one William Minnich.

2. The said automobile was then and there being driven and operated by the said Minnich on the public highway leading from the Town of Phillipsburg to the Borough of Washington, both in the said County of Warren and State of New Jersey, and going in an Easterly direction.

3. The said D. Ford Henry, Jr., deceased, was then and there the owner of a certain automobile.

4. The said D. Ford Henry, Jr., deceased, his servants 30 and agents, were then and there driving and operating the said automobile mentioned in paragraph 3, on the said highway, and were then and there proceeding in a westerly direction.

5. The said D. Ford Henry, Jr., deceased, his servants and agents, then and there carelessly, negligently and unlawfully drove and operated his said automobile, and then and there carelessly, negligently and unlawfully drove and operated his said automobile at a dangerous and excessive rate of speed and on his left-hand side of 40

the said highway, and without keeping any lookout for the said automobile in which the plaintiff's intestate was then and there riding, and without giving any one any warning of the approach of the said automobile, and with the brakes and other parts of his said automobile in a dangerous, defective and unlawful condition, which condition existed on the said day and for a long time prior thereto, of which condition the said D. Ford Henry, Jr., deceased, his servants and agents, had notice on the said
10 day and for a long time prior thereto, all of which was contrary to the statute in such case made and provided.

6. The said D. Ford Henry, Jr., deceased, his servants and agents, when his said automobile was close to the automobile in which the plaintiff's intestate was then and there riding, then and there carelessly, negligently, and unlawfully turned and swerved his said automobile toward and into, the said automobile in which the plaintiff's intestate was then and there riding, so that as the result of all of the aforesaid carelessness negligence and un-
20 lawfulness of the said D. Ford Henry, Jr., deceased, his servants and agents, his said automobile then and there struck the automobile in which the plaintiff's intestate was then and there riding, with great force and violence, so that as the result thereof, the plaintiff's intestate was so greatly bruised, wounded and injured that he died as the result of the said injuries on July 6, 1934, leaving him surviving, his widow, Minnie C. Young, and the following children: LeRoy, Emmett, Jr. and Raymond; his father, Howard Young, his mother, Clara Saylor Young, his
30 grandmother, Arvesta Young, and his grandchildren, Earl and Jean.

7. The plaintiff herein brings into Court his Letters of Administration Ad Prosequendum on the said Emmett E. Young, deceased, issued to him by the Surrogate of the said County of Warren, on September 29, 1934.

8. The said D. Ford Henry, Jr., died on July 7, 1934 leaving a Last Will and Testament which was duly admitted to probate by the Register of Wills of the County of Allegheny, in the State of Pennsylvania, on September
40 24, 1934, and Letters Testamentary thereon were issued

by the said Register of Wills to the Potter Title and Trust Company, of Pittsburgh, Pennsylvania, on the said date. The said D. Ford Henry, Jr., died in the State of New Jersey.

9. On or about October 3, 1934 the plaintiff presented his aforesaid claim in due form to the defendant, the Potter Title and Trust Company, Executor of the Last Will and Testament of D. Ford Henry, Jr., deceased, but the same has not been paid.

10. By virtue of an Order dated October 16, 1934 10 made by the above-stated Court, permission was granted by the above-stated Court to the plaintiff herein to institute this suit in the above-stated Court against the defendant named herein.

11. This action is brought under the Death Act of the State of New Jersey and the amendments and supplements thereto.

12. This action is commenced within two years after the death of the said Emmett E. Young, deceased.

The plaintiff demands as damages the sum of \$40,000. 20

Gebhardt & Gebhardt
Attorneys of Plaintiff.

SHERIFF'S RETURN

RETURN RECEIPT

30

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

(Signature or name of addressee)

POTTER TITLE AND TRUST COMPANY

(Signature of addressee's agent)

E. K. NACHANAS

Dated of delivery, 10/20/34

(Reverse side)

40

POST OFFICE DEPARTMENT

Official Business

Penalty for Private
Use to Avoid Pay-
ment of Postage,
\$300

REGISTERED ARTICLE

Postmark of Delivering
office

No. 29-704

Pittsburgh, Pa. 3

Insured Parcel Oct. 20, 2:30 P. M.

1934

10 No.

And Date of Delivery

Return to DEPT. MOTOR VEHICLES

(Name of Sender)

Street and Number
of Post Office Box,
STATE HOUSE

Post Office at

State TRENTON, N. J.

20

Walter T. Young, Administrator Ad Prosequendum of
Emmett E. Young, deceased, vs. Potter Title and Trust
Company, Executor of the last will and testament of D.
Ford Henry, Jr., deceased.

AFFIDAVIT

STATE OF NEW JERSEY }
COUNTY OF MERCER } ss.

30

M. AGNES SMITH, of full age, being duly sworn on her
oath deposes and says that she is Administrative Clerk
in the Office of the Commissioner of Motor Vehicles of
the State of New Jersey and the person designated by
the Commissioner of Motor Vehicles to acknowledge
service of process under the provisions of Chapter 69
Laws of 1930, and is likewise the person designated by
the Commissioner of Motor Vehicles to mail notice of
service of copy of Summons and Complaint in proceedings

40 under said statute.

Deponent further says that the original and a copy of the Summons and Complaint in the above entitled case was served upon her the 19th day of October, 1934, in accordance with the above-mentioned statute, and that a notice of such service and a copy of the Summons and Complaint was forthwith sent by registered mail to the defendant named therein and that the defendant's return receipt, hereto annexed, containing such notice and copy of Summons and Complaint for the registered letter was received by the deponent on the 22nd day of October, 10 1934, (Potter Title and Trust Co.).

Deponent further says that attached to this affidavit is the original return receipt above referred to, together with the original summons and Complaint served on deponent on the 19th day of October, 1934.

M. Agnes Smith
Acting for the Commissioner
of Motor Vehicles

20

Sworn to and subscribed before
me this 22nd day of October, 1934
Mollie E. Salmon
Notary Public of New Jersey

I hereby deputize and appoint Thomas Conrad a Special Deputy to Serve the within writ and make return thereto.

Witness my hand and seal this 19th day of October, A.
D. 1934.

30

Albert Cooper, Jr.
(L. S.)
Sheriff of Mercer County,
by
Lena M. Booz, Under Sheriff

Served within Summons and Complaint October 19th A.
D. 1934 upon Potter Title and Trust Company, Executor
of the Last Will and Testament of D. Ford Henry, Jr.,
deceased deft., by leaving the original writ and a copy 40

of the same in the office of the Motor Vehicle Commissioner of the State of New Jersey, in the State House, Trenton, N. J., with M. Agnes Smith, Administrative Clerk in said Office, with a service fee of two dollars.

Albert Cooper, Jr., Sheriff

By Thomas Conrad Spec. Dep.

Sheriff's Fees	\$3.62
10 M. V. Comm.	2.00
	\$5.62

Complaint

Service of the within Summons and Demand is hereby acknowledged this nineteenth day of October, 1934.

Harold G. Hoffman

Commissioner of Motor Vehicles

I, Fred L. Bloodgood, Clerk of the Supreme Court of
20 the State of New Jersey do certify that the foregoing is
a true copy of the Sheriff's Return in the above stated
cause as the same remains on file in my office.

(SEAL) In Testimony whereof I have set my hand
and seal of said Court at Trenton, this nine-
teenth day of November, A. D. nineteen
hundred and thirty-four.

Fred L. Bloodgood

Clerk.

30

SPECIAL APPEARANCE OF DEFENDANT

Filed November 1, 1934.

The defendant hereby enters its special appearance in
the above cause solely for the purpose of challenging the
jurisdiction of the court in this cause of action and
further to set aside the service of summons and complaint
40 in this cause because service was not made in accordance

with Chapter 69 of the Laws of 1930 and the amendments thereto.

Smith & Smith
Attorneys for defendant
Appearing specially.

NOTICE OF MOTION TO STRIKE

Service acknowledged November 13, 1934. 10
Filed January 4, 1935

To Gebhardt & Gebhardt, attorneys of the Plaintiff:

YOU WILL PLEASE TAKE NOTICE, that we, appearing specially for the purpose of objecting to the jurisdiction of the court, will move to set aside the service of the summons and complaint in the above entitled cause on the Potter Title and Trust Company, executor of the last will and testament of D. Ford Henry, Jr., deceased, defendant, before Honorable Thomas W. Trenchard, Justice of the New Jersey Supreme Court, at the State House Annex, Trenton, New Jersey, on Thursday, November 22nd, 1934, at ten A. M., or as soon thereafter as counsel may be heard. The grounds upon which we shall rely are as follows: 20

1. That service was not made in accordance with the provisions of Chapter 69, P. L., 1930, p. 295, as amended by P. L. 1933, p. 129.
2. Because the plaintiff's deceased at the time the accident occurred was not a resident of the State of New Jersey. 30
3. Because D. Ford Henry, Jr., the alleged driver of the car in the State of New Jersey at the time the accident occurred is dead and that no actual notice of this suit can be given him under the statute and the law.
4. Because the court cannot acquire jurisdiction over the defendant, Potter Title and Trust Company, executor of the last will and testament of D. Ford Henry, Jr., de- 40

ceased, beyond the limits of the State of New Jersey.

Smith & Smith,
Attorneys appearing specially for the
Potter Title and Trust Company, executor of the last will and testament of
D. Ford Henry, Jr., deceased.

10

ORDER OF REFERENCE

Filed January 5, 1935

It appearing that the defendant, Potter Title and Trust Company, executor of the last will and testament of D. Ford Henry, Jr., deceased, by its attorneys, Smith & Smith, appearing specially for the purpose of contesting the jurisdiction, has given notice of a motion to set aside the service of the summons and complaint in the above
20 entitled cause, and it appearing that the question involved is one of importance, and the plaintiff by his attorneys, Gebhardt & Gebhardt consenting thereto, said motion is hereby referred to Part 3 of the Supreme Court for hearing and determination.

Dated: December 29, 1934.

Rule actually entered.

January 5, 1935.

Thomas W. Trenchard,

J. S. C.

30 We hereby consent to the entry of the above Rule for Reference.

Gebhardt & Gebhardt,
Attorneys of Plaintiff.

Smith & Smith,
Attorneys appearing specially for
Potter Title and Trust Company, executor of the last will and testament of
D. Ford Henry, deceased.

40

STIPULATION OF FACTS

In order to avoid the taking of depositions for use upon hearing of motion to set aside service of summons and complaint in the above entitled cause, Messrs. Gebhardt & Gebhardt, attorneys for Walter T. Young, Administrator Ad Prosequendum of Emmett E. Young, deceased, plaintiff, and Smith & Smith, attorneys appearing specially for the defendant, hereby stipulate and agree upon the following statement of facts:

1. The plaintiff's deceased, Emmett E. Young, was at the time of the accident on July 6th, 1934, mentioned in the Complaint and upon which this action is based, and had been for more than a year, a resident of the Borough of Nazareth, Northampton County, Pennsylvania, and was a non-resident of the State of New Jersey. 10

2. The plaintiff, Walter T. Young, Administrator Ad Prosequendum of Emmett E. Young, deceased, was a resident of the Borough of Washington, County of Warren and State of New Jersey, on July 6, 1934, the date of the said accident, and had been for a period of approximately one year before that date, and has been ever since. 20

3. The said accident which occurred on July 6th, 1934, was a collision of two cars, one driven by William Minnich, in which the plaintiff's deceased, Emmett E. Young, was riding, and the other driven by D. Ford Henry, Jr. The said accident occurred in the township of Lopatcong, County of Warren and State of New Jersey. As the proximate result of injuries received in the said accident, the said Emmett E. Young, deceased, was instantly killed, his death occurring in New Jersey, and D. Ford Henry, Jr., deceased, died on July 6th, 1934, subsequent to the said accident, in the Warren Hospital, Phillipsburg, New Jersey. 30

4. Minnie C. Young, the widow of Emmett E. Young, plaintiff's intestate, was at the time of the said accident, and has been from that time down to the present time, a resident of the Borough of Nazareth, Northampton County, Pennsylvania.

5. The said D. Ford Henry, Jr., left a last will and testament, which was admitted to probate by the Register 40

of Wills of Allegheny County, Pennsylvania, on September 24th, 1934, and letters testamentary thereon were issued by said Register of Wills to the defendant, the Potter Title and Trust Company, of Pittsburgh, Pennsylvania, on September 24th, 1934.

6. The defendant, Potter Title and Trust Company, is a corporation of the State of Pennsylvania and does not have an office in the State of New Jersey and has not designated any resident agent upon whom process
10 can be served in the State of New Jersey.

7. At the time and place of the said accident, the said D. Ford Henry, Jr., deceased, was operating the said automobile mentioned in Paragraph 3 of this Stipulation, of which he was the owner, which said automobile was licensed by the State of West Virginia, but which automobile was not licensed or registered under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles. At the time and place of the said accident, the said D. Ford Henry, Jr., deceased,
20 held a driver's license issued by the State of West Virginia, but was not licensed to operate an automobile in New Jersey. On July 6, 1934 the said D. Ford Henry, Jr., deceased, was a non-resident of the State of New Jersey.

8. On or about October 19, 1934, the attorneys for the plaintiff caused the Summons and Complaint herein to be delivered to the Sheriff of Mercer County, New Jersey, for service upon the Potter Title and Trust Company, Executor of the Last Will and Testament of D.
30 Ford Henry, Jr., deceased, under the provisions of Chapter 69 of the Laws of 1930 and the amendments and supplements thereto. That service of the said summons and complaint was made by the said Sheriff by serving the same upon the Commissioner of Motor Vehicles of New Jersey on October 19, 1934, and that thereupon service of the said Summons and Complaint was made upon the defendant in the manner set forth in the certified copy of the Sheriff's Return, to be printed as a part of the record herein. That a true copy of the said summons
40 and complaint was actually received by the defendant on

October 20, 1934, by virtue of this service.

9. That the plaintiff, Walter T. Young, is a brother of the decedent, Emmett E. Young, and that at the time of the issuance of the summons in this action, he was, and still is, also the General Administrator of Emmett E. Young, deceased.

10. That the said Emmett E. Young, deceased, left him surviving his widow, the said Minnie C. Young; the following three children, LeRoy, Emmett, Jr. and Raymond; his father, Howard Young; his mother, Clara Saylor Young, his grandmother, Arvesta Young; and his grandchildren, Earl and Jean, all of whom are residents of the State of Pennsylvania.

It is hereby stipulated and agreed that the above facts shall be considered on the hearing of the motion to set aside the service of summons and that this stipulation shall be of the same effect as depositions regularly taken in accordance with the rules of law, and of this court.

It is further stipulated and agreed that the foregoing Stipulation of Facts is agreed to for the purpose of this Motion only, and that this Stipulation shall not be construed as an admission of any of the said facts therein contained, for any other purpose.

Gebhardt & Gebhardt,
Attorneys of Plaintiff.

Smith & Smith
Attorneys Appearing Specially
for Defendant.

30

40

OPINION OF SUPREME COURT

Filed April 11, 1935

NEW JERSEY SUPREME COURT

No. 432 January Term 1935

WALTER T. YOUNG, ADMINISTRATOR
AD PROSEQUENDUM OF EMMETT
10 E. YOUNG, DECEASED,

PLAINTIFF,

VS.

POTTER TITLE AND TRUST COM-
PANY, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF D.
FORD HENRY, JR., DECEASED,

DEFENDANT.

20 Submitted January Term 1935. Decided April 11, 1935.

Before Justices Lloyd, Case and Donges.

For plaintiff, W. Reading Gebhardt.

For defendant, Sylvester C. Smith, Jr.

The opinion of the court was delivered by

Case, J. Defendant, on special appearance, moves to set aside the service of summons and complaint on the ground that the service is invalid.

30 Emmett E. Young was a passenger in an automobile which, on July 6, 1934, collided on a public highway in this state with an automobile owned and driven by D. Ford Henry, Jr. Young was killed instantly. Henry died a few hours later. Both men were non-residents of the State of New Jersey. Henry had a driver's license and a car registration issued by the State of West Virginia. He was not licensed and his car was not registered by the State of New Jersey. His last will and testament, pro-
40 bated by the Register of Wills of Allegheny County,

Pennsylvania, named Potter Title and Trust Company as executor. That company, a Pennsylvania corporation, without an office or a designated resident agent in New Jersey, duly qualified. Walter T. Young, a resident of Warren County in this state, was appointed administrator *ad prosequendum* of Young, and as such brought the present action against Henry's executor. Service of summons and complaint was made upon the New Jersey Commissioner of Motor Vehicles, who forthwith sent a notice of such service and a copy of the summons and complaint by registered mail to the defendant executor. In due course the defendant's return receipt was received by the Commissioner and notation thereof was endorsed on, and appended to, the summons and complaint. 10

The issue is whether the attributes of the plaintiff and the defendant are such as to bring the action and the service of process within the purview of ch. 69, Pamph. Laws 1930. An amendment, ch. 69, Pamph. Laws 1933, does not change the provisions now in point. The 1930 enactment is as follows:—

20
“From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile with- 30
in the State of New Jersey, make and constitute the Commissioner of Motor Vehicles of the State of New Jersey his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such owner is in- 40

volved; and the acceptance of the said privilege or the operation of said motor vehicle shall be a signification of his, her or their agreement that any such process against him, her or them which is so served shall be of the same legal force and validity as if served upon him, her or them personally. Service of such process shall be made by leaving the original and a copy of the summons and complaint, with a fee of two dollars, in the hands of the Commissioner of Motor
10 Vehicles of the State of New Jersey, or someone designated by him in his office, and such service shall be sufficient service upon the said non-resident chauffeur, operator or owner; provided, that notice of such service and the copy of the summons and complaint are forthwith sent by registered mail to the defendant by the Commissioner of Motor Vehicles or such person acting for him in his said office, and the defendant's return receipt and the affidavit of the Commissioner of Motor Vehicles or such person in his office acting
20 for him, of the compliance herewith are appended to the said summons and complaint and filed in the office of the clerk of the court wherein the said action may be pending; provided, also, that the date of the said mailing and the date of the receipt of the return card aforesaid are properly endorsed on the said summons and complaint and signed by the said Commissioner of Motor Vehicles or someone acting for him. . . ."

Defendant first contends that inasmuch as plaintiff's decedent was not a resident of this state and none of the
30 ultimate beneficiaries of his estate are residents of the state the action is not within the statutory language "by any resident of the State of New Jersey". Our disposition of the case makes it unnecessary to pass upon this point.

It is next said that the authority for service in the statutory manner was personal to Ford, the operator and owner of the car, that it ended at his death and does not extend to his personal representative. There is little to
40 be gained on the immediate question by a discussion of

the cases on this and like legislation. An earlier statute, ch. 232, P. L. 1924, was sustained by this court in *Pizzutti vs. Wuchter*, 103 N. J. L. 130, but held unconstitutional by the United States Supreme Court in the same case on appeal, 276 U. S. 13, 72 Law. Ed. 446, for evils that have been cured in the present statute. The Massachusetts statute, P. L. 1923, ch. 431, upon which our present act was modeled, was considered and sustained in *Pawloski vs. Hess* (Mass.), 144 N. E. 760; *Hess vs. Pawloski*, 274 U. S. 352; *Paraboschi vs. Shaw*, 258 Mass. 531, 155 N. E. 445; *Duggan vs. Ogden*, 278 Mass. 432, 180 N. E. 301; 10 *O'Donnell vs. Registrar of Motor Vehicles*, 283 Mass. 375, 186 N. E. 657. Still earlier legislation of a somewhat similar nature was sec. 16 of the 1906 New Jersey Motor Vehicle Act as amended by ch. 304, P. L. 1908, passed upon by our Court of Errors and Appeals in *Kane vs. State*, 81 N. J. L. 594, and by the United States Supreme Court on the appeal of that case, 242 U. S. 160, 61 Law. Ed. 222. The cases support the statutory theory that a non-resident chauffeur, operator or owner of an automobile, by using the highways of the state without charge or 20 special license, is assumed to have thereby appointed the Commissioner of Motor Vehicles his agent for the acceptance of process in a civil action against such chauffeur, operator or owner arising out of or by reason of an accident or collision occurring within the state in which such person is involved; but no decision of an appellate court has been brought to our attention wherein is involved the authority of the motor vehicle commissioner or like officer to accept service of process on behalf of the estate of a chauffeur, operator or owner after the death of such 30 person.

The statute is, in its wording, personal to the individual who, to use the terminology of the statute, constitutes the commissioner of motor vehicles his agent:—“... any chauffeur, operator or owner . . . who shall accept the privilege . . . shall by such acceptance . . . constitute the commissioner . . . his, her or their agent . . . in any civil suit . . . against such chauffeur, operator or the owner . . . ; and the acceptance of the said privilege . . . shall 40

be a signification of his, her or their agreement that any such process against him, her or them which is so served shall be of the same legal force and validity as if served upon him, her or them personally . . . such service shall be sufficient service upon the said non-resident chauffeur, operator or owner. . . .” There is nothing in the wording of the act to indicate a legislative purpose that the chauffeur, operator or owner was to authorize substituted service of any character against his personal representative. It is forcefully argued that the reasons
10 which called for the statutory enactment apply as fully to an action against a personal representative as against the individual who was involved in the accident; but this argument runs against the complete absence of language appropriate to that end, against the general rule that the death of the principal puts an end to an agency not coupled with an interest, *Durbrow vs. Eppens*, 65 N. J. L. 10, and against the well established rule that foreign administrators and foreign executors are not liable to be
20 sued in their representative capacity in the courts of this state unless power to be sued has been conferred by statute, *Durie vs. Blauvelt*, 49 N. J. L. 114, *Green, et al, vs. Dolin*, 5 Misc. 1000, *Babbitt vs. Fidelity Trust Company*, 70 N. J. Eq. 651.

The respondent contends that the agency, if such it was, was coupled with an interest and therefore was not terminated by Henry’s death. But the agent had no interest, and it cannot be said that Young did anything in reliance upon the agency. We think that it is not essential to determine whether the state officer is indeed
30 an agent, as he is named in our statute, or actually holds a “power of attorney”, as the phrase runs in the Massachusetts statute, or, as the respondent herein argues, is merely a person designated by law to whose designation a non-resident assents. In view of the “due process” decisions from *Pennoyer vs. Neff*, 95 U. S. 714, 24 Law. Ed. 565, on down we are not inclined to disregard the theory, in which the statute grounds, that the non-resident voluntarily makes, or at least assents to, the appointment
40 by accepting the privilege of driving upon our highways

without a registration license. The Massachusetts courts have called it a "contractual obligation" relating to substantive rights. *Paraboschi vs. Shaw, supra*. If the obligation upon Henry was contractual in its nature, then we must have some thought for the rules applicable to the construction of contracts. The question in one form or another has to be answered:—What does the statute provide and to what did the non-resident assent? And this may be narrowed to an inquiry as to the statutory content because the non-resident assented only to that 10 which is in the statute. In this study we may reasonably expect that a legislative intent to change the settled law regarding suit against a non-resident executor will be adequately manifested.

The statute does not expressly authorize the commissioner to receive service for a personal representative. We find no sufficient foundation for holding that such an authority is implied. Plaintiff's theory rests overmuch upon assumptions and legal fictions. The simple fact is that Henry is not shown to have had any knowl- 20 edge that an agency was being set up against him. In entering upon the highways of this state he automatically and without regard to his actual knowledge and intention, but nevertheless legally, empowered the motor vehicle commissioner to receive service of process, as *his* agent, in any civil suit against *him* with the same legal effect as though served upon *him personally*, and agreed that such service should be sufficient service against *him*. In the wording of that statutory *quasi* contract Henry had no voice and no choice. It would have been easy, had 30 the legislature wished to extend the agency, to make the service good as against personal representatives. But the statute does not say that, and does not say anything beyond what is apt as against Henry himself. The singularly explicit language leads us to conclude that it was not intended to have other than its obvious application.

The motion will be granted, with costs.

RULE TO SET ASIDE SERVICE OF SUMMONS
AND COMPLAINT

Filed April 16, 1935

NEW JERSEY SUPREME COURT, WARREN COUNTY

WALTER T. YOUNG, ADMINISTRATOR
AD PROSEQUENDUM OF EMMETT
E. YOUNG, DECEASED,

10

PLAINTIFF,

VS.

POTTER TITLE AND TRUST COM-
PANY, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF D.
FORD HENRY, JR., DECEASED,

DEFENDANT.

ACTION AT LAW

RULE TO SET ASIDE
SERVICE OF SUM-
MONS AND COM-
PLAINT.

20 The court having heard and considered the argument
of counsel for the defendant appearing specially, and
counsel for the plaintiff, and it appearing that the service
of the Summons and Complaint in the above stated cause
was invalid and should be set aside,

It is, on this 16th day of April, One Thousand Nine
Hundred and Thirty-five, ORDERED by the court, that
the service of said Summons and Complaint upon the
Potter Title and Trust Company, Executor of the Last
Will and Testament of D. Ford Henry, Jr., deceased, be
set aside and be for nothing holden, and that the said de-
30 fendant be discharged from the said service; and

It is further ordered that Walter T. Young, Adminis-
trator Ad Prosequendum of Emmett E. Young, the above
named plaintiff, pay the costs of this motion to be taxed.
Rule actually entered:

Entered April 16, 1935

On motion of Sylvester C. Smith, Jr., counsel appearing
specially for the defendant, Potter Title and Trust Com-
pany, Executor of the Last Will and Testament of D. Ford
40 Henry, Jr., deceased.

NOTICE OF APPEAL

Filed April 27, 1935.

NEW JERSEY SUPREME COURT

WALTER T. YOUNG, ADMINISTRATOR
AD PROSEQUENDUM OF EMMETT
E. YOUNG, DECEASED,
PLAINTIFF-APPELLANT,

VS.

POTTER TITLE AND TRUST COM-
PANY, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF D.
FORD HENRY, JR., DECEASED,
DEFENDANT-RESPONDENT.

ACTION AT LAW

10

NOTICE OF APPEAL.

TO SMITH & SMITH, Esqs., Attorneys of the Defendant-
Respondent.

SIRS:

20

YOU WILL PLEASE TAKE NOTICE that the plain-
tiff-appellant appeals to the Court of Errors and Appeals
from the whole of the judgment entered in the above-
stated cause in the Supreme Court of New Jersey.

Yours respectfully,

Dated April 22, 1935.

30

Gebhardt & Gebhardt,
Attorneys of Plaintiff-Appellant.

Service of the within Notice of Appeal is hereby ac-
knowledgeed this 23rd day April, 1935.

SMITH & SMITH,
Attorneys of Defendant-Respondent. 40

GROUNDS OF APPEAL

Filed May 10, 1935.

NEW JERSEY COURT OF ERRORS AND APPEALS

WALTER T. YOUNG, ADMINISTRATOR
 AD PROSEQUENDUM OF EMMETT
 E. YOUNG, DECEASED,
 PLAINTIFF-APPELLANT,

ACTION AT LAW

10

VS.

ON APPEAL FROM
 THE NEW JERSEY
 SUPREME COURT.

POTTER TITLE AND TRUST COM-
 PANY, EXECUTOR OF THE LAST
 WILL AND TESTAMENT OF D.
 FORD HENRY, JR., DECEASED,
 DEFENDANT-RESPONDENT.

GROUNDS OF
 APPEAL.

TO SMITH & SMITH, Esqs., Attorneys of the Defendant-
 Respondent.

20

SIRS:

YOU WILL PLEASE NOTICE that the appellant
 states the following grounds of appeal in the above-stated
 cause:

1. That the New Jersey Supreme Court erred in giv-
 ing judgment for the defendant-respondent instead of for
 the plaintiff-appellant, namely, in ordering that the ser-
 vice of the Summons and Complaint in the above-stated
 30 cause upon the defendant-respondent be set aside and
 be for nothing holden, and that the defendant-respondent
 be discharged from said service.

2. The service of the Summons and Complaint was
 made in accordance with the statute.

3. The statute under which the service of the Sum-
 mons and Complaint was made in this case, contains due
 and legal authority for the service of the Summons and
 Complaint upon the defendant.

40 4. The statutes of this State contain due and legal

authority for the bringing of this suit against the defendant in this State, although the defendant is a foreign executor.

5. The service of the Summons and Complaint was good, although the plaintiff's intestate, at the time that the accident occurred, was not a resident of the State of New Jersey.

Respectfully yours,

10

Dated May 9, 1935.

GEBHARDT & GEBHARDT,
Attorneys of Plaintiff-Appellant.

Service of the within Grounds of Appeal is hereby acknowledged this 9th day of May, 1935.

SMITH & SMITH,
Attorneys of Defendant-Respondent.

20

30

40

94 MAY.T.1935

New Jersey Court of Errors and Appeals

WALTER T. YOUNG, ADMINISTRATOR AD PROSEQUENDUM OF EMMETT E. YOUNG, DECEASED, PLAINTIFF-APPELLANT, vs. POTTER TITLE AND TRUST COM- PANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF D. FORD HENRY, JR., DECEASED, DEFENDANT-RESPONDENT.	}	ACTION AT LAW ON APPEAL FROM THE SUPREME COURT
---	---	---

Brief of the Plaintiff-Appellant

This is an appeal from the judgment of the Supreme Court setting aside the service of the Summons in the above entitled action.

STATEMENT OF FACTS

The action in this case is based upon the Death Act of New Jersey, and is brought by Walter T. Young, Administrator Ad Prosequendum of

Emmett E. Young, deceased, to recover damages for the latter's death as the result of a collision between an automobile, in which the said Emmett E. Young was riding as a passenger, and another automobile owned and operated by the defendant's decedent, D. Ford Henry, Jr. The accident occurred on July 6, 1934, in Warren County, New Jersey, (Stipulation of Facts, p. 19, par. 3, ll. 22-7; p. 20, par. 7, ll. 11-14).

The plaintiff's intestate, Emmett E. Young, was killed instantly and the decedent, D. Ford Henry, Jr., died later the same day as the result of injuries received in the accident.

Some time after the death of the plaintiff's intestate, his brother, Walter T. Young, was appointed General Administrator of the Estate of Emmett E. Young, deceased. Later on he was also appointed Administrator Ad Prosequendum for the purpose of instituting this suit (Complaint, p. 12, par. 7, ll. 32-5; Stipulation of Facts, p. 21, par. 9, ll. 2-6). On September 24, 1934 the Will of the said D. Ford Henry, Jr., deceased, was admitted to probate by the Register of Wills of Allegheny County, Pennsylvania, and Letters Testamentary were issued thereon to the Potter Title and Trust Company, of Pittsburgh, Pennsylvania (p. 19, par. 5, l. 39 to p. 20, l. 5).

Before bringing this action, the plaintiff obtained from Justice Trenchard, upon due notice to the defendant, an Order permitting the institution of this suit before the expiration of six months from the time of the probate of the Will. This Order was granted in accordance with the provisions of Section 65 of the Orphans' Court Act, *Comp. Stat. p. 3832*.

The Stipulation of Facts, which appears on pp. 19-21 of the State of the Case was used in lieu of depositions being taken.

The decedent Henry was not a resident of this State at the time of the accident and his automobile

was not licensed in this State (p. 20, par. 7, ll. 11-24). Service of the Summons and Complaint in this case was therefore made by serving the same upon the Commissioner of Motor Vehicles of New Jersey, under the provisions of the statute providing for such service, namely *1930 P. L., page 295* as amended, *1933 P. L., page 129*. As will appear from the Sheriff's Return (pp. 13-16) all of the steps required by the Act were complied with, and the Summons and Complaint was actually received by the defendant on October 20, 1934, (p. 20, par. 8, l. 39 to p. 21, l. 1).

The defendant then filed a special appearance (p. 16, l. 33, ff.) and made this Motion to set aside the service of the Summons.

It will appear from the Stipulation of Facts that at the time of the accident, the decedent Henry was a non-resident of the State of New Jersey (p. 20, par. 7, ll. 22-4) and that his automobile was licensed by the State of West Virginia (p. 20, par. 7, ll. 14-18). It will also appear that the plaintiff, Walter T. Young, was at the time of the accident, a resident of Washington, New Jersey, and that he had been for the period of a year prior thereto, and still is, a resident of Washington, New Jersey (p. 19, par. 2, ll. 16-21).

The Potter Title and Trust Company is a bank located in Pittsburgh, Pennsylvania, has no office in this State, and has not designated any resident agent for the service of process in this State, (p. 20, par. 6, ll. 6-10).

OUTLINE OF THE ARGUMENT

The appellant contends that the judgment of the Supreme Court should be reversed for the reasons set forth below.

POINT NO. 1

The appellant in this case is a resident of this State and is entitled to the provisions of this Act. Page 5.

POINT NO. 2

The death of the decedent, Henry, did not operate to terminate the authority of the Commissioner of Motor Vehicles to accept service of the Summons and Complaint. Page 9.

A.

The contract provided for by this statute was not a real contract of agency. Page 9.

B.

Even if this be held to be a contract of agency, it is a power coupled with an interest and therefore was not terminated by the death of Henry. Page 14

C.

The power of the Commissioner of Motor Vehicles is a statutory power, absolute in terms and is not revoked by the death of Henry. Page 21.

D.

This statute is remedial in nature and should be construed liberally, so as to include the instant case. Page 25.

POINT NO. 3

This statute contains sufficient authority for a suit against a foreign Executor in this state. Page 33.

ARGUMENT

The defendant does not contend in this matter that the plaintiff failed to follow any of the steps, in the service of the Summons and Complaint, laid down by the Statute. The whole argument of the defendant is to the effect that for various reasons the instant case is not one which comes within the scope of the Act, and that therefore the service is not good.

The statute of 1930 is set forth in the Opinion of the Supreme Court (p 23, l. 21—p. 24, l. 27), and we shall therefore not take the space to repeat it here. The Act was amended by *1933 P. L., page 129*, but not in any respect that affects this controversy.

In the Court below, the defendant-respondent based its argument upon three points, and we assume will stress the same points in this Court. We shall, therefore, take up these three points and answer them in order.

POINT NO. 1

THE APPELANT IN THIS CASE IS A RESIDENT OF THIS STATE AND IS ENTITLED TO THE BENEFIT OF THE PROVISIONS OF THIS ACT.

The first point made by the defendant below was that although the plaintiff is a resident of this State, he is not entitled to the privilege of obtaining service of the Summons and Complaint in this action under this statute. The Supreme Court did not specifically pass on this aspect of the case, but since counsel argued it below we apprehend that we should deal with it here. This point is included in grounds of appeal Nos. 1 and 5 (p. 30, ll. 5-32; p. 31, ll. 3-6).

On this phase of the case the statute provides as follows, *1933 P. L. p. 129 to 130*:—

"1. From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by the acceptance and the operation of such automobiles within the State of New Jersey, make and constitute the Commissioner of Motor Vehicles of the State of New Jersey his, her, or their agent for the acceptance of process *in any civil suit or proceeding by any resident of the State of New Jersey* against such chauffeur, operator or the owner of such motor vehicle,"

We have set forth in italics the clause under discussion here.

Counsel argue under this point, that since Emmett E. Young, if he had lived (and presumably if he had continued to live in Pennsylvania) would not be entitled to get service of the defendant under this Act that therefore this plaintiff cannot do so.

Our answer to this is, that such argument is entirely beside the point. The plain facts are, that Walter T. Young was, at the time of the accident, and has been ever since, a resident of this State. On the other hand, the statute clearly provides that its benefits are available in "*any civil suit or proceeding by any resident of the State of New Jersey.*" It does not even provide that such a plaintiff must have been a resident of the State at the time of the accident, although in the case at bar the plaintiff was. *There is no more reason why the plaintiff in this action should be required to go all the way out to Pittsburgh to bring this suit, than in the case of a*

person who is injured and who resides in this State at the time of the accident, and when the action is brought.

It is also contended by counsel that inasmuch as all of the next of kin of the plaintiff's intestate, mentioned in the Complaint, reside in Pennsylvania, that therefore the plaintiff cannot avail himself of the Act. But the difficulty with this argument is twofold.

First, there is nothing in the statute that furnishes any basis for this contention. The Act does not provide that it applies only where the next of kin, for whose benefits the suit lies, are residents of this State. *It requires only that the plaintiff shall be a resident of this State.*

Secondly, there is the practical difficulty that any other interpretation of the Act than the one contended for by the plaintiff, would lead to great confusion. Suppose for example, that six of the next of kin entitled to benefit resided in New Jersey and one in Pennsylvania. Should the six be penalized because one lives in Pennsylvania? Or suppose that three lived in New Jersey and three in Pennsylvania. How would the question be decided then? Or, again suppose that two lived in New Jersey and four in Pennsylvania. Should the two be deprived of their right to have one of them appointed Administrator Ad Prosequendum and to bring a suit in this State, because of the four living in Pennsylvania? Another question that would undoubtedly come up would be as to whether the residence of the widow or that of the children should prevail in a case where they happen to be different.

It is obvious that the only sound and sensible rule that can be adopted is, that the test shall be the residence of the plaintiff himself.

Finally, counsel make the point that the purpose of the Act was to benefit only residents and that it was not intended to apply to non-residents or to the next of kin who were non-residents. All of this

might be of some avail were it not that the fact still remains that the plaintiff *is* a resident of this State, and was at the time of the accident, *and that he is necessarily the one who must institute a suit of this kind, rather than the next of kin.* Certainly, this Court cannot be asked to determine whether the widow or some other of the next of kin should be appointed Administrator Ad Prosequendum of this Estate, for it has neither the power nor the time to do so. It is obvious that even if it had the power, for this Court to be required to look into each case and determine whether the Administrator Ad Prosequendum might have been some other member of the family who was not a resident, would be imposing a task, altogether too arduous on this Court, and one that was never contemplated by the statute.

After all, the situation simply is, that the Surrogate did appoint the plaintiff Administrator Ad Prosequendum; that he is not only a resident of this State, but of the very county where the accident happened and presumably where many of the witnesses are located. *What good reason is offered, therefore, why he is not entitled to the benefits of this Act, within the plain terms of which he obviously comes, so that he can have the case tried in his own State rather than be compelled to travel with his witnesses several hundred miles to Pittsburgh and bring his action, away from his own home and business and in a place far removed from the point of the accident? The very purpose of this Act was to prevent such hardship being imposed upon the plaintiff in such a case and we see no reason why this plaintiff is not entitled to its benefits as well as any other resident.*

An analogous situation exists in our State where all the parties are located in this State, in a death case, and the suit is brought by the Administrator Ad Prosequendum in his own county, even though the defendant does not reside there, and the acci-

dent did not happen there. So far as we know, the right of the Administrator to bring the suit in his own county has never been questioned, nor on a motion for a change of venue has this Court ever gone into the question of whether the widow or the next of kin resided in a different county from that of the Administrator Ad Prosequendum, and if such were found to be the case compelled a change of venue to that county. It is therefore contended that by the same line of reasoning, the question as to the residence of the next of kin in this case cannot enter into the determination of this Motion.

It is therefore respectfully submitted that the plaintiff, Walter T. Young, was entitled to the benefit of this Act in bringing his suit in this State.

POINT NO. 2

THE DEATH OF THE DECEDENT, HENRY, DID NOT OPERATE TO TERMINATE THE AUTHORITY OF THE COMMISSIONER OF MOTOR VEHICLES TO ACCEPT SERVICE OF THE SUMMONS AND COMPLAINT.

The second point made by the defendant-respondent in the Court below was, that the authority of the Commissioner of Motor Vehicles to accept service of the Summons and Complaint was terminated by the death of Henry. We shall divide our argument on this point into four separate and distinct parts, for the sake of clarity. This point is included in Grounds of Appeal Nos. 1 and 3 (p. 30, ll. 5-32 and ll. 35-8).

A.

THE CONTRACT PROVIDED FOR BY THIS STATUTE WAS NOT A REAL CONTRACT OF AGENCY.

Counsel took the position below, that by virtue of the provisions of the statute, the decedent, Henry, by the acceptance of the privilege of using the highways of this State, with his automobile, thereby automatically appointed the Commissioner of Motor Vehicles to accept service of process for him, and that this was a contract of agency which was revoked by the death of Henry.

Our first contention is that this view of the matter is untenable because, strictly speaking, this was not a contract of agency.

While it is true that the statute does say that by the acceptance of the privilege to operate his car in this State, the non-resident constitutes the Commissioner of Motor Vehicles "his, her or their agent for the acceptance of process," still, an examination of the matter will make it apparent that it is not a pure contract of agency, *because it lacks practically all of the attributes of the ordinary contract of agency.*

For example, Henry had absolutely no choice in the selection of the person upon whom the process was to be served; as a matter of fact he did not employ him as his agent; this was done by operation of law. Furthermore, Henry did not pay the Commissioner of Motor Vehicles any compensation for his services, nor incur any liability to him for such compensation. Henry did not have the right to discharge the Commissioner as his so-called agent, nor revoke his authority; nor could he substitute another person in his place. Likewise, the Commissioner himself could not lawfully refuse to perform his part of the contract.

In other words, the whole relationship was completely determined and fixed in every detail by the statute and could not be altered or modified by one jot or one tittle, by the parties to the contract.

It is also important to note that there is absolutely nothing personal about the relationship. Under the Act, service can be made on any one in the Com-

missioner's office designated by him for this purpose. Another distinguishing feature is that the Commissioner is entrusted with absolutely no discretion as to any of the acts to be performed by him, He performs a function that is purely and simply ministerial.

It is contended, therefore, that it is clear beyond peradventure of a doubt that we are not dealing here with a contract of pure agency *and in fact, not a contract of agency at all. Rather is it a mere designation, or contract of designation, and one which possesses practically none of the attributes of agency, and therefore a contract that is not subject to the rules of the law of agency.*

There are certain other elements in the situation that lend much strength to this view of the matter. At this stage in the proceedings we have a contract which has been fully performed on the one side; that is, the State made the offer to Henry in this statute and he accepted it by proceeding to use the roads of this State without the payment of any fee, and thereby received the full benefit of the contract on his side. Now certainly, even counsel would not contend that if he had lived, it would be possible for him to attempt to abrogate the contract and to refuse to allow the Commissioner of Motor Vehicles to accept service for him.

What possible reason exists, therefore, why his estate, which certainly stands in his shoes so far as liability for this tort is concerned, should be allowed to abrogate the contract?

This is especially true when it is considered that, unlike a true contract of agency, there is no way in which Henry's estate, if it be allowed to evade this obligation of the contract, made by Henry in conjunction with the operation of the law, can restore the plaintiff in this case to his status quo. In the ordinary case of agency where a consideration has

passed to the principal, if the principal chooses to revoke the agency, he must either restore the agent to his status quo or, if this is not possible, he must respond in damages. *In the case at bar, Henry's estate cannot be obliged to do either.* We contend, therefore, that this is another very cogent reason why Henry's estate should not be allowed to evade the performance of its side of the contract.

Moreover, to allow the estate to avoid this obligation would serve no useful purpose. Obviously, if, as the Courts have uniformly held, such a statute is proper legislation to apply to Henry if he had lived, it is equally fitting that it should likewise apply to his estate.

Nor is it to be conceived for a moment that the Legislature ever intended that the statute should be applicable only to cases where the tort-feasor survived. It is to be presumed that the Legislature, when this statute was passed, had in mind the fact that such a tort survived the death of the tort-feasor under our statute and that it intended the law to apply to his estate where it is bound to respond in damages. In this connection, it is of great importance to note that the statute reads, "in *any* civil suit or proceeding", indicating clearly that the Legislature meant the statute to be broad in scope and to include cases where the tort-feasor died after the accident.

Counsel cited below a number of cases under this point in their Brief and rather attempt to infer that these cases have held the contract to be one of agency. The same cases are referred to by the Supreme Court in its Opinion (p. 25, ll. 1-12). We refer to the following cases: —

Hess v. Pawloski, 274 U. S. 352

Wuchter v. Pizzuti, 275 U. S. 13

Paraboschi v. Shaw, 258 Mass. 531; 155 N. E.

445

Duggan v. Ogden, 278 Mass. 432 at p. 435

O'Donnell v. Registrar of Motor Vehicles, 283
Mass. 375 at p. 378.

An examination of each of these cases, however, will disclose that while the Court may refer to the Commissioner of Motor Vehicles as an agent or something of that sort, *in none of them does the Court discuss the matter in detail, or hold, or even intimate that this contract is one of pure agency.*

The Supreme Court did not pass directly on this contention of the appellant, but referred to it in the following language (p. 26, ll. 28-34) as follows: "We think that it is not essential to determine whether the State officer is indeed an agent, as he is named in our statute, or actually holds a 'power of attorney', as the phrase runs in the Massachusetts statute, or, as the respondent herein argues, is merely a person designated by law to whose designation a non-resident assents."

The Court then went on to say that the Massachusetts Courts have called the relationship a "contractual obligation" and adds that "If the obligation upon Henry was contractual in its nature, then we must have some thought for the rules applicable to the construction of contracts," (p. 27, ll. 3-6).

Then farther down on the same page the Court refers to the contract as a "statutory quasi contract."

Apparently, the Supreme Court agreed with us to that extent, i. e., that the relationship is not a pure contract, or in fact a contract at all, but a mere "statutory quasi contract." We submit that it is highly significant that while the Court below did not sustain the service in this case, nevertheless, it felt impelled to the view that the relationship could not possibly be said to contain the usual attributes of agency. It is insisted that once this is conceded, then the only logical conclusion is that the ordinary rules applicable to a strict contract of

agency cannot apply either, and that the situation must be regarded as a mere designation rather than an agency.

It is submitted, therefore, that the contract in question is not a real contract of agency and that, therefore, it was not revoked by the death of Henry.

B

EVEN IF THIS BE HELD TO BE A CONTRACT OF AGENCY, IT IS A POWER COUPLED WITH AN INTEREST AND THEREFORE WAS NOT TERMINATED BY THE DEATH OF HENRY.

While we are of the opinion that this is not a pure contract of agency, nevertheless, we desire to argue the point that even if this Court should deem this to be a contract of agency, it would still not be revoked by Henry's death because it is a power coupled with an interest. We desire to examine a few of the cases which deal with this doctrine.

One of the leading cases and one which was cited by counsel below, is that of *Hunt v. Rousmanier's Admrs.*, 8 *Wheaton* 174, in which it appeared that Hunt had loaned Rousmanier in his lifetime, the sum of \$2,000, and, as security therefor, Rousmanier had given Hunt a power of attorney to sell Rousmanier's interest in the brig *Nereus* and schooner *Industry*, upon the failure of the latter to pay the loan, and to apply the proceeds thereon. After paying only \$200. on account of the obligation, Rousmanier died, and thereupon Hunt took possession of the two ships and offered Rousmanier's interest therein for sale. Thereupon. Rousmanier's Administrators forbade the sale and Hunt filed a Bill to compel them to join in the sale of the ships by him.

It was contended by Rousmanier's estate that the power of attorney was revoked by his death. To

this Hunt responded that it was a power coupled with an interest and therefore did not terminate with his death. The Court held, however, that it was not a power coupled with an interest and therefore ended with his death. The basis for the Court's decision here was, that the title to Rousmanier's interest in the boats had not been assigned to Hunt. The reason for this rule was that this was a mercantile transaction and one in which, under the law, as it then stood in the early part of the 19th century, the sale would have to be in the name of the owner and the bill of sale given to the buyer in the owner's name, which the Court said was impossible because of his death.

In the course of the century that has elapsed since this decision, business conditions have changed and there have been many new statutes passed and new legal conceptions have come into being. Undoubtedly, due to all of these factors, the Courts have, during this period, extended and modified the rule as originally laid down in *Hunt v. Rousmanier's Admrs.*

A very material extension of the rule was permitted in *Jeffries Admr. v. Mutual Life Insurance Co. of N. Y.*, 110 U. S. 305. In this case K died leaving a policy of insurance on his life. J, his administrator, contracted with L and T, law partners, for the prosecution of the claim on the policy upon the understanding that they would receive a percentage of the proceeds of the litigation as their fee. They were also given full power to compromise the claim as they should deem best. Suit was instituted by the attorneys, after which J died and C succeeded him as Administrator of the Estate. A judgment was finally recovered and the attorneys, considering the claim doubtful, compromised it for a somewhat smaller sum, while an appeal was pending, despite a notice from C, the new Administrator, that he would not ratify such a compromise. After the settlement had been made, C instituted a proceeding to

vacate the entry of the satisfaction of the judgment. The United States Supreme Court held that J had given L and T, the attorneys, a power coupled with an interest, which survived the death of J, and that, therefore, the compromise made by L and T was binding upon C, the new Administrator.

It is very important indeed to note in connection with this case that there was no assignment of any interest in the life insurance to the attorneys and they held no title to any part of it. In other words, by this decision, the United States Supreme Court modified the rule laid down in Hunt vs. Rousmanier's Admrs., and decided that it was no longer necessary, in order to establish a power coupled with an interest, to have a transfer of the title to the subject matter to the holder of the power.

A still more recent case, in our own State, is that of *Durbrow v. Eppens*, 65 N. J. L. 10. In this case the plaintiffs, Durbrow, et al., brought suit against the estate of Eppens for the recovery of a sum of money from the defendant executors. The plaintiffs were insurance brokers and agents and had entered into a contract, designated by the Court as a deed or power of attorney, with the decedent who was one of twenty underwriters known as "International Fire Lloyds." Among other things, the power of attorney conferred upon the plaintiffs the right to sell policies of insurance and also to adjust and pay losses occurring thereunder. At the time of Eppens' death, there was due to Eppens some \$3,000. in premiums, from the plaintiffs. There were also certain outstanding losses on policies written by the plaintiffs prior to Eppens' death, and after his death the plaintiffs proceeded to adjust these losses and paid in satisfaction thereof, some \$4,000. The plaintiffs instituted this suit to recover the sum of \$4,000. less the premiums already due to Eppens.

Eppens' estate took the position that the power of attorney was not one coupled with an interest, and therefore was terminated by Eppens' death, and

that the plaintiffs consequently had no right to adjust these losses after his death. This Court held, however, that there was an interest on the part of the persons insured by these policies in the subject matter of the agency, which was the insurance, and also in the funds in the hands of the agents and that, therefore, the power was one coupled with an interest and did not terminate with Eppens' death.

It is important to note that here again there was a decided extension of the rule, because in this case the interest relied upon by this Court was not an interest of the agent but rather an interest of certain third persons, namely, the insureds.

Our contention is, that if this contract is one of agency, then, as the law now stands, it is clearly a power coupled with an interest. This is easily demonstrated. The State made the contract with Henry, through this statute, because it has an interest in the subject matter of the so-called agency, namely, in providing for the safe use of the highways of this State and in affording a remedy in this State against an automobile operator who has an accident in this State as the result of which some one is injured or killed. Under the statute this interest in the subject matter of this contract exists in the State for the benefit of any resident of this State who brings a suit to recover for injuries or death sustained in such an accident. *It is submitted, therefore, that it is clear that both the State and its residents, including the plaintiff, have an interest in the subject matter of this contract, and that, therefore, it is a power coupled with an interest.*

That the State properly has such an interest in the subject matter of this contract in this day and age is supported by the following excerpt from the Opinion of the Court in the case of *Hess v. Pawloski*, 274 U. S. 352 at 356:—

“Motor Vehicles are dangerous machines; and, even when skillfully and carefully operat-

ed their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights."

These modifications of the rules governing this subject of a power coupled with an interest, have been recognized and gathered up and embodied in the Restatement of the Law of Agency, by the American Law Institute. In this work, a new and different nomenclature is used in this connection and a power coupled with an interest is denominated a "power given as security." We set forth certain excerpts from this volume on this subject because they are so directly applicable to the case at bar:—

"Sec. 138. A power given as security is a power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration.

"Sec. 139. Termination of Powers Given as Security.

(1) *Unless otherwise agreed, a power given as security is not terminated by:*

(a) revocation by the creator of the power;

- (b) surrender by the holder of the power, if he holds for the benefit of another;
- (c) the loss of capacity during the lifetime of either the creator of the power or the holder of the power; or
- (d) *the death of the holder of the power, or, if the power is given as security for a duty which does not terminate at the death of the creator of the power, by his death.*

"Sec. 120. The death of the principal terminates the authority of the agent.

"COMMENT: *It is only where a power, although in the form of an agency power is given for the benefit of the agent or a third person that the power is not terminated by the death of the one giving it* (see Sec. 139).

"CAVEAT: No inference is to be drawn from the rule stated in this Section that an agent does not have power to bind the estate of a deceased principal in transactions dependent upon a special relationship between the agent and the principal, such as that of banker and depositor, or trustee and cestui que trust, or in transactions in which special rules are applicable, as in dealings with negotiable instruments." (*Italics ours*).

We contend that it is entirely obvious that the situation in the case at bar comes directly within the definition of a "power given as security," Sec. 138, supra. It can certainly well be said that if this is a contract of agency at all, then (1) it is a power which affects the legal relations of another (here, the plaintiff); (2) it is created in the form of an agency authority; (3) it is held for the benefit of a third person (here, the plaintiff) to secure the performance of a duty, (here, to accept service of pro-

cess in an action for damages); (4) the power is given for a consideration (here the privilege extended to Henry to use the highways of this State, without the payment of a fee).

This being so, it follows that the rule laid down in Sec. 139, supra—applies, namely, that where “the power is given as security for a duty which does not terminate at the death of the creator of the power” it is not terminated by the latter’s death. In the case a bar it is manifest that the duty of Henry to respond in damages would not terminate with his death but survives to his estate, and that therefore, the power would not terminate with his death.

Counsel rely upon the case of *Arlotta v. McCauley*, 16 D. & C. (Pa.) 657. This is a decision of one of the Common Pleas Courts of Pennsylvania and would, therefore, not form any precedent of any weight for this Court. In that case the Court followed the rule of *Hunt v. Rousmanier’s Admrs.*, and remarked that there was no contention made by counsel that there was any interest coupled with the power such as would make an exception to the general rule. It is apparent, therefore, that neither counsel nor the Court went into the situation carefully and that the point that this was a power coupled with an interest, was not even brought out.

The other case cited by counsel below was that of *Boyd v. Lemmerman*, 11 N. J. Misc. 701. While this is a decision by one of the Circuit Court Judges, which would not be binding upon this Court, still, we desire to merely point out in passing that this case was one in which the suit was brought against the deceased tort-feasor himself, which obviously, could not properly be done.

The Supreme Court dismissed the argument of the plaintiff below on this point with the following two sentences (p. 26, ll. 24-28): “The respondent contends that the agency, if such it was, was coupled with an interest and therefore was not terminated by Henry’s death. But the agent had no

interest and it cannot be said that Young did anything in reliance upon the agency."

This answer to the plaintiff's contention below is so tersely put that it is exceedingly difficult to tell what were the reasons for the Court's position. The Opinion does state that the "agent [here the Commissioner of Motor Vehicles] had no interest" *but completely ignores the heart of the plaintiff's argument below, which is also set forth here just above, and which is supported by the case of Durbrow v. Eppens, supra, namely, that an interest on the part of one or more third persons is sufficient.*

Then the Court below goes on to say "that it cannot be said Young did anything in reliance upon the agency." We do not understand the pertinency of this statement, for the test of whether the principal holds out his agent as having certain powers and whether a third party relies upon that in dealing with the agent, applies only to a case where the dispute is as to whether the principal can be held for the acts of his agent done within the apparent scope of authority of the agent. In the case at bar, however, this is not the point in dispute.

We therefore respectfully urge upon this Court that this contention on the part of the appellant be carefully weighed and considered, since it is possible that in the Court below we did not point out with sufficient clarity, the direction of our reasoning on this point.

C

THE POWER OF THE COMMISSIONER OF MOTOR VEHICLES IS A STATUTORY POWER, ABSOLUTE IN TERMS AND IS NOT REVOKED BY THE DEATH OF HENRY.

We now pass to the third reason for our position, that the designation of the Commissioner of Motor Vehicles to accept service of the process was not re-

voked by Henry's death. Under this title we contend that even if it be held that this is a contract of agency, it would still not be revoked by the death of Henry, because it is a statutory power made absolute in its terms by the statute, and because of this fact, was not revocable by Henry in his lifetime, nor revoked by his death.

This principle was enunciated in a case in the Circuit Court of Appeals, for the 9th Circuit, namely, that of *Bell v. Mills*, 123 Fed. 24, in which the facts were as follows:—

One Thomas Bell pledged some shares of stock to a bank as security for a loan, and thereafter died before the loan was paid. The California statute provides that the pledgee in a case of this kind has a special power of sale and that before the sale, a demand must be made on the pledgor, "if he can be found" and that actual notice of the sale must be given him. The issue involved in this suit was whether the bank retained the power to sell the stock after the death of the pledgor.

It was contended by the Estate that the statute intended to provide a remedy only as against a living pledgor because of the fact that a demand must be made upon the pledgor and actual notice of the sale given him. *The Court held, however, that the personal representatives of the pledgor stood in the shoes of the pledgor after his death, and that although the statute did not in terms apply to the Executor or Administrator of the pledgor it would be held to do so.*

Then it was contended by the Estate that even if the statute be held to be sufficiently broad in its scope to apply to the representative of the Estate of the deceased pledgor, that still the power of sale was revoked by the death of the pledgor on the theory that it was not a power coupled with an interest under the doctrine laid down in the case of *Hunt v. Rousmanier's Admrs.*, *supra*. Considerable strength was added to this argument on the part of

the Estate by the fact that the California statute specifically provided that the title to the stock in a case of this kind remained in the pledgor.

The Circuit Court of Appeals held, however, that the power of sale survived the death of the pledgor because, as the Court said:—

“ the power vested in a pledgee to sell pledged property is not a power granted by the pledgor or to be exercised in his name; it is a power conferred upon the pledgee by statute—a power absolute in its terms.”

In other words, the Circuit Court of Appeals held that this power of sale was a contract brought into being by operation of law, and that therefore, the power so created by the statute was absolute in its terms and was not revoked by the death of the pledgor.

And the Court apparently did not hold that this was a power coupled with an interest and so bring the case within the doctrine of *Hunt v. Rousmanier's Admrs.* What it really did, was to recognize a new class of cases, i. e., where the power is one created by a specific statute, in which it held the power would not be revoked by death.

We submit with the utmost earnestness that this decision by one of the higher Courts of the land is a case that is absolutely on all fours with the case at bar, and that it furnishes a clear and clean-cut precedent for its determination.

It will be observed that exactly the same arguments were advanced there as here, namely, that the statute by its terms did not extend to the estate of the pledgor; that no actual notice to the pledgor himself of the sale could be given to him, nor a demand made upon him, because he was dead; and finally, that the power was revoked, because it was not one coupled with an interest, and yet the Court, despite all these arguments advanced by the Estate of the pledgor, held that the power was not revoked by his death.

In the case at bar, as we have already pointed out, the power or designation involved is purely a creature of statute, and the power is one fixed by statute, exclusively, and one that is absolute in its terms. In fact, the power in the instant case is even more strongly typical of this class of powers, defined by the Circuit Court of Appeals in this decision.

It is submitted that the case of Bell v. Mills provides the key to this problem, and a ready, sensible and logical solution for it.

A careful reading of the Opinion below does not disclose any reference to this theory which was also argued under this point in the Court below, so we are unable to ascertain the reasons why the Court did not adopt it.

Apparently the Court below, in the last analysis, disposed of this whole matter by holding, that since the statute did not *specifically and in so many words* provide for service upon the *personal representative of the deceased tort-feasor* by serving the Commissioner of Motor Vehicles of this State, therefore the statute was not broad enough to sustain the service.

The Court was undoubtedly of the opinion that with this support gone, the plaintiff's whole case fell to the ground, and apparently overlooked the fact that even if it so held on this point, the plaintiff's position could still stand on any one of the three legs or theories set forth under points A, B and C above. This is true, because of the fact that if for any of these three reasons the so-called agency continued after the death of Henry, the service would be good, regardless of the absence of those express words in this statute.

In other words, in order to set the service aside, it was necessary for the Supreme Court to go further than examining the language of the statute, and determine that on none of these three theories was the service good.

We respectfully submit that we believe that the Supreme Court fell into error at this point and that all of the various angles of the plaintiff's argument be considered by this Court, for it is vigorously insisted that on one or more of these grounds the service should stand.

D

THIS STATUTE IS REMEDIAL IN NATURE AND SHOULD BE CONSTRUED LIBERALLY, SO AS TO INCLUDE THE INSTANT CASE.

Our final contention under Point No. 2 is that this is a remedial statute and that therefore it should be construed liberally so that it will be applicable to the case at bar.

A recent case in New Jersey in which a similar statute was held to be remedial and therefore to be liberally construed, is that of *Primmer v. Baldwin*, 1 N. J. Misc. 95. This was a suit brought by Mr. and Mrs. Primmer against the heirs and next of kin of Henry W. Baldwin, deceased. The case was brought to recover for personal injuries alleged to have been sustained as the result of the negligent operation of Baldwin's car by him, in which the plaintiffs were riding as the guests of Baldwin at the time of the accident.

The Court held, of course, that under our survivorship statute the action survived against the Executor or Administrator of Baldwin. The contention of the defendants was, however, that the statute merely permitted a suit against the *executors or administrators* of a decedent and did not allow the bringing of an action against the *heirs and next of kin* of the decedent.

The survivorship statute is *Sec. 5 of the Executors' Act*, 2 Comp. Stat. p. 2260:—

"That where any testator or intestate shall,

in his or her lifetime, have taken or carried away or converted to his or her use, the goods or chattels of any person or persons, or shall, in his or her lifetime, have committed *any trespass to the person or property, real or personal*, of any person or persons, such person or persons, his or her executors or administrators, shall have and maintain the same action *against the executors or administrators of such testator or intestate* as he, she or they might have had or maintained against such testator or intestate, and shall have the like remedy and process for the damages recovered in such action as are now had and allowed in other actions against executors or administrators." (Italics ours).

It will be observed that the statute did refer only to the Executors or Administrators of the deceased tort-feasor. Despite this fact, Justice Trenchard, speaking for the Court, held in effect that the statute was a remedial one and should be liberally construed. We quote from the Opinion of the Court at p. 96:—

"The defendants named in this action, however, are not Baldwin's personal representative, but instead his heirs and next of kin. Out of this fact arise the issues raised by the motion. The reasons assigned in the notice of the motion (while by implication conceding that the action might survive against the personal representative) make objection that it does not survive against the heirs and next of kin of the deceased tort-feasor, and this is the only question argued.

"I am of the opinion that this objection is not well founded because the executors' statute above quoted causes the right of action to survive against the estate of the deceased tort-

feasor, and that being so, it follows as a necessary consequence that his estate may be followed, as in the case of ordinary debts, not only in the hands of its personal representative, but, after distribution, into the hands of his distributees or next of kin."

Another still more recent case in which a similar statute in Pennsylvania was held to be remedial and to be liberally construed, is that of *Wiesheier, et al. v. Joseph Kessler, Admr. of H. A. Kessler, dec'd.*, 165 Atl. 854 (Pa.). This was an action to recover damages for personal injuries and damage to property alleged to have been caused by the negligent operation of an automobile by the defendant's decedent, H. A. Kessler. Under the common law practice of Pennsylvania, such a suit would have to be instituted in a Common Pleas Court and the process of this Court would not run beyond the borders of its own county. In order to remedy this situation in motor vehicle cases, a statute was passed in 1931 providing as follows, p. 854:

"(1) The Act of June 22, 1931, P. L. 751, 812, Sec. 2 (Section 1208), 75 PS Sec. 738, provides, inter alia: 'Civil Actions for Damages. All civil actions for damages, arising from the use and operation of any vehicle, may *** be brought *** in the county wherein the alleged damages were sustained *** in the court of common pleas of said county, and service of process *** may be made by the sheriff of the county where the suit is brought deputizing the Sheriff of the County wherein the defendant or his registered agent resides, or where service may be had upon him under the existing laws of this Commonwealth, in like manner as process may now be served in the proper county.
*** ' "

This suit was brought in Cambria County, and

the defendant Administrator was served in Philadelphia County. Thereupon, the defendant filed a Petition to set the service aside, on the ground that the said statute "does not provide for service upon a non-resident Administrator of a decedent, there being no allegation that the Administrator was concerned or connected in any manner with the accident, out of which the action arose." (p. 854).

The Supreme Court held, however, that the statute should be liberally construed because it was remedial legislation and refused to set aside the service. We quote from the Opinion at p. 855:—

"(2, 3) The foregoing is in accord with the well-established rules of interpretation. *'It is always to be presumed that a statute was intended to have the most reasonable and beneficial operation that its language permits.'* 25 R. C. L. Sec. 255, p. 1018; Orlosky v. Haskell, 304 Pa. 57, 66, 155 A. 112, 114. In *Pocono Spring Water Ice Co. v. American Ice Co.*, 214 Pa. 640, 648, 64 A. 398, 401, this court said, quoting from Endlich on Interpretation of Statutes, Sec. 107: *Such (remedial) statutes 'are to be construed giving the words the largest, the fullest, and most extensive meaning of which they are susceptible. The object of this kind of statutes being to cure a weakness in the old law, to supply an omission, to enforce a right, or to redress a wrong, it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely, as the language used, when understood in its most extensive signification, would indicate.'* ***

"In *Turbett Twp. v. Port Royal Borough*, 33 Pa. Super. Ct. 520, 524, Judge Rice said: 'The effect and consequences of the proposed construction of a law, as well as its reason and spirit, will be looked into in determining the

legislative intent, which is the criterion by which all acts must be construed. Hence, if there is room for construction, the court will prefer that construction which is most consonant with the purpose for which the act was passed.'

"As we said in *Orlosky v. Haskell*, *supra*, section 1208 of the Act of May 1, 1929, P. L. 905, 997 (re-enacted in section 1208 of the Act of 1931 [section 2] *supra*), 'was an enlarging not a restricting, act.' The vast amount of traveling in late years, done by persons in automobiles, and the numerous injuries inflicted by motor vehicles operated by such itinerants, has made it the policy of the law, as evidenced in recent statutes and decisions, to bring tortfeasors who are non-residents of the county in which torts are committed by them within the jurisdiction of the courts of those counties. To give the statute under consideration complete effect in all cases, we must hold that, when the alleged tort-feasor dies before suit is brought, service of process may be made upon his administrator or executor in the county in which the latter resides". (Italics ours.)

Another case in our State in which the same rule was applied, is that of *Ten Eyck v. Runk*, 31 N. J. L. 428. In this case an action was brought to recover damages claimed to have been sustained by water being flooded back upon plaintiff's land, from the mill-dam of the defendant. During the pendency of the suit the defendant died, and the question was, as to whether the action could be continued against his executor. This involved the question as to whether the action was one that could originally have been brought against the executor or administrator of the defendant under the provisions of the survivorship statute of 1855, quoted above. The specific question was, as to whether the wrong com-

plained of constituted a trespass, within the meaning of the statute of 1855. The Court held that it did. We quote from the Opinion at p. 430: —

“It is obvious, therefore, that in this broad acceptation of the word, the injury which constitutes the foundation of the action in the present case, was a trespass—and being such, it clearly falls within the letter of the statute. But not only this, it is, as it seems to me, just as clearly embraced in its general scope or spirit. *This act is highly remedial in its character. Its intent was to relieve against the harsh injustice of the old rule—‘actio personalis moritur cum persona.’* There was certainly nothing in morals, in public policy, or in good sense, to justify the continuance of a rule which grounded a man’s right to recover for an injury to his person or estate, inflicted by a tortious act, on the contingency of the party injured surviving to the date of the judgment. The statute, therefore, is to be liberally construed so as to advance the remedy for this imperfection; but to hold that the act is operative, only with regard to torts remedial by the action of trespass, would be, certainly, to leave one-half the evil of the old law unaffected by the remedial provision. It would seem very absurd to so construe the act, that if A injure the horse of B by carelessly driving against him, it is a trespass, and by force of the provision in question, the action will survive against the executors of A, and at the same time to hold that if the servant of A, in the course of his employment, injure, by the same means, the same horse, the suit will not survive, as the injury is consequential and the action must be in case. In my judgment, to ascribe this intention to the framers of this law would not be warranted either by its phraseology or the general purpose con-

templated in its enactment. *In my opinion the word 'trespass,' as used in the section under consideration, must be received as equivalent in meaning to the word 'tort'—so that the effect of the provision is to give a right of suit against the personal representatives of a deceased wrong-doer for any injurious act of a suable nature, without reference to the form in which the remedy must be sought.*” (Italics ours).

A similar view was adopted by this Court in the case of *Soden v. Trenton, &c., Traction Corp.*, 101 N. J. L. 393, where the question was, whether an action would lie for the personal injuries sustained by the plaintiff's intestate during the period between the accident and the time of his death. We quote from p. 396:—

“Viewing the subject historically, therefore, it would seem that but one conclusion could be reached. **We have the old law, the mischief and the remedy, and it is our duty to ‘so construe the act as to suppress the mischief and advance the remedy.’** 1 Bl. Com. 87. *That the old law fell short of meting out justice in the class of injuries of which the present is a type would seem to be beyond question. To hold that the damage to one's property should create liability surviving the death of its owner, and to withhold the remedy where, under like circumstances, the injury is to one's person, is illogical, inconsistent and an offense to our sense of justice.* The additional words supplied in the act of 1855 are aptly used to enlarge the old law and to correct this injustice. It is impossible not to recognize a legislative purpose to complete the corrective process which had been in part attained in 1848, for it must not be overlooked that the act of 1855 followed in sequence

the act of 1848 and not the reverse." (*Italics ours*).

Likewise, in the case at bar, it is to be presumed that the Legislature had in mind, and intended to alleviate, the situation at which this statute is aimed, not only in cases where the tort-feasor lived but also where he had died. The rule is well settled that in passing a given statute such as this, the Legislature is presumed to have had in mind the already existing statutes of the State, including in this case, the survivorship statute, and we therefore contend that it meant the Act involved in this case to apply to cases coming within the survivorship statute.

The statute involved in the instant case has been held to be a remedial statute by the Supreme Court in the cases of *Dwyer v. Volmar Trucking Corp.*, 105 N. J. L. 518, and *Rubin v. Goldberg*, 9 N. J. Misc. 460.

The State of New York has a statute similar to that of New Jersey, and the Court held that this statute should be liberally construed on another point in a recent case, namely, that of *Clarke v. Ackerman*, 276 N. Y. S. 833. The New York statute provides that it shall apply to accidents occurring "on a public highway in this State." The accident in question happened on one of the Hudson River bridges, which was under the control of the Port of New York Authority, and which was therefore not a public highway, and furthermore, the accident did not occur in New York, but on the New Jersey side of the bridge. It appeared further that New York had exclusive jurisdiction over this bridge. Although the accident did not come within the terms of the statute at all, nevertheless, the Court held that the statute was a remedial one and should therefore be liberally construed and would therefore be held to cover this particular situation.

So far as the Opinion of the Court below, in the case at bar, is concerned, no reference is made to

the lengthy argument made by the appellant on this point below, so we are at a loss to know whether the Court came to the conclusion that the statute was not a remedial one or whether it took the view that it should not be construed liberally for some other reason.

It is therefore submitted that inasmuch as this statute is clearly a remedial statute, it should be liberally construed so as to carry out the purpose of the legislature in enacting it, and that it should be held to include the instant case.

POINT NO. 3

THE STATUTE CONTAINS SUFFICIENT AUTHORITY FOR A SUIT AGAINST A FOR- EIGN EXECUTOR IN THIS STATE.

In their last point, counsel argued below that the service was not good because the Potter Title and Trust Company did not appoint the Commissioner of Motor Vehicles its agent to accept service. This point is included in Grounds of Appeal, Nos. 1 and 4 (p. 30, ll. 25-32; p. 30, l. 40—p. 31, l. 3). While it is true that no such appointment was made, nevertheless, we desire to point out that under this statute, it is not contemplated that this shall be done. The whole theory of the statute is that the designation of the Commissioner was accomplished by operation of law, when Henry used the highways of this State without first obtaining a license for his car. In other words, it is not contemplated in the statute that the non-resident shall make the designation *after* the accident, but rather *before*, and this is done *ipso facto* by his driving his car in this State.

Under this point counsel contended that this statute does not, in so many words, provide that a foreign Executor can be sued in this State. But this was entirely unnecessary, as we now propose to demonstrate.

Suppose that the Legislature had gone into great detail and had in so many words provided in this statute that the designation of the Commissioner of Motor Vehicles to accept service of process would extend to include his accepting service of process for the foreign Executor of a non-resident. Could it then be contended with any force whatever, that the foreign Executor could not be sued unless the statute contained an additional section, specifically providing that the foreign Executor could be sued in this State? To ask the question is to answer it. No Court would hold that such a section would be required, because of the fact that it would be a mere repetition of the previous section.

Likewise, in the case at bar, if, as we contend would be proper, this Court comes to the conclusion that the Legislature did not mean to restrict this statute to cases where the tort-feasor was still living at the time of the suit, but that it was also intended to cover a case like the instant one, where the non-resident had died, then it must follow, as the day the night, that the Legislature intended that service could be had upon the foreign Executor of the non-resident. To hold otherwise would be, in effect, to completely nullify the intention of the Legislature to extend the application of this Act to cases where the non-resident had died.

As we have already pointed out under Point No. 2-D, the whole history of the decisions of our Courts in construing remedial statutes, upholds the rule, that where it is apparent that the Legislature set out to remedy some defects, or inadequacies, or difficulties of the existing law, it will be presumed that the Legislature intended to cure the whole situation, not just a section of it.

And we contend that, in the case at bar, the statute should be given the broad construction which the Legislature undoubtedly intended. This is particularly true where no possible harm can come from so doing, and where on the contrary,

great injustice would be done if this construction were not adopted.

In other words, if this Act is a piece of just, beneficial and desirable legislation, as applied to Henry if he had lived, it is equally just, beneficial and desirable that it be held to apply to his Executor after his death.

It is submitted therefore that the statute sufficiently provides for the maintenance of this action against the foreign Executor.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the Judgment of the Supreme Court should be reversed.

Respectfully submitted,

GEBHARDT & GEBHARDT,
Attorneys of Plaintiff-Appellant.

W. READING GEBHARDT,
Of Counsel.

great injustice would be done if this construction were not adopted. In other words, if this Act is a piece of legislation and if it is applied to the rights and liabilities of the parties, it is equally just, certain and desirable that it be held to apply to the parties after the death of the parties. It is submitted therefore that the statute should be construed to the maintenance of this action against the foreign estate.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

GEORGE E. CERNARDT

Attorney at Law, Philadelphia

W. READING CERNARDT

Of Counsel

New Jersey Court of Errors and Appeals

WALTER T. YOUNG, ADMINISTRATOR
AD PROSEQUENDUM OF EMMETT
E. YOUNG, DECEASED,

PLAINTIFF-APPELANT,

vs.

POTTER TITLE AND TRUST COM-
PANY, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF D.
FORD HENRY, JR., DECEASED,

DEFENDANT-RESPONDENT.

ACTION AT LAW

ON APPEAL

FROM THE

SUPREME COURT

BRIEF OF

DEFENDANT

SMITH & SMITH, Attorneys of Defendant-
Respondent.

Sylvester C. Smith, Jr., of Counsel.

I.

THE PLAINTIFF, AS ADMINISTRATOR AD
PROSEQUENDUM OF A NON-RESIDENT, IS NOT
ENTITLED TO THE PROVISIONS OF THIS ACT.

The appellant's brief sets forth only a portion of
§ 1 of the amended act, *P. L. 1933, 129*.

The act specifically provides that service upon the
Commissioner of Motor Vehicles "in any civil suit or

proceeding by any resident of the State of New Jersey against***the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such owner is involved, shall be of the same legal force and validity as if served upon him, her or them personally”.

If Emmett Young, plaintiff's deceased, had lived, he would not have been entitled to the privileges of this act since he was a resident of Nazareth, Pennsylvania. The plaintiff, Walter T. Young, as administrator ad prosequendum, represents the next of kin, all of whom in this case are non-residents of the State of New Jersey.

Under the death act, suit is instituted and brought in the name of the administrator ad prosequendum who does not represent the general estate of the deceased but the next of kin for whose benefit the suit is brought, (1917 P. L., p. 531). He sues purely in a representative capacity. It would appear that in order to overcome the lack of residence of the decedent and of the non-resident next of kin, the administrator ad prosequendum who was appointed, was a resident of the State of New Jersey, living at Washington, New Jersey.

It is urged that there is a clear legislative intent to provide a remedy solely for the residents of New Jersey against non-resident drivers without compelling *residents of New Jersey to leave the State* of their domicile for the purpose of seeking redress in the event of accidents or collisions with non-resident motor vehicles.

It is an established rule in the exposition of statutes that the intention of the legislature is to be derived from a view of the whole and of every part of the statute, taken and compared together. The real intention, when ascertained, will prevail over the literal sense of terms. When words are not ex-

plicit the intention is to be collected from the context and the occasion and the necessity of the law and from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. *Lynch vs. Long Branch*, 111 N. J. L. 148.

While under the literal interpretation the administrator ad prosequendum is a resident of the State of New Jersey, where he sues as a representative of non-resident next of kin of a decedent, none of whom could in their own names maintain the action, the interpretation goes beyond the real intention of the legislature as expressed in this act and taken as a whole.

Answering the argument of appellant's counsel that a condition might arise where six of the next of kin entitled to benefit resided in New Jersey and one in Pennsylvania, in such an instance the right of action would accrue to the next of kin residing in New Jersey and through their representative or administrator ad prosequendum, no matter what his residence, they would be entitled to redress under the statute.

The *Death Act*, *Comp. St. p. 1907*, creates a new right of action in the next of kin. *Soden vs. Trenton Traction Corporation*, 101 N. J. L. 393; *Cooper vs. Shore Electric Company*, 63 N. J. L. 395.

Thus, the appellant's argument is not sound, since if six of the next of kin resided in New Jersey, suit by their administrator ad prosequendum would come within the wording of the act: "in any civil suit or proceeding by any resident of the State of New Jersey" who can only bring a suit by a representative, the administrator ad prosequendum.

Such are not the facts in the present case. All of the next of kin are non-residents.

II.

THE DEATH OF THE DECEDENT, HENRY, OPERATED TO TERMINATE THE AUTHORITY OF THE COMMISSIONER TO ACCEPT SERVICE OF THE SUMMONS AND COMPLAINT.

A.

APPELLANT ARGUES THAT THIS WAS NOT A REAL CONTRACT OF AGENCY AND UPON THIS POINT THERE IS NO DISAGREEMENT.

Thus, in the *Restatement, Agency*, in the scope note, p. 3, it is stated:

"Likewise various cases of non-consensual representation are not dealt with as where a statute provides that service of process may be made upon a designated public official as agent for a non-resident motorist who commits a tort while driving through the State".

The definition of agency, *Restatement, Agency, Sec. 1*, states that "agency is the relationship which results from the manifestation of consent by one person to another that the other would act on his behalf and subject to his control and consent by the other so to act".

It will be seen that the relationship of the Commissioner of Motor Vehicles and the non-resident owner using the highways of this state is not strictly an agency relationship, and the Massachusetts courts have called it a "contractual obligation relating to substantive rights."

Paraboschi vs. Shaw, 258 Mass. 531, 155 N. E. 545.

The manifestation of consent that the Motor Vehicle Commissioner act as the agent for the service of process, is the creature of the statute. By its

provisions the non-resident owner accepting the privilege of driving an automobile without a New Jersey registration license shall by acceptance and operation of the automobile constitute the Commissioner of Motor Vehicles of the State of New Jersey his agent for the acceptance of process. Without this statute such a manifestation of consent would not create such a relationship. By using the highways of the State, the non-resident owner only consents to that which the statute provides, and that is that any such service of process against him which is so served "shall be of the same legal force and validity as if served upon him, her or them *personally*".

The statute does not indicate any legislative intent that the non-resident owner consent to substituted service of any character against his personal representative in the event of his death. So that while it is admitted that the relationship between the Commissioner of Motor Vehicles and the non-resident owner is not that of agency, it may be termed a quasi-contractual agency and the application of the general rules of agency is of aid in interpreting the authority of the statutory agent and the termination of the statutory relationship.

B.

INTERPRETING THE RELATIONSHIP AS A QUASI-CONTRACTUAL AGENCY, THE DEATH OF HENRY, NON-RESIDENT OWNER, TERMINATED THE CONTRACT.

The general rule is that death terminates the power of an agent. This is admitted by the appellant; but it is urged that this was a power coupled with an interest and therefore was not terminated by the death of Henry.

The appellant cites *Hunt vs. Rousmanier's Admrs.*

8 *Wheat*. 174. There is no similarity in the facts. There, power to sell Rousmanier's interest in the brig *Nerius* and the schooner, *Industry*, was given as security for a loan of \$2000.00. Speaking for the Supreme Court, Chief Justice Marshall pointed out that the title to the debtor's interest in the ships remained in the debtor and that therefore, there was no transfer of interest in the ships accompanying the power.

Where was there any transfer of interest provided for by the statute in this case?

What transfer of interest then existing accompanied the statutory power to accept service?

In the New Jersey case of *Durbrow vs. Eppens*, 65 N. J. L. 10, counsel for the appellant indicates that there was extension of the doctrine of *Hunt vs. Rousmanier's Admr.*, *supra*, but examination fails to disclose any distinction. This was on demurrer to the declaration. It was a case where a syndicate was formed to issue policies and the declaration alleged a deed of trust creating the same party agent for each. The title to the fund, with the power of its disposition, was included in the deed alleged in the declaration.

In *Unger vs. Newlin-Haines Co.*, 94 N. J. E. 458, there were mutual covenants by the depositing stockholders in a bankrupt corporation. By the agreement and its supplement the stockholders divested themselves of title to the stock which they deposited with the committee, placing it in the committee with power to do with it as their judgment dictated. This was a power coupled with an interest.

Counsel for the appellant argue that this power of the Commissioner comes with §138, *Restatement, Agency*, which is as follows:

"A power given as security is a power to affect the legal relations of another created in

the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration."

Analyzing the situation, certainly the power to accept service was not for the benefit of the power holder, the Commissioner of Motor Vehicles. If it was for the benefit of a third person, a resident of the State of New Jersey, it was not given to secure the performance of a duty because at the time no duty existed on the part of the non-resident using the highways, to accept service and submit himself to the jurisdiction of the courts of New Jersey.

The Pennsylvania Statute, *Purdon's Statutes*, §§1201, 1202, is copied substantially from the Massachusetts act.

In *Arlotta vs. McCauley*, 16 D & C. (Pa.) 657, a non-resident operator of an automobile was resident of Delaware. He died before service of process was made upon the Commissioner of Motor Vehicles. The court held that the statute created a statutory appointment of an agent and that the death of the non-resident operator terminated that appointment.

While it is true that this is a Common Pleas Court decision in Pennsylvania, it is indicative of the manner in which the court of a sister state treated a similar statute.

It is therefore urged that construing the relationship along well settled principals of law, this was not a power coupled with an interest because the agent had no interest nor was there any transfer of title in the interest of either the agent or a third person to the agent, therefore the power terminated with the death of Henry, the non-resident owner.

III.

NOTHING IN THE STATUTE INDICATES A LEGISLATIVE INTENT THAT THE POWER OF THE COMMISSIONER TO ACCEPT SERVICE SHALL SURVIVE THE DEATH OF THE NON-RESIDENT OWNER.

Mr. Justice Case, in the opinion of the Supreme Court in this case, pointed out the significance of the word *personally* in the statute.

The statute provides:

“**any such process against him, her or them by a non-resident owner and which is so served, shall be of the same legal force and validity as if served upon him, her or them *personally*.”

The pronouns, him, her or them, refer to any chauffeur, operator or owner of any motor vehicle. Nothing is said in the statute about serving the personal representatives of the estate of the non-resident owner. There is no wording in the act which would indicate a legislative intent authorizing service upon the representative of the non-resident.

The interpretation sought by the appellant would in effect make the statute read that such process which is so served shall be of the same force and validity as if served upon the non-resident owner personally, or in the event of his death, upon his personal representatives.

It is a well established rule of law that foreign administrators and foreign executors are not liable to be sued in their representative capacity in the courts of this state unless power to be sued has been conferred by statute. *Restatement, Conflict of Laws*, §512; *Durie vs. Blauvelt*, 49 N. J. L. 114, *Green, et al., vs. Dolin*, 5 N. J. Misc. 1000, *Babbitt vss Fidelity Trust Company*, 70 N. J. Eq. 651.

Mr. Justice Storey in *Vaughn vs. Northrup*, 40 U. S. 1, 10 L. E. 639, speaking for the United States Supreme Court in a case where this question was directly before the court, said:

"Under these circumstances the question is broadly presented whether an administrator, appointed and deriving his authority from another State, is liable to be sued here, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, de jure, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity; which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and interests of its own citizens. ****Hence, it has become an established doctrine that an administrator, appointed in one State, cannot, in his official capacity, sue for any debt due to his intestate in the courts of another State; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous both in England and in America; but it seems to be unnecessary in the present state of the law, to do more than to refer to the leading principle as recognized by this court in *Fenwick v. Sears* (1 Cranch, 259), *Dixon's Executors v. Ramsay's Executors* (3 Cranch, 319), and *Kerr v. Moon*, (9 Wheat 565)"

The attempt to subject a Pennsylvania administrator of the deceased plaintiff to jurisdiction of this court under the present statute would, in the opinion of the defendant be an invasion of the defendant's constitutional rights, requiring due process of law.

D.

THE ACT SHOULD NOT BE CONSTRUED IN A MANNER THAT WOULD VIOLATE THE ACTUAL WORDING OF THE STATUTE.

It is urged that the statute is remedial and for that reason there should be a liberal interpretation.

Reference is made to the case of *Primmer vs. Baldwin*, 1 N. J. Misc. 95, where the Supreme Court held that an action surviving the death of a tort-feasor permitted a suit not only against the executors and administrators but against the heirs and next of kin as the representatives because the right of the action survived against the estate of deceased tort-feasor and his estate could be followed not only into the hands of his personal representative but after distribution into the hands of his distributees or next of kin.

In this particular case, there was an allegation in the complaint of an appointment of administrator, inventory and failure to pay the deceased and a distribution without executing refunding bonds. No liberal interpretation of the act was necessary nor was there any interpretation requiring additional words.

It is argued that the statute should be so construed so as to suppress the mischief and advance the remedy which is to avoid bringing suit in a foreign jurisdiction by residents of New Jersey.

It is submitted that the plaintiff is not a resident

of New Jersey entitled to the benefits of the act and that in event that his decedent, Young, had lived, he would have been compelled to have instituted the suit in the Courts of Pennsylvania since he was a non-resident. But there is another rule that statutes in derogation of the common law must be strictly construed; to permit a suit against a foreign executor or administrator is in derogation of the common law. *Durie v. Blauvelt*, 49 N. J. L. 114; *Vaughan v. Northrup*, 40 U. S. I, 10 L. E. 639.

While statutes relating solely to remedy and procedure are to be liberally construed to the effect of administration of justice, nevertheless, such as take away, change or diminish fundamental rights must be strictly construed both as to the cases embraced within their terms and as to the methods to be pursued *Hill vs. Hill*, 93 N. J. L. 567, *aff'd*. 95 N. J. L. 233.

Finally it has been often held that liberality in the interpretation of a statute cannot be extended to the point of reading into a statute powers which plain language does not give. *West Jersey & Seashore Railroad Company vs. Board of Public Utility Commissioners*, 8 N. J. Misc. R. 899, 152 At. 378.

It is respectfully urged that the judgment of the Supreme Court setting aside the service of the summons in the above case should be affirmed.

Counsel for Defendant-Respondent

SYLVESTOR C. SMITH, Jr.



