

Jurisdiction and the Non-Resident Motorist

William Tapley

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

JURISDICTION AND THE NON-RESIDENT MOTORIST

IN determining the validity of a law or a judgment, the presence of jurisdiction is always an important requisite. Jurisdiction, as the term is applied to the acts, laws, or judgments of a state, is the power of the sovereign to command persons and things. "The foundation of jurisdiction is physical power."¹ Without jurisdiction the law is a nullity and the court's determination is *coram non iudice* and void.² In the law of nations it is indisputable that any direct exertion of authority by one sovereign over persons domiciled or property situated elsewhere is an encroachment upon the independence of the other sovereign. If one nation attempts to give an extraterritorial operation to its laws or to enforce an extraterritorial jurisdiction by its tribunals over persons domiciled or property situated in another nation, it will be treated as usurpation.

Although the source of these principles is international law, they are equally applicable to the several states of the Union. Many of the powers which originally belonged to the sovereign states were delegated by the United States Constitution to the newly created Federal Government. However, the powers not granted were reserved to the states or the people, and to that extent each state does possess and exercise many powers of an independent state. Therefore, the problem of jurisdiction is not primarily solved by reference to the Constitution or Constitutional Law, but, rather, to the Conflict of Laws. It is true that as an incident thereto constitutional questions will arise. For example, a natural concomitant of an attempt by a state to enforce a judgment over persons or things where jurisdiction is wanting, is deprivation of life, liberty, or property without due process of law. But whether or not the Fourteenth Amendment has been violated depends on the presence or absence of jurisdiction. This can only be ascertained by reference to the Conflict of Laws.

¹ McDonald v. Mabee, 243 U. S. 90, 37 Sup. Ct. 343 (1917).

² Pennoyer v. Neff, 95 U. S. 714 (1877); STORY, CONFLICT OF LAWS (3d ed. 1846) 539.

Story recognized the great importance of the question of jurisdiction and its essentiality when he wrote as follows:

“The jurisdiction, then, arising from the conflict of the laws of different nations, in their application to modern commerce and intercourse, is a most interesting and important branch of public law. To no part of the world is it of more interest and importance, than to the United States, since the union of a national government with already that of twenty-six states, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of these states, which call for the constant administration of extra-municipal principles.”³

Probably the most urgent problems “creating complicated private relations and rights between the citizens of these states” and requiring “the constant administration of extra-municipal principles” are those arising under the recent laws pertaining to jurisdiction of non-resident motorists.

No one can question the advisability and the expediency of legislation which seeks to make amenable to the courts of a state non-resident motorists who have caused serious injury to persons and property by reason of the negligent operation of an automobile on the public highways of that state. The exercise of a state's police powers would alone justify such laws. But how to acquire jurisdiction is a problem which necessarily precedes all others. It is the purpose of this article to review briefly the methods by which jurisdiction may generally be acquired, and then to examine Section 52 of the Vehicle and Traffic Law of New York State to note whether or not the statute does constitute an encroachment upon the independence of other states by a direct assertion of authority over persons domiciled or property situated elsewhere.

A sovereign has jurisdiction over property providing it is situated within the boundaries of the state.⁴ It follows

³ STORY, *op. cit. supra* note 2, at 13.

⁴ Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928).

that a state may lawfully vest jurisdiction in its courts in respect to controversies arising out of the ownership or title to such property. If the statute makes provision for reasonable notice to the resident or non-resident owner, the judgment is conclusive and binding everywhere. Such notice, although not a jurisdictional requisite, is necessary in order that the proceeding be in accordance with due process of law. Actions strictly *in rem* do not require personal service of the summons on the defendant or his voluntary appearance to give jurisdiction. The location of the property within the state is the sole requirement. Upon this principle of public law are founded state statutes providing that when the complaint demands judgment that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property *within the state*, the summons may be served upon a defendant without the state.⁵

As a corollary to the above stated principle, it is also generally recognized that provisional remedies which provide for an attachment and levy of defendant's property within the state prior to the commencement of the action may confer jurisdiction upon the courts.⁶ Although the action in these cases may be *in personam*, they are deemed *in rem* to the extent of adjudicating the plaintiff's right to the attached property. Manifestly, if the defendant has not conferred jurisdiction by his appearance, the judgment cannot exceed the value of the attached property. The action is *quasi in rem* and the court's jurisdiction, limited to the attached property, is conclusive and final.⁷

In actions *in personam*, as for example, to recover damages for the commission of a tort, jurisdiction may be acquired in one of three ways: to wit, by the presence of the defendant within the state, by the allegiance of the defendant to the state, or by the consent of the defendant.⁸

Among all nations it is recognized that a sovereign has jurisdiction over all persons within its borders. It is immaterial that the non-resident's stay is temporary and with no

⁵ N. Y. CIV. PRAC. ACT §§ 232, 235.

⁶ PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (1937) 912.

⁷ *Pennoyer v. Neff*, 95 U. S. 714 (1877).

⁸ *Plimpton v. Bigelow*, 93 N. Y. 592 (1883).

intent of establishing a residence. The authority vests by reason of his presence alone. Huberus lays down the doctrine in his second maxim: "All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof." Jurisdiction attaches when personal service of summons is made upon the defendant. Where the defendant is a natural person, such personal service requires a delivery of a copy of the summons to the defendant within the state. A personal delivery elsewhere will not suffice for the reason that jurisdiction is dependent solely on the defendant's presence within the state. Indeed, the only equivalent for such personal service is the general appearance of the defendant in the action.

Jurisdiction based upon personal service of process and depending on the presence of the defendant within the state is frequently recognized under the rules of private international law in actions against foreign corporations. In the development of the law it was at one time thought that jurisdiction over foreign corporations could only be acquired by consent. The argument ran that a corporation had only one domicile and that was in the state of its incorporation. It could not migrate.⁹ But, since it was not protected by the comity clause of the Federal Constitution, another state might exclude it entirely from doing business within its borders (providing interstate commerce was not affected thereby) unless certain conditions were met. Thus, it was customary, before granting authority, to exact from the foreign corporation its consent to confer jurisdiction in all actions brought in the state court against it. The practice was frequently criticized because in many instances it was apparent that the consent could neither be objectively nor subjectively shown.¹⁰ The doctrine that a corporation can be present only in the state of its incorporation has been discarded. When it appears that a foreign corporation is engaged in another state in a continuous course of business, systematically and regularly carried on, the corporation is in fact there. Hence, ser-

⁹ *Bank of Augusta v. Earle*, 13 Pet. 519 (U. S. 1839); *Lafayette Ins. Co. v. French*, 18 How. 404 (U. S. 1855).

¹⁰ *Old Wayne Mutual Life Ins. Co. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236 (1906); *Bagdon v. Reading Co.*, 217 N. Y. 432, 111 N. E. 1075 (1916).

vice upon one of its officers or agents is valid, jurisdiction attaches, and the judgment is conclusive and final.¹¹

A sovereign has jurisdiction over its subjects although the latter are temporarily absent from the state. Jurisdiction by allegiance has been recognized under the principle of the laws of nations and the common law from earliest times. Under the Federal Constitution, all persons born or naturalized in the United States are citizens of the United States and of the state wherein they reside. It follows that a state may make provision for subjecting its residents to the jurisdiction of its courts by substituted service of process. These methods, clearly, would not be applicable in actions against non-resident defendants. Judge Lehman, in his opinion in the case of *Rawstone v. Maguire*,¹² pointed this out when he wrote:

“Where there is no bodily presence in the state, where there is no permanent place of abode and no domicile, it is plain that there is no residence here and no basis for the exercise of the jurisdiction of this court.”

At common law, if a citizen failed to appear and answer to the process of the courts of the land, he was outlawed and his property was taken to satisfy the judgments of his creditors. While outlawry does not exist here, it is nevertheless true that jurisdiction may be acquired over resident defendants without the necessity of personal service of process. In the case of *Continental National Bank v. Thurber*,¹³ Judge Follet definitely enunciated this rule in New York. In that decision he said:

“A citizen of a state is bound by its laws, both substantive and those regulating judicial procedure. Acquiring jurisdiction of resident defendants by constructive service of process is a proceeding according

¹¹ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944 (1913); *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

¹² 265 N. Y. 209, 192 N. E. 294 (1934).

¹³ 74 Hun 632, 26 N. Y. Supp. 956 (1st Dept. 1893), *aff'd*, 143 N. Y. 648, 37 N. E. 828 (1894).

to the course of the common law, and is due process of law.”

Further on in his scholarly opinion, he wrote :

“Every sovereignty has power to regulate the procedure of its courts, and prescribe the rights which plaintiffs may acquire, and the liabilities which may be imposed on resident defendants by judgments recovered in its tribunals.”

Upon this principle of public law are founded state statutes authorizing plaintiffs in actions *in personam* to make application to the court for orders permitting substituted service of process.¹⁴ Though the defendants may be natural or artificial persons, they must be shown to be residents of the state for the reason that jurisdiction is acquired by allegiance. If it is then established that personal service of the summons cannot be made with due diligence, other prescribed methods may be allowed.

The final method of acquiring jurisdiction over defendants in actions *in personam* is by consent. It has always been recognized that even a non-resident might validly confer jurisdiction although he was not present or did not own property within the state. The consent might be manifested in different ways. If the defendant voluntarily participated in the action, his consent would be implied.¹⁵ Frequently statutes were enacted adopting this principle of public law and providing that the service of a notice of appearance would confer jurisdiction upon the court.¹⁶ Finally, it was recognized that a non-resident might validly appoint an agent within the state upon whom personal service of summons might be made, and the *in personam* judgment would be accorded the same legal force and validity as if served on defendant personally within the state.

It has previously been seen that foreign corporations were frequently required, as a condition to their doing business in a state, to obtain a certificate of authority. This,

¹⁴ N. Y. CIV. PRAC. ACT §§ 230, 231.

¹⁵ *Farmer v. N. L. Ass'n*, 138 N. Y. 265, 33 N. E. 1075 (1893); *Henderson v. Henderson*, 247 N. Y. 428, 160 N. E. 775 (1928).

¹⁶ N. Y. CIV. PRAC. ACT § 237.

among other things, included the designation of the Secretary of State as the organization's agent upon whom all process in any action or proceeding against the corporation might be served personally within the state. There was never any serious doubt as to the constitutionality of these laws because the defendant could not invoke the protection of the comity clause and, except as to interstate commerce, the state might entirely exclude the defendant from carrying on business within its borders.

With the increase of automobile travel and the dangers to persons and property resulting from the negligent operation of automobiles on the public highways, a demand arose for laws conferring jurisdiction upon state courts in actions against non-resident motorists. Jurisdiction by presence was not possible for the non-resident had returned to his home. The very fact that the defendant was a non-resident precluded the acquisition of jurisdiction by allegiance. Of course, there was always the possibility of an attachment and levy, but this, too often, proved worthless, for the defendant had no property within the state which might be seized under the attachment. The only possible solution was to secure jurisdiction by consent. New Jersey was the first state to enact such a law when it required the non-resident motorist, upon entering the state, to execute an express consent appointing the Secretary of State as agent of the motorist upon whom service might be made in actions arising out of defendant's negligent operation of his automobile on the public highways of the state.¹⁷ There was no reason why this particular officer should be selected unless it was thought that having worked successfully in the case of foreign corporations, there must be something particularly sacrosanct about his office. It would seem that the Commissioner of Motor Vehicles or one of his many deputies would be a more appropriate person to act as agent of drivers and owners of automobiles. Massachusetts followed with a more workable rule.¹⁸ The statute provided that the use of its highways by non-resident motorists constituted an implied appointment of the Regis-

¹⁷ N. J. P. L. (1906) 182, § 16 as amended by N. J. P. L. (1908) 615, § 4.

¹⁸ MASS. GEN. LAWS, c. 90.

trar of Motor Vehicles as the agent of the non-resident upon whom personal service of summons might be made in actions arising out of the negligent operation of defendant's automobile. Both statutes made provisions for due notice to the defendant of the personal service of process upon his appointed agent. The statutes were before the United States Supreme Court and were sustained in both instances.¹⁹ In these cases the question of jurisdiction over the non-resident defendant was not directly before the court. The defendants had appeared in the actions and contested the constitutionality of the law as depriving them of life, liberty, and property without due process in contravention of the Fourteenth Amendment. In the opinion of the state court regarding the Massachusetts statute, it was pointed out: "No question has been raised in the case at bar as to the sufficiency of the service upon the defendant, if he can be held at all."²⁰ The court, in both instances, held that the statutes did not deprive the defendants of their privileges and immunities as citizens of the United States under Article IV of the Federal Constitution and that they did not constitute an unreasonable and arbitrary exercise of the state's police power in requiring non-resident motorists, either expressly or impliedly, to appoint agents upon whom personal service of process might be made; and that, since due notice to the defendant was provided in the statutes, it could not be said that the laws were not in accordance with due process. As a result of these decisions, it follows that a delivery of a copy of the summons within the state to the designated agent is a delivery to the non-resident; that due notice being given to the defendant, the court in which the action is pending acquires jurisdiction of the person of the defendant; and that the judgment rendered is enforceable, not only in that state, but must also be recognized as valid in every state of the Union.

New York's first statute on this subject was substantially in the language of the Massachusetts law except that it designated the Secretary of State as the agent of the non-resident. The law was amended in 1937 and is now desig-

¹⁹ Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916); Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1927).

²⁰ Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760 (1924).

nated as Section 52 of the Vehicle and Traffic Law. Our examination will be directed particularly to the new section.²¹

The statute provides :

"The operation by a non-resident of a motor vehicle or motor cycle on a public highway in this state, or the operation on a public highway in this state of a motor vehicle or motor cycle owned by a non-resident if so operated with his consent, express or implied, shall be

²¹ N. Y. VEH. AND TRAF. LAW § 52, as amended by Laws of 1937, c. 94: "Section 52. Service of Summons on Nonresidents. The operation by a non-resident of a motor vehicle or motor cycle on a public highway in this state, or the operation on a public highway in this state of a motor vehicle or motor cycle owned by a nonresident if so operated with his consent, express or implied, shall be deemed equivalent to an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such a public highway or in which such motor vehicle or motor cycle may be involved while being operated on such a highway with the consent, express or implied, of such nonresident owner; and such operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state and within the territorial jurisdiction of the court from which the summons issues. A summons in such an action may issue in any court in the state having jurisdiction of the subject matter and be served as hereinafter provided. Service of such summons shall be made by leaving with, or mailing a copy thereof to the secretary of state at his office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of two dollars, and such service shall be sufficient service upon such nonresident provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered mail by the plaintiff to the defendant. The defendant's return receipt, the plaintiff's affidavit of compliance herewith, and a copy of the summons and complaint shall be filed with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, within thirty days after the defendant's return receipt is received by the plaintiff. Service of process shall be complete ten days after the foregoing papers are filed. Service of such summons also may be made by leaving with, or mailing a copy thereof to the secretary of state at his office in the city of Albany, or by personally delivering a copy thereof to one of his regularly established offices, with a fee of two dollars, and by delivering a duplicate copy thereof, with the complaint annexed thereto, to the defendant personally without the state by a resident or citizen of the state of New York or a sheriff, under-sheriff, deputy-sheriff or constable of the county or other political subdivision in which the personal service is made, or an officer authorized by the laws of this state, to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counselor at law qualified to practice in the state where such service is made, or by a United States marshal or deputy United States marshal. Proof of personal service without the state shall be filed with the clerk of the court in which the action is pending within thirty days after such service. Personal service without the state is complete ten days after proof thereof is filed. The court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action."

*deemed equivalent to an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle on such a public highway or in which such motor vehicle or motor cycle may be involved while being operated on such a highway with the consent, express or implied, of such non-resident owner; and such operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state and within the territorial jurisdiction of the court from which the summons issued * * *.*" (Italics ours.)

It will be noted that the implied consent of the non-resident is limited by the statute to the appointment of the Secretary of State. He alone is the lawful agent upon whom such personal service may be made. According to the implied consent, if the summons is served personally on him, the service has the same force and validity as if served on defendant personally within the state. In receiving and accepting service, the Secretary of State acts as agent of the non-resident, and not as an officer of this state.

In the case of *Flynn v. Union Surety and Guaranty Co.*,²² the question arose as to the validity of service of summons on the Superintendent of Insurance on a public holiday. The state officer had been previously designated by the non-resident defendant as the agent for service of process within the state. The court in sustaining the service said:

"It (the summons) was served upon him for the reason that he was the appointed agent of the defendant, representing it in this state for the purpose of receiving and admitting the service of process in actions or special proceedings sought to be brought against it. In receiving and accepting service he acted as agent

²² 170 N. Y. 145, 63 N. E. 61 (1902).

of the defendant company, and not as an officer of the state. While the statute required the defendant, before engaging in business in this state to execute and deliver to him a power of attorney to receive the service of process, his action under the power of attorney was that of the company to whom he could be called to account for any misconduct or omission with reference thereto."

If there is to be a valid service upon defendant's agent, it is submitted that there must be a delivery of a copy of the summons to the agent within the state. The language of the statute admits of no substitute and, if it did, then it would clearly be contrary to the established statutory practice of this state. There is no civil action commenced by the personal service of summons which dispenses with a delivery of a copy of the summons within the state. The practice is mandatory—a brief review of the pertinent sections of the Civil Practice Act demonstrates convincingly the great importance placed by the legislature on the requirement that there must be a personal delivery of a copy of the summons within the state and that there can be no substitute.

Section 225 provides for service upon a natural person. The very first sentence provides that the service of a summons must be made by a delivery of a copy thereof within the state. If the defendant is an adult, the delivery within the state is to him. If the defendant is an infant, the delivery within the state is to his father, mother or guardian, and also to the infant if he is of the age of fourteen years or over. If the defendant is an adjudicated incompetent, the delivery within the state must be to his committee and the incompetent, though in exceptional cases the court by order may dispense with the latter service.

Section 228 provides for personal service of summons upon a domestic corporation. In this instance, because the defendant is an artificial person, the practice must make provision for service of the summons upon an agent of the defendant. In this respect the practice is similar to the service on the non-resident motorist. Again, the first sentence of the section states: "Personal service of the summons upon

a domestic corporation must be made by delivering a copy thereof, within the state." If the defendant is a city, delivery of a copy of the summons within the state must be made to the mayor, comptroller or corporation counsel. If the defendant is a county, town or village, delivery of a copy of the summons within the state must be made to the designated official. If the defendant is a private corporation, delivery of a copy of the summons within the state must be made to the designated persons associated with the defendant. Finally, if the defendant is a business corporation, service, under certain circumstances, may be made on the Secretary of State, but the practice further requires a delivery of a copy of the summons to him within the state.²³ Under our practice, from colonial times, it has been recognized that personal service can only be effected by a delivery within the state of a copy of the summons to the defendants personally or to their authorized agents. There is no substitute for this.

So again, under Section 229, provision is made for personal service of summons upon a foreign corporation. The first sentence provides that personal service of summons must be made by delivering a copy thereof within the state. As under Section 228, the service being upon an agent of the defendant, to this extent it resembles service upon the non-resident motorist. In each instance it will be noted, whether or not the agent is a high state official or the defendant's managing clerk, the service of the summons must be by a delivery of a copy thereof within the state to the agent.

Finally, under Section 227 of the Civil Practice Act the situation is practically the same as under the Vehicle and Traffic Law, except that the consent under the former is voluntary and limited to adult residents, while under the Vehicle Law the consent is implied by reason of the non-resident's use of the public highways. Both situations involve defendants who are natural persons against whom personal judgments may be obtained by reason of personal service of summons upon their appointed agents. It will be

²³ N. Y. CIV. PRAC. ACT § 228. Sections 24 and 25 of the N. Y. Stock Corporation Law providing for the appointment of the Secretary of State as agent of domestic business corporations, require a delivery of copies of the summons to the Secretary of State or one of his deputies.

noted that under Section 227, after provision for the appointment of the agent is made, the statute provides that service shall be made "*in like manner* and with like effect, as if it were served personally upon the person making the designation." Service made "*in like manner*" can mean only a delivery of a copy of the summons to the agent within the state, following the requirements of Section 225. It would seem that the language of Section 52 has been taken from Section 227 of the Civil Practice Act for it, too, provides that the operation of the motor vehicle is a signification of the non-resident's agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state. It definitely appears, therefore, that Section 52 of the Vehicle and Traffic Law and all the pertinent sections of the Civil Practice Act relating to the practice in this state require that personal service of summons can only be made by a delivery of a copy of the summons within the state to the defendant or his appointed agent. (Italics ours.)

The principle that a remedial statute should be construed liberally has no application when the objection is the absence of jurisdiction. As was pointed out by Judge Chase in the case of *Erickson v. Macy*:²⁴

"Whenever it is necessary to determine whether jurisdiction has been obtained over a defendant in an action by service of the summons in some way other than by personal service thereof, it must be remembered that the general rule in regard to the service of process established by centuries of precedent, is that process must be served personally within the jurisdiction of the court upon the person to be affected thereby. Substituted service when provided by statute is in derogation of such general rule, and, consequently, the directions thereof must be strictly construed and fully carried out to confer any jurisdiction upon the court."

With bland disregard of the limits of the non-resident's consent, forced upon him by the state, the statute proceeds

²⁴ 231 N. Y. 86, 90, 131 N. E. 744, 745 (1921).

to specify the methods of service which are in no sense personal. It is true that infinite care is taken to give the defendant due notice, but, unfortunately, these provisions do not and cannot confer jurisdiction on the court to control persons and things beyond the borders of the state. A delivery of a summons and complaint on a defendant in New Jersey will apprise him of the institution of an action, but no lawyer would argue that it conferred jurisdiction over the defendant.²⁵ The statute continues as follows:

“Service of such summons shall be made by leaving with or mailing a copy thereof to the secretary of state at his office in the City of Albany or by personally delivering a copy thereof to one of his regularly established offices, with a fee of two dollars * * *.”

It would be difficult to find a more confusing statement. Indeed, the Bar will have just reason to be disappointed with the entire section. Lawyers in this state have been assured that all future laws pertaining to practice will be definite, concise and certain,—a sort of legal pasteurization through which all proposed changes must pass. It would seem that the statute authorizes three methods of serving the summons upon the non-resident's agent: (1) leaving with the Secretary of State a copy at his office in Albany; (2) mailing a copy to the Secretary of State at his office in Albany; (3) personally delivering a copy at one of the regularly established offices with a fee of two dollars.

If under the first method “leaving with” means a delivery of a copy within the state to the Secretary of State it is, at least, in accordance with the non-resident's consent as provided for in the first sentence of the statute. However, there is no reason for limiting the service to Albany. Such a requirement hinders and delays the resident plaintiff and it is not a limitation contained in the non-resident's consent. On the other hand, if “leaving with”

²⁵ *Wuchter v. Pizzutti*, 276 U. S. 13, 48 Sup. Ct. 259 (1928). The distinction was pointed out by Mr. Justice Holmes in his dissenting opinion. In the case at bar, the objection is not lack of jurisdiction but denial of due process because the non-resident statute did not require the secretary to notify the non-resident defendant.

does not require a personal delivery then the method is invalid. We have seen under the practice of the state that there is no substitute for personal delivery.

The second method provides for mailing a copy of the summons to the Secretary of State at Albany. Apparently it is not important whether or not sufficient postage is placed on the letter. The grave objection, however, to this method is that the non-resident has not consented that service may be made by mail.

In the case of *Bennett v. Supreme Tent K. of M.*,²⁶ in the state of Washington Supreme Court, one of the issues concerned the validity of the service of process, by mail, on a statutory agent of defendant, a foreign corporation. The court said:

"The agency created by the act in question, and by the commissioner provided for therein, is a passive agency. To hold that such agent can admit or waive service of summons, when no service has been in fact made, is to add materially to the powers conferred upon him by the statute and by his warrant of attorney. The insurance laws of New York are similar to our own on the question under consideration. In the case of *Farmer v. National Life Ass'n*, 50 Fed. 829, the superintendent of insurance, who was the statutory agent in that state, formally admitted service of a summons and complaint, which he had received through the mail, as in this case.²⁷ The court held,

²⁶ 40 Wash. 431, 82 Pac. 744 (1905).

²⁷ We quote from 2 L. R. A. (N. S.) 390n.: "In *Farmer v. National Life Ass'n*, 50 Fed. 829, cited in *Bennett v. Supreme Tent, K. of M.*, it was held that the state superintendent of insurance, who, it is stated in the statement of facts, had been designated by the insurance company as its attorney in the exact language of the statute, could not accept service by mail; but, the action being subsequently remanded to the state court, it was held that the service was valid and sufficient, though it does not clearly appear whether the court meant to decide that service by mail in such cases is valid, or that the superintendent of insurance had power to admit due service.

"In *South Pub. Co. v. Fire Ass'n of Philadelphia*, 67 Hun 119, 21 N. Y. Supp. 1056, 67 Hun 41, 21 N. Y. Supp. 675, it was held that personal service on a clerk in the office of the superintendent of insurance, which service was subsequently admitted by the superintendent, was valid. In this case, also, it does not clearly appear whether the validity of a service on the clerk, or the power of the superintendent to admit the service, was the basis of the decision; and, even

without an opinion, that such service was void. The syllabus of the case is as follows: "The appointment of the state superintendent of insurance as the attorney of a non-resident insurance company for the purpose of receiving service of process, as required by New York Laws, 1884, Chap. 346, sec. 1, p. 420, does not authorize him to accept service by mail and such service is void.' "

The third method providing for a personal delivery to a regularly established office is a novel one. It is entirely unimportant to whom this delivery shall be made. The only requirement is that someone can there be found who will accept the fee of two dollars to complete the service. This should not be difficult but unfortunately the method is not provided for in the non-resident's consent.

Section 52 makes no further provision for service upon the non-resident's agent. What follows might be sufficient in itself to give due notice to the defendant, but it could not add to the jurisdiction of the court. The statute continues:

"And such service shall be sufficient service upon such non-resident provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered mail by the plaintiff to the defendant."

This section requires that the complaint be annexed to the summons thus placing the non-resident defendant in a quandary. If he is to be guided by the direction contained in the summons and served upon his agent, he will only be required to serve his notice of appearance within twenty days after service upon him is complete.²⁸ On the other hand, if he is to be guided by the papers he receives, he will be required to serve his answer within twenty days after the service upon him is complete. Since the court's jurisdiction

if the latter was the true ground, the decision is of no general value, because, by the terms of the power of attorney, the superintendent was authorized both to receive and accept service of process."

²⁸ N. Y. CIV. PRAC. RULE 45.

depends upon the service of the process within this date, it would seem that a notice of appearance within twenty days should suffice. The doubt, however, will remain until corrected or judicially construed.

The statute continues with an alternative provision in respect to the notice to be given to the non-resident. The service upon the agent within the state is identical to that which is provided above. The notice to be given to the non-resident defendant is provided for as follows:

“ * * * By delivering a duplicate copy thereof, with the complaint annexed thereto, to the defendant personally without the state by a resident or citizen of the state of New York or a sheriff, undersheriff or constable of the county or other political subdivision in which the personal service is made, or an officer authorized by the laws of this state, to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counselor at law qualified to practice in the state where such service is made, or by a United States Marshal or deputy United States Marshal.”

If the service is to be made personally without the state, by a resident or a citizen, is it valid if made by an infant? Personal service in this state requires that the process server shall be of the age of eighteen, or upward; there is no express limitation found here.²⁹ Secondly, in connection with the service of the summons and complaint, is it required that some notice of the service of the summons upon the defendant's agent within the state shall be given? It would seem that this was the most important document that the non-resident should receive. He is then apprised that the court has acquired jurisdiction over his person by reason of the due service within this state upon an individual who has acted as his agent. Without any notice being given, the non-resident is only apprised of the institution of an action in which, apparently, our courts have never secured jurisdic-

²⁹ N. Y. CIV. PRAC. ACT § 220.

tion. That it was the intention not to require service of such notice seems to follow from what the statute provides:

“Proof of personal service without the state shall be filed with the clerk of the court in which the action is pending, within thirty days after such service. Personal service without the state is complete ten days after proof thereof is filed.”

It will be noted that no provision is made for a filing of the proof of service upon the agent within the state. Under such circumstances, in the event that the defendant defaulted, the judgment roll would never show such service, and the *in personam* judgment would clearly, on its face, be absolutely void.³⁰

It would seem that Section 52 of the Vehicle and Traffic Law constitutes an attempt on the part of this state to project its laws and judgments into sister states, and control persons and things in the sister states without acquiring jurisdiction according to the fundamental principles of public law. Lip service to these principles is given, it is true, but the practice provided is in flagrant disregard of all of them. The results inevitably will work a hardship on the residents of New York. They will rely on the law, only to find sister states refusing to recognize the judgments obtained thereunder. The claims will then probably be outlawed by Statutes of Limitations, so that an action in the state of defendant's residence will not lie. The number of causes of actions arising in this state every year and requiring such service of summons on non-resident defendants is enormous. To protect the residents of this state and to insure the validity of the judgments, the statute should be amended immediately.

WILLIAM TAPLEY.

St. John's University School of Law.

³⁰ *Wuchter v. Pizzutti*, 276 U. S. 13, 18, 48 Sup. Ct. 259 (1928), held a statute of New Jersey void for this reason. Chief Justice Taft, writing for the majority, said: “The question made in the present case is whether a statute making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making reasonably probable that notice of the service on the secretary will be communicated to the non-resident defendant who is sued.”