

March 1948

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Recommended Citation

J. C. Gregory, *Applicability of Substituted Service Statute to Resident Automobile Drivers*, 26 Chi.-Kent L. Rev. 159 (1948).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol26/iss2/3>

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NOTES AND COMMENTS

APPLICABILITY OF SUBSTITUTED SERVICE STATUTE TO RESIDENT AUTOMOBILE DRIVERS

Forward-looking steps were taken by every American jurisdiction, after the decision of the United States Supreme Court in *Hess v. Pawlowski*,¹ to subject the non-resident motorist to the jurisdiction of local tribunals for wrongful acts committed by him while using local highways. It now begins to appear, from decisions such as that of the Supreme Court of Colorado in the case of *Carlson v. District Court of the City and County of Denver*,² that most state legislatures, when dealing with the problem of the non-resident driver, overlooked the equally vexatious problem of how to treat with the resident driver who leaves the state after an accident but before jurisdiction can be acquired over him or his property.

The case in question arose out of a collision in Colorado between automobiles operated by one Fodor and one Carlson. Carlson's car bore Illinois license plates at the time. Fodor filed suit in Colorado against Carlson and undertook to secure jurisdiction by serving summons on the Secretary of State of Colorado pursuant to a typical statute on the subject.³ He alleged that Carlson was a non-resident at the time of the accident, being then a resident of New York. Notice to Carlson was completed by sending him a registered article for which Fodor obtained Carlson's signed receipt. Upon Fodor's affidavit as to these facts, a continuance for the purpose of taking evidence and for the entry of a default judgment was granted. Carlson then appeared specially and moved to quash the service, offering an affidavit to the effect that he was a resident of Colorado on the date of the accident and had remained such until six months thereafter when he moved to New York to accept the pastorate of a church. He explained the use of foreign license plates by declaring that he had moved to Colorado from Illinois some five months

¹ 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

² 116 Colo. 330, 180 P. (2d) 525 (1947).

³ Colo. Stats. Ann. 1935, Ch. 16, § 48, and 1937 Supp. § 48(1), provides: "The operation by a non-resident of a motor vehicle on a public highway in this state shall be deemed equivalent to an appointment by such non-resident of the secretary of state to be his or its true and lawful attorney, upon whom may be served all lawful civil process in any action or proceedings against him or it, growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle on such public highway. . . ."

before the accident but had neglected to purchase local plates as his work was such that he might be required to leave Colorado at any time. Carlson's motion was denied and he was ordered to answer the complaint. He then filed an original proceeding for a writ of prohibition in the Colorado Supreme Court, which court held that he was not subject to substituted service in the fashion indicated because the statute applied only to drivers who were non-residents at the time the cause of action arose. The writ of prohibition was, accordingly, granted.

The problem is not entirely a new one, but the decision serves to re-emphasize a weakness to be found in the statutes of most states, including that of Illinois,⁴ where a similar result would probably have to be reached if and when the occasion arises. As these statutes relate to non-resident drivers only, they leave injured persons without a local remedy against those who, at the time the cause of action accrues, are residents of the state in which the accident or collision occurs but who subsequently abandon residence before jurisdiction is acquired and thereafter remain outside the state. The purpose supporting the constitutionality of such statutes as a proper exercise of the police power against non-residents because necessary to provide for a speedy adjudication of the rights of the parties⁵ is defeated where local wrongdoers are able to remove themselves from the situs subsequent to the accident and thereby defeat the acquisition of jurisdiction.

To illustrate the inadequacy of such statutes, reference may be made not only to the instant case but also to decisions like that in *Berger v. Superior Court in and for Yuba County*⁶ where the defendant, stationed in California during the war years, was involved in a highway accident one month before his discharge from service. He returned to his original domicile after his discharge and substituted service was held improper, prohibition being granted on the ground that he was not within the purview of the California Vehicle Code.⁷ Similar results have been obtained in Iowa,⁸ the District of Columbia,⁹ and in North Dakota.¹⁰ A

⁴ Ill. Rev. Stat. 1947, Ch. 95½, § 23, is practically identical with the Colorado statute referred to in note 3, ante.

⁵ See *Pawloski v. Hess*, 253 Mass. 478, 149 N. E. 122 (1925), affirmed in 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

⁶ 79 Cal. App. (2d) 425, 179 P. (2d) 600 (1947).

⁷ *Deering*, Cal. Vehicle Code, § 404.

⁸ *Welsh v. Ruopp*, 228 Iowa 70, 289 N. W. 760 (1940).

⁹ In *Wood v. White*, 68 App. D. C. 341, 97 F. (2d) 646 (1938), the court held that D. C. Code, Tit. 40, § 403, could not be extended to include residents who become non-residents. See also *Suit v. Shailer*, 18 F. Supp. 568 (1937), where it was held that Md. Ann. Code 1939, Art. 56, § 167, did not apply to non-residents who temporarily reside in Maryland for more than three months in any one year.

¹⁰ *Northwestern Mortgage & Security Co. v. Noel Const. Co.*, 71 N. D. 256, 300 N. W. 28 (1941).

decision in the last-mentioned jurisdiction furnishes an extreme demonstration of the inefficacy of the general type of statute for there the defendant became involved in a collision in North Dakota, his domicile for thirty years, while driving to Washington to establish a new domicile. Service on him through the local commissioner of insurance was held invalid as defendant was treated as still being a resident at the time of the collision.¹¹ The evident obstruction to justice in such cases lies not in the construction given to the statutes by the courts but rather with the law-making bodies who have failed to perceive one danger while correcting another.

A small number of jurisdictions, aware of these shortcomings, have enacted legislation which seems to solve the problem. They have enlarged the scope of their statutes so as to permit substituted service upon one who, whether resident or not, uses the highways of the state and thereby appoints some suitable public official as his true and lawful attorney for purpose of service with respect to all claims growing out of the use of the highway. In Ohio, for example, the injured person's remedy is protected by a statute which specifically includes resident drivers who become non-residents after the accident.¹² The Pennsylvania provision¹³ is much like that in Ohio, but the one in Montana has been made applicable to "any person who operates a vehicle on a public way."¹⁴ Perhaps the most comprehensive statute was one possessed by New York which not only applied to residents who subsequently became non-residents but declared that absence for thirty days, whether intended to be temporary or permanent, was sufficient to justify substituted service.¹⁵

¹¹ See note 10, ante.

¹² Page Ohio Gen. Code Ann., Vol. 4-A, § 6308-5, provides: "This act shall be construed to extend the right of service of process upon non-residents and upon residents who subsequently become non-residents or who conceal their whereabouts. . . ." The statute was held constitutional in *Hendershot v. Ferkel*, 144 Ohio St. 112, 56 N. E. (2d) 205 (1944), where defendant, residing in Ohio at the time of and for one and one-half years after the accident, subsequently moved to California. Service on the Secretary of State of Ohio was held sufficient to confer jurisdiction.

¹³ *Purdon's Pa. Stat. Ann. 1931, App. to Rules of Civil Procedure, Rule 2077*, provides that the rules relating to non-resident defendants shall apply to "actions as to which the laws of this Commonwealth authorize service of process upon a non-resident or a resident who becomes a non-resident or who conceals his whereabouts." See also *McCall v. Gates*, 354 Pa. St. 158, 47 A. (2d) 211 (1946).

¹⁴ *Mont. Rev. Code 1936, App. Vol. 1, § 1760.13*. Held constitutional and applicable in *State ex rel. Thompson v. District Court of Fourth Judicial Dist.*, 108 Mont. 362, 91 P. (2d) 422 (1939), a suit against a Montana resident who left the state two weeks after the accident.

¹⁵ *Thompson's Cons. Laws N. Y. 1939, Vehicle & Traffic Law, § 52a*, declares: "The operation by a resident of a motor vehicle on a public highway in this state . . . shall, in all cases where such resident shall have removed from this state, prior to the service of legal process upon him . . . and shall have been absent therefrom for thirty days continuously, be deemed equivalent to an appointment by such resident of the Secretary of State to be his true and lawful attorney.

The few cases which have arisen thereunder clearly disclose the beneficial effects of so complete and adequate a law.¹⁶

While none of these last-mentioned statutes have faced constitutional tests before the United States Supreme Court as yet, there would seem to be as much justification for upholding such measures when applied to residents who later become non-residents as there is for enforcing the same against those who are non-residents at the time of the accident. If a foreign corporation licensed to do business in the state may not cancel authority given for service on an agent merely by surrendering its license, at least as to acts done while there,¹⁷ there seems little reason to treat the resident who withdraws from the state in any different light. Granted that differences exist between artificial persons and human beings and that to apply such a rule to every transaction within the state might transcend constitutional limitations on due process, still the recognition already accorded to the proposition that, 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 the highways,"¹⁸ should warrant different treatment in highway accident cases. Admittedly such a statute, being in derogation of the common law, would have to be construed strictly,¹⁹ but that fact does not militate against its constitutionality. Moreover, from the standpoint of equal protection of the laws, it should pass muster for it puts the resident who stays at home, the foreigner who temporarily comes within the state, and the resident who flees therefrom, in the same sphere, *i.e.* each being made amenable within the state for acts done while there.

As no conceivable constitutional objection exists, it would seem not only proper but advisable for most state legislatures to re-examine their vehicle codes in order to cover a marked deficiency in existing statutes.

J. C. GREGORY

... " N. Y. Laws 1941, Ch. 248, added the provision: "Whether such absence is intended to be temporary or permanent." For some unexplained reason, the N. Y. legislature, at the time it added such amendment, also repealed the major provision.

¹⁶ *McNally v. Howard*, 45 N. Y. S. (2d) 7 (1943); *Reed v. Lombardi*, 181 Misc. 805, 44 N. Y. S. (2d) 382 (1943); *Marano v. Finn*, 155 Misc. 793, 281 N. Y. S. 440 (1935).

¹⁷ In general, see *Fletcher, Cyc. Corp.*, Perm. Ed., Vol. 18, § 8762.

¹⁸ *Hess v. Pawloski*, 274 U. S. 352 at 355, 47 S. Ct. 632, 71 L. Ed. 1091 at 1094 (1927).

¹⁹ See, for example, *Brauer Machine & Supply Co. v. Parkhill Truck Co.*, 383 Ill. 569, 50 N. E. (2d) 836 (1943), confining the application of the Illinois statute to accidents occurring on the highway. Further limitations may be observed in *Rose v. Gisi*, 139 Neb. 593, 298 N. W. 333 (1941); *Balter v. Webner*, 175 Misc. 184, 23 N. Y. S. (2d) 918 (1940); *Haughey v. Mineola Garage*, 174 Misc. 332, 20 N. Y. S. (2d) 857 (1940); *Hendershot v. Ferkel*, 144 Ohio St. 112, 56 N. E. (2d) 205 (1944); *Williams v. Meredith*, 326 Pa. St. 570, 192 A. 924 (1937).