

1954

Howard C. Teague v. District Court of the Third Judicial District in and for Salt Lake County, State of Utah, and Milton C. Brandon : Plaintiff's Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

HOWARD C. TEAGUE,
Plaintiff,

vs.

THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT IN
AND FOR SALT LAKE COUNTY,
STATE OF UTAH, and MILTON
C. BRANDON,
Defendants.

Case No. 8232

PLAINTIFF'S BRIEF

SKEEN, THURMAN, WORSLEY & SNOW
and H. G. CHRISTENSEN
Attorneys for Plaintiff.

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IN THE SUPREME COURT
of the
STATE OF UTAH

HOWARD C. TEAGUE,

Plaintiff,

vs.

THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT IN
AND FOR SALT LAKE COUNTY,
STATE OF UTAH, and MILTON
C. BRANDON,

Defendants.

Case No. 8232

PLAINTIFF'S BRIEF

STATEMENT OF FACTS

This is an original proceeding by which Howard Teague seeks an Order of this Court under the provisions of Rule 65B, Utah Rules of Civil Procedure, permanently prohibiting the defendant District Court from proceeding with the case now pending in that court, entitled *Milton C. Brandon, Plaintiff, vs. Howard C. Teague, Defendant*, Civil No. 99973. A extraordinary writ in the nature of an alternative writ of prohibition was issued by this Court on July 21, 1954, for the purpose of allowing this Court to inquire into the matter.

The ground upon which Teague seeks to have the alternative writ made permanent is that the defendant District Court has assumed to act without and in excess of its jurisdiction, since Teague was not personally served with process, and the only process against him was that served upon the Secretary of State under the provisions of the statute known as the Non-Resident Motorist Act, 41-12-8, U.C.A., 1953. Teague claims he was not a "non-resident motorist" within the meaning of that Act.

For the convenience of the Court, and to avoid confusion, the parties will be designated by name.

On October 2, 1953, Brandon, a resident of Everett, Washington, filed his complaint against Teague in the District Court of Salt Lake County. He alleged that Teague "is a non-resident of the State of Utah" (emphasis ours). He claimed further that on August 8, 1952 he was riding in a car being driven by Teague in Salt Lake County, and that he sustained injuries in an accident which resulted from Teague's willful misconduct. (R. 3, 4).

On October 2, 1953, a summons and a copy of the complaint were filed with the Secretary of State of Utah (R. 11), in an attempt to serve Teague under the provisions of Chapter 41-12-8, U.C.A., 1953. The pertinent portions of this statute are as follows:

"The use and operation by a nonresident or his agent of a motor vehicle upon and over the highways of the state of Utah shall be deemed

an appointment by such nonresident of the secretary of state of the state of Utah, to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation of a motor vehicle over the highways of this state resulting in damages or loss to person or property and said use or operation shall be a signification of his agreement that any such process shall, in any action against him which is so served, be of the same legal force and validity as if served upon him personally . . .”

Brandon's counsel, by affidavit dated October 2, 1953, stated he had mailed, on October 1, 1953, by registered mail, a copy of the complaint and summons to Teague at his last known address: “Deseret Chemical Depot, Tooele County, Utah” (R. 6). Included with the summons and complaint, according to the affidavit, was a notice to defendant of the purported service upon the Secretary of State (R. 7).

On March 25, 1954, Teague, appearing specially, moved the Court to quash the service of summons upon the ground that he was not subject to service of process under the provisions of Section 41-12-8, U.C.A., 1953, since he was not a “non-resident” at the time of the alleged accident. This motion was supported by the affidavit of one of counsel for Teague, in which it was stated that at the time of the alleged accident, Teague was a member of the Armed Forces of the United States, stationed within the borders of the State of Utah, and had been so stationed for many months prior to said date and was so stationed for many months following the date of

said accident and until the summer of 1953, and that at all times during that period defendant could be found at Deseret Chemical Depot, Tooele County, Utah. (R. 14).

Brandon filed no counter affidavit. At the hearing on the Motion, Brandon's counsel took the stand and testified, in substance, that he had made "diligent search concerning Mr. Teague" and that he was not within the state "at this time." This testimony was on April 20, 1954, more than six months after the complaint was filed and twenty months after the accident. Counsel also stated that, at some date not specified, prior to the filing of the complaint in the present matter, suit was brought against the United States "in this matter" and that Teague was not then within the State of Utah. (R. 25).

It will be observed that this testimony does not controvert the affidavit filed on behalf of Teague. The testimony was directed to the proposition that, at the time of the complaint, fourteen months after the accident, Teague was not within the borders of Utah and had a mailing address in another state. Exhibit P-1, a copy of the State Police report, showed that the car being driven by Teague had out-of-state license plates, although the address of Teague was given as Deseret Chemical Depot, which is, of course, in Tooele County, Utah.

Despite the fact that no further showing was made on behalf of Brandon, the District Court, on May 13, 1954, denied Teague's motion to quash.

Teague thereupon filed his petition for intermediate appeal to the Supreme Court of the State of Utah, Case No. 8204, which petition was by this Court denied on June 1, 1954. Teague thereafter commenced this original proceeding by filing his complaint against Brandon and the District Court of the Third Judicial District in and for Salt Lake County, State of Utah. Upon this complaint an alternative writ was issued by this Court on July 21, 1954, and the record of proceedings before the District Court was filed in this Court on October 19, 1954.

STATEMENT OF POINTS

THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, IS PROCEEDING WITHOUT AND IN EXCESS OF ITS JURISDICTION IN THAT ACTION PENDING BEFORE IT, ENTITLED *MILTON C. BRANDON, PLAINTIFF VS. HOWARD C. TEAGUE, DEFENDANT*, CASE NO. 99973, IN THAT THE COMPLETE RECORD OF THAT COURT FAILS TO SHOW THAT HOWARD C. TEAGUE WAS A NON-RESIDENT OF UTAH AT THE TIME OF THE ACCIDENT.

ARGUMENT

THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, IS PROCEEDING WITHOUT AND IN EXCESS OF ITS JURISDICTION IN THAT ACTION PENDING BEFORE IT, ENTITLED *MILTON C. BRANDON, PLAINTIFF VS. HOWARD C. TEAGUE, DEFENDANT*, CASE NO. 99973, IN THAT THE COMPLETE RECORD OF THAT COURT FAILS TO SHOW THAT HOWARD C. TEAGUE WAS A NON-RESIDENT OF UTAH AT THE TIME OF THE ACCIDENT.

It will be observed from the language of the Utah statute, quoted in the Statement of Facts, that it is the "use and operation" of a motor vehicle by a non-resident which is construed as an "appointment by such non-resident" of the Secretary of State as his attorney on whom process may be served. Further, it is such "use or operation" which signifies the "agreement" of the non-resident that such process shall have legal effect.

It is our contention that this statutory language is susceptible of only one reasonable interpretation, namely, that the term "non-resident" refers to the time of the "use and operation" of the vehicle, and not to the time of the commencement of an action arising out of such use and operation.

Our research discloses that similar statutes have been so construed by both Federal and State courts and we have failed to find any case where the court has adopted a contrary view.

The following cases support our position:

Fisher v. Terrell, et al., (New Mexico, 1947) 187 P. (2d) 387; *DePier, et ux. v. Maddox et al.*, (Cal., 1948) 197 P. (2d) 87; *Johnson v. Jacoby*, (Ct. of App., Dist. of Col., 1952) 195 F. (2d) 563; *Wood v. White*, 68 App. D. C. 341, 97 F. (2d) 646 (1938), Certiorari denied, 304 U.S. 578; *Clendening v. Fitterer*, (Okla., 1953) 261 P. (2d) 896; *Red Top Cab & Baggage Co. for Use and Benefit of Fountaine v. Holt, Judge*, (Fla., 1944), 16 Southern (2d) 649; *Northwest Mortgage and Security Co. v. Noel Construction Co.*, (North Dakota, 1941), 300 N.W. 28;

Roach v. Roupp, (Iowa, 1940), 289 N.W. 760; *Warwick v. District Court of City and County of Denver, et al.*, (Col., 1954), 269 P. (2d) 704; *Suit v. Shailer, et al.*, (D. C., D. Md., 1937), 18 F. Supp. 568; *Colon et al. v. Penn. Greyhound Lines, Inc., et al.*, (New Jersey, 1953), 99 A. (2d) 181; *Rompza v. Lucas, et al.*, (Ill., 1949), 85 N.E. (2d) 467; *Hinten et al. v. Peter et al.*, (Minn., 1952), 55 N.W. (2d) 442; *Way v. Turner*, (Ga., 1950) 57 S.E. (2d) 439.

The rule has been stated in this language by the Oklahoma Supreme Court:

“The statute does not apply to a motorist who was a resident of the state at the time the accident occurred, although he thereafter leaves the state and becomes a non-resident and is a non-resident at the time suit is brought.” *Clendenning v. Fitterer supra*.

In *Carlson v. District Court of City and County of Denver, et al.*, (Colo., 1947), 180 P. (2d) 525, the court had before it this statutory provision:

“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 processes in any actions . . . growing out of any accident . . . in which such non-resident may be involved . . .”

It was held that non-residence at the time of the accident was required for service of process under that statute.

In the case of *Kurland v. Chernobil, et al.*, 260 New York 254, 183 N.E. 380, the Court of Appeals clearly indicated that the controlling factor is the status of the defendant at the time of the accident. For many years, the traffic laws of New York contained a provision allowing for service of process upon a non-resident motorist in language almost identical to the Utah statute. It was apparently recognized by the New York Legislature that the statute made no provision for service upon a motorist who was a resident of New York at the time of the accident, but who subsequently, and before suit was filed, became a non-resident, for the Legislature added a new section to the code specifically covering that situation.

In the *Kurland* case, the accident happened before the addition to the statute became effective. After its effective date, the action was instituted against the defendant Lehman. In holding that the time of accident is the critical time, the Court said:

“When this defendant operated his car on our highways, certainly he did not in fact agree to vest the Secretary of State with any power of agency for the receipt of service of process. *At that time* no presumption had been established, for the presumption exists only by reason of statutory enactment, and no statute applicable to persons of his class was then effective.”

(Emphasis added)

In the case of *Wood v. White, et al., supra*, the United States Court of Appeals for the District of Columbia, had before it for decision a question similar to that

presently before this Court. The Circuit Court was asked to adopt an interpretation of the statute so that the statute would read in effect:

“The operation by a non-resident (or by a resident who shall have become a non-resident at the time process is issued) shall be deemed an appointment of a statutory agent for the service of process.”

The Court, in rejecting this interpretation, stated that this view would require the Court to hold that the word “non-resident” actually means “resident.” The Court observed that this “would go far beyond any reasonable process of legislative interpretation.” Continuing, the Court observed that:

“Where a statute imposes a contractual obligation in derogation of the common law, and affects substantial rights, it cannot be extended by implication to include persons who do not come within its terms, but instead must be strictly construed.”

The Court concluded that:

“It is the non-resident, and the non-resident only, who, by making use of the highways, signifies his agreement that substituted service may be made upon him and that he does so only at the time he uses the highways and only by the act of operating a motor vehicle thereon.”

An examination of decisions reaching a contrary result indicates that in those jurisdictions a statute fundamentally different from our Section 41-12-8, U.C.A., 1953, was before the court. See for example, *State ex rel*

Thompson v. District Court of the Fourth Judicial District in and for Missoula County, et al., (Mont., 1939), 91 P. (2d) 422, where the statute provided:

“The operation by *any person* . . . of any motor vehicle . . . on any public way in this state, shall be deemed equivalent to an appointment by such person of the secretary of state . . . to be his true and lawful attorney upon whom may be served all lawful processes in any action . . . growing out of an accident . . . in which he . . . may be involved while operating a motor vehicle on any public way in this state . . .” (Emphasis added)

See also *Sanders v. Paddock*, (Ill., 1951) 97 N.E. (2d) 600, decided after amendment to the Illinois statute, subsequent to the decision in *Rompza v. Lucas*, (Ill., 1948), 85 N.E. (2d) 467.

When the Illinois and Montana statutes are closely examined it is clear that decisions based upon such statutes can have no force in the determination of a proper interpretation of the Utah statute, since the language is fundamentally different.

We submit that on the basis of the cases hereinabove cited and discussed, and on the basis of sound logic and reasoning, the only proper conclusion is that a motorist cannot be subject to service of process under the Utah Non-Resident Motorist Statute, unless he was in fact a non-resident at the time of his use of our highways.

With this rule in mind it becomes pertinent to examine the record of the trial court to determine if

there was a showing that Teague was a non-resident at the time of the accident. Teague's special appearance for the purpose of quashing the purported service of summons upon him, constituted a challenge to the jurisdiction of the court and the burden was thus thrust upon Brandon to show that the trial court was properly exercising its jurisdiction.

It is a rule of general application that when jurisdiction is challenged the court's duty to inquire into its right to entertain the procedure is imperative, and he who invokes the court's power must show that he is properly before it. See *In re Pacific States Savings & Loan Company* (D. C. Cal., 1939), 27 F. Supp. 1009.

This rule has been recognized and applied in several cases involving non-resident motorist statutes in which the defendant has attacked the jurisdiction of the court by motion to quash the service of summons. In *Carlson v. District Court of City and County of Denver, et al., supra*, the defendant appeared specially and moved the Colorado Supreme Court for an order quashing service of summons upon him on the ground that he was a resident at the time of the accident. The Court said:

“The motion to quash challenged the court's jurisdiction and consequently the burden of proof in the District Court was on Fodor (plaintiff below) to establish by competent evidence all the facts essential to the court's jurisdiction. One of these essential facts in the instant case was the non-residence of plaintiff here (defendant below) at the time of the accident on December 4, 1944.”
p. 530.

A similar rule was adopted in *Warwick v. District Court of City and County of Denver*, (Colo., 1954), 269 P. (2d) 704, and *Rompza v. Lucas, et al.*, (Ill., 1949), 85 N.E. (2d) 467.

In *Jermaine v. Graf, et al.*, (Iowa, 1939), 283 N.W. 428, one of the defendants moved to quash the service of summons upon him on the ground that he was not a "person" within the meaning of the act. The Court said:

"The special appearance was a direct attack. The burden rested on plaintiff to sustain by adequate showing the questioned jurisdiction
* * *"

Plaintiff's pleadings in the trial court contain only one statement relative to the non-residence of the defendant, Teague. It is alleged in the complaint that Teague "is a non-resident" (R. 3) (emphasis ours). This complaint was filed on October 2, 1953. The accident occurred on August 8, 1952, according to plaintiff's complaint. No statement is made as to defendant's residence at that time. That time, however, is the critical time. Residence or non-residence at the time of the commencement of the action is wholly immaterial. See *Carlson v. District Court, supra*, and *Rompza v. Lucas, supra*, where the Illionis court in affirming an order setting aside a judgment said:

"... the affidavit is to the effect that the defendants were non-residents eleven months after the accident. It does not appear that they were non-residents on May 26, 1946 (the date of the accident)."

The pleadings of the plaintiff in the lower court affirmatively show that Teague's last address was in Tooele County, Utah. It cannot seriously be urged that these pleadings raise even a suggestion of jurisdiction over the person of the defendant.

Teague's motion to quash the service of summons and the affidavit attached, state that he was not a non-resident at the time of the accident, having been stationed within the borders of Utah as a member of the Armed Forces of the United States for many months prior to the date of the accident, August 8, 1952, and thereafter until the summer of 1953. On the hearing upon the motion the evidence showed that Teague was located within the State of Utah until the summer of 1953. Mr. Dwight King, attorney for Brandon, testified that Howard C. Teague was not a resident of the State of Utah at the time the complaint was filed. He also offered in evidence a purported copy of a motor vehicle accident report. Even if this report be considered competent evidence—which it obviously is not—it added only one additional fact. It showed only that the automobile owned and driven by Teague carried a North Carolina license plate.

A similar showing as to the license plate was made in *Carlson v. District Court of City and County of Denver et al.*, *supra*. The Colorado Supreme Court said:

“If it should be held here that simply because the automobile driven by plaintiff bore an Illinois license rather than a Colorado license, we should be obliged to hold the licensee to be a non-resi-

dent, we would be adopting an artificial, strained, and unwarranted construction on the term 'non-resident.' " p. 530.

In *Johnson v. Jacoby*, (Dist. of Col. Court of Appeals, 1952), 195 Fed. (2d) 563, plaintiff brought suit to recover damages for personal injuries sustained on April 24, 1945. The suit was filed on November 18, 1947. Jacoby moved to quash the service on the ground that he was not a non-resident, having left his home in New York to accept employment in the District of Columbia and having actually lived in the District of Columbia until January, 1946. The affidavit filed in opposition to the motion to quash stated that Jacoby's automobile bore New York license plates on the date of the accident. The court said that although Jacoby may have been domiciled in New York on April 24, 1945, he actually resided in the District of Columbia from December 31, 1943, until January, 1946, and that there was nothing in the case to indicate that Jacoby would not have been amenable to service in the ordinary way at any time within eight months after the accident. In affirming the order of the lower court quashing the summons, the court of Appeals for the District of Columbia Circuit, said:

"In our view the statute was not intended to reach an actual resident such as Jacoby was, but was enacted to provide a means of bringing before the local court a non-resident transient motorist who is here today and gone tomorrow."

In *Suit v. Shailer*, a Federal Case, *supra*, the plaintiff urged that the automobile being driven by the defendant was registered in California. In holding that this

fact did not affect the question of residence, and in granting the motion to quash the service of summons, District Judge Chesnut of the District Court for the District of Maryland, said:

“The mischief which was intended to be overcome by the statute was obviously the difficulty of effecting service of summons in the usual way within the state on transient motorists or non-residents who are only temporarily within the state, but no such condition existed in this case where the defendant was actually residing within the state for two years before the wrong complained of and for more than a year thereafter. There is nothing in this case to indicate that she would not have been amenable to service of summons in the ordinary way at any time within a year after the accident, and indeed it appears that she could not in fact have effectively been sued elsewhere than in Maryland during that period.” p. 571.

The basis of jurisdiction *in personam* over non-resident motorists under the Utah statute is not operation of an automobile bearing an out-of-state license. It is “the use and operation” by a non-resident of an automobile upon the highways of Utah. Residence of the driver, not registration of the automobile is the test.

In *Chapman v. Davis*, (Minn., 1951), 45 N.W. (2d) 822, the court said in affirming an order quashing service of summons:

“The mischief which was intended to be remedied . . . was the difficulty of effecting service of summons in the usual way within the state on

non-residents who were only temporarily within the state. But no such condition existed in this case, where defendant was actually residing within the state for almost a year after the alleged accident." p. 827.

In the instant case it is clear that from the time of the accident on August 8, 1952, until the late summer of 1953, the defendant below was subject to service of process at the Deseret Chemical Depot, Tooele County, Utah, under Section 63-8-1, U.C.A., 1953, which provides for the service of process upon lands acquired by the United States for Military or Naval purposes. And under the decision of *Booth v. Crockett, District Judge, et al.*, 110 Utah 336; 173 P. (2d) 647 (1946), the defendant below would not have been subject to service of process at any other place.

In that case the evidence showed that Frank Fairbanks went to the U.S. Naval Training Depot at San Diego, California on December 5, 1945. A summons was left with his mother at the Fairbanks home on December 13, 1945. The defendant moved to quash the service of summons on the ground that the Fairbanks home was not "the usual place of abode" of Frank Fairbanks. The motion was granted. On appeal, the Supreme Court, citing *Kurilla v. Roth*, 132 N.J.L. 213; 38 A. (2d) 862 (1944) said:

" 'Abode' is one's fixed place of residence for the time being—the place where a person dwells. One's usual place of 'abode' in the statutory view, is the place where one is 'actually living' at the time when service is made." p. 368.

In a recent New Jersey decision the court defined “resident” in terms of “usual place of abode.” The Court said:

“In my opinion the word ‘resident’ is to be taken to refer to a person who has a dwelling house or usual place of abode—at which a summons can be served.” *Colon et al v. Penn. Greyhound Lines, Inc., et al.*, (N. J., 1953) 99 A. (2d) 181, 182.

The domicile of the defendant in the case below may have been elsewhere than the State of Utah. His “residence,” however, as that term is used in the non-resident motorist statute, was Deseret Chemical Depot, Tooele County, Utah.

As was said by the Supreme Court of Colorado in *Carlson v. District Court of City and County of Denver, et al.*, *supra*:

“The distinction between mere residence and domicile must be borne in mind. The former is used in law to denote that a person dwells in a given place; the latter is the local home of the person, or that place where the law presumes that he has the intention of permanently residing, although he may be absent from it. * * *

“The term non-resident as used in our statutes should be so construed as to make it consistent with the purpose of the Act. It is obvious that the Legislature intended to obviate the difficulty presented in effecting service of process in the usual and ordinary way within the State of Colorado on non-residents, who were temporarily within the state, and who, while here, became involved in an auto accident on a public highway.

In the instant case no such difficulty presented itself for plaintiff was actually living and residing in Leadville, Colorado, with his family for a period of more than five months after the accident, and there is nothing in the record disclosing any reason why service could not have been effectuated during this time." pp. 529-30.

The Utah non-resident motorist statute should be construed in the light of the objectives for which it was enacted. The construction placed upon the Colorado statute in the *Carlson Case, Supra*, well serves the intention of the Legislature in enacting this method of obtaining jurisdiction *in personam* of non-resident motorists who are here today and gone tomorrow, and who accordingly cannot be served by process in the usual fashion.

Section 41-12-8, U.C.A., 1953, should be given a construction consistent with the other methods of service of process provided by statute. In the *Booth case, supra*, the Supreme Court of Utah held that a member of the United States Navy stationed at the Naval Training Depot at San Diego, California, did not have his usual place of abode at his parents' home. His abode was construed to be his residence for the time being. He could not, therefore, be served with process by leaving a copy of that process at his parents' home. If the plaintiff in that action had sought service under the provisions of the non-resident motorist statute, this court would surely have held that Fairbanks, having a usual place of abode in California, where he was then residing, was a non-resident of the State of Utah at that time. Any other

result would have precluded the plaintiff from obtaining service of process in any way, contrary to the purposes for the enactment of the non-resident motorist statute.

The defendant in this case had a usual place of abode in Tooele County, Utah; that is where he was, at that time, residing. He was a non-resident at that time of the state where he had lived prior to his induction, but was a resident of the State of Utah.

CONCLUSION

By this extraordinary proceeding we have urged that this court consider and decide this question of jurisdiction because it is a question which, under modern travel and living conditions, will recur again and again.

We perceive no real difficulty in determining a proper construction of the statute when the plain and clear meaning of the statutory words is realized. It is "the use and operation" of a vehicle which gives rise to the appointment of the Secretary of State as the agent for service of process. It is the "use or operation" which signifies the agreement that the process so served, shall have full legal force and effect. Obviously the appointment of a process agent and the signification of agreement occur *at the time of the use or operation*. There is no appointment, nor is there signification of agreement until that time, but as soon as the use of the highway is made by the operation of a motor vehicle, the appointment and agreement spring into life.

Since the use and the operation are the determining factors, the status of the person who is deemed to have made the appointment and to have signified his agreement, must be determined contemporaneously with such use and operation. There was never any showing, either by Brandon or by inferences from the whole record, that Teague was a non-resident of Utah at the time of the accident.

Since the statute is in derogation of common-law rights, and ought to be strictly construed, it is earnestly submitted that the defendant District Court should be restrained from proceeding further with the action now pending before it, and the temporary writ ought to be made permanent.

Respectfully submitted,

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