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A SURVEY OF THE MODERN NONRESIDENT MOTORIST STATUTES

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In 1927 the Supreme Court in *Hess v. Pawloski*[1] sustained the constitutionality of the Massachusetts nonresident motorist statute by which jurisdiction could be asserted locally against a nonresident in an action for damages resulting from a motor vehicle accident on the public highways of the state. Since that time every state has adopted such a statute,[2] and hundreds of judicial opinions interpret-

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[1]274 U.S. 352 (1927).

[2]ALA. CODE tit. 7, §199 (1960); ARIZ. REV. STAT. ANN. §28-502 (1956); ARK. STAT. ANN. §27-341 (Supp. 1959); CAL. VEHICLE CODE §404; COLO. REV. STAT. ANN. §13-8-2 (Supp. 1957); CONN. GEN. STAT. §52-62 (1958); DEL. CODE ANN. tit. 10, §3112 (Supp. 1958); D.C. CODE §40-423 (Supp. VI, 1957); FLA. STAT. §47.29 (1959); GA. CODE ANN. §68-801 (1957); IDAHO CODE §49-1602 (Supp. 1959); ILL. ANN. STAT. ch. 95½, §9-301 (Smith-Hurd Supp. 1959); IND. STAT. Ann. §47.1043 (Supp. 1960); IOWA CODE §321.498 (Supp. 1959); KAN. GEN. STAT. ANN. §8-401 (Supp. 1955); KY. REV. STAT. §188.020 (Supp. 1960); LA. REV. STAT. §13-3474 (Supp. 1959); ME. REV. STAT. ANN. c. 22, §70 (Supp. 1954); MD. CODE ANN. art. 66½, §115 (1957); MASS. ANN. LAWS c. 90, §3A-3D (Supp. 1959); MICH. STAT. ANN. §9.2103 (1960); MINN. STAT. ANN. §170.55 (Supp. 1959); MISS. CODE ANN. §9352-61 (Supp. 1958); MO. ANN. STAT. §506.210 (Supp. 1959); MONT. REV. CODE ANN. §53-201 (1947); NEB. REV. STAT. §25-530 (1956); NEV. REV. STAT. §14.070 (1959); N.H. REV. STAT. ANN. §264:1 (1955); N.J. STAT. ANN. §39:7-2 (Supp. 1959); N.M. STAT. ANN. §64-24-3 (1953); N.Y. VEHICLE AND TRAFFIC LAW c. 71, §253; N.C. GEN. STAT. §1-105 (Supp. 1959); N.D. R. CIV. P. 4(d); OHIO REV. CODE ANN. §2703.20 (Supp. 1959); OKLA. STAT. ANN. §47-391 (Supp. 1959); ORE. REV. STAT. §15.190 (1959); PA. STAT. ANN. tit. 75, §1201 (Supp. 1959); R.I. GEN. LAWS ANN. §31-7-6 (1956); S.C. CODE §46-104 (1952); S.D. CODE §53.0808 (Supp. 1960); TENN. CODE ANN. §20-224 (Supp. 1959); TEX. REV. CIVIL STAT. ANN. art. 2039A (Supp. 1960); UTAH CODE ANN. §41-12-8 (1953); VT. STAT. tit. 12, §891 (1958); VA. CODE ANN. §8-67.1 (1957); WASH. REV. CODE §46-64.040 (Supp. 1959); W. VA. CODE ANN. §5555(1) (1955); WIS. STAT. ANN. §345.09 (1958); WYO. STAT. ANN. §1-52 (1957).

ing this legislation have been written.[3] It is a rare state that has not amended its act; many states have amended their statutes a number of times, and much of this supplemental legislation is of recent vintage. The purpose of this article is to give an up-to-date account of the problems arising under the modern motorist statutes.[4] First, however, it is desirable to direct attention to the public policy functions served by the statutes and the constitutional bases for, and alleged restrictions on, this class of legislation.

The doctrine ascribed to the 1877 Supreme Court decision of *Pennoyer v. Neff*[5] — that there are constitutional barriers to assertion of jurisdiction over nonresidents who are not personally served in the state or consent to be sued there — has undergone considerable modification, especially in the past two decades.[6] The nonresident motorist statutes and the decision of *Hess v. Pawloski* upholding this type of legislation played a pioneering role in this development. These statutes speak in terms of the appointment by the nonresident of a state official as an agent for service of process in the state, and the appointment is deemed to have been consented to by the nonresident by the act of driving on the state highways. Although it has become commonplace to assert that the fictional "implied consent" is not the true constitutional basis for this jurisdictional legislation, the language of "consent" contained in these statutes has given rise to no end of trouble in their administration by supplying theoretical justification for various interpretations that restricted their operation.[7]

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[3]The writer has read over 500 decisions under these statutes and can testify that there are more yet to be read.

[4]For general commentary on this subject, see Culp, *Recent Developments in Actions Against Nonresident Motorists*, 37 MICH. L. REV. 58 (1938); Culp, *Process in Actions Against Nonresident Motorists*, 32 MICH. L. REV. 325 (1934); Scott, *Jurisdiction over Nonresident Motorists*, 39 HARV. L. REV. 563 (1926); Comment, 44 IOWA L. REV. 384 (1959); Notes, 30 GEO. L.J. 768 (1941); 30 N.Y.U.L. REV. 702 (1955). Other literature relating to more particular topics is cited at relevant points in the text.

[5]95 U.S. 714 (1877).

[6]The literature in the field of jurisdiction over foreign corporations, the area in which most of the developments are taking place, is vast. For some recent commentary, see Damback, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958); Hoffman, *The Plastic Frontiers of State Judicial Power over Nonresidents*, 24 BROOK. L. REV. 291 (1958); Reese & Galston, *Doing an Act or Causing Consequences As Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

[7]Occasionally courts have been moved to disclaim the "consent" theory of jurisdiction and to justify the legislation on the basis of state police power.

The decision that delivered the mortal wound to the "consent" theory was the landmark *International Shoe v. Washington*[8] decision of 1945. Even before this, however, the constitutionality of the motorist statutes was being explained on other grounds. The most popular of these was the idea that an exception to the usual jurisdictional standards was justified because automobiles were dangerous instrumentalities subject to reasonable police power regulations.[9] This view of the statutes is widely accepted by state judges today,[10] yet it is doubtful that, absent these statutes, nonresidents would drive more carelessly because of an anticipation of an immunity from the inconvenience of local jurisdiction. At any rate, the idea that these statutes are merely a species of traffic regulations was not the major consideration behind their adoption.

International Shoe laid the "consent" theory to rest and substituted in its place another base of jurisdiction.[11] The new principle was "reasonableness"; jurisdiction over the defendant would be permitted when this would accord with "fair play and substantial justice." As a criterion for determining reasonableness, the Court directed attention

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Ogden v. Giankos, 415 Ill. 591, 114 N.E.2d 686 (1953) (amendment applied retroactively against claim of defendant that when he drove on the state highways he did not consent to the later enacted provision); Burns v. Godwin, 211 Miss. 310, 51 So. 2d 486 (1951) (permitting one nonresident to bring suit under act against another nonresident on ground that statute served a public function rather than a private one available only to residents); Paduchik v. Mikoff, 158 Ohio St. 533, 110 N.E.2d 562 (1953) (upholding amendment providing for jurisdiction over accidents occurring on private property as opposed to the public highways). In Psychas v. Trans-Canada Highway Express, 146 F. Supp. 11 (E.D. Mich. 1956), the court upheld jurisdiction over the personal representative of a deceased tortfeasor even though in the amendment to the statute the word *appointment* had been omitted. The court reasoned that the police power, rather than the ficticious appointment of a resident agent, was the basis for the act. See also Steffen v. Little, 2 Wis. 2d 350, 86 N.W.2d 662 (1957).

[8]326 U.S. 310 (1945).

[9]This was given currency by the language of the Supreme Court in the *Hess* decision: "Motor vehicles are dangerous machines . . . even when skillfully and carefully operated . . . . In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of . . . [those] who use its highways. The measure in question operates . . . to provide for a claimant a convenient method by which he may sue to enforce his rights." Hess v. Pawloski, 274 U.S. 352, 356 (1927).

[10]See note 6 *supra*.

[11]It also tolled the demise of the "presence" theory of jurisdiction over foreign corporations, *i.e.*, that corporations were present and thus amenable to jurisdiction wherever they were "doing business." See Note, 5 DUKE L.J. 137 (1956).

to the doctrine of *forum non conveniens,* a concept by which courts having jurisdiction could explain refusal to entertain a suit when it was unreasonably inconvenient for the defendant to defend in that court.[12]

Another test suggested by the Court, which was in the nature of a limitation on the exercise of jurisdiction, was that there must be certain "minimum contacts" by the defendant within the state in which jurisdiction is sought. Most of the interest of judges and commentators has been concentrated on determining the significance of this latter test, a limitation that has little relevance to the operation of the motorist statutes when the defendant's contact with the state seems clearly sufficient.[13] Furthermore, although the policy considerations implicit in the "minimum contacts" test frequently coincide, or are consistent, with those involved in the convenience-of-forum test, there is not necessarily a relationship between the criteria. When application of the tests leads to divergent results, it is submitted that the "convenience" test should be considered dominant. The "minimum contacts" test, in this view, becomes merely a rough yardstick used to administer desirable constitutional limitations on state jurisdictional power.[14] Those limitations are, or should be, the product of convenience-of-forum factors.

Whatever the acceptability of the aforementioned suggestions,[15] since the "minimum contacts" test is admittedly of little consequence as a brake on the operation of nonresident motorist statutes, the basic policy criterion in the administration of this legislation should be the convenience of the forum to the parties. Although it is easy to

[12]See Ehrenzweig, *The Transient Rule of Personal Jurisdiction,* 65 YALE L.J. 289 (1956).

[13]In those states in which the owner is subject to jurisdiction when his vehicle is driven with his permission, an argument has been made that to assume jurisdiction over the owner by presuming his permission to the driver might be violative of the owner's constitutional rights. Stumber, *Extension of Nonresident Motorist Statutes to Those Not Operators,* 44 IOWA L. REV. 268 (1959). Whatever the merits of this contention, it would apply to the Florida and Massachusetts statutes discussed at note 99 *infra.* See also Bowman v. Atlanta Baggage & Cab Co., 173 F. Supp. 282 (N.D. Fla. 1959) (jurisdiction over owner upheld despite contractual limitation on lessee's authority to drive vehicle in the state).

[14]Admittedly, when international, rather than interstate, contacts are involved, the concept that jurisdiction is based on power of the state over the person or property of the defendant has a legitimate role to play, as, *e.g.,* when the federal government asserts the application of the antitrust laws against the activities of a foreign cartel restraining trade in the world market.

[15]Compare Ehrenzweig, *supra* note 12.

talk about the "convenience" of the court to the parties, to apply this vague generalization to a particular litigation or a class of suits is not so simple. This is probably why less attention has been given to it than to the "minimum contacts" test and why the latter standard has been found more useful in the application of the *International Shoe* principle of "reasonableness."

Despite the uncertainties regarding application of the convenience-of-forum concept to other types of cases, the realities of automobile accident litigation point clearly to the situs of the accident as the most desirable place to conduct a determination of the merits of these controversies. One of the parties involved may be forced to travel to the distant forum to testify — a factor that cancels out, since there is no reason to prefer one party over the other.[16] However, the annoyance and expense of employing foreign counsel to appear at the trial are less disadvantageous to the defendant in the usual case, in which his insurer assumes this obligation and has established local contacts. It is true that one party must be prepared to face a jury composed of his opponent's neighbors, but the widespread prevalence, indeed in many states the requirement, of automobile liability insurance tends to diminish any niggardly attitude even of a jury selected from residents of the defendant's locale.

An important factor, and one as to which a more objective appraisal can be made concerning convenience, is the availability and compellability of witnesses regarding the issues of the defendant's liability and damage to the plaintiff. In the majority of cases these witnesses will be residents of the place of the accident. Moreover, the governing law generally is, by traditional conflict of laws principles, that of the situs of the accident, a factor of convenience to the court. Most of a variety of documents — such as police reports, hospital records of the plaintiff's injury, and the plaintiff's earning records — typically employed at these trials are usually located in the state of the accident, or at least are less likely to be located in the defendant's state. In sum, usually the court located at the place of the accident is clearly the most convenient forum for hearing the dispute.

Before proceeding to a discussion of the various problems in the

[16]When the defendant dies, there would seem to be one less factor in the balance to justify his executor's challenge to the reasonableness of assertion of jurisdiction against the estate in a forum other than that of the deceased's domicile. But other factors relating to administration of estates may give the executor's contention more substance than if the deceased were alive. See discussion at note 121 *infra*.

administration of these statutes, it is worth while to examine briefly alternative procedures for obtaining jurisdiction over the nonresident defendant. One of these is the Federal Motor Carrier Act of 1935,[17] which provides for jurisdiction over interstate common carriers by requiring the holders of Interstate Commerce Commission franchises to appoint a resident agent in every state through which they travel. Because the statute is not restricted to claims arising out of vehicle accidents[18] in the state,[19] as are nonresident motorist acts, an extra measure of security is given to the plaintiff by the federal act or similar state legislation.[20]

An alternative avenue to jurisdiction exists in the well-known state statutes providing for jurisdiction over foreign corporations "doing business" in the state. The *International Shoe* case and the subsequent decisions elaborating on the "minimum contacts" test[21]

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[17]49 U.S.C. 321 (c) (1958).

[18]*But see* Madden v. Truckaway Corp., 46 F. Supp. 702 (D. Minn. 1942), in which the court held that the statute could not be used as a basis for jurisdiction over the defendant carrier in a stockholder's suit, since the act was intended to provide jurisdiction only for causes of action reasonably related to interstate transportation.

[19]See note 141 *infra*.

[20]The alternatives of the Federal Motor Carrier Act and state foreign corporation statutes are generally held to be cumulative procedures available to the plaintiff, who may employ any one of them without giving preference to any other. Schoulte v. Great Lakes Forwarding Corp., 230 Iowa 812, 298 N.W. 914 (1941); Olsen v. Midstates Freight Lines, 12 Misc. 2d 897, 173 N.Y.S.2d 711 (Sup. Ct. 1958). Georgia, however, has held to the contrary, requiring service of process on a foreign corporation to be upon its appointed resident agent if an appointment has been made. Southeastern Truck Lines, Inc. v. Rann, 214 Ga. 813, 108 S.E.2d 561 (1959); Hirsch v. Shepard Lumber Corp., 194 Ga. 113, 20 S.E.2d 575 (1942). The theory here apparently is that it is desirable to require service on an agent actually, rather than ficticiously, appointed.

Still another method of obtaining local jurisdiction, but which is limited to the proceeds of the defendant's liability insurance, however, is by the use of "direct action" statutes. Such legislation permits suits to be brought against the insurer before the liability of the insured is determined, thus overcoming the normal effect of the so-called no action clauses in standard liability policies. If jurisdiction over the insurer can be obtained, the injured plaintiff need not resort to the nonresident motorist statute for jurisdiction over the tort-feasor. A provision in the Louisiana motorist statutes permitting direct suit against the insurer was upheld against a challenge based on due process violation in Pugh v. Oklahoma Farm Bureau Mut. Ins. Co., 159 F. Supp. 155 (E.D. La. 1958), in which the insurer's only contact with the state was its "presence on the risk" of the nonresident driver. Only Louisiana and Rhode Island have such statutes.

[21]Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co.,

have brought about a considerable extension of the jurisdiction that may be constitutionally asserted under these statutes.[22] Several states now have legislation providing for local jurisdiction for any tort committed within the state.[23] Statutes of this type have been upheld by some state courts,[24] and if the Supreme Court should declare such a statute constitutional in an extreme situation, many states would soon adopt similar statutes. Because of the factors relating to the convenience to the parties of the place of the accident forum, factors that are often similar for other types of tort litigation, the probabilities that these statutes will be found constitutional are excellent. As a result, it would appear that the nonresident motorist statutes, which pioneered the modern expansion of jurisdiction, may, in this age of jet travel, soon be bypassed as obsolete products of the age of automobiles, just as *Pennoyer v. Neff* was scorned as a relic of the horse and buggy era. Viewed in this light, the traditional judicial attitude of niggardly interpretation of these statutes seems quite out of joint with the times.

SERVICE OF PROCESS PROBLEMS[25]

The detailed procedure by which process is served on the defendant varies among states more than any other portion of the statutes. The typical procedure involves mailing one copy of the summons and complaint to the secretary of state and another copy

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355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[22]For discussion, see Reese & Galton, *supra* note 6; Note, 44 IOWA L. REV. 345 (1959).

[23]Clews v. Stiles, 181 F. Supp. 172 (D.N.M. 1960) (court refused to apply N.M. STAT. ANN. §21-3-16 (Supp. 1959), which is the same as the Illinois statute *infra*, as not being retroactive and of doubtful constitutionality); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957), upholding ILL. ANN. STAT. ch. 110, §17.1 (Smith-Hurd Supp. 1959); (on this important Illinois statute see Note, 44 IOWA L. REV. 361 (1959). See Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357, *cert. denied*, 348 U.S. 943 (1955), construing MD. ANN. CODE. art. 23, §92(d) (1957); Shepard v. Reem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959) (discussion of N.C. GEN. STAT. §55-145(a)(3) (Supp. 1959)), noted DUKE L.J. 644 (1959); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951) (interpreting Vermont statute).

[24]See cases cited note 23 *supra*.

[25]For other discussions see Culp, *Process in Actions against Non-resident Motorists*, 32 MICH. L. REV. 325 (1934); Culp, *Recent Developments in Actions Against Non-resident Motorists*, 37 MICH. L. REV. 58, 60-67 (1938); Note, 26 CHI.-KENT L. REV. 275 (1948).

to the defendant.[26] The copies to the defendant are sent by registered mail, and the receipt for delivery returned by the post office is then filed with the pleadings. This procedure was upheld by the Supreme Court in 1928 in *Wuchter v. Pezzutti*[27] against the contention that it violated due process. The Court concluded that the substituted service procedure was sufficient if it provided a reasonable probability of notice to the defendant of the existence of the suit against him.

Because the courts view the requirements of these statutes as steps necessary to acquire jurisdiction, they have usually insisted that compliance with the details of the procedure set forth in the statute be meticulously observed. Some courts have adopted a more moderate stance when it appeared that the error was nonprejudicial to the defendant.[28] Although there are numerous local variations

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[26]While in some states the copies of both the summons and the complaint are sent to the public official who is responsible for forwarding a copy to the defendant, in most states the act requires that the plaintiff mail the papers informing the defendant of the service on the public official "forthwith." In Bond v. Golden, 273 F.2d 265 (10th Cir. 1959), the court set aside service because the statute required that the notice inform the defendant of the service on the secretary of state, whereas the plaintiff had mailed both letters on the same day. See also Conway v. Spence, 119 So. 2d 426 (Fla. 1960).

As to the requirement that notice to the defendant informing him of service on the state officer be sent "forthwith," the court in Devier v. George Cole Motor Co., 27 F. Supp. 978 (W.D. Va. 1939), held that a three-day interval between service on the state officer and notice to the defendant was not too long a delay. But in Weir v. Devine, 48 Del. 102, 98 A.2d 778 (1953), the notice was held not sent "forthwith" when the first letter to the defendant was returned unclaimed, the plaintiff did not learn of the defendant's actual address for three months afterward, and the second letter was not sent for a month after that.

As to the contents of the notice to the defendant, see Webb Packing Co. v. Harmon, 38 Del. 476, 193 Atl. 596 (1937), in which the court set aside service because the notice to the defendant did not contain a statement required by statute informing him that the substituted service was as valid as if made personally. Absent a statutory provision requiring this, the notice need not contain such a statement. Castelline v. Goldfine Truck Rental Service, 48 Del. 550, 112 A.2d 840 (1955); Hatch v. Hooper, 101 N.H. 214, 138 A.2d 671 (1958) (plaintiff's duty is to give notice, not to advise as to the consequences of the service).

[27]Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[28]*E.g.*, Michaud v. Lussier, 6 App. Div. 2d 746, 174 N.Y.S.2d 349 (3d Dep't 1958) (failure to file return receipt promptly not sufficient basis for upsetting service if it is nonprejudicial); *accord*, Kimball v. Midwest Haulers, Inc., 195 Misc. 231, 89 N.Y.S.2d 119 (Sup. Ct. 1949) (inadvertent, nonprejudicial error in the mailing of notice to the defendant will not deprive court of jurisdiction); Kornfeld v. Hurwitz, 178 Misc. 216, 32 N.Y.S.2d 820 (Sup. Ct. 1941); Steward v. Transcontinental Car Forwarding Co., 169 Misc. 427, 7 N.Y.S.2d 926 (Sup. Ct. 1938) (summons

of this typical statutory scheme, several problems of general significance deserve attention.

There are three types of statutes in regard to the sending of notice to the defendant. The first requires that the letter be sent "to the defendant" and that the return receipt be filed with the pleadings. This is the form of more than half of the statutes. The second type, which includes only a few states, also provides that the letter be sent to the defendant but makes no provision for the filing of a return receipt. The third type, which has been adopted in about a third of the states, specifies that the letter is to be sent to the "last known address" of the defendant. Some of these also contain a provision for the return receipt.

Under the first type of statute, the courts have virtually insisted that the defendant actually receive the notice sent to him, often basing their conclusion on the requirement that a signed return receipt be filed.[29] Although this rationale is not available in the cases decided under the second type of statute, there is little difference in the rigidity of the courts in requiring actual notice to the defendant.

A problem arises under the first two types of statutes when the defendant, probably because he is aware of its contents, refuses to accept delivery of the letter. Most of the courts have held that when the defendant by such conduct prevents the plaintiff from effectuating service, he is in no position to complain of the defect in the service when the plaintiff is unable to supply a return receipt signed by the defendant.[30] Some states, including those in which courts had reached

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sent to defendant but not a complaint; the court held, in a doubtful decision, that sending a complaint was unnecessary, since the service was on the secretary of state personally, and all defendant was entitled to was notice of that service).

[29]See note 32 *infra.*

[30]Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956) (when defendant refuses service, court will decline to reopen default judgment); Boss v. Irvine, 28 F. Supp. 983 (D. Wash. 1939); Cherry v. Hefferman, 132 Fla. 386, 182 So. 427 (1938); Mull v. Taylor, 68 Ga. App. 663, 23 S.E.2d 595 (1942); State *ex rel.* Charette v. District Ct., 107 Mont. 489, 86 P.2d 750 (1939) (defendant, having refused service, is in no position to complain that return receipt had not been filed); Wax v. Van Marter, 124 Pa. Super. 573, 189 Atl. 537 (1937). *Contra,* Dwyer v. Shalek, 232 App. Div. 780, 248 N.Y. Supp. 355 (2d Dep't 1931) (overturned by later N.Y. statute). The same result may be reached as a practical matter by requiring the plaintiff to prove that the refusal was made by the defendant rather than by an agent, or that the word *Refused* was written by a postal employee. See *Ex parte* Smith, 258 Ala. 319, 62 So.2d 792 (1953). In Wax v. Van Marter, *supra,* the court admitted that if the refusal had been made by an agent rather than by the defendant himself, this would be a valid defense, with the burden of proof resting on the

a contrary position, amended their statutes to provide that refusal by the defendant to accept the registered letter would satisfy the requirements of a valid service. Presumably all courts under such a statute would reach that result today.

In the majority of states in which the statute requires the letter to be sent "to the defendant," the courts have also relaxed their position to the point of upholding service when it is delivered to an agent, even though the defendant may not actually receive notice if the agent fails to forward the papers.[31] In those states in which the statute requires only that the letter be sent to the defendant's "last known address," the courts have not been concerned about the problems of frustration of service by refusal to accept or the authority of agents in accepting service.

Obviously, the most important problem concerning service of process arises when the defendant cannot be found at the address to which the letter is sent, and the letter is returned unclaimed. The courts in the majority of states operating under statutes that require the letter to be sent "to the defendant" have uniformly refused to sustain service.[32] A similar result was threatened in the early cases decided under the statutes containing the "last known address" phraseology when some courts interpreted the term to mean virtu-

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defendant rather than the plaintiff.

Compare the situation in which the letter is never presented to the defendant, although he apparently knows of it. In Stone v. Sinkfield, 70 Ga. App. 787, 29 S.E.2d 310 (1944), the letter was sent by registered mail to "General Delivery" in a small town and returned unclaimed. The court held that in such circumstances there could be no presumption of the defendant's notice and intent to obstruct proper service. *Accord*, Paxson v. Crowson, 47 Del. 114, 87 A.2d 881 (1952).

[31]Employers' Liability Assur. Corp. v. Perkins, 169 Md. 269, 181 Atl. 436 (1935) (wife of defendant); Shusherevba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931); Tennant v. Farm Bureau Mut. Auto Ins. Co., 286 App. Div. 117, 141 N.Y.S.2d 449 (4th Dep't 1955) (wife). *Contra*: Weisfield v. Superior Ct., 110 Cal. App. 2d 148, 242 P.2d 29 (1952) (statute requires that the return receipt bear "the signature of said defendant").

[32]See, *e.g.*, Syracuse Trust Co. v. Keller, 35 Del. 304, 165 Atl. 327 (1932); Spearman v. Stover, 170 So. 259 (La. App. 1936); Parker v. Bond, 330 S.W.2d 121 (Mo. 1959); Bernardt v. Scianimanico, 21 Misc. 2d 182, 192 N.Y.S.2d 1018 (Sup. Ct. 1959); Mollohan v. North Side Cheese Co., 107 S.E.2d 372 (W. Va. 1959). *But see* Williams v. Egan, 308 P.2d 273 (Okla. 1957) (if plaintiff acts in good faith and uses correct address of defendant, it is not absolutely necessary that defendant actually receive service). This overrules in part an earlier Oklahoma decision, Hicks v. Hamilton, 283 P.2d 1115 (Okla. 1955).

ally the defendant's actual address.[33] More recent decisions, however, take a more moderate position and tend to uphold the sufficiency of the service.[34]

All of the decisions appear to be in agreement that the plaintiff must exercise due diligence in an effort to ascertain the defendant's present location before he may take advantage of the "last known address" provision. The problem is then reduced to the question what sources of information the courts will accept as a sufficient basis of reliance by the plaintiff, that is, whether it is sufficient to look no further than the address found in the police report of the accident, or the foreign motor vehicle registers, or the defendant's driver's license.[35] Several decisions have concluded that when the plaintiff knows that the defendant cannot be found at the address to which the letter is sent, the service is unsatisfactory.[36] This is not a desirable position, because the address may still be the last one that reasonable diligence could ascertain.

A problem of much importance under the statutes permitting notice to be mailed to the "last known address" concerns the status

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[33]In State *ex rel.* Cronkhite v. Belden, 193 Wis. 145, 158, 211 N.W. 916, 920 (1927), the court declared that "last known address" "must mean not his last address known to the plaintiff, but plaintiff is required to ascertain at his peril the last known address of the defendant as a matter of fact, and his failure to do so will amount to a failure to comply with the statute . . . ." This decision was overruled in Sorenson v. Stowers, *infra* note 35. Cases following this view are Glenn v. Holub, 36 F. Supp. 941 (S.D. Iowa 1941); Weiss v. Magnussen, 13 F. Supp. 948 (E.D. Va. 1936); Hartley v. Vitiello, 113 Conn. 74, 80, 154 Atl. 255, 258 (1931) ("Unless the defendant has departed for parts unknown, it [last known address] means his actual address . . . . This address the plaintiff must learn at his peril . . .").

[34]Powell v. Knight, 74 F. Supp. 191 (E.D. Va. 1947); Staples v. Southern Fire & Cas. Co., 289 S.W.2d 512 (Ky. App. 1956); MacClure v. Accident Ins. Co., 229 N.C. 305, 49 S.E.2d 742 (1948); Hendershot v. Ferkel, 144 Ohio St. 112, 56 N.E.2d 205 (1944); Wiest v. Hefferman, 17 Pa. D. & C. 212 (1931); Powell v. Knight, 74 F. Supp. 191 (E.D. Va. 1947); State *ex rel.* Nelson v. Grimm, 219 Wis. 630, 263 N.W. 583 (1935).

[35]Glenn v. Holub, *supra* note 33 (letter sent to address defendant had given plaintiff and insurance adjuster and which was contained on the license registration of the car held not sent to last known address, since defendant had moved and letter was returned unclaimed); Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (1947) (plaintiff held entitled to rely upon defendant's address as found in police report of the accident).

[36]*E.g.*, Towe v. Giovinetti, 164 F. Supp. 159 (W.D. Mo. 1958); Drinkard v. Eastern Airlines, Inc., 290 S.W.2d 175 (Mo. App. 1956); Conner v. Miller, 154 Ohio St. 313, 96 N.E.2d 13 (1950).

of the defendant's liability insurer when the defendant has disappeared and the notice is returned to the plaintiff unclaimed.[37] When claim is made against the insurer to enforce the default judgment against the defendant, the insurer may assert that it is not liable under the so-called cooperation clause of the insurance contract, because the materials served on the defendant were not forwarded by the defendant to the company.[38] It appears that the courts will respect this argument unless it can be shown that the insurer was fully apprised of the existence and timing of the litigation against its insured; such knowledge may create an estoppel against the company. Under this rule the insurer may be obliged to conduct the search for the defendant and face trial without his testimony if he cannot be found. This result, however, is preferable to requiring the plaintiff, who may be able to prove the defendant's liability beyond doubt, to go uncompensated while the insurer retains the premiums collected for assuming this risk.

Ordinarily the question of "last known address' will not be of ultimate importance. Trial judges are not inclined to deny default judgments by inquiring deeply into the adequacy of the address to which the letter to the defendant was sent. If the defendant later shows up to attack the default judgment, he can be served at that time by sending a letter to his new address.[39] When it is not the defendant but his insurer against which the judgment is being enforced, it is not to be expected that courts will be willing to set aside the judgment on the ground of failure to obtain the defendant's last known address if the insurer cannot locate the defendant either. It seems clear, then, from the plaintiff's point of view, that statutes containing the provision permitting the letter to be sent to the "last known address" of the defendant are less restrictive than those that require actual service on the defendant or his agent. Given the safeguards that the courts have placed on the operation of the "last known address" provisions as regards the diligence of the plaintiff in locating the defendant,[40] this type of statute also appears to be superior from the standpoint of the general administration of civil

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[37]See generally Note, 66 YALE L.J. 152 (1956).

[38]Staples v. Southern Fire & Cas. Co., 289 S.W.2d 512 (Ky. 1956); Tennant v. Farm Bureau Mut. Auto Ins. Co., 286 App. Div. 117, 141 N.Y.S.2d 449 (4th Dep't 1955); *cf.* Employers' Liability Assur. Corp. v. Perkins, 169 Md. 269, 181 Atl. 436 (1935); MacClure v. Accident Ins. Co., 229 N.C. 305, 49 S.E.2d 742 (1948).

[39]See Glenn v. Holub, 36 F. Supp. 941 (S.D. Iowa 1941).

[40]See notes 33-36 *supra*.

justice. The injured party is permitted access to the defendant's insurance coverage when he vanishes to parts unknown.

Actions by Nonresident Plaintiffs

An issue that arises with some frequency is whether the jurisdictional advantages of these statutes should be accorded to a nonresident plaintiff. With the exception of a few states that have amendments authorizing such suits,[41] the statutes are silent on this question. Nevertheless, the great majority of the cases have ruled that the procedure is available to residents and nonresidents alike on the ground that there is nothing in the statutes suggesting a limitation based on the residence of those invoking its benefits.[42] A few decisions have held to the contrary, but apparently these have been repudiated by later holdings or overturned by statute.[43] Indeed, there are several cases in which suit was permitted even though both parties were residents of the same state,[44] and even when they were husband and wife.[45]

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[41]Two states explicitly provide in their statutes for suits by nonresident plaintiffs: Mo. Ann. Stat. §506.210 (1949); W. Va. Code ch. 56, art. 4, §5555.2 (1955).

[42]See, *e.g.*, Peeples v. Ramspacher, 29 F. Supp. 633 (E.D.S.C. 1939); Fine v. Wencke, 117 Conn. 683, 169 Atl. 58 (1932); Beach v. W. D. Perdue Co., 35 Del. 285, 163 Atl. 265 (1932); Vassill's Adm'r v. Scarsella, 292 Ky. 153, 166 S.W.2d 64 (1942); White v. March, 147 Me. 63, 83 A.2d 296 (1951); Garon v. Poirier, 86 N.H. 174, 164 Atl. 765 (1933); Malak v. Upton, 166 Misc. 817, 3 N.Y.S.2d 248 (Sup. Ct. 1938) (court has no discretion to refuse jurisdiction); Sobeck v. Koellmer, 240 App. Div. 736, 265 N.Y. Supp. 778 (2d Dep't 1933).

[43]See Lambert v. Doyle, 70 F. Supp. 990 (E.D. Pa. 1947), noted 21 Temp. L.Q. 270 (1947); Haddonleigh Estates, Inc. v. Spector Motor Serv., Inc., 41 Pa. D. & C. 246 (1941). *Contra*: Neff v. Hindman, 77 F. Supp. 4 (W.D. Pa. 1948); Greene v. Goodyear, 112 F. Supp. 27 (M.D. Pa. 1953); John v. Parks, 63 Pa. D. & C. 375 (1947).

Some early New Jersey cases held that there was a statutory impediment to suits by nonresident plaintiffs under the statute. Charles v. Fisher Baking Co., 117 N.J.L. 115, 187 Atl. 175 (1936); Gender v. Rayburn, 15 N.J. Misc. 704, 194 Atl. 441 (Cir. Ct. 1937). *But see* Liebried v. Rhodes, 18 N.J. Misc. 464, 12 A.2d 679 (Dist. Ct. 1940) (after amendment to statute).

[44]Hoagland v. Dolan, 259 Ky. 1, 81 S.W.2d 869 (1935); Burns v. Godwin, 51 So.2d 486 (Miss. 1951); State *ex rel.* Gallagher v. District Ct., 112 Mont. 253, 114 P.2d 1047 (1941); Gianetto v. LaDelpha, 278 App. Div. 179, 104 N.Y.S.2d 362 (4th Dep't 1951); Ellis v. Garwood, 168 Ohio St. 241, 152 N.E.2d 100 (1958) (see note 47 *infra*); State *ex rel.* Rush v. Circuit Ct., 209 Wis. 246, 244 N.W. 766 (1932).

[45]Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941); Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940); see discussion note 50 *infra*.

It is true that the purpose of the statutes is to protect residents from the burden of being forced to bring suit away from home, a purpose that would not encompass protection for injured nonresidents. The courts assert, however, that the states' interest in public safety is encouraged by these statutes and that this interest is applicable irrespective of the residence of those seeking to invoke the aid of the statute.

Although the merit in this argument is slight,[46] the majority conclusion can easily be sustained on other bases seldom articulated by the courts. The most important reason for permitting suits by nonresidents is that, for reasons previously discussed, the court at the place of the accident is the one most convenient to the parties from an objective view.[47] The value of permitting nonresidents to use the jurisdictional provisions is also demonstrated by its usefulness in short-circuiting the need for unnecessary litigation. Not infrequently a nonresident defendant seeks to join another nonresident defendant as a joint tort-feasor or indemnitor.[48] The desirability of accomplishing this for the benefit of both the plaintiff and the original defendant is obvious. Also in a situation in which there are two plaintiffs, one of whom is a nonresident,[49] it would be absurd to force the nonresident to bring a separate suit at the defendant's residence when the same trial can settle the defendant's responsibility toward both parties.

In summation, the position that the statutory process may be initiated by a nonresident, a view which has been adopted in virtually all of the states that have faced the question, is well supported by policy considerations.[50]

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[46]See note 10 *supra*.

[47]One of the factors relating to the convenience-of-court question is absent here, the local residence of at least one of the parties. Even so, the balance of the rest of the factors would probably still point to the court of the place of the accident as the proper forum, as opposed to a court in the defendant's state. However, when both parties are residents of the same foreign state, a different conclusion on this question might be appropriate. See also note 50 *infra*.

[48]See, *e.g.*, Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941).

[49]See, *e.g.*, Haddonleigh Estates, Inc. v. Spector Motor Service, Inc., 41 Pa. D. & C. 246 (1941).

[50]The biggest difficulty in permitting nonresident plaintiffs to bring suits under the act is that, owing to uncertainties in various areas in application of choice-of-law principles of conflict of laws, it is quite possible that the plaintiff may find forum shopping advantageous. *E.g.*, in several cases jurisdiction was upheld under the statute when one spouse brought suit against the other in the state of the

One further aspect of the problem of the nonresident plaintiff deserves mention. The great majority of cases have held that a resident plaintiff may obtain valid service of process against a nonresident defendant in a federal court in the plaintiff's district under diversity of citizenship jurisdiction.[51] However, the Supreme Court in *Olberding v. Illinois Central Ry.*,[52] a 1953 decision, held that under section 1391(a) of the Federal Judicial Code, which provides that suits must be brought in diversity cases "where all plaintiffs or all defendants reside," federal venue is improper when a nonresident sues another nonresident under the state motorist statute on the ground

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accident although neither resided there. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941); Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940). Their purpose in doing this apparently was to obtain a judgment against their liability insurer, and although the result may be desirable, there is little doubt that court at their residence would have followed the majority rule and refused to entertain jurisdiction in a tort suit between spouses. See also Ellis v. Garwood, 168 Ohio St. 241, 152 N.E.2d 100 (1958), in which the Ohio court upheld a wrongful death action by a widow against the employer of her dead husband when both plaintiff and defendant resided in New York, even though an applicable New York statute provided that after receiving workmen's compensation payments for a specified period of time, then expired, this was to be the exclusive remedy against the employer. Although there are cases such as these demonstrating the disadvantages of permitting suit by nonresident plaintiffs, they are exceptional; and it is believed that the desirable features of this rule outweigh its unfortunate aspects.

[51]The issue here involves the interpretation of FED. R. CIV. P. 4(d)(7), as it tends to conflict with Rule 4(f). Rule 4(d)(7) provides that the defendant can be served either "in the manner prescribed by any statute of the United States or in any manner prescribed by law of the state in which service is made . . . ." Rule 4(f) provides that "all process . . . may be served anywhere within the territorial limits of the state in which the district court is held . . . ." Most of the cases have concluded that since Rule 4(d)(7) permits service of process under state law, which, in turn, permits effective service outside the state, the language of Rule 4(f) cannot be deemed to restrict service completely to the confines of the state boundaries. See, *e.g.*, Star v. Rogalny, 162 F. Supp. 181 (E.D. Ill. 1957); Giffen v. Ensign, 15 F.R.D. 200 (M.D. Pa. 1953), *aff'd*, 234 F.2d 307 (3d Cir. 1956); Mendenhall v. Texas Co., 15 F.R.D. 193 (W.D. Pa. 1953). *Contra*: McCoy v. Siler, 205 F.2d 498 (3d Cir. 1953); Ulrich v. Stead, 161 F. Supp. 891 (W.D.N.Y. 1956); Angelone v. Monahan, 9 F.R.D. 313 (D.R.I. 1949). See also Dennis v. Galvanek, 171 F. Supp. 115 (M.D. Pa. 1959). See cases collected in 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §184 (1960); 2 MOORE, FEDERAL PRACTICE §§4.16, 4.18 (1948).

[52]Olberding v. Illinois Cent. Ry., 346 U.S. 338 (1953), noted, 14 MD. L. REV. 62 (1954), 52 MICH. L. REV. 918 (1954), 7 VAND. L. REV. 414 (1954). See the excellent discussion in Pacienza, *Motorist Statutes and Federal Jurisdiction*, 5 CATHOLIC L. REV. 87 (1955).

that neither resides in the district. The Court rejected the argument that the defendant should be deemed to waive federal venue objections by consenting to be sued under the state motorist statute by driving on the highways of the state. While the policy of the federal requirement, intended to limit forum shopping by the plaintiff in diversity cases, is valid and the Court's logic unanswerable, the result is an unfortunate discrimination against the nonresident plaintiff, who usually possesses a legitimate interest in bringing suit at the situs of the accident. The ruling in *Olberding,* which deprives the nonresident plaintiff of an original choice of a federal forum, will probably not be extended to situations in which the nonresident defendant is a common carrier registered under the Federal Motor Carrier Act or similar state legislation, or the defendant is a foreign corporation authorized to do business in the state. In either of these situations, the defendant will be deemed to have waived federal venue objections by appointment of a resident agent for service of process in the state.[53]

THE REQUIREMENT THAT THE DEFENDANT BE A NONRESIDENT[54]

The statutes as originally passed referred simply to jurisdiction over "nonresidents," without any statutory definition of the term.[55] Since courts uniformly read the statutes as requiring nonresidence at the time of the accident rather than at the time of the suit,[56] the meaning of the term became important in the class of cases in which the defendant contended that jurisdiction was improper because he was a resident at the time the alleged tort was committed.

The term *residence* is susceptible of various meanings, but virtually all of the courts in these cases have given it the connotation of

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[53]See Nierbo Co. v. Bethlehem Corp., 308 U.S. 165 (1939) (actual appointment by a foreign corporation of a process agent in the state held to waive objections to improper federal venue).

[54]See generally Comments: 44 IOWA L. REV. 384, 386-89 (1959); 30 N.Y.U.L. REV. 702, 703 (1955); 33 N.C.L. REV. 680 (1955); Annot., 53 A.L.R.2d 1159 (1955).

[55]The term *nonresident* has been held to include aliens in Lulevitch v. Hill, 82 F. Supp. 612 (E.D. Pa. 1949); Silver Swan Liquor Corp. v. Adams, 43 Cal. App. 2d 851, 110 P.2d 1097 (1941); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951); Hand v. Frazer, 139 Misc. 446, 248 N.Y. Supp. 557 (Sup. Ct.), *aff'd,* 233 App. Div. 800, 250 N.Y. Supp. 947 (4th Dep't 1931). The *Silver Swan* case, among others, also held that the act applied to minors against the contention that a minor cannot irrevocably appoint an agent.

[56]See note 69 *infra.*

"actual" residence. They have rejected the more extreme interpretations — on one hand "domicile," which would exclude from the act those who remain away from "home" for extended absences,[57] and, on the other hand, "place of abode," which would prevent jurisdiction over the short-term vacationer from another state.[58] The "actual residence" concept, by requiring a substantial length of time within the state, coupled with some intent to remain, is probably a satisfactory compromise.

Most of the cases fall into one of two problem groups. In the first group are defendants who are employed for a moderate period of time in the state, but who retain substantial contacts elsewhere and leave the state before suit is begun. In this category, for example, is the teacher who stays in the state during the school term only,[59] or the hockey player who remains only for the season.[60] Because such persons are more than mere visitors to the state, they have generally been deemed to have been residents at the time of the accident.[61] As a result the local plaintiff is deprived of jurisdiction over them when they later leave the state.[62]

The second group of cases concerns the status of military personnel assigned to duty in the state. Such persons are also in the state for reasons of employment, and sometimes remain for extended periods of time. Yet the courts have been less inclined to grant

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[57]*But see* Breskman v. Williams, 154 F. Supp. 51 (E.D. Pa. 1957) (service set aside when defendant was domiciled in the state, because domicile "includes" residence); Northwestern Mtge. and Security Co. v. Noel Constr. Co., 71 N.D. 256, 300 N.W. 28 (1941), noted 1942 WIS. L. REV. 439 (defendants in process of moving to new home in another state when the accident occurred held still domiciled in the state).

[58]This construction would also prevent jurisdiction over persons in military service stationed for short periods of time in barracks in the state. See note 65 *infra*.

[59]Chapman v. Davis, 233 Minn. 62, 45 N.W.2d 822 (1951).

[60]Warwick v. District Ct., 129 Colo. 300, 269 P.2d 704 (1954).

[61]Johnson v. Jacoby, 195 F.2d 563 (D.C. Cir. 1952) (defendant worked in D.C. for 15 months before and 8 months after the accident); Carlson v. District Ct., 116 Colo. 330, 180 P.2d 525 (1947) (defendant was pastor at a church for 8 months before and 4 months after the accident); Hughes v. Lucker, 233 Minn. 207, 46 N.W.2d 497 (1951) (student held resident of state where he attended school and worked before being drafted into service).

[62]See, *e.g.*, Wood v. White, 97 F.2d 646 (D.C. Cir. 1958); Solis v. Bailey, 139 F. Supp. 842 (S.D. Tex. 1956); Hammond v. Parker, 20 Conn. Supp. 193, 129 A.2d 793 (1956); Fisher v. Terrell, 51 N.M. 427, 187 P.2d 387 (1947); Clendening v. Fitterer, 261 P.2d 896 (Okla. 1953).

them immunity from jurisdiction by classifying them as residents. This difference in attitude has been explained on the ground that the element of volition is lacking in the intention to establish a home in the state.[63] There are a number of cases in which the serviceman was found to be a resident when he lived off base with his wife and was located in the state for a long period of time.[64] However, there is probably a presumption against the residence claims of unmarried personnel living on a military base.[65]

The decisions as to the meaning of "nonresidence" are difficult to summarize, since the courts have considered a number of variables to be significant. Length of time in the state, intention to remain,[66] the place of licensing the vehicle,[67] and other factors have been given different weights at different times. It is submitted that in the light of the policy behind the statutes, the courts should shift their emphasis to the factors of how long the defendant remained in the

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[63]*But see* note 66 *infra*.

[64]Suit v. Shailer, 18 F. Supp. 568 (D. Md. 1937); DePier v. Maddow, 87 Cal. App. 2d 460, 197 P.2d 87 (1948); Clark v. Reichman, 130 Colo. 329, 275 P.2d 952 (1954); Colon v. Pennsylvania Greyhound Lines, Inc., 27 N.J. Super. 280, 99 A.2d 181 (1953). Compare Briggs v. Superior Ct., 81 Cal. App. 2d 240, 183 P.2d 758 (1947) (sailor stationed in state for 1½ months and who lived off base with wife held nonresident).

[65]See Evans v. Brooks, 93 Ga. App. 352, 91 S.E.2d 799 (1956); Hughes v. Lucker, 233 Minn. 207, 46 N.W.2d 497 (1951); Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955), noted 33 N.C.L. REV. 680 (1955); Foster v. Holt, 237 N.C. 495, 75 S.E.2d 319 (1953); United Services Automobile Ass'n v. Harman, 151 S.W.2d 609 (Tex. Civ. App. 1941). It has been held to be error to conclude defendant is a nonresident simply because he lived elsewhere and was in the state on military assignment. Berger v. Superior Ct., 79 Cal. App. 2d 425, 179 P.2d 600 (1947); Teague v. District Ct., 4 Utah 2d 147, 289 P.2d 331 (1955).

[66]See Mackie v. Rankin, 87 F. Supp. 614 (E.D. Mich. 1949) (defendant who had accepted a job in another state, sold his house, and was prepared to leave, held resident because he remained in the state for several months after the accident); Hinton v. Peter, 238 Minn. 48, 55 N.W.2d 442 (1952) (husband of defendant had already moved to a home in another state, but defendant, who remained behind for a short period of time during which the accident occurred, held to be a resident); Northwestern Mtge. and Security Co. v. Noel Constr. Co., 71 N.D. 256, 300 N.W. 28 (1941).

[67]Johnson v. Jacoby, 195 F.2d 563 (D.C. Cir. 1952); Carlson v. District Ct., 116 Colo. 330, 180 P.2d 525 (1947); Brenner v. Margolies, 102 A.2d 300 (Mun. Ct. App. D.C. 1953); State *ex rel.* Penick & Ford, Inc. v. Civil Court, 127 Fla. 331, 171 So. 516 (1936); see Brigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931); Teague v. District Ct., 4 Utah 2d 147, 289 P.2d 331 (1955); *cf.* Thomas v. Green, 137 N.J.L. 98, 58 A.2d 539 (1948).

state after the accident and whether he was available for personal service in the state during that time. A test built around these factors would better comport with the policy of this legislation, and it is believed that many courts have unconsciously used these factors as a touchstone when the issue of residence was debatable.[68]

The foregoing suggestion does not, of course, get to the roots of the problem, and it is proposed only as an interim solution while awaiting amendment of the statutes. The difficulty was created when the courts uniformly interpreted the statutes as requiring nonresidence at the time of the accident rather than at the time of the suit, and refused to accept jurisdiction unless nonresidence at the time of the accident was pleaded and demonstrated.[69] This position is consonant with the earlier restrictive attitude toward this legislation and consistent with the "consent" theory of jurisdiction.[70] It conflicts seriously,

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[68]See, *e.g.*, Johnson v. Jacoby, 195 F.2d 563 (D.C. Cir. 1952); Mackie v. Rankin, *supra* note 66; Carlson v. District Ct., *supra* note 67; and correlate the holdings with the duration of the defendant's stay in the state after the accident in the cases cited note 64 *supra*. Judges have occasionally articulated a similar policy view. "This legislative enactment was designed to reach those motorists not residing in this state, who, because of the temporary length of their stay here, could not be personally served with process within a reasonable period after the accident occurred." Clark v. Reichman, 130 Colo. 329, 336, 275 P. 2d 952, 956 (1954). Compare the policy thoughts of the concurring opinion in Teague v. District Ct., 4 Utah 2d 147, 151, 289 P.2d 331, 334 (1955), to the effect that the term *nonresident* should be interpreted in such a way as to avoid the danger that "one having a poor or unmeritorious case could refrain from serving process personally, having ample opportunity so to do, and then wait until he is reasonably sure the defendant is far and away, and unable to return and defend himself . . . ." See notes 72, 73, 75 *infra*.

[69]Red Top Cab & Baggage Co. v. Holt, 154 Fla. 77, 16 So. 2d 649 (1944); Way v. Turner, 80 Ga. App. 814, 57 S.E.2d 439 (1950); Rompza v. Lucas, 337 Ill. App. 106, 85 N.E.2d 467 (1949). See also Webb v. Strait, 214 Ark. 890, 218 S.W.2d 722 (1949) (earlier service dismissed for failure of allegation of nonresidence in complaint); Welsh v. Ruopp, 228 Iowa 70, 289 N.W. 760 (1940) (only proof offered as to nonresidence related to time of suit); Mann v. Humphrey, 257 Ky. 647, 79 S.W.2d 17 (1935); *cf.* Hale v. Kinsey, 344 Ill. App. 420, 100 N.E.2d 346 (1951) (allegation and affidavit that defendant was a resident at time of accident). California provides in its statute for residence at time of accident. CAL. VEHICLE CODE §404 (h).

It has been held, and with good reason, that under amendments covering residents who leave the state the plaintiff need not allege the defendant's nonresidence at time of accident. Atkinson v. Dalton, 186 Kan. 145, 348 P.2d 644 (1960); Blackwell v. Columbus & So. Ohio Elec. Co., 65 Ohio L. Abs. 222, 113 N.E.2d 676 (1951).

[70]*But see* note 7 *supra*.

however, with the policy of these statutes, which is not to protect resident defendants who leave the state but to facilitate litigation by resident plaintiffs through local trial of the suits. All of the policy reasons for permitting local jurisdiction are equally applicable whether the defendant was ever a resident of the state or not.

In order to eliminate this unjustifiable gap in the enforcement of the policy of the statutes, the legislatures of twenty-nine states to date have amended their statutes.[71] All of the amendments appear to cover the situation in which a resident of the state becomes a nonresident, and most of the new provisions are limited to this.[72] Some amendments go further and extend jurisdiction to residents who leave

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[71]These amendments have been found constitutional and applied in a number of cases. See, *e.g.*, Garcia v. Frausto, 97 F. Supp. 583 (E.D. Mo. 1951); Allen v. Superior Ct., 41 Cal. 2d 306, 259 P.2d 905 (1953); Atkinson v. Dalton, 186 Kan. 145, 348 P.2d 644 (1960); State *ex rel.* Thompson v. District Ct., 108 Mont. 362, 91 P.2d 422 (1939); Hendershot v. Ferkel, 144 Ohio St. 112, 56 N.E.2d 205 (1944); Blackwell v. Columbus & So. Ohio Elec. Co., *supra* note 69; Whittington v. Davis, 350 P.2d 913 (Ore. 1960); McCall v. Gates, 354 Pa. 158, 47 A.2d 211 (1946). In Breskman v. Williams, 154 F. Supp. 51 (E.D. Pa. 1957), the Pennsylvania district court reached the absurd conclusion that a defendant living outside the state was neither a nonresident nor a resident who had removed, and dismissed service. See also cases cited note 74 *infra*.

In Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953), the court applied an amendment to the Illinois statute which became effective after the accident to a resident who had left the state, on the ground that the validity of the service does not depend on consent but on the police power of the state; see Note, 67 HARV. L. REV. 1087 (1954). See also State *ex rel.* Thompson v. District Ct., 108 Mont. 362, 91 P.2d 422 (1939). Most of the cases have refused to apply this type of amendment retroactively. See Chesin v. Superior Ct., 142 Cal. App. 2d 360, 298 P.2d 593 (1956); Sanders v. Paddock, 342 Ill. App. 701, 97 N.E.2d 600 (1951); Davis v. Jones, 247 Iowa 1031, 78 N.W.2d 6 (1956); Hughes v. Lucker, 233 Minn. 207, 46 N.W.2d 497 (1951); Kurland v. Chernobil, 260 N.Y. 254, 183 N.E. 380 (1932). In Continental Cas. Co. v. Nelson, 147 Misc. 821, 264 N.Y. Supp. 560 (County Ct. 1933), the court rejected the argument that the statute should be applied, even though it became effective after the accident, because the defendant drove on the highways of the state after the statute became effective and before he left the state. The conclusion of the majority of cases that these amendments should not be applied retroactively is in accord with the majority view regarding all types of amendments to the motorist statutes; see note 208 *infra*.

[72]States having passed amendments of this type are Ark., Ariz., D.C., Ga., Ill., Ind., Ky., Me., Mo., N.J., and Wis. Iowa, Mich., N.H., and Tex. have provided coverage for a resident who "removes" from the state after the accident. The wording of this type of statute may lead to interpretation problems as to the meaning of "remove." See note 74 *infra*. Citations to the statutory provisions referred to are found in note 2 *supra*.

the state for a specified period of time after the accident,[73] apparently irrespective of whether they become nonresidents.[74] Furthermore, a number of states now have language in their statutes authorizing service when a resident becomes a nonresident or has "concealed himself in the state."[75] Under the last named type of amendment, substituted process may be presumed available in any case in which the defendant cannot be located in the state after a reasonably diligent search. Thus in an attempt to remedy defects in legislation permitting jurisdiction to be secured over those absent from the state, legislatures have been encouraged to utilize the technique of substituted service by registered mail over *residents* who for some other reason are not available for personal service.[76] At present this is a small wedge into traditional procedure and is limited only to motor vehicle accidents, but in the future this device may find broader usefulness.

These amendments to the statutes are desirable, and their enactment is recommended to the states that still operate under the old legislation, with its irrelevant and burdensome requirement of nonresidence at the time of the accident.

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[73]Md. (removes from state within 3 years after the accident), Minn. (absent for 6 months after accident), Miss. (same as Minn.), New York (absent for 30 days after the accident whether absence is intended to be temporary or permanent), N.C. (60 days absence whether intended to be temporary or permanent), N.D. (6 months), Tenn. (30 days before service), Va. (30 days' absence after accident), and Wash. (leaves within 3 years after accident).

[74]New York first amended its statute to cover residents who "removed" from the state for 30 or more days after the accident. In Marano v. Finn, 155 Misc. 793, 281 N.Y. Supp. 440 (Sup. Ct., App. T. 1935), the court concluded that the term *remove* indicated that an intention to stay out of the state more than temporarily was required and that the amendment was inapplicable to a college student who went out of the state to school. The opposite view was reached in Reed v. Lombardi, 181 Misc. 805, 44 N.Y.S.2d 382 (Sup. Ct. 1943); Lerman v. Copperman, 183 Misc. 352, 52 N.Y.S.2d 50 (Sup. Ct. 1944); McNalley v. Howard, 45 N.Y.S.2d 7 (Sup. Ct. 1943); Uslan v. Woronoff, 173 Misc. 693, 18 N.Y.S.2d 222 (New Rochelle City Ct. 1940) (college student). In the first 3 cases the serviceman was stationed outside the state. The New York statute (and the North Carolina amendment) now provides that the time provision applies whether the absence is intended to be temporary or permanent.

[75]Fla., Mont., Ohio, Ore., Pa., and Vt. go even further and provide broadly for jurisdiction over "any person" who uses the highways. See note 2 *supra* for citations to statutes.

[76]*Compare*, in this regard, Hendershot v. Ferkel, 144 Ohio St. 112, 56 N.E.2d 205 (1944), *with* Robinson v. D'Odom, 2 Misc. 2d 963, 150 N.Y.S.2d 700 (Sup. Ct. 1956).

COVERAGE OF PARTIES WHO MAY BE VICARIOUSLY LIABLE

Much litigation concerns the problem of determining which of a group of parties potentially liable for the plaintiff's injuries are subject to jurisdiction under the statutes. Obviously the negligent driver of the vehicle will always be subject under the acts;[77] and there are others whose vicarious liability may be invoked, such as the driver's employer or the owner of the vehicle if it is owned by someone other than the driver. Several of the early statutes were written in terms of the consent of the "operator" of the vehicle to jurisdiction. Court decisions in leading states, however, soon interpreted "operator" to cover only the driver.[78] As a result, the statutes were amended, and subsequent legislation in other states was designed to reach beyond the driver to encompass two groups of potentially liable parties, owners and employers.

In a growing minority of jurisdictions, now numbering thirteen states,[79] owners of vehicles involved in accidents are covered if the vehicle was being used by the driver with "the permission, consent or acquiescence of the owner." The coverage of ownership, while in part designed to reach the business employment situation in which the employer owns the vehicle,[80] also extends jurisdiction to situations in which a nonbusiness owner lends the vehicle to another,[81] usually a friend or a member of the family. The extension of coverage to the latter situation is a reflection of the growing policy of requiring liability insurance for the protection of the public, a policy reflected in

[77]An Arkansas court by a tortuous interpretation of the statute once reached the conclusion that only nonresident owners were covered. Kerr v. Greenstein, 213 Ark. 447, 212 S.W.2d 1 (1948), noted 47 MICH. L. REV. 413 (1949). In only one other discovered case has the driver of the vehicle even ventured to contend that the statute was inapplicable to him. Eisman v. Martin, 174 Kan. 726, 258 P.2d 296 (1953) (nonresident driver of resident's car argued unsuccessfully that the act applied only to nonresident owners and their agents).

[78]Larsen v. Powell, 117 F. Supp. 239 (D. Colo. 1953); Flynn v. Kramer, 271 Mich. 500, 261 N.W. 77 (1935); O'Tier v. Sell, 252 N.Y. 400, 169 N.E. 624 (1930); Jones v. Newman, 135 Misc. 473, 239 N.Y. Supp. 265 (Sup. Ct. 1930).

[79]Ala., Ark., Cal., Del., Fla., Ill., Iowa, Ky., Mich., N.Y., Ohio., Pa., Tenn. For citations to statutes see note 2 *supra*.

[80]See, *e.g.*, Bowman v. Atlanta Baggage & Cab Co., 173 F. Supp. 282 (N.D. Fla. 1959); Producers' & Refiners' Corp. v. Illinois Cent. Ry., 168 Tenn. 1, 73 S.W.2d 174 (1934).

[81]See, *e.g.*, Wilson v. Hazard, 145 F. Supp. 23 (D. Mass. 1956); Culver v. Tucker, 182 F. Supp. 385 (N.D. Fla. 1960); Shippey v. Berkey, 4 App. Div. 2d 739, 163 N.Y.S.2d 431 (3d Dep't 1957).

the "family purpose" doctrine and financial responsibility laws.

Coverage of the driver's employer has been accomplished under the statutes by several avenues. In those states in which the owner of the vehicle is covered, the business employer owning the vehicle is subject to jurisdiction on that basis.[82] Furthermore, in almost all of the statutes the agency relationship is explicitly covered. Naturally there has been a fair amount of litigation concerning whether in a given situation the driver was an "agent" of the nonresident defendant at the time of the accident.[83] However, if agency is demonstrated, it is proper to assert that, in all states, the business employer of the driver is subject to jurisdiction when the vehicle involved in the accident is owned by the employer.

Still unsettled in many states is the problem which arises when the vehicle is not owned by the driver's employer. Two of the more frequent situations involve the traveling salesman[84] who owns his car and the trucking cases in which truck, tractor, or trailer has been "leased" to the carrier which employs the driver.[85]

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[82]See note 80 *supra.*

[83]See *e.g.*, Kern v. Maryland Cas. Co., 112 F.2d 352 (6th Cir. 1940) (Ky. statute); Kropiunik v. Mast, 144 F. Supp. 946 (D. Md. 1956); Fidler v. Victory Lumber Co., 93 F. Supp. 656 (N.D. Fla. 1950); Wedekind v. McDonald, 82 F. Supp. 678 (S.D. Fla. 1948) (the Florida statute has since been amended to cover owners and those driving with the owner's permission); Jones v. Pebler, 371 Ill. 309, 20 N.E.2d 592 (1939); Brassett v. United States Fidelity & Guaranty Co., 153 So. 471 (La. App. 1934); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951); Norwood v. Parthemos, 230 S.C. 207, 95 S.E.2d 168 (1956). In several cases it was contended that the driver was the agent of a passenger who had control of the vehicle. Arndt v. Mitchell Cadillac Rental, Inc., 115 F. Supp. 533 (D.N.J. 1953); Boulay v. Pontikes, 93 F. Supp. 826 (W.D. Mo. 1950); Wheat v. White, 38 F. Supp. 791 (E.D. La. 1941); Duncan v. Ashwander, 16 F. Supp. 829 (W.D. La. 1936); Parr v. Gregg, 70 Ohio App. 235, 42 N.E.2d 922 (1942).

[84]A less frequent situation of this type involves the transporting and delivering of vehicles from the seller to the buyer. The nonowning employer was held covered in Tanksley v. Dodge, 181 F.2d 925 (5th Cir. 1950) (Miss. Act); Dealer's Transport Co. v. Reese, 138 F.2d 638 (5th Cir. 1943) (Ala. law). *Contra*: Morrow v. Asher, 55 F.2d 365 (N.D. Tex. 1932); Wolfe v. Asher, 1 Pa. D. & C. 2d 662 (C.P. 1954). When the employer is the owner of the vehicle, the courts have little difficulty in finding the employer covered. For cases involving salesmen, see, *e.g.*, Winborne v. Stokes, 238 N.C. 414, 78 S.E.2d 171 (1953); Austinson v. Kilpatrick, 82 N.W.2d 388 (N.D. 1957); *cf.* Day v. Bush, 18 La. App. 682, 139 So. 42 (1932). For cases involving trucking firms see, *e.g.*, Attenello v. Vanadium Alloys Steel Co., 126 F. Supp. 475 (D. Conn. 1954); Edwards v. Gisi, 45 F. Supp. 17 (D. Neb. 1942); Rose v. Gisi, 139 Neb. 593, 298 N.W. 333 (1941).

[85]Courts have split on whether an owner of a vehicle who leases it commercially

A significant factor, which remains unarticulated in these decisions, is an appraisal of which of the several defendants maintains, or should maintain, liability insurance coverage. In the cases involving salesmen who own their own cars, most of the decisions have held that the salesmen are not "agents" of the firm they represent,[86] a reflection perhaps of the belief that ordinarily the owner of the car is the party responsible for procuring insurance. However, in the cases in which the trucking firm does not own the vehicle, most of the decisions have held that the firm is covered by the statute.[87] This

is subject to jurisdiction in a suit arising from the negligent operation of the vehicle by the lessee. In two cases decided under "agency" statutes, the lessee was held not to be an agent for the lessor. Boulay v. Pontikes, *supra* note 83; (car rental firm); Hayes Freight Lines v. Cheatham, 277 P.2d 664 (Okla. 1954) (a semi-trailer interchanged between carriers). In a recent case under a statute covering "owners," jurisdiction was found over the owner of a truck which had been leased to another. Bowman v. Atlanta Baggage & Cab Co., 173 F. Supp. 282 (N.D. Fla. 1959). The N.Y. and Fla. statutes also cover lessees. See Miner v. Bettendorf, 2 App. Div. 2d 951, 157 N.Y.S.2d 27 (3d Dep't 1956).

[86]The majority of the decisions have held that a salesman who owns his own automobile is not an agent of the defendant foreign corporation. The rationale most often employed is that such a salesman is an "independent contractor." See, *e.g.*, Millican v. Gee, 97 F. Supp. 1012 (W.D. Pa. 1950); Hayes v. Jansen, 89 F. Supp. 1 (D. Iowa 1950); Fritchey v. Summar, 86 F. Supp. 391 (D. Ark. 1949); Wood v. Wm. B. Reilly & Co., 40 F. Supp. 507 (N.D. Ga. 1941); Kirchner v. N. & W. Overall Co., 16 F. Supp. 915 (E.D.S.C. 1936); Myers v. Katz, 67 Ga. App. 640, 21 S.E.2d 482 (1942); Wallace v. Smith, 238 App. Div. 599, 265 N.Y. Supp. 253 (1st Dep't 1933); Smith v. Haughton, 206 N.C. 587, 174 S.E. 506 (1934); Clesas v. Hurley Machine Co., 52 R.I. 69, 157 Atl. 426 (1931); State *ex rel.* Oak Park Country Club v. Goodland, 242 Wis. 320, 7 N.W.2d 828 (1943). *Contra*: Covert v. Hastings Mfg. Co., 44 F. Supp. 773 (D. Neb. 1942); Boylston v. Stauffer, 7 Conn. Supp. 42 (Super. Ct. 1939); McLeod v. Birnbaum, 14 N.J. Misc. 485, 185 Atl. 667 (Sup. Ct. 1936); Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958); Pray v. Meier, 69 Ohio App. 141, 40 N.E.2d 850, 43 N.E.2d 318 (dissenting opinion) (1942); Halverson v. Sonotone Corp., 71 S.D. 568, 27 N.W.2d 596 (1947); Barber v. Textile Machine Works, 178 Va. 435, 17 S.E.2d 359 (1941). While the plaintiff, under the nonresident motorist statutes, has usually been unable to obtain jurisdiction over foreign corporations represented by salesmen who owned their own cars, it is probable that in most of these cases jurisdiction could have been obtained under statutes directed against foreign corporations doing business in the state. See note 22 *supra*. Jurisdiction under such statutes appears to be especially easy to obtain when the salesman is a resident.

[87]Weaver v. Winn Dixie Stores, Inc., 160 F. Supp. 621 (N.D. Ohio 1958); Smith v. Christian, 124 F. Supp. 201 (W.D. Mo. 1954); Glover v. Daniels Motor Freight, Inc., 101 F. Supp. 97 (W.D. Pa. 1951); Skutt v. Dillavou, 234 Iowa 610, 13 N.W.2d 322 (1944); Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951); Shepherd v. Shapiro Fisheries, Inc., 99 N.E.2d 512 (Ohio C.P. 1951); Tipton v. Fleet Mainten-

position is derived in part perhaps from the understanding that under federal and state statutes relating to common carriers, the carrier is legally responsible for the operation of vehicles under its governmental franchise even if they are not owned by the carrier and must obtain liability insurance.[88]

Of course the language of the particular motorist statute also plays an important part in the determination of this type of case. In the many states that have expressly covered the agency relationship, the employer is usually held to be covered, and the lack of ownership is deemed immaterial. This is especially true in those states in which the statutory terminology is *"use* and operation" by a nonresident or his agent,[89] as opposed to those states in which the agency phrase is merely linked with the term *operation.*[90] In states in which the

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ance Co., 75 Ohio L. Abs. 516, 142 N.E.2d 882 (C.P. 1957). Cases holding the trucking firm not liable are Stouffer v. Eastern Motor Dispatch, Inc., 80 Pa. D. & C. 30 (C.P. 1951); Burns v. Philadelphia Transportation Co., 44 Pa. D. & C. 654 (C.P. 1942).

[88]In a series of cases beginning with Venuto v. Robinson, 118 F.2d 679 (3d Cir. 1941), the doctrine has become established that a carrier which has obtained an Interstate Commerce Commission certificate for a vehicle is liable to the public for its negligent operation even though it is being operated by an independent contractor at the time of the accident. See, *e.g.*, Trautman v. Higbie, 10 N.J. 239, 89 A.2d 649 (1952), and cases cited therein. Similar results may be reached under state statutes. This doctrine acquires significance in the present context in that it is broad enough to cover situations in which the carrier obtaining the governmental franchise for a vehicle does not own it. See Quinn v. Revoir, 3 Pa. D. & C. 2d 682 (C.P. 1954). With liability established against the carrier, courts are now rationalizing the result in terms of "agency" which will support jurisdiction under state nonresident motorist statutes. See Thomas v. Warren, 162 F. Supp. 101 (D. Mont. 1958). Of course process can be issued under the jurisdictional provisions of the federal statute without this uncertainty of result. See notes 18 *supra*, 141 *infra*.

[89]Eleven states have statutes of this type: Ill., Minn., Mo., Neb., Nev., N.D., Okla., S.D., Utah, Wis., Wyo. Nearly all of the cases under statutes of this type have held the nonowning employer covered. See Boulay v. Pontikes, *supra* note 83; Smith v. Christian, Skutt v. Dillavou, *supra* note 87; Covert v. Hastings Mfg. Co., Halverson v. Sonotone Corp., *supra* note 86; Jones v. Pebler, *supra* note 83.

[90]Twenty-six states have this type of statute: Ariz., Colo., Conn., D.C., Ga., Idaho, Ind., Kan., La., Me., Md., Mass., Miss., Mont., Ore., N.H., N.J., N.M., N.C., R.I., S.C., Tex., Vt., Va., W. Va., Wash. Only about half of the cases under this type of statute have found the nonowning employer covered. The cases sustaining jurisdiction over the employer are as follows: Dealer's Transport Co. v. Reese, *supra* note 84; Gallagher v. District Ct., 112 Mont. 253, 114 P.2d 1047 (1941); Boyleston v. Stauffer, Pressley v. Turner, Barber v. Textile Machine Works, *supra* note 86. The cases in which jurisdiction over the employer was denied are Tank-

statute covers "*owners* and operators," the courts have been more reluctant to apply the statute to nonowning employers. This position is supported in part by the thought that there is a legislative intention to limit the statute's coverage to owners.[91] Nevertheless, in spite of this seemingly restrictive statutory terminology, the courts in a number of cases have managed to reach the employer by utilizing an expanded interpretation of the word *operator*.[92] In sum, even the nonowning employer is generally held subject to jurisdiction in the great majority of the states.

A major difficulty with the statutes is that a differential may exist between jurisdictional coverage and the substantive liability of the parties. Thus, while respondeat superior may render a trucking firm employing a truck driver liable for the driver's negligence under state law, in some states the nonresident employer need not defend a local suit under the nonresident motorist statute if the firm does not own the vehicle involved.[93] In another typical instance, the nonresident owner of an automobile may be liable under state law for the torts of another who is driving under the family purpose doctrine or financial responsibility law and yet be immune from jurisdiction of the state of the accident under the local motorist statute.[94] As a result of such gaps between jurisdictional coverage and substantive liability, the injured plaintiff may be faced with the alternative of local litigation against less than all of the potential defendants — and possibly only an insolvent, uninsured driver — or of bearing the extra

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sley v. Dodge, *supra* note 84; Fritchey v. Summar, Wood v. William B. Reilly Co., Kirchner v. N. & W. Overall Co., Myers v. Katz, Smith v. Haughton, *supra* note 86.

[91]About half of the cases decided under these statutes have refused to hold the nonowning alleged principal subject to jurisdiction. See Josephson v. Siegel, 110 N.J.L. 374, 165 Atl. 869 (1933); Greenfield v. Novick, 282 App. Div. 860, 124 N.Y.S.2d 581 (1st Dep't 1953); Parr v. Gregg, 70 Ohio App. 235, 42 N.E.2d 922 (1942); Wolfe v. Asher, *supra* note 84; Hayes v. Jansen, Millican v. Gee, *supra* note 86; Stouffer v. Eastern Motor Dispatch, Inc., Burns v. Philadelphia Transportation Co., *supra* note 87.

[92]The cases reaching this conclusion under these statutes are Eckman v. Baker, 224 F.2d 954 (3d Cir. 1955); Rigutto v. Italian Terazzo Mosaic Co., 93 F. Supp. 124 (W.D. Pa. 1950); McLeod v. Birnbaum, Pray v. Meier, *supra* note 86; Weaver v. Winn Dixie Stores, Tipton v. Fleet Maintenance Co., Shepherd v. Shapiro Fisheries, Inc., Glover v. Daniels Freight, Inc., *supra* note 87. These courts have concluded that "operate" includes the activity of the employer in having the vehicle driven in the state in spite of earlier precedents which limited "operate" to the physical mechanics of driving. See note 78 *supra*.

[93]*E.g.*, Stouffer v. Eastern Motor Dispatch, Inc., 80 Pa. D. & C. 30 (C.P. 1951).

[94]*E.g.*, Wilson v. Hazard, 145 F. Supp. 23 (D. Mass. 1956).

expense of bringing suit against the more financially responsible employer or owner in a distant state.

In general, the courts have officially ignored this problem and adopted a narrow view of these statutes, leaving the task of reducing any possible jurisdictional lag to the legislatures. There are signs of progress, however, in a few recent cases that have suggested that the question of the existence of substantive liability may be a proper factor in determining jurisdictional coverage.[95]

Another problem of the same type exists in regard to the coverage provisions of these statutes. It is obvious that often the issues debated as to jurisdiction are the same that relate to liability; for example, whether the salesman is an agent or an independent contractor, or whether, if an agent, he was acting within the scope of his employment or whether the owner acquiesced in the use of his car by another. An important aspect of the administration of these statutes lies in weeding out the cases in which the defendant would not be liable even if jurisdiction attached, and retaining those in which the defendant challenging jurisdiction may be liable. In fairness to the defendant, he should not be made to stand the expense of defending in the foreign forum when it is clear that his liability is remote. On the other hand, in fairness to the plaintiff, he should not be deprived of jurisdiction over any defendant against whom there is a reasonable possibility of liability being proved at the trial.

These questions are decided at a preliminary hearing, and the decision is reached on the basis of the pleadings and affidavits.[96] Because the issues are perhaps best determined at trial before a jury with an opportunity to cross-examine the defendant, it is suggested that when the question is debatable, the doubt should be resolved in favor of the plaintiff. In some cases courts have recognized this policy and articulated it in terms of presumptions. When, for instance, an employer admits that the driver is his agent, the agent is presumed to have been operating the car within the scope of his employment.[97] The registered owner of a vehicle is presumed to be the true owner,[98] and the owner is presumed to have given permission

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[95]See Culver v. Tucker, 182 F. Supp. 385 (N.D. Fla. 1960); Thomas v. Warren, 162 F. Supp. 101 (D. Mont. 1958).

[96]See, *e.g.*, Fuller v. Lindenbaum, 29 Cal. App. 2d 227, 84 P.2d 155 (1938). Compare Reese v. American Red Ball Transit Co., 107 F. Supp. 549 (W.D. Pa. 1952).

[97]See Austinson v. Kilpatrick, 82 N.W.2d 388 (N.D. 1957); Moorer v. Underwood, 194 S.C. 73, 9 S.E. 2d 29 (1940).

[98]Lehigh Valley Transit Co. v. Yatch, 75 Pa. D. & C. 381 (C.P. 1950); Staunton

to the driver to use the car.[99] While these presumptions have been developed to resolve questions of burden of proof when the issue is substantive liability, the courts have been indulging in them under the motorist statutes as virtually determinative of the jurisdictional issue. Since the use of these presumptions usually has the effect of preventing defendants from avoiding jurisdiction when they may be liable, the trend toward the use of the presumptions may be accounted desirable.

JURISDICTION OVER THE PERSONAL REPRESENTATIVE OF THE DECEASED TORT-FEASOR

A problem of much significance is created when a nonresident subject to the statute dies before judgment can be obtained against him. The death of the alleged tort-feasor as the result of the accident in which the plaintiff was injured is not infrequent. None of the original statutes contained any provision explicitly covering this situation. In all of the cases in which the statute was silent on the point, the courts have held that it does not confer jurisdiction over the foreign personal representative of the deceased's estate.[100] Further,

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v. Robbins, 136 Misc. 197, 239 N.Y. Supp. 565 (N.Y. Munic. Ct. 1930). This presumption may cut both ways, however, as in Josephson v. Siegel, 110 N.J.L. 374, 165 Atl. 869 (1933), in which the plaintiff claimed that the vehicle was owned by the defendant and the court ruled for the defendant on the jurisdictional issue because the vehicle was registered to another person. *Cf.* Midora v. Alfieri, 341 Pa. 27, 17 A.2d 873 (1941) (appearance of commercial name on commercial vehicle raises rebuttable presumption of ownership).

[99]Shippey v. Berkey, 4 App. Div. 2d 739, 163 N.Y.S.2d 431 (3d Dep't 1957); Lamere v. Franklin, 149 Misc. 371, 267 N.Y. Supp. 310 (Sup. Ct. 1933). *But see* Zimmerman v. First Judicial Dist. Ct., 74 Nev. 344, 332 P.2d 654 (1958), in which a court in a state with an "agency" statute held that it was error to presume that one co-owner was an "agent" of the other co-owner.

In Wilson v. Hazard, 145 F. Supp. 23 (D. Mass. 1956), MASS. ANN. LAWS ch. 231, §85A (1954), which provided a presumption that the registered owner of a vehicle is legally responsible for the negligent conduct of the operator, was held inapplicable to the jurisdictional issue. However, in Culver v. Tucker, 182 F. Supp. 385 (N.D. Fla. 1960), the court applied FLA. STAT. §51.12 (1959), which provides that the plaintiff need not allege that the operator was driving the vehicle with the consent of the owner.

[100]Brown v. Hughes, 136, F. Supp. 55 (M.D. Pa. 1955); Davis v. Smith, 125 F. Supp. 134 (D. Del. 1954); Hendrix v. Jenkins, 120 F. Supp. 879 (M.D. Ga. 1954); Wittmen v. Hanson, 100 F. Supp. 747 (S. Minn. 1951); Belliveau v. Greci, 21 Conn. Supp. 501, 157 A.2d 602 (Super. Ct. 1960); Downing v. Schwenck, 138 Neb. 395, 293 N.W. 278 (1940); Young v. Potter Title & Trust Co., 114 N.J.L. 561, 178 Atl. 177

most of the courts that have considered the issue have held that when the defendant nonresident motorist has been served, and dies after the suit has begun, the proceedings are terminated and may not continue against the executor.[101] The courts have advanced several unconvincing rationalizations in these cases, one of the most popular of which is that the appointment by the deceased of the state official as his agent for service of process is revoked at death by operation of law.[102] These cases can, however, easily be justified on the basis that executors appointed to administer decedents' estates have traditionally been immune from suit outside the jurisdiction of their appointment;[103] and, absent an express statutory provision, it is proper to presume that the legislature did not intend to overturn the common law rule.

Since jurisdiction over foreign personal representatives has not been available, recourse has frequently been had to an alternative procedure by which the injured party applies for ancillary administration of the assets of the deceased in the state of the accident. A local suit is then brought against the ancillary administrator. However, the granting of ancillary administration is generally conditioned upon the existence of local assets,[104] a requirement which the plain-

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(1935); Vecchione v. Palmer, 249 App. Div. 661, 291 N.Y. Supp. 537 (2d Dep't 1936); Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935); Harris v. Owens, 142 Ohio St. 379, 52 N.E.2d 522 (1943); Brickley v. Neuling, 256 Wis. 334, 41 N.W.2d 284 (1950). See Annot., 53 A.L.R.2d 1194 (1957), 96 A.L.R. 589 (1934).

[101]See, *e.g.*, Riggs v. Schneider, 279 Ky. 361, 130 S.W.2d 816 (1939); Fyffe v. Eddington, 97 Ohio App. 309, 125 N.E.2d 882 (1953); Giampalo v. Taylor, 335 Pa. 121, 6 A.2d 499 (1939); Cosgrove v. Weierman, 4 Misc. 2d 798, 162 N.Y.S.2d 432 (Sup. Ct. 1956); Balter v. Webner, 175 Misc. 184, 23 N.Y.S.2d 918 (N.Y. Munic. Ct. 1940).

[102]*E.g.*, Harris v. Owens, 142 Ohio St. 379, 52 N.E.2d 522 (1943). Another theory occasionally used is that the statute requires that a return receipt for the registered mail letter of notice be signed by the defendant, and a dead man cannot sign the return receipt. *E.g.*, Boyd v. Lemmerman, 11 N.J. Misc. 701, 168 Atl. 47 (Sup. Ct. 1933).

[103]See RESTATEMENT, CONFLICT OF LAWS §§507, 512-13 (1934). This position has been carried to the extent of holding unconstitutional a statute which extended jurisdiction over foreign executors generally. McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556 (1925). In some few states, however, jurisdiction over the foreign executor in a motor vehicle accident has been obtained by his consent or personal service in the state. Brown v. Hughes, 136 F. Supp. 55 (M.D. Pa. 1955); Zientz v. Derereux, 6 Pa. D. & C. 2d 321 (C.P. 1955) (general appearance).

[104]See, *e.g.*, Appeal of Gantt, 286 App. Div. 212, 141 N.Y.S.2d 738 (1st Dep't 1955), noted 40 MINN. L. REV. 722 (1956).

tiff seeks to satisfy by contending that the deceased's automobile liability policy is a local asset of the estate. A majority of the courts have concluded that the insurer's obligation to the deceased is an asset of the estate[105] and has a situs in the state,[106] provided that the insurer is subject to local jurisdiction or, according to other courts, is authorized to do business in the state.[107]

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[105]Generally, the courts have had little difficulty in holding that the deceased's conditional right under the policy to compel the insurer to defend, exonerate, and indemnify the deceased is "property" subject to administration. See, *e.g.*, Gordon v. Shea, 300 Mass. 95, 14 N.E.2d 105 (1938); *In re* Kresovich's Estate, 168 Neb. 673, 97 N.W.2d 239 (1959); *In re* Leigh's Estate, 6 Utah 2d 299, 313 P.2d 455 (1957). However, some of the cases holding that ancillary administration is not available have reached this result by holding that the contingent claim against the insurer was not an asset of the deceased. Feil v. Dice, 135 F. Supp. 851 (S.D. Idaho 1955); *In re* Wilcox Estate, 60 Ohio Ops. 232, 73 Ohio L. Abs. 571, 137 N.E.2d 301 (Ct. App. 1955).

[106]Local situs upheld: American Surety Co. v. Sutherland, 35 F. Supp. 353 (N.D. Ga. 1940); Berry v. Smith, 85 Ga. App. 710, 70 S.E.2d 62 (1952); Furst v. Brady, 375 Ill. 425, 31 N.E.2d 606 (1940); Liberty v. Kinney, 242 Iowa 656, 47 N.W.2d 835 (1951); Gordon v. Shea, 300 Mass. 95, 14 N.E.2d 105 (1938); *In re* Kresovich's Estate, 168 Neb. 673, 97 N.W.2d 239 (1959); Power v. Plummer, 93 N.H. 37, 35 A.2d 230 (1943); Robinson v. Carroll, 87 N.H. 114, 174 Atl. 772 (1934); Kimball v. Smith, 64 N.M. 374, 328 P.2d 942 (1958); *In re* Reilly's Estate, 63 N.M. 352, 319 P.2d 1069 (1957); Miller v. Stiff, 62 N.M. 383, 310 P.2d 1039 (1957); *In re* Vilas' Estate, 166 Ore. 115, 110 P.2d 940 (1941); Davis v. Cayton, 214 S.W.2d 801 (Tex. Civ. App. 1948); *In re* Leigh's Estate, 6 Utah 2d 299, 313 P.2d 455 (1957); *In re* Breese's Estate, 51 Wash. 2d 302, 317 P.2d 1055 (1957). *Contra*: Hendrix v. Rossiter, 155 F. Sup. 44 (S.D. Ga. 1957); Wheat v. Fidelity & Cas. Co., 128 Colo. 236, 261 P.2d 493 (1953); Brogan v. Macklin, 126 Conn. 92, 9 A.2d 499 (1939); *In re* Rogers' Estate, 164 Kan. 492, 190 P.2d 857 (1948); *In re* Roche's Estate, 16 N.J. 579, 109 A.2d 655 (1954); McElroy v. George, 76 Pa. D. & C. 231 (C.P. 1951). See also cases cited note 107 *infra*. See generally Notes, 54 HARV. L. REV. 1401 (1941); 23 MINN. L. REV. 221 (1938); 8 U. CHI. L. REV. 769 (1941); 27 VA. L. REV. 953 (1941). The problem has diminished in importance with the advent of amendatory legislation subjecting the domiciliary administrator to jurisdiction in the state of the accident. See note 113 *infra*.

[107]One approach to the question of situs of the intangible right against the insurer is that the situs of a simple contract obligation is at the residence of the debtor. See 3 BEALE, CONFLICT OF LAWS 1452 (1935); Annot., 34 A.L.R.2d 1270 (1954). The insurer, ordinarily a foreign corporation, is then found to be a "resident" of the state if it has obtained official authorization to do business in the state (domesticated). This theory, however, may exclude local suit when the insurer has not registered locally, even though it was subject to jurisdiction in the state in an action against it. *In re* Klipple's Estate, 101 So.2d 924 (3d D.C.A. Fla. 1958).

Another theory which localizes the situs of the intangible right against the

In two states this approach to jurisdiction has received legislative sanction: in Iowa by a statute declaring auto liability insurance to be an asset within the state,[108] and in South Carolina by removing the existence of local assets as a condition for obtaining ancillary letters in applications based on motor vehicle accident claims.[109] While this avenue to local jurisdiction is undoubtedly useful in the states in which it has been established,[110] the problem remains elsewhere. In

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insurer, while avoiding reliance on the irrevelant fact that the insurer is locally licensed, has occasionally been utilized. According to this theory, since the deceased could have brought suit to enforce the contract obligations against the insurer in the state, this right is an asset of the estate susceptible to ancillary administration within the state. Lawson v. Davis, 18 Ill. App. 2d 586, 153 N.E.2d 87 (1958) (letters of administration held properly granted even though insurer was not licensed to transact local business). This approach is especially useful in that the difficulty of obtaining jurisdiction over foreign insurers has been greatly diminished in recent years. See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Pugh v. Oklahoma Farm Bureau Mut. Ins. Co., 159 F. Supp. 155 (E.D. La. 1958).

Since in nearly all of these cases the insurer was licensed to do business locally, a choice by the court between the two theories was unnecessary. Although the latter theory, which is based on jurisdiction over the insurer, appears preferable because it is broader, venue requirements may yet prevent suit in the county of the accident. See Shirley's Estate v. Shirley, 334 Ill. App. 590, 80 N.E.2d 99 (1948); Olsen v. Preferred Auto Ins. Co., 259 Mich. 612, 244 N.W. 178 (1932). Under either theory, abuse of the ancillary administration technique for acquiring jurisdiction is possible, as is demonstrated by *In re* Riggles' Will, 18 Misc. 2d 988, 188 N.Y.S.2d 622 (Surr. Ct. 1959). Here, ancillary administration of the nonresident's estate was upheld in New York when the insurer was locally licensed, even though the accident took place in Wyoming. This decision, while logically defensible, is undesirable from a policy view, since it conflicts with the beneficial principle of litigating accident claims at the place of the tort.

[108]15 IOWA CODE ANN. §321.5121 (Supp. 1959). The only appellate case so far involving the statute, *In re* Fagin's Estate, 246 Iowa 496, 66 N.W.2d 920 (1954), concerned an inconsequential issue; see Note, 44 IOWA L. REV. 402, 406-09 (1959).

[109]S.C. CODE §10-212 (1952). See Gregory v. White, 151 F. Supp. 761 (W.D.S.C. 1957). Missouri attempted to solve the problem in the same fashion as South Carolina by providing for appointment of a local administrator when a nonresident caused injuries in the state and dies. In two cases, however, the legislative purpose was foiled by restrictive judicial interpretations: Crump v. Treadway, 276 S.W.2d 226 (Mo. 1955); Harris v. Bates, 364 Mo. 1023, 270 S.W.2d 763 (1954). Thereafter the legislature abandoned this course and amended its nonresident motorist statute to cover the domiciliary representative, a provision which has been held constitutional. State v. Cross, 314 S.W.2d 889 (Mo. 1958). In the light of the Missouri experience, legislative resolution of the problem in the fashion of the South Carolina statute can hardly be recommended.

[110]Still another method of obtaining local suit for the purpose of reaching

any event, the plaintiff will benefit from a local trial only to the extent of the deceased's insurance coverage.

As a matter of policy, all of the reasons for entertaining jurisdiction over a living nonresident tort-feasor are equally available against the representative of his estate.[111] The restrictive interpretations placed upon the nonresident motorist statutes have thus resulted in a serious gap in the effectuation of the policy of localizing automobile negligence trials at the place of the accident,[112] a hiatus which has not been sufficiently closed by the debatable success of the ancillary administration technique. In an effort to remedy this situation, the legislatures of twenty-six states have amended their statutes to cover explicitly the personal representative of the deceased nonresident's estate.[113] The force of tradition weighs heavily, however; and in one of the first cases to pass on an amended statute, *Knoop v. Anderson*,[114] a 1948 Iowa federal district court decision, the amendment was held unconstitutional. Subsequently, however, other courts, following the lead of the New York Court of Appeals in *Leighton v. Roper*,[115] a 1950 case, have unanimously held these amendments to be constitutional.[116]

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the insurance proceeds exists in the few states that have "direct action" statutes. See note 20 *supra*. The operation of a direct action statute in the context of the present problem is seen in Fazio v. American Auto Ins. Co., 136 F. Supp. 184 (W.D. La. 1955), in which the court refused jurisdiction over the foreign executor; the suit continued against the defendant foreign insurer, which did not bother to contest jurisdiction.

[111]Further, at least one of the factors weighing against jurisdiction in the state of the accident — the inconvenience to the defendant, who is often the principal defense witness on the liability issue — is not applicable.

[112]A situation which may present unusual inconvenience to the plaintiff exists when the suit is brought against two defendants, one of whom is a nonresident who has died. The plaintiff can proceed against only one defendant at a time and must take the risk that the one he sues first will be found not liable. See Warner v. Maddox, 68 F. Supp. 27 (W.D. Va. 1946).

[113]Ark., Colo., Fla., Ga., Ky., La., Md., Mass., Mich., Minn., Miss., Mo., Neb., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Pa., S.C., Tenn., Tex., Va., Wis., Wyo. Statutes are cited note 2 *supra*. Most of these statutes were enacted during the last 5 years; if the present rate of accretion continues, virtually all of the states will have passed such amendments by the end of the next decade.

[114]Knopp v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947), noted 61 HARV. L. REV. 355 (1948); 15 U. CHI. L. REV. 451 (1948); 57 YALE L.J. 647 (1948).

[115]Leighton v. Roper, 300 N.Y. 434, 91 N.E.2d 876 (1950), noted 28 CHI.-KENT. L. REV. 347 (1950); 26 IND. L.J. 93 (1950); 36 IOWA L. REV. 128 (1950); 25 N.Y.U.L. REV. 907 (1950).

[116]The other cases in which the amendments have been held constitutional

The discussion of the constitutionality of these amendments has been clouded by some confusing ideas that have dominated the conflict of laws concerning decedents' estates.[117] Several theoretical explanations have been used to support the traditional position that an administrator cannot be sued outside the state of his appointment. One is that the position of administrator is created by the state probate court and that the power of this court is confined to the territorial limits of the state.[118] This is hardly a satisfactory basis for an assertion of constitutional immunity for foreign administrators, since the right of objection to extraterritoriality would be in the foreign state rather than the domiciliary state. The new amendments, then, could be viewed as having the effect of recognizing the official status of an administrator appointed by a sister state.

A second rationalization is that because the administrator is under a duty to account for the distribution of assets of the deceased in his possession, a suit against him is a suit against the estate and is analogous to an action in rem, which by constitutional theory can lie only where the assets are located. The New York court in *Leighton v. Roper* skirted this objection with the argument that the suit had sufficient elements of an in personam proceeding to permit jurisdiction to be exercised despite the absence of local assets. In a 1950 Michigan decision, *Plopa v. DuPre,*[119] the court in upholding a similar amendment concluded that even if the action were deemed to be in rem, the statute conferring jurisdiction would nevertheless be

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are Brooks v. National Bank, 251 F.2d 37 (8th Cir. 1958), *reversing* 152 F. Supp. 36 (W.D. Mo. 1957); Feinsinger v. Bard, 195 F.2d 45 (7th Cir. 1952); Colman v. Pitzer, 160 F. Supp. 862 (W.D. Pa. 1958); Psychas v. Trans-Canada Highway Express, 146 F. Supp. 11 (E.D. Mich. 1956); Guerra De Chapa v. Allen, 119 F. Supp. 129 (S.D. Tex. 1954); Oviatt v. Garretson, 205 Ark. 792, 171 S.W.2d 287 (1943); Plopa v. DuPree, *infra* note 119: Tarczynski v. Chicago M. St. P. R.R., 261 Wis. 149, 52 N.W.2d 396 (1952).

[117]See generally Holt, *Extension of Non-resident Motorist Statutes to Nonresident Personal Representatives,* 101 U. PA. L. REV. 223 (1952); Stumberg, *Extension of Nonresident Motorist Statutes to Those Not Operators,* 44 IOWA L. REV. 268 (1959); Comment, 1958 WIS. L. REV. 425; Notes, 56 COLUM. L. REV. 915 (1956); 15 U. CHI. L. REV. 451 (1948); 11 U. FLA. L. REV. 250 (1958); 1951 WASH. L.Q. 559; 57 YALE L.J. 647 (1948). See also MCDOWELL, FOREIGN PERSONAL REPRESENTATIVES 100-04 (1957).

[118]This was the thesis relied upon in Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947). Authority for this illogical position may be found in the opinion of Cardozo, J., in Helme v. Buckelew, 229 N.Y. 363, 128 N.E. 216 (1920).

[119]Plopa v. DuPre, 327 Mich. 660, 42 N.W.2d 777 (1950).

constitutional. Whatever the theoretical merits of these various contentions, this issue appears to be too abstract and irrelevant to justify it as the touchstone in the resolution of the problem.

It is clear that there is a legitimate interest in reducing the expense of administration by channeling all litigation against the estate into the court of the decedent's domicile. There is, of course, an extra expense in obtaining counsel to defend in a foreign tribunal. In the typical case, however, the only counsel that would be present would be appointed by the insurer at its expense, a factor that tends to reduce the weight of this consideration. When balanced against the clear convenience and justice of permitting suit at the place of the tort, this objection to jurisdiction seems to be insufficient.[120]

Another policy issue, which so far has been neglected by the commentators, is the collision of interests that can arise in regard to the time within which claims against the estate may be presented. Statutes of limitations on automobile accident torts are typically short. Those on claims against decedents' estates are usually even shorter. Thus suit may be filed within the tort limitations of the plaintiff's state when the time for filing claims against the estate has already expired.[121] Whether full faith and credit will be given to the judg-

[120]One commentator has suggested another policy conflict which might justify holding such legislation unconstitutional. This view is that the common law rule of nonsurvival of claims for personal injuries still prevails in a few states. If the administrator in such a state were compelled to be amenable to jurisdiction in a state where there was a survival statute, this would deprive the former state of the power to effectuate its policy of nonsurvival. Stumberg, *supra* note 117 at 274-75. One may be in accord with this view to the extent of agreeing that the state of the deceased's residence might be justified in refusing to grant full faith and credit to the judgment on the ground of the overriding importance of the local policy of nonsurvival, and yet not be convinced that this argument is sufficient to render the statutes unconstitutional. The courts which have held these amendments constitutional have generally made an effort not to foreclose issues such as this. Further, the number of states which still follow the common law rule are so few as to render this policy argument against the constitutionality of the legislation highly unmeritorious. See PROSSER, TORTS 708-10 (2d ed. 1955).

[121]It is generally accepted that the claim against the estate need not be liquidated in order to satisfy the limitations period. *E.g.*, in Florida the only requirement is that it be in writing and filed within 8 months. FLA. STAT. §733.16 (1959). If the rule were otherwise, delaying tactics by defense counsel could prevent a judgment from being obtained within the time permitted for presentation of claims. A problem might exist where state statutes require that in order to toll the limitations period a complaint be filed against the estate in the local probate court if the claim is unliquidated. If the court refused to accept a judgment which was not obtained pursuant to that complaint, the plaintiff would be forced

ment to the extent of permitting a late claim against the estate contrary to state statute is a debatable issue. The policy of expeditious settlement of claims against estates for the benefit of the decedent's family is a strong interest. If such a judgment were rejected, the plaintiff would still have recourse to any insurance that existed. However, the idea that the plaintiff's rights should be limited to the insurance is not likely to engender enthusiastic support. Judging from the rationales of the cases so far arising under the amendments, none of which decided the full faith and credit issue, it is likely that the courts will take the view that enforcement of the foreign judgment against the estate should be governed by the procedure of the administrator's state[122] and that the limitation period on the filing of claims should be considered part of that procedure. Whether such a position is ultimately desirable may be subject to some dispute.

Whatever the outcome of policy conflicts resulting from statutes extending jurisdiction over nonresident executors, it seems clear that this type of amendatory legislation is a desirable extension of protection of the public from the burden of out-of-state litigation[123] and that more states will follow this path in the future.

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to press his action at home to judgment within the few months typically available for claims against the estate. Not only would this be difficult to accomplish but it might impose a hardship, for in some accident cases the full extent of the plaintiff's injuries cannot be discovered in such a short period of time.

[122]The courts in these cases have refused to be enticed into a discussion of whether a judgment rendered under the local statute should be given full faith and credit in the state of the domiciliary administration. Yet the basic issue in determining full faith and credit treatment is jurisdiction of the court which rendered the judgment, the same issue which the court is deciding. In the only case found in which the question of the expiration of the limitations period for claims against the estate was raised, the court adopted this ambivalent position and rejected the defense on the ground that it confused the existence of a right with its enforcement. Colman v. Pitzer, 160 F. Supp. 862 (W.D. Pa. 1958).

[123]The mere passage of an amendment to the statute purporting to cover the personal representative of the nonresident decedent does not, apparently, eliminate all the problems in this area. *E.g.*, in Hunt v. Teague, 205 Md. 369, 109 A.2d 80 (1954), process was sent to the nonresident driver, but he died before the process was received. After judgment was entered for the plaintiff, the executor moved to set aside the judgment, as he had not been served. The plaintiff then amended his complaint to substitute the executor as defendant. The court held that a new and different party cannot be substituted as a defendant after judgment. Thus, if the deceased has been served and then dies, the proceeding may be continued against the executor; but if he dies before the service, a new complaint and service of process on the executor must be made, and in the meantime the

WHAT IS A "MOTOR VEHICLE"?

An issue is occasionally encountered in regard to the meaning of the term *motor vehicle* as used in the statutes.[124] Some clear cases exist, such as two recent holdings that a ship is not a motor vehicle as contemplated in the statute;[125] and presumably neither would an airplane be so considered.[126] In a few cases involving agricultural[127]

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statute of limitations continues to run. It had expired in this case.

A series of New York decisions demonstrates the combination of poor drafting and restrictive judicial interpretation. While the New York amendment covered administrators of nonresidents who died, two decisions held that this provision did not cover administrators of residents who left the state after the accident and then died: Shelton v. Johnson, 278 App. Div. 1012, 106 N.Y.S.2d 149 (4th Dep't 1951); Central Greyhound Lines, Inc. v. Faust, 196 Misc. 53, 91 N.Y.S.2d 609 (Sup. Ct. 1949). This problem was cured by a 1958 amendment to the statute which added a provision on administrators to the section covering residents who leave the state. Then, in Loomis v. Delta Chevrolet, Inc., 20 Misc. 2d 441, 193 N.Y.S.2d 372 (Sup. Ct. 1959), the court held that the 1958 amendment did not apply to the situation in which a tort-feasor died a resident but whose executor left the state before suit.

[124]Some of the cases on this subject may be found in Annot., 48 A.L.R.2d 1278 (1954).

[125]Rutter v. Louis Dreyfus Corp., 181 F. Supp. 531 (E.D. Pa. 1960); Wade v. Romano, 179 F. Supp. 72 (E.D. Pa. 1959). Both of these cases involved attempts of injured longshoremen and seamen to acquire jurisdiction over operators of vessels for suits resulting from accidents on shipboard. Several states have separate provisions in their statutes designed to cover jurisdiction over nonresident owners and operators of watercraft. See, *e.g.*, LA. REV. STAT. §13-3479 (1950); MO. STAT. ANN. §506.330 (1949); TENN. CODE ANN. §20-229 (1955). See Hill v. Upper Miss. Towing Co., 252 Minn. 165, 89 N.W.2d 654 (1958).

[126]There have been no cases to date. Several states, however, have statutory provisions on the subject, *e.g.*, ME. REV. STAT. ANN. ch. 22, §70 (Supp. 1959); VT. STAT. ANN. tit. 5, §§230-32 (Supp. 1959); VA. CODE ANN. §8-67.4 (1957). See Peters v. Robin Airlanes, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953), noted 29 NOTRE DAME LAW. 640 (1954); discussion note 140 *infra*. See also Notes, 41 IOWA L. REV. 662 (1956); 39 MARQ. L. REV. 324 (1956); 17 U. PITT. L. REV. 614 (1956).

[127]The New York statute defines motor vehicles as "all vehicles propelled by any power other than muscular, except . . . tractors used exclusively for agricultural purposes." N.Y. VEHICLE AND TRAFFIC LAW §52(a)(8). In Wilson v. Heidenreich, 201 Misc. 333, 109 N.Y.S.2d 428 (Sup. Ct. 1951), the court quashed service under the act on the theory that a mere showing of operation of the tractor on the highway does not overcome a presumption of agricultural use. However, in Berkley v. Rockwell Spring & Axle Co., 162 F. Supp. 493 (W.D. Pa. 1958), the court held that a "tractor" was a motor vehicle. The tractor had overturned while being operated, killing the driver, and the suit was based on negligent manufacture of the equipment. This is the first case discovered of the use of the nonresident

and construction[128] equipment, the courts have generally reached the same conclusion.

For the most part, the problem revolves around the status of commercial semi-trailers, as distinguished from the tractors that pull them.[129] The majority of the cases have held trailers not to be motor vehicles.[130] Several different policy problems are involved in this seemingly simple issue. For one thing, trailers are often exchanged, or leased, by commercial carriers among themselves, so that the firm

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motorist statutes in a claim for product liability.

[128]In Wood v. Food Fair Stores, Inc., 49 N.J. Super. 352, 139 A.2d 805 (L. 1958), the court held that a trench digger or "back hoe" which moved on treads and was carried from job to job on a trailer was not a motor vehicle, as it was not designed to operate on public highways for transportation purposes. The court appeared to have decided the case on another point, that the danger did not result from an "accident or collision" but from the improper excavation of the plaintiff's property.

[129]Occasionally, another section of a state's vehicle and traffic laws will supply a definition of "motor vehicle," although probably it will not have been drafted with the nonresident motorist provisions in mind. *E.g.*, IOWA CODE §321.1 (1958):

"1. 'Vehicle' means every device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.

"2. 'Motor vehicle' means every vehicle which is *self propelled* but not including vehicles known as trackless trollies which are propelled by electric power obtained from overhead trolley wires, but not operated upon rails." (Emphasis added.) Query: Would this definition cover semi-trailers in light of the term *self-propelled*? Presumably the chances are better that a court would include trailers under the phraseology of a statute defining motor vehicles as "all *motor propelled* vehicles except electric and steam railways." KY. REV. STAT. §188.010 (1953). (Emphasis added.) See Glover v. Daniels Motor Freight, Inc., 101 F. Supp. 97 (W.D. Pa. 1951), in which the court held that an introductory definition did not include trailers. For a listing of states that have amended their statutes so as to cover trailers explicitly see note 137 *infra*.

[130]Glover v. Daniels Motor Freight, Inc., *supra* note 129; Lowe v. Western Express Co., 189 Misc. 177, 68 N.Y.S.2d 873 (Sup. Ct. 1947) (the New York statute was subsequently amended to cover semi-trailers; see note 2 *supra*); Hayes Freight Lines v. Cheatham, 277 P.2d 664 (Okla. 1954). In Stouffer v. Eastern Motor Dispatch, Inc., 80 Pa. D. & C. 30 (C.P. 1951), the driver owned the tractor and his employer owned the trailer. In a suit against the employer, the injured plaintiff argued that the two components should be considered together and the employer should be viewed as owning the combination within the statute covering ownership of vehicles. The court held that the trailer was not a "motor vehicle," and even if the tractor and trailer were viewed together, it would be the ownership of the tractor which was determinative. The court, therefore, dismissed service on the trucking firm, since it was not the "owner or operator" of a vehicle within the act.

employing the driver may own the tractor but not the trailer.[131] In such circumstances it may not be desirable to hold the owner of the trailer liable for the negligence of the lessee's driver, especially if the trailer owner's insurance policy does not cover such liability.[132] On the other hand, when a trucking firm owns the trailer and is the employer of the driver, who owns the tractor, it is desirable that the trucking firm be deemed to own a "motor vehicle" within the statute so that coverage will exist under provisions in some states which are designed to extend jurisdiction to those who may be vicariously liable because of their ownership of the vehicle involved in the accident.[133] Further, the owner of the trailer should be covered to the extent that injuries are caused by the defective conditions of the trailer itself.[134] To complicate the picture, some of the cases involving trailers occur in loading and unloading situations, in which the statute may be declared unavailable to the plaintiff on the grounds that the accident occurred on private property[135] or did not arise out of the "operation" of the vehicle.[136]

Some half-dozen states[137] have amended their statutes to cover

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[131]This appears to have been the arrangement in Hayes Freight Lines v. Cheatham, *supra* note 130. See also Reese v. American Red Ball Transit Co., 107 F. Supp. 549 (W.D. Pa. 1952), in which the trucking firm lessee argued that the driver was the agent of the lessor.

[132]See Way v. Turner, 80 Ga. App. 814, 57 S.E.2d 439 (1950), in which the insurers of a truck refused to defend a suit against the owner of the vehicle on the ground that the policy excluded coverage when the vehicle was leased to another. The degree to which owners of commercial trailers are required to obtain insurance under federal or state law and the business practice as to types of insurance policies used in trailer interchange and lease arrangements are subjects which unfortunately cannot be explored in an article of this scope.

[133]This was the situation in Stouffer v. Eastern Motor Dispatch, Inc., and Glover v. Daniels Motor Freight, Inc., discussed in note 129 *supra*. Apparently, the arrangements whereby drivers own the tractors and lease them to a trucking firm by which they are employed is not infrequent. See Skutt v. Dillavou, 234 Iowa 610, 13 N.W.2d 322 (1944); *cf.* Quinn v. Revoir, 3 Pa. D. & C. 2d 682 (C.P. 1954) (driver owned trailer, which was also leased to firm).

[134]Apparently this was the situation in Hayes Freight Lines v. Cheatham, *supra* note 130, for the plaintiff was the driver. Several cases have held that when the plaintiff is injured by a defective condition of a leased *truck* the lessor is subject to jurisdiction under the statutes (see note 171 *infra*), and the same result should obtain when the vehicle leased is a trailer.

[135]See note 146 *infra*.

[136]See note 167 *infra*.

[137]Ariz., Mass., Mo., N.Y., Va., W. Va. See note 2 *supra* for statute citations.

trailers explicitly, a step which is recommended to other legislatures.[138]

WHERE MUST THE ACCIDENT OCCUR?[139]

Virtually all of the original statutes referred to accidents occurring while a vehicle is being operated on the "public highways of the state." Obviously, accidents that occur outside the state are not within the purview of the nonresident motorist statutes,[140] although it is possible that local jurisdiction over the nonresident defendant might be obtained via alternative procedures.[141] A more substantial question

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[138]Absent an amendment covering trailers, there is an alternative procedure which may be available to plaintiffs under state and federal legislation providing for jurisdiction over common carriers. See notes 17, 88 *supra*.

[139]For a somewhat different discussion of this subject, see Note, 44 IOWA L. REV. 384, 395-98 (1959).

[140]It is, of course, elementary that the accident must take place in the state for the statute to be applicable. Glazier v. Van Sant, 33 F. Supp. 113 (W.D. Mo. 1940); Hume v. Rogers, 49 N.Y.S.2d 209 (Sup. Ct. 1944); O'Brien v. Richtarsic, 2 F.R.D. 42 (W.D.N.Y. 1941). In several cases the accident occurred on an interstate bridge, so that the question of state boundaries became involved. Schueren v. Querner Truck Lines, Inc., 22 Ill. App. 2d 183, 159 N.E.2d 835 (1959); Clarke v. Ackerman, 243 App. Div. 446, 278 N.Y. Supp. 75 (1st Dep't 1935); *cf.* Emerson v. Carrier, 119 Vt. 390, 125 A.2d 822 (1956) (a complaint that did not allege that the accident occurred in the state held defective as insufficient pleading of a jurisdictional fact).

[141]When the defendant is a foreign corporation of the state in which the trial is sought, jurisdiction in an action by a nonresident plaintiff in that state is constitutionally permissible when the corporation's activities are continuous and systematic, according to Perkins v. Benequet Consol. Mining Co., 342 U.S. 437 (1951). However, many states will not entertain a suit on a cause of action arising elsewhere against a foreign corporation "doing business" in a state in which it is not qualified with local authorities, even if the plaintiff is a resident.

If the defendant is an interstate motor carrier which holds a certificate from the I.C.C., there is authority under the Federal Motor Carrier Act of 1935 (49 U.S.C. §321 (c)) permitting suit to be brought by a resident against a carrier which has appointed an agent for service of process in the state, although the accident did not occur there. Wynne v. Queen City Coach Co., 49 F. Supp. 103 (D.N.J. 1943). One case even upheld a suit when the plaintiff was also a nonresident. State *ex rel.* Blackledge v. Latourette, 186 Ore. 84, 205 P.2d 849 (1949). *Contra,* King v. Robinson Transfer Motor Lines, 219 N.C. 223, 13 S.E.2d 233 (1941). Compare Peters v. Robin Airlanes, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953), noted NOTRE DAME LAW. 640 (1954), which held unconstitutional the application of a New York statute providing for local jurisdiction over nonresident aircraft owners in actions growing out of accidents in which the aircraft landed at, or departed from, an airfield in the state, though the accident occurred outside

was whether the acts applied to situations in which the accident occurred on private property rather than on the streets or highways. The courts, with an occasional dissent,[142] have uniformly responded in the negative. No jurisdiction has been held to exist over suits based on accidents occurring at a filling station,[143] a parking lot by a roadside restaurant,[144] a parking lot inside factory gates,[145] a loading zone owned by a private corporation,[146] a private driveway,[147] or a federal military reservation.[148] Of course, when the negligent conduct occurs on a public road, jurisdiction will lie even though the damage may take place on private property.[149]

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the state. For yet another possibility of obtaining local jurisdiction on a foreign cause of action, see *In re* Riggle's Will, 18 Misc. 2d 988, 188 N.Y.S.2d 622 (Surr. Ct. 1959), discussed note 107 *supra*.

[142]See note 151 *infra*.

[143]Walton v. Stephens, 119 F. Supp. 1 (W.D. Va. 1954); Finn v. Schreiber, 35 F. Supp. 638 (W.D.N.Y. 1940); Langley v. Bunn, 225 Ark. 651, 284 S.W.2d 319 (1955). *Contra*, Schefke v. Superior Ct., 136 Cal. App. 2d 715, 289 P.2d 542 (1955).

[144]Harris v. Hanson, 75 F. Supp. 481 (D. Idaho 1948).

[145]Tyler v. Barry, 18 Conn. Supp. 290 (1953). See also O'Sullivan v. Brown, note 148 *infra*.

[146]Acuff v. Service Welding & Machine Co., 141 F. Supp. 294 (E.D. Tenn. 1956); Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E.2d 836 (1943); *cf.* Chiarello v. Guerin Special Motor Freight, 22 N.J. Super. 431, 92 A.2d 136 (L. 1952).

[147]Rilling v. Jones, 130 F. Supp. 834 (D. Md. 1955); Dworkin v. Spector Service, Inc., 3 F.R.D. 340 (D. Conn. 1944); Zielinski v. Lyford, 175 Misc. 517, 23 N.Y.S.2d 489 (Sup. Ct. 1940); Catalano v. Maddux, 175 Misc. 24, 22 N.Y.S.2d 149 (N.Y. City Ct. 1940) (accident on New York World's Fair grounds); Haughey v. Mineola Garage, 174 Misc. 332, 20 N.Y.S.2d 857 (Sup. Ct. 1940).

[148]O'Sullivan v. Brown, 171 F.2d 199 (5th Cir. 1948) (accident occurred in parking lot on land owned by the federal government and occupied by a defense plant which was fenced in and guarded at the gates; the court, applying Texas law, held that the accident did not happen on a "public highway"); Camden v. Harris, 109 F. Supp. 311 (W.D. Ark. 1953) (the Arkansas statute was subsequently amended to cover "military reservations"); *cf.* Bertrand v. Wilds, 198 Tenn. 543, 281 S.W.2d 390 (1955) (accident occurred on a driveway leading to a federal veterans' hospital; the court held that this was a public highway within the meaning of the act). In Cantrell v. Haas, 161 F. Supp. 433 (W.D.N.C. 1958), the court held an amendment covering accidents occurring "in the state" applicable to a collision on an army post.

[149]*E.g.*, in Dodson v. Maddox, 359 Mo. 742, 233 S.W.2d 434 (1949), a negligently driven gasoline truck crashed into an embankment on private property. The plaintiff attempted to extricate the driver from the truck but was burned when the escaping gas ignited. The court held that the plaintiff's injuries resulted from the negligent operation of the truck while it was on the highway and sustained jurisdiction over the truck owner. Compare Keeley v. Koetting, 164 Kan.

A problem remains in determining what is included in the term *public highways*,[150] which raises the possibility that private property which is traditionally open to public vehicular traffic might be included in a broad interpretation.[151] The courts, however, buttressed by constitutional doubt about application of the statutes to accidents arising on private property, generally have avoided this possibility by adopting a restrictive interpretation of this term.[152] The standard technique in resolving this type of problem is to borrow a definition of "public highway" from some other section of the statute, although

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542, 190 P.2d 361 (1948), in which the plaintiff alleged that the defendant negligently drove his car off the highway, causing a fire which burned plaintiff's wheat field, although it was not stated whether there was an accident on the highway or how the fire started. The court dismissed service on the ground that the damages occurred on private property, a conclusion that may or may not be justifiable depending on unstated facts.

[150]The courts have found little difficulty in holding that sidewalks are included in the term *public highway*. In Winford v. Barsi, 92 F. Supp. 110 (W.D. Mo. 1950), the defendant's truck when driven on the sidewalk caused it to cave in, throwing the plaintiff, a pedestrian, into a sewer. The court fastened its reasoning on a provision from another part of the statute which defined "highways" as the area between the private property on either side of a public way, thus including sidewalks. In Chiarello v. Guerin Special Motor Freight, 22 N.J. Super. 431, 92 A.2d 136 (L. 1952), the court found that an accident which occurred while a truck was parked partly on a sidewalk and partly on a private lot transpired on a public highway.

[151]There is some judicial authority for the view that the term *public highway* should be given a more expansive meaning in order to effectuate the purposes of the statutes. In Galloway v. Wyatt Metal & Boiler Works, 189 La. 887, 181 So. 187 (1938), the court held that the term was broad enough to cover a private road owned by a corporation but which the public traditionally used, and adopted the test that a public highway includes any road open to the public, either conditionally or unconditionally.

The most promising of the theories by which courts could expand coverage to accidents occurring on private property is expressed by the court in Schefke v. Superior Ct., 136 Cal. App. 2d 715, 289 P.2d 542 (1955), in which the accident happened on a service station lot. The court stated: "The question here does not depend upon an interpretation of what is or is not a highway, but is a question of whether or not the servicing of a motor vehicle . . . is a necessary incident to its operation . . . . [E]ntry into or exit from a service station must be considered as a part of and incidental to the operation of a vehicle upon the highway." *Id.* at 720, 289 P.2d at 545. This theory was adopted in Kohanovich v. Youree, 51 Del. 440, 147 A.2d 655 (1959) (parking lot of private corporation).

[152]See Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill 569, 50 N.E.2d 836 (1943).

sometimes the courts have adopted a more generalized test to the effect that a public highway is a road open to the public as a matter of right.[153]

The justice of requiring the alleged tort-feasor to defend litigation in the state in which the cause of action arose remains undiminished by the fact that the accident occurred on private rather than on public property. Accordingly, some twenty states have amended their statutes to cover actions arising from accidents occurring "in this state."[154] Several other states have enacted less extensive amendments covering specific locations, such as private property adjacent to public roads.[155] The majority of the cases involving such amendments have upheld their constitutionality and found no difficulty in applying them.[156] In two cases,[157] however, courts have refused to apply the amendments,

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[153]Sometimes the statute utilizes the same test, *e.g.*, W. VA. CODE ANN. §5555 (1) (1955).

[154]States having statutes of this type are Colo., Del., Fla., Kan., Ky., Md., Miss., Mont., N.H., N.J., N.M., N.Y., N.C., N.D. ("Whether the damage occurs on public or private property"), Ohio, Pa., Tenn., Tex., Vt., Va. See note 2 *supra* for statute citations.

[155]The Minnesota amendment seems to cover most of the frequent sources of difficulty, since it applies "whether the damage or loss occurs on a highway or on abutting public or private property." MINN. STAT. ANN. §170.55 (Supp. 1959). Wisconsin has a similar provision. WIS. STAT. ANN. §85.06 (6) (1958). Less extensive is the provision adopted by Massachusetts, which covers the operation of a vehicle "on a [public] way or private way if entrance thereto was made from a way or in any place in which the public has a right of access, in this Commonwealth . . . ." MASS. ANN. LAWS ch. 90, §3A (Supp. 1959). The least significant of the amendments is that of Arkansas, which defines public highways as "including . . . military reservations, whether used conditionally or unconditionally by the public." ARK. STAT. ANN. §27-341.1 (Supp. 1959).

[156]The amendments extending the place of accident to anywhere in the state have been found constitutional in Kennelly v. Second Transportation Co., 173 F. Supp. 247 (S.D.N.Y. 1959); Paduchik v. Mikoff, 158 Ohio St. 533, 110 N.E.2d 562 (1953) (accident took place in farm yard); Sipe v. Moyers, 353 Pa. 75, 44 A.2d 263 (1945) ("To hold that state power . . . could not be constitutionally exercised to reach beyond the highway . . . onto private property . . . would create an artificial and unreasonable distinction"). Other cases that have applied the new amendments are Cantrell v. Haas, 161 F. Supp. 433 (W.D.N.C. 1958) (street on army post); Kohanovich v. Youree, 51 Del. 440, 147 A.2d 655 (1959) (parking lot of private corporation); Miner v. Bettendorf, 2 App. Div. 2d 951, 157 N.Y.S.2d 27 (3d Dep't 1956) (loading platform on property of private corporation).

[157]Walton v. Stephens, 119 F. Supp. 1 (W.D. Va. 1954) (filling station accident); Keeley v. Koetting, 164 Kan. 542, 190 P.2d 361 (1948) (see discussion note 149 *supra*).

a result caused in part by unwarranted fears of constitutional danger[158] and in part by defective drafting of the statutes.[159]

ACCIDENTS ARISING OUT OF THE OPERATION OF THE VEHICLE[160]

The statutes in all states seem to require that the accident arise out of the operation of the vehicle. Some situations are clearly not within the term *operation of the vehicle,* for instance, when a truck driver starts a fist fight at a loading platform,[161] or a bus driver negligently collides on foot with a pedestrian.[162] On the other hand, in several unusual cases it has been held that merely turning on the ignition key and pressing the starter, even without an intention of driving, was "operation" of the vehicle.[163] Beyond this, there are cases holding that a vehicle need not be in motion to be "operated," as

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[158]The constitutional doubts based on the "consent" theory are insubstantial. See note 156 *supra.*

[159]The drafting insufficiency arises from the fact that there are two clauses in the typical statute. The first provision usually reads "operation by a nonresident or his agent of a motor vehicle on the highways of this state." The second provision usually is to the effect that a public officer is appointed as agent for service of process for "any actions arising out of accidents occurring on the public highways of the state." When only the second provision is amended to read "in this state," difficulties may exist, as the Keeley v. Koetting and Walton v. Stephens, *supra* note 157, decisions indicate. To avoid all construction problems, legislatures would do well to emulate the inclusiveness of the Maryland amendment, which reads "public highway or elsewhere within the boundaries of the state of Maryland, including, but not limited to property owned by individuals, firms, corporations, or the federal government . . . ." MD. CODE ANN. art. 66½, §115 (1957).

[160]For other discussions of this topic, see 44 IOWA L. REV. 384, 398-400 (1959); 30 N.Y.U.L. REV. 702 (1955); Notes, 46 MICH. L. REV. 1128 (1948); 24 TENN. L. REV. 880 (1957).

[161]Lindsey v. Teddy's Frosted Foods, 18 N.J. 61, 112 A.2d 529 (1955). The plaintiff's case is not much stronger when the altercation between the drivers starts in a dispute over responsibility for the accident, as in Feinberg v. Apone, 201 Misc. 437, 114 N.Y.S.2d 472 (Sup. Ct. 1952), in which the court also denied jurisdiction.

[162]Schrager v. Fifth Avenue Coach Lines, 6 Misc. 2d 604, 167 N.Y.S.2d 456 (Sup. Ct.), *aff'd,* 4 App. Div. 2d 869, 168 N.Y.S.2d 467 (1st Dep't 1957).

[163]In Hurte v. Lane, 166 F. Supp. 413 (N.D. Fla. 1958), the defendant turned on the ignition and pressed the starter of the car, causing the engine to backfire and inflame gasoline which the plaintiff was pouring into the carburetor. The court held that the car was being "operated." In Bomes v. Crowley, 78 R.I. 453, 82 A.2d 867 (1951), a passenger in the car, in order to start the heater, pressed the starter when the car was in gear, resulting in damages to the plaintiff's property.

when the accident results from the vehicle being negligently parked, causing an unreasonable hazard to the public,[164] or when the door of the vehicle is opened negligently, injuring a pedestrian.[165] Since the courts felt obligated to rationalize the result of these cases with the idea that operation involves movement, the concept was expressed that "operation" includes stops incidental to travel on the highways.[166]

In another group of cases concerning the unloading of trucks, jurisdiction has been refused on the ground that the accident did not arise out of the operation of the vehicle.[167] In some cases, such as when the injury resulted from alleged negligent packing of the cargo in the truck, this conclusion would appear necessary.[168] Stronger cases seem to be presented when there is a defect in the truck as the result of negligent maintenance of the vehicle, such as a rotten floor[169]

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[164]Chiarello v. Guerin Special Motor Freight, 22 N.J. Super. 431, 92 A.2d 136 (L. 1952); Hand v. Frazer, 139 Misc. 446, 248 N.Y. Supp. 557 (Sup. Ct.), *aff'd*, 233 App. Div. 800, 250 N.Y. Supp. 947 (4th Dep't 1931).

[165]Taylor v. Hall, 103 Ohio App. 283, 145 N.E.2d 241 (1956). See also Ehlert v. McElroy, 14 Conn. Supp. 496 (Super. Ct. 1946), in which the cover of the trunk of a car parked at the edge of the highway fell on the plaintiff as a result of the defendant's negligence. The court found that the vehicle was being "operated." However, in Mulligan v. New Jersey Truck Renters, 196 Misc. 828, 95 N.Y.S.2d 232 (N.Y. City Ct. 1949), an opposite result was reached when a piece of cardboard fell out of a truck being unloaded and hit a pedestrian. Arguably, the motion of the doors on the vehicles in the first two cases present stronger cases for a holding of "operation" than in the *Mulligan* case, in which no mechanical parts of the vehicle were in motion. Such a distinction, however, appears unwarranted.

[166]Hand v. Frazer, 139 Misc. 446, 248 N.Y. Supp. 557 (Sup. Ct.), *aff'd*, 233 App. Div. 800, 250 N.Y. Supp. 947 (4th Dep't 1931). The other cases in notes 164, 165 *supra*, in which jurisdiction was upheld, all relied on *Hand v. Frazer* and its rationale. See also Schefke v. Superior Ct., 136 Cal. App. 2d 715, 721, 289 P.2d 542, 546 (1955) ("entry into or exit from a service station must be considered as a part of and incidental to the operation of a vehicle on the highways"); Kohanovich v. Youree, 51 Del. 440, 147 A.2d 655 (1959) (driving on a parking lot of a private corporation "reasonably incidental" to the use of the highway).

[167]In some of these unloading cases there is no question of the operation of the vehicle, *e.g.*, Miner v. Bettendorf, 2 App. Div. 2d 951, 157 N.Y.S.2d 27 (3d Dep't 1956), in which the defendant's employee negligently backed up a truck into a loading platform, damaging it and rendering it hazardous to the plaintiff, who was subsequently injured. Similarly in Paduchik v. Mikoff, 158 Ohio St. 533, 110 N.E.2d 562 (1953), a driver backing up a truck crushed a child against a barn. In both of these cases jurisdiction was upheld under statutes which covered accidents occurring "in the state."

[168]Ellis v. Georgia Marble Co., 191 Tenn. 229, 232 S.W.2d 45 (1950).

[169]Acuff v. Service Welding & Machine Co., 141 F. Supp. 294 (E.D. Tenn. 1956), noted 24 TENN. L. REV. 880 (1957) (accident took place on private property;

or a broken tail gate.[170] Here the relationship of the vehicle to the accident is direct, and a tenable basis of jurisdiction under the statute exists.[171] Nevertheless, most of the courts have denied coverage in unloading cases because of the absence of "operation."[172]

Several other grounds for denying jurisdiction have occasionally been available to the courts in these "unloading" cases. It has been held that a truck trailer is not a motor vehicle within the statutes, and thus injuries caused by negligent maintenance of a trailer might be precluded on this ground.[173] Since the loading and unloading often takes place on private property, this basis of exclusion may be available.[174] Amendments covering private property and broadening the meaning of "motor vehicle" have been enacted in a number of states,[175]

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service quashed); DeLuca v. Consolidated Freight Lines, 132 F. Supp. 863 (E.D.N.Y. 1955) (unloading is not "operation").

[170]McDonald v. Superior Ct., note 171 *infra*; Brown v. Hertz Driveurself Stations, Inc., 203 Misc. 728, 116 N.Y.S.2d 412 (Sup. Ct. 1952).

[171]Some protection for lessees of defective vehicles may be found in McDonald v. Superior Ct., 43 Cal. 2d 621, 275 P.2d 464 (1954), in which the plaintiff was injured as a result of the defective condition of a truck leased from a commercial renting agency. The court upheld jurisdiction on the theory that leasing defective equipment for use on the highways of the state is an "operation" of the vehicle by the defendant. "The statute does not require that the accident occur during the time that the vehicle is being operated . . . . It is enough that the accident results from such operation." *Id.* at 624, 275 P.2d at 466. See also Elfield v. Burkham Auto Renting Co., 299 N.Y. 336, 87 N.E.2d 285 (1949). *Contra*: Brown v. Hertz Driveurself Stations, Inc., *supra* note 170; Hayes Freight Line v. Cheatham, 277 P.2d 664 (Okla. 1954).

[172]DeLuca v. Consolidated Freight Lines, *supra* note 169; Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569, 50 N.E.2d 836 (1943); Ellis v. Georgia Marble Co., *supra* note 168. See also cases cited notes 168-171 *supra*.

To some degree, the reluctance to extend coverage in these cases may result from doubts concerning the constitutionality of such an expansion of jurisdiction. This was a major rationale in the *Brauer* case, *supra*. And see RESTATEMENT, JUDGMENTS §23, comment *e* at 113 (1942), which suggests that jurisdiction under these statutes "is unconstitutional under the Fourteenth Amendment to the extent to which it applies to causes of action unconnected with the operation of the automobile within the State." However, constitutional law as regards jurisdiction is considerably more liberal now than when the *Brauer* case was decided and this section of the *Restatement* was penned. See Reese & Galston, *Doing an Act or Causing Consequences As Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

[173]Hayes Freight Line v. Cheatham, 277 P.2d 664 (Okla. 1954). See note 130 *supra*.

[174]See notes 154, 155 *supra*.

[175]See note 137 *supra*.

but there is still an excellent chance that courts will continue to hold that loading accidents are not covered because the vehicle was not in operation.[176]

The absence of coverage in truck loading accidents may be cured to some degree by the employment of federal or state statutes subjecting to jurisdiction foreign common carriers traveling in the state. The application of these statutes is not limited to actions arising from accidents resulting from operation on the highways.[177] Such an independent approach to jurisdiction is limited mainly to common carriers and would not be available when the accident resulted from the unloading of a truck owned by a firm for its own delivery purposes.[178]

Limitations on the nonresident motorist statutes have been cured by amendments in many situations, but there has been no effort to extend by amendatory legislation the application of the statutes to circumstances which courts have held beyond the coverage of vehicular operation. Because generally it would be better to try tort actions of this type at the place of occurrence, remedial legislation extending jurisdiction to accidents with any reasonable relation to the use of the vehicle is desirable.

TYPES OF SUITS PERMITTED UNDER THE STATUTES[179]

The typical action in which the nonresident motorist statute is invoked involves negligence in the operation of a motor vehicle. The statutes are generally phrased to cover "any actions or proceedings arising out of an accident or collision," language which could open up the statutory process for any type of suit reasonably related to a motor vehicle accident. Unfortunately, the problem of the availability of the statutes in such cases is often expressed in terms of whether "contract" actions are permissible, an approach which, it is submitted, presents a false issue.

Several extreme situations may be isolated and dismissed. When an insurer has paid a claim on a casualty policy and become sub-

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[176]*Cf.* Acuff v. Service & Welding Machine Co., 141 F. Supp. 294 (E.D. Tenn. 1956).

[177]See note 18 *supra*.

[178]At this point, reliance might well be placed on statutes providing for jurisdiction over foreign corporations "doing business in the state." See *supra* at note 22.

[179]For further discussion see 32 NOTRE DAME LAW. 328 (1957); 30 N.Y.U.L. REV. 702, 707 (1955); 1 VILL. L. REV. 97 (1956).

rogated under the insurance contract to the insured's rights against the tort-feasor who caused the damage, an objection to the use of the statutory jurisdiction by the insurer on the ground that the cause of action is based on the contractual right of subrogation would appear to be frivolous.[180] On the other hand, the objection seems to be well founded when the insurer brings suit under the statute against the insured, asking for a declaratory judgment that it is not liable under the contract because of the insured's fraudulent representations in procuring the policy.[181] The point of distinction between these situations is obvious enough. In the first the witnesses and the documentary evidence relating to the trial issues of negligence and damages are locally available, and the rational policy behind the statutes is equally applicable even though the plaintiff is the insurer rather than the owner of the damaged car. It is highly unlikely that these policy factors will be present in the second case, in which the insurer is seeking exculpation from the contract with a nonresident insured on the ground of fraudulent inducement. The basis of resolution suggested by these two situations offers a clue to judicial determination of most of the cases in this problem area.

Cases in which the availability of the statutory jurisdiction has turned on the nature of the suit have arisen in various contexts. One group involved suits for contribution between joint tort-feasors. In several cases the defendant sought to implead another defendant who was a nonresident, on the ground that local statutes required a joint

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[180]The only case in which this objection appears to have been considered meritorious is Mercer Cas. Co. v. Perlman, 62 Ohio App. 133, 23 N.E.2d 502 (1939). Subsequent Ohio decisions have largely repudiated the view adopted in the *Mercer* case. Permanent Ins. Co. v. Cox, 99 Ohio App. 389, 133 N.E.2d 627 (1955); Harper v. Lynch, 159 N.E.2d 818 (Ohio C.P. 1959). In these last two cases the insurer joined the insured as plaintiff, who also claimed against the out-of-state defendant for the amount of damages to the auto not covered by the insurance and for personal injuries. To permit the car owner to obtain jurisdiction over the nonresident defendant but to preclude his casualty insurer from the suit would be an absurd result.

[181]This was the conclusion reached in the only cases discovered which treated the issue. Hurley v. Finley, 6 Ill. App. 2d 23, 126 N.E.2d 513 (1955); Secured Cas. Ins. Co. v. Sinelnikoff, 1 App. Div. 2d 1036, 152 N.Y.S.2d 15 (2d Dep't 1956). It is understandable that the insurer should wish to have its liability on the contract determined before it undertakes the expense of defending the insured. However, this is no reason for bringing the suit at other than the residence of the insured, where the evidence is likely to be located. Since the insurer is in charge of the defense of the insured in the state of the accident, it should be able to stall that litigation until the fraud issue is determined at the residence of the insured.

judgment as a prerequisite to a claim for contribution between them.[182] The courts rejected the argument that the third-party complaint could not be maintained because the cause of action alleged was in the nature of an implied contract. The same position was adopted in *Southeastern Greyhound Lines v. Meyers*,[183] a 1941 Kentucky decision in which one tort-feasor settled with the injured party and sought to obtain contribution in a separate action against another alleged tort-feasor.[184] These results are highly justifiable, since the liability of the nonresident defendant for contribution rests upon his liability to the party injured, the evidence of which is best available at the forum where the collision took place.

Another situation is illustrated by *Maddry v. Moore Bros.*,[185] in which an employee brought suit against his nonresident employer under a workmen's compensation statute. The action was upheld despite the contention that this was an action to enforce an implied contract. The Louisiana court refused to find an exclusion of nondelictual claims in the plain meaning of the statutory language.

A problem of continuing significance in this regard is the availability of the statute for suits based on express contracts of indemnification against liabilities incurred as a result of motor vehicle accidents. In *Whalen v. Young*,[186] a 1954 New Jersey decision, a majority of the court refused to permit a defendant truck driver to implead his employer on such a contract. The opposite conclusion was reached in a 1954 Illinois case, *Dart Transit Co. v. Wiggins*,[187] a suit by the lessee of a truck against the lessor on an indemnity provision in the lease. This was followed by *Gore v. United States*,[188] a 1959 federal district court decision permitting a similar action. The latter view would seem preferable. It is true that the usual convenience of forum argument based in part on the availability of witnesses might not be applicable when the defense of the nonresident indemnitor is based on the validity or operation of the contract, but the convenience to

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[182]Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941); Cirelli v. Good Distributors, 20 Pa. D. & C. 651 (C.P. 1934).

[183]288 Ky. 337, 156 S.W.2d 161 (1941), noted 55 HARV. L. REV. 1051 (1942).

[184]The *Southeastern Greyhound* case was followed in McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950); Burnett v. Agent, 227 Ark. 1050, 303 S.W.2d 575 (1957).

[185]Maddry v. Moore Bros. Lumber Co., 195 La. 979, 197 So. 651 (1940).

[186]Whalen v. Young, 15 N.J. 321, 104 A.2d 678 (1954), a 4-3 decision.

[187]Dart Transit Co. v. Wiggins, 1 Ill. App. 2d 126, 117 N.E.2d 314 (1954).

[188]Gore v. United States, 171 F. Supp. 136 (D. Mass. 1959).

the defendant in avoiding separate litigation on the contract is a weighty factor.

The notion that contract actions should not be permitted is still strongly embedded. An unusual Georgia case in 1956, *Aldrich v. Johns*,[189] denied jurisdiction to an assignee of doctors' bills incurred in emergency treatment of employees of the defendant's truck line after an accident. Although the relationship between the contract and the collision was clear and most of the evidence was probably available locally, the court felt that the fact that the cause of action sounded in contract precluded utilization of the statute.[190] The difficulty of reconciling this view with the policy factors that tend to induce courts to take jurisdiction is illustrated by a recent New York case.[191] An insurance company sued to recover workmen's compensation payments made to a nonresident employee injured in a local accident in which the employee, after receiving the payments, obtained a common law judgment against the employer. The court, while insisting that contract actions are not permitted under the act, upheld jurisdiction over this claim (which is clearly in assumpsit) by arguing that this was a tort claim because it arose directly from the accident.

In summary, the problem involved in this area is one of determining the most appropriate forum for the litigation, which involves a consideration of the special evidential factors in each type of case. It will not be intelligently solved by recourse to artificial historical distinctions between actions *ex delicto* and *ex contractu*.

Also deserving of mention here are case distinctions between intentional and negligent torts. An early North Carolina decision, *Lindsay v. Short*,[192] concluded that an action for abuse of process could not be maintained under the statute when it was alleged that the defendant had unjustifiably obtained the plaintiff's arrest following an accident. Along the same line is a New York case in which the court quashed service under the statute in a suit for assault and battery in an altercation between the drivers of the vehicles following a col-

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[189]Aldrich v. Johns, 93 Ga. App. 787, 92 S.E.2d 804 (1956), noted 32 NOTRE DAME LAW. 328 (1957).

[190]It is only a question of time before a plaintiff will invoke the nonresident motorist statute for an analogous claim for repairs to a vehicle damaged in an accident. While success for the claimant in such a case is not to be predicted, a respectable policy argument could be mustered in favor of local jurisdiction.

[191]Merchants Mut. Ins. Co. v. Jackson Trucking Co., 21 Misc. 2d 1005, 193 N.Y.S.2d 135 (County Ct. 1959).

[192]210 N.C. 287, 186 S.E. 239 (1936).

lision.[193] Such decisions can be squared with the statute on the basis that the relation of the causes of action to the accident is too remote. To draw a distinction between intentional and negligent torts on the basis of these cases, however, is to follow a false lead, for it seems clear that intentionally tortious conduct is equally covered, provided it is accomplished through the operation of a vehicle.

Statute of Limitations Problems[194]

In many states the statute of limitations provides that the limitations period is tolled when the defendant is absent from the state. If this typical savings clause is applicable to nonresident motorists, the usually short statute of limitations period for tort actions may be extended indefinitely. However, since the purpose of these provisions seems to be to preserve the claims of resident plaintiffs against nonresident debtors who at common law were not subject to local jurisdiction, the passage of the motorist statutes by which nonresidents are amenable to trial within the state satisfies the policy of the savings clause provisions and renders them inapplicable. Although some early cases held that by the plain meaning of the statute of limitations the tolling provision applied,[195] the great majority of states have reached the opposite result by creating an exception when the policy of the statute is satisfied[196] or through legislative amendments.[197] The

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[193]Feinberg v. Apone, 201 Misc. 437, 114 N.Y.S.2d 472 (Sup. Ct. 1952). See also Lindsey v. Teddy's Frosted Foods, 18 N.J. 61, 112 A.2d 529 (1955).

[194]See 12 VAND L. REV. 295 (1958).

[195]Chamberlain v. Lowe, 252 F.2d 563 (6th Cir. 1958); Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430 (Sup. Ct. 1942); Maguire v. Yellow Taxicab Corp., 253 App. Div. 249, 1 N.Y.S.2d 749 (1st Dep't), *aff'd*, 27 N.Y. 576, 16 N.E.2d 110 (1938); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

[196]Scorza v. Deatherage, 208 F.2d 660 (8th Cir. 1954) (applying Mo. law); Tublitz v. Hirschfield, 118 F.2d 29 (2d Cir. 1941) (applying Conn. law); Mangene v. Diamond, 132 F. Supp. 27 (E.D. Pa. 1955) (applying Cal. law); Karagiannis v. Shaffer, 96 F. Supp. 211 (W.D. Pa. 1951); Hale v. Morgan Packing Co., 91 F. Supp. 11 (E.D. Ill. 1950); Peters v. Tuell Dairy Co., 250 Ala. 600, 35 So.2d 344 (1948); Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17 (1938); Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711 (1952); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Canaday v. Hayden, 80 Ohio App. 1, 74 N.E.2d 635 (1947) (*but see* Couts v. Rose, note 195 *supra*); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Reed v. Rosenfeld, 115 Vt. 76, 51 A.2d 189 (1947).

[197]GA. CODE ANN. §68-801 (1957). In New York the tolling clause of the statute

conclusions of the majority of the courts in disregarding the tolling provisions in situations covered by nonresident motorist statutes are well justified.[198]

CONCLUSION

The early nonresident motorist statutes, prototypes for later legislation, were cautiously drafted with one eye on the problem sought

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of limitations applies when the defendant has left the state, unless an agent for service of process in the state has been designated. In Maguire v. Yellow Taxicab Corp., 253 App. Div. 249, 1 N.Y. Supp. 749 (1st Dep't), *aff'd*, 27 N.Y. 576, 16 N.E.2d 110 (1938), the courts held that the provision referred only to voluntary appointment of an agent rather than to involuntary designations, as provided by the motorist statute. The limitations statute was then amended to cover involuntary designations as well as voluntary. N.Y. CIVIL PRAC. ACT §19. See Caruso v. Bard, 20 Misc. 2d 887, 194 N.Y.S.2d 535 (Sup. Ct. 1959); Harvey v. Fussell, 13 Misc. 2d 602, 177 N.Y.S.2d 234 (Sup. Ct. 1958); Dougherty v. Seigle, 181 Misc. 674, 42 N.Y.S.2d 646 (Sup. Ct. 1943). These three cases also demonstrate the principle that the operation of the tolling provision is not modified if jurisdiction over the nonresident cannot be accomplished.

A peculiar amendment to the Tennessee statute, which provided that the secretary of state would be the agent of the nonresident for service of process for only one year after the accident, has caused much confusion. *Compare* Oliver v. Altsheler, 198 Tenn. 155, 278 S.W.2d 675 (1955), *with* Noseworthy v. Robinson, 203 Tenn. 683, 315 S.W.2d 259 (1958). See also Young v. Hicks, 250 F.2d 80 (8th Cir. 1957); Proctor v. Hendrick, 174 F. Supp. 270 (E.D. Tenn. 1958); Tabor v. Mason Dixon Lines, Inc., 196 Tenn. 198, 264 S.W.2d 821 (1933); Note, 12 VAND. L. REV. 295 (1958).

[198]The question has arisen whether the existence of jurisdiction under the nonresident motorist statutes alters the operation of §525 of the Soldiers and Sailors Relief Act, 50 U.S.C. §521 (1958), which provides that statutes of limitations are tolled as to military personnel during the period of their service. The recent case of Zitomer v. Holdsworth, 178 F. Supp. 504 (E.D. Pa. 1959), reached the conclusion that the limitations period was tolled despite the policy argument to the contrary. In several earlier cases the courts reached the opposite result but without reference to §525 of the Relief Act. *E.g.*, Mangene v. Diamond, 229 F.2d 554 (3d Cir. 1956); Puchek v. Elledge, 160 F. Supp. 286 (N.D. Ind. 1958). Since the tolling provisions of the federal act appear to be based in part on the same considerations as the savings clauses in state statutes, it would seem that the federal statute should also be deemed inapplicable when local jurisdiction can be obtained. The two situations are not exactly similar, however; §521 of the Relief Act provides that an action against a serviceman shall be stayed "unless, in the opinion of the court, the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." See Rutherford v. Bentz, 345 Ill. App. 532, 104 N.E.2d 343 (1952). Because of this provision, the plaintiff can never be certain that the defendant will be subject to jurisdiction. To require the plaintiff first

to be remedied and the other focused on an attempt to secure their constitutionality. The language of "implied consent" which they contain was borrowed from the then most successful inroad on earlier restrictive concepts of jurisdiction. On the policy end, the pressing need was for relief to the local plaintiff who received personal injuries in a collision with a car owned by a vacationing out-of-state tourist or a truck driven by an interstate trucking firm. The policy goals of this legislation were satisfied and the constitutional doubts were diminished by limiting the scope of the statutes to actions arising out of accidents resulting from the operation by a nonresident of a motor vehicle on the public highways.

Apparently little thought was given to whether nonresidents should be permitted to use these statutes as plaintiffs, or to whether actions for statutory contribution or contractual indemnity should be permitted. Nor were answers supplied as to whether semi-trailers were motor vehicles, as to whether jurisdiction existed if the accident took place on the lot of a filling station, or as to what would happen if the defendant died before judgment. Most of the early statutes provided merely that notice of service was to be sent "to the defendant," without apparent concern as to what would happen if the defendant refused to accept service or could not be found.

The early legislation drafters were satisfied to cure the main trouble. In the light of the problem then sought to be remedied, this legislation must be accounted a great success. The peripheral questions were left to the courts, which responded to the thrust of these statutes into traditional concepts by seeking to limit their operation to the narrowest possible scope. On almost every issue that was open to reasonable debate, the courts voted against the application of the statutes beyond the simple problem sought to be treated by the drafters.

After doubts about the constitutionality of this legislation had been dispelled and the problems involving the less typical situations had become clarified, it occurred to the legislatures that these ancillary problems contained the same policy elements justifying local jurisdiction as the more common variety sought to be treated by the original statutes. These policy factors were articulated earlier in this article

to obtain a court order staying his suit under §521 in order to claim the advantages of the §525 tolling provision, or in the alternative suffer the consequences of a bad appraisal of the likelihood of a court granting such an order, would perhaps place an unreasonable burden on the plaintiff. Whether this offsets the obvious unfairness of §525 to servicemen is debatable.

under the rubric of convenience of the forum.[199] The result has been a spate of amendatory legislation. New York has gone further than any other state, although some progress has been made in nearly every state.[200] The bulk of the amendments have involved four areas. These are provisions for reaching (1) the owner of a vehicle who may be vicariously liable for the conduct of the driver,[201] (2) residents who become nonresidents,[202] (3) executors of deceased alleged tort-feasors,[203] and (4) perpetrators of accidents "in the state" as opposed to the old provision relative to "the public highways."[204] Other refinements that have been less widely adopted recommend themselves, for example, covering lessees as well as owners[205] and including semi-trailers in a definition of motor vehicles.[206] The provision for service of process on the defendant by sending a letter to his last known address has proved itself both useful and safe in the many states that have employed it; and it is deserving of adoption in those states that have the usual provision for service, that is, sending the letter "to the defendant."[207] Further, it would be desirable to specify in future amendments whether the provision is to have a retroactive effect, thereby avoiding much litigation revolving around this issue.[208]

Beyond the proposed amendments to the motorist statutes are the

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[199]See *supra* at note 16.

[200]Florida has kept up better than most states, as its statute provides coverage over owners and lessees of vehicles, executors of deceased tort-feasors, and residents who become nonresidents or remove from the state.

[201]For states having this type of statute, see note 79 *supra*.

[202]See notes 72, 73, 75 *supra*.

[203]See note 113 *supra*.

[204]See note 154 *supra*.

[205]See note 85 *supra*.

[206]See note 137 *supra*.

[207]See discussion at note 40 *supra*.

[208]Considerable litigation has arisen concerning this question if the number of appellate decisions is any index of trial court activity, even though it appears settled that, absent a declaration that the amendment is to be retroactive, it will not be given that effect. See, *e.g.*, Hartley v. Utah Constr. Co., 106 F.2d 953 (9th Cir. 1939) (Ore. statute); Chesin v. Superior Ct., 142 Cal. App. 2d 360, 298 P.2d 593 (1956); Sanders v. Paddock, 342 Ill. App. 701, 97 N.E.2d 600 (1951); Davis v. Jones, 247 Iowa 1031, 78 N.W.2d 6 (1956); Hughes v. Lucker, 233 Minn. 207, 46 N.W.2d 497 (1951); State *ex rel.* Thompson v. District Ct., 108 Mont. 362, 91 P.2d 422 (1939); Cassan v. Fern, 33 N.J. Super. 96, 109 A.2d 482 (L. 1954); Gender v. Rayburn, 15 N.J. Misc. 704, 194 Atl. 441 (1937); Kurland v. Chernobil, 260 N.Y. 254, 183 N.E. 380 (1932). *But see* Ogden v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953), noted 67 HARV. L. REV. 1087 (1954); Duggan v. Ogden, 278 Mass. 432, 180 N.E. 301 (1932).

"single transaction" statutes, so called because they provide for jurisdiction over any cause of action arising in the state, even when the defendant has had only one transaction therein.[209] The policy objectives of this type of legislation are laudable; their most important goal is to permit local jurisdiction over personal injury actions and business torts, especially product liability litigation. Unfortunately, these statutes are very broadly phrased and contain the vice of requiring defendants to submit to local jurisdiction where the action arose, even though this may not be a convenient place for trial. Because the convenience factors in most types of tort litigation point toward the place of injury as the most suitable for trial, it is likely that these statutes will be upheld with some qualifications.[210] The more recent statutes of this type cover any person as opposed merely to foreign corporations. It appears, then, that much litigation presently brought under the nonresident motorist statutes will be channeled under the newer legislation, which will bar some of the technical objections to jurisdiction treated herein. However, this article is not meant to be an obituary for the once vigorous harbinger of jurisdictional progress; the nonresident motorist statutes have many useful years ahead of them. Still, the fact that plans for far greater extensions of jurisdiction than offered by the motorist statutes are in the air, and on the statute books in some states, does suggest the advisability of remedial amendments and more liberal judicial interpretation of the motorist statutes.

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[209]See note 23 *supra*.

[210]Of the few cases that have come before state courts, most of the decisions have upheld the constitutionality of these statutes as applied. See note 23 *supra*. A Florida statute of this variety was applied in State *ex rel.* Weber v. Register, 67 So.2d 619 (Fla. 1953), in which jurisdiction was sustained over nonresident defendants who purchased a citrus grove and subsequently listed it for sale, this activity being held to be a "business venture" within the meaning of the statute.