


April 1964

# Conflict of Laws--Appointment of a Valid Agent for Service of Process

William Walter Smith

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Civil Procedure Commons](#), [Conflict of Laws Commons](#), and the [Criminal Procedure Commons](#)

---

## Recommended Citation

William W. Smith, *Conflict of Laws--Appointment of a Valid Agent for Service of Process*, 66 W. Va. L. Rev. (1964).

Available at: <https://researchrepository.wvu.edu/wvlr/vol66/iss3/7>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

take and hold and the trust is capable of being executed and enforced according to the law of the place to which the property was to be transmitted under the will of the donor the disposition is perfectly valid. This decision represents the majority view in this area in refusing to upset a charitable trust which does not offend the policy of the state of domicile. *Cavers, TRUSTS INTER VIVOS AND THE CONFLICT OF LAWS*, 44 HARV. L. REV. 161, 167 (1931).

The West Virginia court has never decided the precise question raised by the principal case. It did however, approach the problem in *American Bible Soc'y v. Pendleton*, 7 W.Va. 79 (1873). In that case *M*, living in Virginia, made a deed conveying land in Pennsylvania to *P* to be sold, directing that the proceeds of the sale should be held by *P* subject to the written order of the grantor. Subsequently *M* made a will disposing of the proceeds of the land, which will was admitted to probate in Virginia. The court held that the validity of any bequest of the proceeds of the land must be determined by the laws of Virginia in force when the will took effect. This decision would seem to favor the orthodox rule enunciated earlier.

In conclusion then, we may say that the orthodox rule is undergoing some modification. Although it is only speculation, it is submitted that West Virginia would follow this change and adopt the rule presented by the principal case.

*George Charles Hughes, III*

---

### Conflict of Laws—Appointment of a Valid Agent for Service of Process

*Ds* leased two incubators from *P*, a corporate lessor with its principal place of business in New York City. The lease was a form lease signed in Michigan designating the wife of one of the corporate lessor's officers as agent for the purpose of accepting service of any process within the State of New York. The form lease was less than one and a half pages long and the clause designating the agent to accept the service of process was just above the signatures of *Ds*. The above clause in no way stated that the designated agent was obligated, or had duty to give notice to *Ds* if service of process was served. *P* later sued *Ds* in the United States District Court for the Eastern District of New York for an alleged default of the payments of the lease. The agent, upon receipt of service of process from the

United States marshal, on the same day sent the summons and complaint to *Ds*. The district court quashed service of process on the ground that the lease did not create a valid agency for the service of process. The Court of Appeals for the Second Circuit affirmed. *Held*, reversed. Five members of the Court expressed that the designated agent was an agent authorized by appointment to receive service of process within the meaning of Federal Civil Procedure Rule 4(d) (1), because the agent gave prompt notice of the service to *Ds* even if there was no obligation to do so. *National Equip. Rental, Ltd. v. Szukhent*, 84 Sup. Ct. 354 (1964).

The question presented here is whether a party to a private contract may appoint an agent to receive service of process within the meaning of Rule 4(d) (1) of the Federal Rules of Civil Procedure where the agent has not expressly undertaken to transmit notice to the party and the parties were not on equal footing as far as bargaining power was concerned.

Rule 4(d)(1) states that service of process can be served upon an individual by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, however, the rule does not define what is a valid "appointment of an agent." The majority in the principal case treated the issue involved as a determination of a federal procedural rule and therefore, state law did not have to be followed in determining if a valid agency existed. The Court held that there was a valid agency apparently because the agent made a prompt acceptance and transmittal to the defendants of the service of process although she had not expressly undertaken to do so. By way of dicta the Court stated that if the appointed agent had not given such prompt notice then the agency would have been invalid.

Dissent in the principal case disagreed in that they thought this was a problem dealing with substantive law and state law should have been determinative, but even if this was a federal procedural question the agency should be held invalid because it was a "sham" agency. The minority also felt that the agency should be held invalid because of lack of due process to the defendants.

On the question of whether the Supreme Court should follow the law of New York in determining if the agency was valid, the Court held in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) that a federal court which exercised jurisdiction over the litigants on the

ground of diversity of citizenship was not free to treat this question as of so-called "general law," but must apply the state law as declared by the highest state court. In the principal case federal jurisdiction was based on diversity of citizenship. The highest court of New York which has passed on the question held in *Rosenthal v. United Transp. Co.*, 188 N.Y. Supp. 154 (App. Div. 1921) that only residents of the state of New York could appoint an agent to accept service of process in New York. In *Francis v. Humprey*, 25 F. Supp. 1 (E.D. Ill. 1938) the court held that the act of June 19, 1934, which gave the United States Supreme Court its authority to prescribe rules governing procedure in the federal district courts in civil actions at law, provided that such rules shall neither abridge, enlarge, or modify the substantive rights of any litigant. If Rule 4(d)(1) was interpreted and applied in the principal case to abridge or modify the substantive rights of the defendants or to enlarge the substantive rights of the plaintiff as established by the law of New York, it would seem the rule as thus interpreted should be void and unauthorized. The majority in the principal case also said that "if" the law of New York was applied they would rely upon *National Equip. Rental, Ltd. v. Graphic Art Designers*, 36 Misc.2d 442, 234 N.Y.S.2d 61 (Sup. Ct. 1962) where the court held the agency to be valid. The majority believed the *Rosenthal* case to be entirely inapposite because it interpreted a civil practice act which created a procedure whereby a resident of New York could appoint an agent for the receipt of process by designation of a person to receive service and the filing thereof with the county clerk. Thus the *Rosenthal* case clearly applied only to residents of New York who left the state and was not in point with the principal case.

In determining if the agency violated any due process rights of the defendants, the dissent cited *Pennoyer v. Neff*, 95 U.S. 714 (1877) which held that no state can serve a personal process on a resident of another state and compel him to leave his home state and go to a foreign state where a personal judgment might be handed down against him without the actual consent of the defendant to waive his constitutional right. Waivers of constitutional rights to be effective must be deliberately made and can be made only by clear and unambiguous language. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The majority felt that defendants gave their consent to be sued in another state by signing the lease which was only one and a half pages long. Also the clause designated the appointed agent was just above the signatures of the defendants. Dissent based their opinion on the

idea that due process was invaded because the form lease was forced upon the defendants by the superior bargaining power of the plaintiffs and the defendants had no other choice but to sign the lease.

Prior to the principal case there was authority that there must be an actual appointment of an individual as an agent to receive service of process. There must be an actual appointment of an agent and not just an implied appointment. Annot., 26 A.L.R.2d 1086, 1088 (1952). The appointment of the agent may be accomplished by contract. 2 MOORE, FEDERAL PRACTICE § 4.12, at 931 (2d ed. 1962). The court in *Szabo v. Keeshin Motor Express*, 10 F.R.D. 275 (1950) held that appointment under Rule 4(d)(1) meant an actual appointment by the defendant, and if such appointment has been made, service upon the agent gives the court jurisdiction. In *Fleming v. Malouf*, 7 F.R.D. 56 (W.D.N.Y. 1947) the court stated that appointment under Rule 4(d)(1) of an agent to accept service of process does not mean that the agent has to show any express authority other than accepting service of process for his principal. The majority decision adds to this prior law that there is a valid agency where the agent accepts service and does in fact deliver notice to the defendants of the service of process as soon as possible although the agent had not expressly undertaken to do so. However, it would seem that the Court did not base their decision on the lease agreement itself in determining if the agency was valid, but instead used hindsight to see what were the results and effects of the contract after the contract was breached.

On the other hand, the dissent examined the contract as of the time of its making and because the "appointed agent" was under no obligation to transmit service of process to the defendants, felt that the agency should be held invalid. In *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), the Court held that state statutes that appoint an agent for service of process must make it a requirement that the appointed agent give notice of the service of process. It was reasoned by the dissent that if federal law was to apply in determining if a valid agency existed in the principal case, instead of state law, then it was reasonable to require that the appointed agent be obligated to give notice just as state statutes have to require their appointed agents to give notice. However, the majority of the Court in the principal case did not believe that the decision in *Wuchter v. Pizzutti*, *supra*, applied to the principal case because the parties themselves contracted

for the agent to accept the service of process. Hence, the holding clearly shows that there is a difference in a state appointing an agent for service of process and the parties themselves appointing an agent for service of process.

The decision in the principal case making the agency valid may open the doors in the future to a great deal of litigation on this matter. Other big businesses may start putting clauses in all of their interstate contracts specifying a "sham" agent to accept service of process for the other party. If the parties were on an equal footing as far as bargaining power is concerned than it would seem that the result of the principal case would be more easily accepted. But, as in the principal case, where the bargaining power greatly favors the plaintiff, there is some doubt that the defendant, by having the form lease forced upon him, actually gave his consent to be sued in a foreign state and waive his constitutional right to be sued in his home state.

*William Walter Smith*

---

#### **Criminal Law—Extradition for Nonsupport**

Petitioner, a New Hampshire resident, instituted habeas corpus proceedings to obtain release from custody. Massachusetts had brought extradition proceedings under the Uniform Reciprocal Enforcement of Support Act. A hearing in New Hampshire resulted in a refusal of extradition. Thereafter, Massachusetts brought proceedings under the Uniform Criminal Extradition Act against petitioner to answer criminal charges for the nonsupport of his alleged illegitimate child born in Massachusetts in 1953 shortly after the mother had moved there from New Hampshire. The mother married sometime thereafter and continued to reside in Massachusetts. The petitioner was never within the state of Massachusetts. In 1962 the mother requested public support and as a result Massachusetts officials started extradition proceedings. *Held*, writ granted. Massachusetts could not impose on a New Hampshire resident never present in Massachusetts an obligation to support an alleged illegitimate child nor make his failure to support criminal. Under the law of New Hampshire, no duty to support an illegitimate child arises unless a suit to determine paternity is instituted within one year after the birth of the child. The dissent stated that section 6 of the Uniform