

1935

## CONSTITUTIONAL LAW-SERVICE OF PROCESS-JURISDICTION OVER NON-RESIDENT ACQUIRED BY SERVICE UPON RESIDENT AGENT

Maurice S. Culp  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Jurisdiction Commons](#), and the [Securities Law Commons](#)

---

### Recommended Citation

Maurice S. Culp, *CONSTITUTIONAL LAW-SERVICE OF PROCESS-JURISDICTION OVER NON-RESIDENT ACQUIRED BY SERVICE UPON RESIDENT AGENT*, 33 MICH. L. REV. 963 (1935).

Available at: <https://repository.law.umich.edu/mlr/vol33/iss6/15>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

CONSTITUTIONAL LAW — SERVICE OF PROCESS — JURISDICTION OVER NON-RESIDENT ACQUIRED BY SERVICE UPON RESIDENT AGENT — Henry L. Doherty, a non-resident of the State of Iowa, did business within the state under the name of Henry L. Doherty & Co., with a district manager in charge of the office at Des Moines. Under the manager were clerks and salesmen engaged in the business of selling securities. One of these salesmen made an illegal sale to Goodman, and for damages resulting from the transaction Goodman brought suit in 1931, serving in the regular manner in accordance with the provisions of section 11079<sup>1</sup> of the Iowa Code the district agent at the Des Moines office. Doherty appeared specially to challenge the jurisdiction of the district court, but his special plea was overruled, and on appeal the Supreme Court of Iowa<sup>2</sup> affirmed the judgment of the lower court, relying upon the precedent set in the case of *Davidson v. Henry L. Doherty & Co.*<sup>3</sup> Thereupon Doherty appealed

<sup>1</sup> This section, Iowa Code (1931), sec. 11079, reads as follows: "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

<sup>2</sup> *Goodman v. Henry L. Doherty & Co.*, (Iowa 1934) 255 N. W. 667.

<sup>3</sup> 214 Iowa 739, 241 N. W. 700 (1932).

to the Supreme Court of the United States, contending that the construction placed upon this statute offended sec. 2, Article IV, and sec. 1 of the Fourteenth Amendment, of the Constitution of the United States. The Supreme Court of the United States *held* that the judgment be affirmed. On the charge that the statute in question infringed the constitutional guarantees cited to the Court, Mr. Justice McReynolds, writing the opinion of the Court, quoted liberally from the Iowa decision in *Davidson v. Henry L. Doherty & Co.*, and, pointing to the circumstance that Doherty had complied with the Iowa securities law<sup>4</sup> in registering and filing his consent to service of process, stated that this fact coupled with the accepted construction of the Iowa service statute did not deprive Doherty of any right guaranteed by the federal Constitution. *Flexner v. Farson*<sup>5</sup> was put aside as inapplicable because service in that case was not upon the agent of the defendants, as it admittedly was in this case. And finally, the Supreme Court relied upon the analogy of the non-resident motorist service statutes to support its conclusion that, upon the facts of this case, the statute assailed was within the principle of the non-resident motorist decisions. *Henry L. Doherty & Co. v. Goodman*, (U. S. 1935) 55 Sup. Ct. 553.

This decision leaves no doubt that a non-resident dealer in securities<sup>6</sup> may be sued in a state where he is doing business by service of process upon an agent within the state. The Supreme Court very carefully stated that its decision was confined to the circumstances of this case.<sup>7</sup> Although the Iowa court made no mention of the fact that Doherty had complied with the Iowa Securities Act,<sup>8</sup> the Supreme Court placed some emphasis upon the *exceptional* treatment of the business of dealing in corporate securities by this statute in the course of its opinion.<sup>9</sup> In this respect the decision leaves some doubt as to the future attitude of the Court toward the application of service statutes of this character to non-residents engaged in business of an *unexceptional* nature. The Court's

<sup>4</sup> This statute was embodied in Iowa Code (1931), sec. 8581-c9, and provided a special method of service of process upon a public officer. There was apparently never any attempt to apply this statute in the principal case. It was involved neither in the Davidson nor the Goodman cases, and was barely mentioned in the dissenting opinion in *Davidson v. Henry L. Doherty & Co.*, 214 Iowa 739, 241 N. W. 700 at 706 (1932). Mr. Justice McReynolds seems to have used it to show that Iowa treated a business such as defendant was carrying on as exceptional.

<sup>5</sup> 248 U. S. 289, 39 Sup. Ct. 97 (1919).

<sup>6</sup> At least 23 states now have special service statutes for non-resident stocks and securities dealers, although not all of them have service provisions like those in Iowa Code (1931), sec. 8581-c9, or a general service statute as complete as section 11079, quoted in note 1, *supra*. In addition, several other exceptional businesses have been singled out, and it does not seem unreasonable that the principle of this decision will be applied to cases arising under such statutes. For a reference to these statutes and a discussion of the problem of service, see Culp, "Process in Actions Against Non-Residents Doing Business Within a State," 32 MICH. L. REV. 909-910 (1934).

<sup>7</sup> "So far as it affects appellant, the questioned statute goes no farther than the principle approved by those opinions permits. Only rights claimed upon the present record are determined. The limitations of Section 11079 under different circumstances we do not consider." (U. S. 1935) 55 Sup. Ct. 553 at 554.

<sup>8</sup> See note 4, *supra*.

<sup>9</sup> *Henry L. Doherty & Co. v. Goodman*, (U. S. 1935) 55 Sup. Ct. 553.

favorable comparison of the non-resident motorist statutes with the Iowa service statute must be considered as confined to service upon a non-resident engaged in a business of an exceptional nature.<sup>10</sup> However, the Supreme Court of Iowa previously, in *Davidson v. Henry L. Doherty & Co.*,<sup>11</sup> gave cogent reasons which destroy all constitutional objections to imposing such service upon any non-resident as to business regularly transacted within a state, and elsewhere in this Review the constitutional basis for substituted service of process in such cases has been discussed at length.<sup>12</sup> The other problems discussed by the Court have been the cause of some speculation in the past. One is the question whether such a statute denies the equal protection of the laws and restricts the privileges of citizens. Since the Iowa statute applies to every non-resident of the county where the agency is whose transactions gave rise to the cause of action, whether resident of the state or one of the United States, there was no ground whatever for charging that either the equal protection of the laws had been denied or that the privileges and immunities of the citizens of the several states had been infringed,<sup>13</sup> and if these are untouched, certainly no privi-

<sup>10</sup> *Henry L. Doherty & Co. v. Goodman*, (U. S. 1935) 55 Sup. Ct. 553-554, and see the quotation in note 7, *supra*.

<sup>11</sup> *Davidson v. Henry L. Doherty & Co.*, 214 Iowa 739 at 743, 241 N. W. 700 at 701, 702 (1932):

"Even though a state may not exclude a citizen of another state from doing business therein, the Constitution does not prohibit a state from imposing reasonable conditions upon the citizen of a foreign state who seeks to do business within its borders, and this is especially so when like conditions are imposed upon its own citizens."

"No good reason can be urged against the justice of a rule that makes such a statute applicable to the non-resident as well as the resident of the state. The latter may, under this statute, be compelled to defend a personal action in another county very far removed from the county of his residence. Why should not the resident who may live merely across a boundary line be equally required to defend in an action *in personam* in a county of this state where such nonresident maintains an office or agency as to matters growing out of such office or agency where proper service is had on the agent? A non-resident who gets all the benefits of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this State."

See also the quotation from the opinion in note 13, *infra*.

It should be pointed out here that both the *Davidson* and *Goodman* cases in the Iowa courts were based squarely on this general service statute.

<sup>12</sup> Culp, "Process in Actions Against Non-Residents Doing Business Within a State," 32 MICH. L. REV. 909 at 914-929 (1934).

<sup>13</sup> Mr. Justice McReynolds quoted from the careful reasoning of the Iowa Court in *Davidson v. Henry L. Doherty & Co.*, and a pertinent extract from the *Davidson* case follows:

"Under the record in this case the court obtained jurisdiction over the appellant in the precise manner pointed out by the statute. The statute does not (1) deny to the defendant any rights or immunities granted to citizens of this state; (2) it does not deny to the defendant the equal protection of the law, because it applies equally to residents and nonresidents; (3) it does not deny to the defendant due

leges and immunities of citizens of the United States are violated.<sup>14</sup> The decision would seem to put at rest effective appeal to *Flexner v. Farson* in future cases.<sup>15</sup> The agent served in this case would properly come within the classification of a "managing" agent, and service upon him would appear to satisfy the requirements of due process as to notice.<sup>16</sup> And at least by the use of the direct analogy of the power of states to impose restrictions upon non-resident motorists in support of the power to impose conditions on non-resident securities dealers, situated like the defendant in this case, within their borders, it would seem that any methods of service which have received judicial sanction under the non-resident motorist statutes<sup>17</sup> should be equally valid for non-residents engaged in the sell-

process of law, because it provides for a substituted service upon the existing agent of the defendant in charge of the defendant's office or agency, and is limited to matters growing out of that agency, and there is 'every reasonable probability' that such notice so served will necessarily be brought to the attention of the defendant and afford him ample opportunity to defend." 214 IOWA 739 at 752.

<sup>14</sup> The right to engage in any business not licensed by or exercised under federal protection or authority does not seem to be a privilege or an immunity of citizens of the United States. See *Duncan v. Missouri*, 152 U. S. 377 at 382, 14 Sup. Ct. 570 at 571 (1894). See McGovney, "Privileges or Immunities Clause — Fourteenth Amendment," 4 IOWA L. BULL. 219 (1918); Morris, "What are the Privileges and Immunities of Citizens of the United States?," 28 W. VA. L. Q. 38 (1921).

<sup>15</sup> *Henry L. Doherty & Co. v. Goodman*, (U. S. 1935) 53 Sup. Ct. 553 at 554: "Flexner v. Farson . . . much relied upon, does not sustain appellant's position. There the service was made upon one not then agent for the defendants; here the situation is different."

This is one way to dispose of the decision in that case. It was suggested several years ago. See Scott, "Jurisdiction over Nonresidents Doing Business Within a State," 32 HARV. L. REV. 871 at 889-890 (1919). However, it should be pointed out that the case of *Flexner v. Farson*, on its own facts, could not be decisive of the many constitutional objections urged against the validity of service of process on such non-residents. See Culp, "Process in Actions Against Non-Residents Doing Business Within a State," 32 MICH. L. REV. 909 at 917-922 (1934).

<sup>16</sup> The test seems to be whether the provisions for service of process make it "reasonably probable that notice of the service will be communicated to the non-resident defendant who is sued." See *Wuchter v. Pizzutti*, 276 U. S. 13, 48 Sup. Ct. 259 (1928).

Service upon an agent with a representative character, such as a managing agent or a general agent or an agent in charge of an office, would properly be likely to bring the matter to the principal's attention. See *Minneapolis Threshing Machine Co. v. Ashauer*, 142 Wis. 646, 126 N. W. 113 (1910); *Chase Bag Co. v. Munson Steamship Line*, (App. D. C. 1924) 295 Fed. 990. See BOWERS, CIVIL PROCESS AND ITS SERVICE 453-458 (1927).

It would be possible under the literal terms of the Iowa statute to serve a mere agent or minor clerk in an office (note 1, supra), and it may be doubted whether such service would give the requisite notice — the chance of notice reaching the defendant would be relatively hazardous.

<sup>17</sup> For an analysis of the methods of service and of giving notice to non-resident motorists, see Culp, "Process in Actions Against Non-Resident Motorists," 32 MICH. L. REV. 325 at 335-344 (1934).

ing of securities or in any other business upon which a state can impose reasonable regulations as to service of process.<sup>18</sup>

MAURICE S. CULP

<sup>18</sup> A good many service statutes which apply to special businesses require service of process upon a public officer, and further impose a duty upon either the officer or the plaintiff to mail a copy of this process to the non-resident defendant. For a detailed consideration of these and other service statutes on this general problem, see Culp, "Process in Actions Against Non-Residents Doing Business Within a State," 32 MICH. L. REV. 909 at 935-940 (1934).

One of the earliest non-resident motorist service statutes sustained by the Supreme Court provided for service upon a public officer, and that notice of the service and copy of the process be sent to the non-resident by registered, return-receipted mail. *Hess v. Pawloski*, 274 U. S. 352, 47 Sup. Ct. 632 (1927).