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Ronan E. Degnan

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# SEMI-DIRECT ACTION AGAINST LIABILITY INSURERS: CURRENT PROBLEMS

RONAN E. DEGNAN\*

The legislatures of the various states of the union have by and large seen fit to forbid actions by an injured party directly against a liability insurer. This limitation, founded upon policy reasons which are doubtless apparent to the reader, has led the interested parties to seek out various indirect or semi-direct methods for reaching the insurance fund. This article is designed to discuss two particularly difficult problems which have arisen because of this semi-direct mode of proceeding: (1) By what appropriate methods can a judgment be obtained against a nonresident tortfeasor or his estate so as to create an obligation under the insurance contract? (2) What is the status of such a judgment once it is obtained; will it be enforceable under the full faith and credit clause of the Constitution? So long as the nonresident insured is still alive at the time of judgment, the solutions provided for these problems by the nonresident motorist statutes appear to be quite satisfactory; it has therefore seemed proper to consider that type of situation only briefly. But when the death of the nonresident insured intervenes prior to judgment, a number of practical and theoretical obstacles present themselves. It is these obstacles which form the focal point of the present article, and attention is thus centered upon two types of proceedings—actions against a nonresident administrator, appointed by the insured's domicile; and actions against administrators appointed locally without the approval of the insured's domicile.

## I. PROCEDURES AVAILABLE AGAINST AN INSURED

### *A. Nonresident Motorist Statutes*

Perhaps because escape from that state is not easy, Alaska alone among American jurisdictions is without a nonresident motorist statute.<sup>1</sup> The problems which have attended application of these statutes have been regularly explored in the quarter century in which they have been in common use. On the whole, they have been ones of scope and statutory construction in recent years, not questions of constitutional validity. *Hess v. Pawloski*<sup>2</sup> is the landmark case, of

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\* Professor of Law, University of Utah.

1. In addition to the collection in Note, *Nonresident Motorist Statutes—Their Current Scope*, 44 IOWA L. REV. 384, n. 1 (1959), see HAWAII REV. LAWS §§ 230-34 (1955).

2. 274 U.S. 352 (1927). Scott, *Jurisdiction Over Nonresident Motorists*, 39

course. For a simple, not untypical example of what the evolution has been the particular Massachusetts statute there upheld may be examined. It first appeared in 1923 in the form of a qualification of general provisions regulating the operation, registration and licensing of foreign vehicles on the "ways" of Massachusetts. It made the "acceptance" by the "non-resident of the rights and privileges conferred" to operate a motor vehicle on a "public way in the commonwealth" the equivalent of an appointment of the Registrar as his attorney for service of process "in any action . . . against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way."<sup>3</sup> Familiar and largely unchanged provisions for the mechanics of service followed. This was the act in the form held valid by the Supreme Court over the charge that it violated the due process clause of the fourteenth amendment. In the year following that decision the first legislative expansion occurred. The original portion was retained unchanged, except that it became section 3A and applied to any person "who is a resident of any other state or country" instead of to the former "non-resident."<sup>4</sup> This trifling alteration had some meaning in the light of the newly enacted section 3B, however, for that section made substantially the same procedures available against "any person" operating any motor vehicle "on any public way in this commonwealth."<sup>5</sup> Thus, Massachusetts early reached out to make resident as well as nonresident operators available for suit. And many states have since followed suit.<sup>6</sup>

A 1953 amendment enlarged the geography to which the statute applied rather than the persons subject to it. Both section 3A and section 3B made the operative field not merely the prior "public way in the commonwealth" but on a "way, or private way if entrance thereto was made from a way, or in any place to which the public has a right of access."<sup>7</sup> Gasoline service stations, private driveways and parking lots—common places of automobile accidents—thus came within the scope of the act. Relatively insignificant is

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HARV. L. REV. 563 (1926), written before the Supreme Court decision, is still the classic treatment.

3. Mass. Acts 1923, ch. 431, MASS. GEN. LAWS c. 90, § 3 (1932).

4. Mass. Acts 1928, ch. 344.

5. *Ibid.*

6. See the discussion of variations in statutory approach in the excellent Note, *Nonresident Motorist Statutes—Their Current Scope*, 44 IOWA L. REV. 384, 388-89 (1959), and Note, *Process—Substituted Service Under Nonresident Motorist Statutes*, 30 N.Y.U.L. REV. 702, 705-07 (1955). The trend toward this expansion continues to date. See, e.g., Ind. Laws 1959, ch. 125, § 1, enlarging IND. ANN. STAT. § 47-1047 (1952) to include ". . . any resident of this state who may thereafter become a non-resident."

7. Mass. Acts 1953, ch. 366, §§ 1, 2. For comparable action elsewhere see Note, 44 IOWA L. REV. 384, 395-98 (1959).

the 1955 amendment, which brought the operation of "trailers" as well as motor vehicles within the ambit of the act.<sup>8</sup>

Doubtless the failure to include some of these provisions in the original statute, both in Massachusetts and elsewhere, was the result of a failure to anticipate the variety of questions which would arise. Perhaps it was partly the exercise of restraint founded in doubts of the constitutional validity of a broad statute. But the constitutional doubts have very largely disappeared,<sup>9</sup> so that the current process of expansion is one of eliminating technical bugs.

#### B. Tortious Act Statutes—The Coming Trend?

It might be suggested that this is wasted effort. The nonresident motorist statute has about run its course and like many another development of this century it will have become obsolete before it reaches its highest technical perfection. The next decade will probably see them replaced by general tortious act statutes which authorize the exercise of jurisdiction by state courts upon single wrongful acts committed within the state. Several such acts have been adopted to date,<sup>10</sup> with the intent of conferring upon the courts of the states in question the full range of jurisdiction permitted to states by the fourteenth amendment.<sup>11</sup> It is true that no state has as yet repealed its nonresident motorist statute upon enactment of a single act statute, and that the most recent attempt to resort to such an act in a typical nonresident motorist situation encountered a skeptical judge who avoided applying the statute because he found it not to be retroactive in application.<sup>12</sup> But the replacement seems inevitable,

8. Mass. Acts 1955, ch. 196, § 1.

9. See Stumberg, *Extension of Nonresident Motorist Statutes to Those Not Operators*, 44 IOWA L. REV. 268 (1959); Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A.L. REV. 198 (1958).

10. E.g., ILL. REV. STAT. ch. 110, § 17(1)(b) (1959); ME. REV. STAT. ANN. ch. 112, § 21(I)(B) (Supp. 1959) (copied from the Illinois act); N.M. STAT. ANN. § 21-3-16 (A)(3) (Supp. 1959) (substantially copied from the Illinois act).

Acts similar in character but limited in scope to foreign corporations have been enacted in other states. E.g., MINN. STAT. § 303.13(3) (Supp. 1959); N.C. GEN. STAT. § 55-145 (1960). On the general validity and scope of the single-act statutes see 1 EHRENZWEIG, *CONFLICT OF LAWS* 96-98 (1959) [hereinafter cited as EHRENZWEIG]; Reese and Galston, *Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 1003-04 (1960); Note, 42 MINN. L. REV. 909 (1958).

11. See Cleary and Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599 (1955).

12. *Clews v. Stiles*, 181 F. Supp. 172 (D.N.M. 1960). The case involved a New Mexico collision occurring before the effective date of the 1959 act. Why plaintiff elected to proceed under the new act rather than under the nonresident motorist statute, N.M. STAT. ANN. § 64-24-3 (1953), does not appear. The new New Mexico act contains a special jurisdictional base not found in the Illinois model. "The operation of a motor vehicle upon the highways of this state . . ." N.M. STAT. ANN. § 21-3-16 (a)(2) (Supp. 1959). But see *Star v. Rogalny*, 162 F. Supp. 181 (E.D. Ill. 1957), upholding jurisdiction by service under the general act.

in practice if not in the statute books, since the general act avoids all the technical problems of what constitutes a "vehicle," and of how to define being "operated" on a "highway" or "public place." This is not to say that there will be no problems about the allowable scope of the single act statutes, but only that they will not be these problems.<sup>13</sup> The man who succeeds in drafting the perfect nonresident motorist act will be admired for his perseverance but for little else.

### C. *Actions Against a Nonresident Domiciliary Administrator*

Reverting to the development of the Massachusetts nonresident motorist act, a 1952 amendment was omitted from the chronology because it introduces the major subject matter of this article. It subjected to the jurisdiction of the Massachusetts courts not only the "resident of any other state or country" of section 3A and the "any person" of section 3B but the "executor or administrator" of those persons as well.<sup>14</sup> If such people were to be subjected to the jurisdiction of the state courts an amendment of the statute was necessary, for state courts without exception were unwilling to extend their process to personal representatives without explicit statutory language making it applicable to them.<sup>15</sup> The reluctance was because of statutory lack rather than strong constitutional doubt, however, for state courts have with equal unanimity sustained such extensions against claims that they violated non-claim statutes, in that the claim had not been presented to the domiciliary administration of the deceased within the time allowed in the domiciliary state; or that it was improper to render a judgment which would interfere with the in rem jurisdiction of the domiciliary state; or that the statute violated the rule and policy of unitary administration of the estates of deceased persons; or that suit against a foreign representative outside the state of his appointment is impossible because he cannot function in that capacity when he leaves the state.<sup>16</sup>

The only opposition to these statutes has arisen in the federal district courts. In a widely noted early case, Judge Graven in the Northern District of Iowa held the statute invalid as an Iowa attempt

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13. For what those problems will be, and how they will probably be resolved, see Cleary and Seder, *supra* note 11; Reese and Galston, *supra* note 10.

14. Mass. Acts 1952, ch. 125.

15. See cases collected in Annots., 53 A.L.R.2d 1164, 1194-96 (1957); 155 A.L.R. 333, 345-46 (1945).

16. Detailed analysis is not undertaken because the general problem and treatment of the individual objections has been widely and thoroughly discussed. See 1 EHRENZWEIG, 62-65 (1959); Holt, *Extension of Non-Resident Motorist Statutes to Non-Resident Personal Representatives*, 101 U. PA. L. REV. 223 (1952); Scott, *Hess and Pawloski Carry On*, 64 HARV. L. REV. 98 (1950); Stumberg, *supra* note 9. Especially helpful among the abundant student treatments are Note, 57 YALE L.J. 647 (1948); 57 MICH. L. REV. 406 (1959).

to encroach upon the sovereignty of other states.<sup>17</sup> Another district court in the same circuit arrived at a similar conclusion.<sup>18</sup> But that later decision was reversed by the Court of Appeals for the Eighth Circuit,<sup>19</sup> and the reversing grounds were so broad that the earlier case must also be regarded as overruled. Only by finding narrow Iowa grounds upon which to place his ruling could Judge Graven strike down another Iowa legislative attempt<sup>20</sup> to reach the foreign representative of the deceased nonresident motorist—his own court of appeals effectively pulled out the federal rug on which he stood.

Thus it appears that the only outstanding decision which may truly be said to be opposed to the validity of such statutes is one put upon an extremely narrow ground. The federal district court for Massachusetts, construing the 1952 Massachusetts amendment referred to above, found that all it did was make the administrator subject to Massachusetts process; it "does not purport, even if it could, to create substantive liability, or to confer extra capacity upon a foreign administrator."<sup>21</sup> The case must have been poorly presented, for Judge Aldrich mentions none of the abundant authority, both judicial and non-judicial, which had considered that very ground for objection to the extension and found it wanting in substance.<sup>22</sup> And it may freely be predicted that when the Massachusetts courts consider the statute they will swiftly divine a legislative intent to accomplish what Judge Aldrich thought had not been done.

This development, unlike the scope and construction questions discussed above, does present a question of some importance in the continued administration of nonresident motorist statutes. More important (in light of the suggestion above that the nonresident motorist statute is on its way out), is the fact that the same problem infects the single-act statutes which will replace the nonresident motorist statutes. Each of the single-act statutes referred to above<sup>23</sup> purports to be available against the personal representatives of the deceased as well as against the wrongdoer himself. The problem has not been escaped.

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17. *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947). The case is examined in some detail in the articles discussed in note 16 *supra*.

18. *Brooks v. National Bank*, 152 F. Supp. 36 (W.D. Mo. 1957).

19. *Brooks v. National Bank*, 251 F.2d 37 (8th Cir. 1958); see 57 MICH. L. REV. 406 (1959), for a full discussion.

20. See Note, *Should Iowa Again "Reach Out" For Estate Representatives of Nonresident Motorists?*, 44 IOWA L. REV. 402 (1959).

21. *Derrick v. New England Greyhound Lines*, 148 F. Supp. 496, 497 (D. Mass. 1957).

22. This is not to say that he might not have reached the same result. But had the state cases and two United States Court of Appeals decisions discussed in the authorities cited in note 16 *supra* been presented he could scarcely have disposed of them in a one and one-half page opinion.

23. *Supra* note 10.

The most serious objection presented to such statutes, and the one which has prompted the three holdings against exercise of jurisdiction, has been that the judgment would be ineffective abroad.<sup>24</sup> At the moment it is sufficient to point out that no court has yet been asked to give full faith and credit to a judgment rendered against its appointed administrator or executor by the courts of a sister state. Before embarking upon an exploration of the problem of the status of these judgments, reference should be made to another somewhat parallel line of cases. This group of decisions, generally rendered in the absence of express legislative sanction, has introduced another device for proceeding against the representative of a deceased non-resident motorist.<sup>25</sup> Since these cases have attracted less attention and no very comprehensive treatment, they will be explored in some detail before the problems of the efficacy of the judgment rendered under either device will be examined.

#### *D. Actions Against a Locally Appointed Administrator*

As early as 1934 the Supreme Court of New Hampshire was asked to approve the appointment of an administrator in that state for the estate of a non-domiciliary who had been involved in an automobile accident there and who had died before an action was commenced against him.<sup>26</sup> New Hampshire probate law permitted appointment of an administrator of any deceased "inhabitant" and also of a deceased nonresident if he left "estate" in New Hampshire. The only estate alleged to exist was a liability policy insuring the deceased against the assessment of legal liability issued by an insurance company which was subject to suit in the courts of New Hampshire. In order to constitute this "estate" in New Hampshire the court was obliged to find it an asset, consisting of rights of the insured against the insurer, and that it was located in New Hampshire. Over the objection that no rights existed at all until judgment had been rendered against the insured for damage to person or property, the court found that the possibility of an immediate obligation to the insured arising when and if judgment was obtained against the administrator con-

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24. See, e.g., *Knoop v. Anderson*, 71 F. Supp. 832, 849 (N.D. Iowa 1947). "For a district court in one state to give an advisory opinion to a court in another state is something that has not been sanctioned. . . ."

25. This symposium is limited to automobile liability insurance. The line of cases discussed is of even more potential importance in other types of personal liability insurance because of the absence of broad statutes permitting suit against nonresident, non-motorist tort-feasors. For illustration, see *In re Reilly's Estate*, 63 N.M. 352, 319 P.2d 1069 (1958), approving appointment of a New Mexico administrator for an airline pilot killed in a crash in that state, for the purpose of maintaining actions against the pilot and ultimately against a company which had issued a casualty policy insuring the pilot.

26. *Robinson v. Dana's Estate*, 87 N.H. 114, 174 Atl. 772 (1934).

stituted a sufficient estate for the purposes of administration. "Appointment or refusal to appoint does not depend upon the probable merits of the decedent's title or claim."<sup>27</sup> The court did not try the claim to determine whether an administrator should be appointed, but appointed an administrator to determine whether there is a claim. Even though the decedent's claim against the insurer was not one presently enforceable, it nevertheless had present value—the court compared it to an unmatured note. And in response to the seeming objection that the obligation of the insurer in the event of judgment was not to pay money to the estate but to discharge the judgment, the court drew a parallel to appointment of an administrator to set aside fraudulent conveyances made by the deceased; the administrator may sue even though the deceased himself could not have avoided the transfers.

Finding an asset to exist, the court had no difficulty in holding it to be located in New Hampshire for the purpose of administration. The deceased had been temporarily resident in New Hampshire prior to his death and the insurance company was "locally present" and subject to suit in that state.

The fact pattern of this case is (1) a resident of the forum is injured by an automobile (2) in the forum (3) by a nondomiciliary of the forum (4) who is insured against legal liability by an insurer at least subject to service of process in the state and probably (this is unclear in the report) doing business there. A large number of cases have been decided, the bulk of them in the past decade, which involve variations on that pattern. Most uphold the procedure approved by New Hampshire in *Robinson v. Dana's Estate*. The variations have some significance, however.

1. *The residence of the claimant or petitioner.*—In the infancy of nonresident motorist statutes the extraordinary process of subjecting to jurisdiction a man who could not be found within the state was justified in part by the legitimate high concern of the forum in providing a remedy to its own residents. But most statutes are not so limited in their terms, and it seems clear that there is no constitutional need so to limit them.<sup>28</sup> Some of that same problem is present here. In the *Robinson* case the court emphasized that the plaintiff was a resident of New Hampshire. And in most of the cases permitting appointment the claimant is a resident of the appointing state. In one federal case it clearly appeared that the claimants were residents

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27. 174 Atl. at 774.

28. See *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66, 72 (1954), justifying Louisiana's direct action statute partly on the ground that "persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them." See also Note, 30 N.Y.U.L. Rev. 702, 709 (1955).

of Oregon attempting to proceed in Idaho against a deceased Californian for injuries arising out of an Idaho collision.<sup>29</sup> Although the court refused to permit suit against the Idaho-appointed administrator to proceed, the judge did not include the fact of the residence of claimants in formulating the questions he felt required to decide.<sup>30</sup>

A widely cited New Jersey case, *In re Roche's Estate*,<sup>31</sup> found as one objection to appointment of an administrator the fact that it was an attempt by New Yorkers to sue other New Yorkers in New Jersey for death arising out of a New Jersey accident. It found in this a clear design to utilize the nonresident motorist procedures in a case in which they would not be available, since the New Jersey act was then restricted to use by residents of that state.<sup>32</sup> But in the even more extreme setting of *In re Fagin's Estate*<sup>33</sup>—both the deceased nonresident and the claimants were residents of Rock Island County, Illinois, where domiciliary administration was proceeding—the Iowa court could find no requirement that petitioning creditors be Iowans, nor disqualification in the fact that the creditors were resident in the place of domicil of the deceased. And the quite recent Nebraska opinion in *In re Kresovich's Estate*,<sup>34</sup> recites that at least one of the petitioner-claimants was a resident of California without attaching any consequence to that fact.

In short, only one case seems to regard the residence of the claimant as being of any significance, and it found additional reasons, perhaps more compelling, to condemn the procedure.<sup>35</sup>

2. *Injury arising in the forum.*—In all but one of the cases involving the ancillary administration device the accident or injury in question occurred within the forum. That one exception is from Illinois, *Shirley's Estate v. Shirley*.<sup>36</sup> There the petition showed the Indiana

29. *Feil v. Dice*, 135 F. Supp. 851 (D. Idaho 1955).

30. 135 F. Supp. at 852. In *Hendrix v. Rossiter*, 155 F. Supp. 44 (S.D. Ga. 1957), the claimants were the survivors of one killed in a crash with the decedent-defendant. It seems probable from the report that both the claimants and their deceased were non-Georgians, but the court in refusing to permit the action to proceed made no such point.

31. 16 N.J. 579, 109 A.2d 655 (1954).

32. *Charles v. Fischer Baking Co.*, 117 N.J.L. 115, 187 Atl. 175 (1936). See note 71 *infra*.

33. 246 Iowa 496, 66 N.W.2d 920 (1954).

34. 168 Neb. 673, 97 N.W.2d 239 (1959), 12 STAN. L. REV. 668 (1960). The contention was also summarily dismissed in *Davis v. Cayton*, 214 S.W.2d 801 (Tex. Civ. App. 1948).

35. Indications that the New Jersey court might adhere to its position in spite of the fact that its nonresident motorist statute is now available to both resident and nonresident claimants may be found in *In re Roche's Estate*, 16 N.J. 579, 109 A.2d 655, 658 (1954) where the court suggests that the policy is "not a chose in action for the protection of which ancillary administration in New Jersey is needed, in the interest of either a resident or a nonresident creditor." (Emphasis added.)

36. 334 Ill. App. 590, 80 N.E.2d 99 (1948).

death of an Indiana resident caused by an Indiana accident. The deceased was insured by an Indiana corporation qualified and doing business in Illinois. Petitioner was an Illinois corporation whose truck had been damaged in the Indiana collision. The letters were revoked, not on the broad ground that the accident must occur in the forum but on the narrower reasoning that the insurer did not and never had done business in Cook County, Illinois, where the petition was filed. Thus the ruling purports to be based upon venue, not jurisdiction; nothing in the opinion would preclude petitioning in an Illinois county in which the insurer did engage in business or maintain an office.

The care with which the court refrained from seizing upon the obvious ground that it was a foreign accident is emphasized by a subsequent Illinois case. *In re Lawson's Estate*<sup>37</sup> involved an Illinois accident in which an Ohio resident was killed. The Ohio insurer of the decedent was neither licensed to do business nor doing business in Illinois, but it had designated the Secretary of State as its attorney for service of process. The court distinguished *Shirley's Estate* by pointing to an alternative—and previously approved<sup>38</sup>—venue, the county in which the accident occurred. It did not even mention the fact that the *Shirley's Estate* accident occurred in Indiana.

Doubtless the fact that the accident occurs abroad might be resorted to by a court for the purpose of invoking the doctrine of forum non conveniens.<sup>39</sup> The accident occurred in Indiana, most witnesses presumably were there, Indiana law would be applied. But plaintiff was an Illinois corporation, and those courts which apply the doctrine either refuse to exercise it against residents or do so only for the most compelling of reasons.<sup>40</sup> Analogous to the doctrine of forum non conveniens is the recognized probate practice of exercising discretion in the appointment of ancillary administrators, but it too is sparingly applied to petitions of local creditors.<sup>41</sup>

It is of course true that if the Indiana resident had been so improvident as to enter Illinois during his lifetime and had been there served with process the action could have been entertained without regard to convenience. Now that the "transient rule"<sup>42</sup> of personal jurisdiction has been pushed to its loony but logical ultimate by a holding that one passing over the territory of a state in a non-stop

37. 18 Ill. App. 2d 586, 153 N.E.2d 87 (1958).

38. *Furst v. Brady*, 375 Ill. 425, 31 N.E.2d 606 (1941).

39. Adopted in Illinois: see *Whitney v. Madden*, 400 Ill. 185, 79 N.E.2d 593 (1948). See generally 1 EHRENZWEIG 120-25.

40. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 410-15 (1947).

41. 4 BANCROFT, PROBATE PRACTICE § 1228 (1950).

42. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

airplane flight is subject to service of process of courts in that state,<sup>43</sup> there can be no doubt. And it seems likely that if he had been so served in Illinois the action could continue against him after his death by substitution of an administrator, at least if Illinois has established procedures for such substitution.<sup>44</sup> It is less clear that personal service in Illinois on the Indiana personal representative would subject the Indiana estate to the jurisdiction of Illinois courts; a long history, not yet abandoned, denies the appointed representative any status as representative when he ventures abroad.<sup>45</sup>

It is possible that Illinois could accomplish the same purpose by a direct action statute. A recent Louisiana enactment provides that operation of a motor vehicle in that state by a nonresident subjects not only himself but his liability insurer to the jurisdiction of Louisiana courts.<sup>46</sup> The fate of that act is not yet clear although it has been approved in one decision.<sup>47</sup> Even if it be valid, it seems more reasonable to subject the insurer everywhere the insured goes than to subject the insurer to the defense of all of its insureds in any state where it does business.<sup>48</sup>

There is, of course, the parallel to attachment and garnishment, through which the owner of property may be subjected to *quasi in rem* jurisdiction of the courts of a state in which his property may be found. As to tangible property, this is sometimes justified by the

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43. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959), 12 VAND. L. REV. 1395 (1959).

44. See 1 EHRENZWEIG 64 n.16 (1959). A statutory procedure for substitution was held unconstitutional in *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925). As a consequence the statute was repealed. N.Y. Sess. Laws 1926, ch. 660, § 1. Faithful to that rule, the Appellate Division held that substitution could not be allowed. Appeal of *Gantt*, 141 N.Y.S.2d 738 (App. Div. 1955). So the Surrogate Court in *In re Riggle's Will*, 18 Misc. 2d 988, 188 N.Y.S.2d 622 (1959), was obliged to resort to the presence of an "asset" in the form of a policy issued to the deceased nonresident by a New York-authorized liability insurer. It distinguished *Cosgrove v. Weierman*, 3 App. Div. 2d 940, 163 N.Y.S.2d 1005 (1957), on the ground that insurance was not shown in that case. *But see In re Klipple's Estate*, 101 So. 2d 924 (Fla. App. 1958), refusing continuation of an action under the Florida nonresident motorist statute where the defendant died after commencement of the action and the insurer was not licensed in Florida; see note 112 *infra*.

In a carefully reasoned opinion the Court of Appeals for the Second Circuit recently held that although substitution of a foreign administrator was not allowed under New York law it could be accomplished in a diversity case in New York under the provisions of FED. R. CIV. P. 25(a)(1); application of the rule did not violate either the fifth amendment or the *Erie* doctrine. *Iovino v. Waterson*, 274 F.2d 41 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960).

45. See generally Note, *The Amenability to Suit of Foreign Executors and Administrators*, 56 COLUM. L. REV. 915 (1956); see also notes 98-101 *infra*.

46. LA. REV. STAT. § 13:3474 (Supp. 1959).

47. *Pugh v. Oklahoma Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958).

48. Mentioned among the justifications for the Louisiana direct action statutes in *Watson v. Employers Liab. Corp.*, 348 U.S. 66, 72 (1954), is that "her claim is for injuries from a product bought and used . . ." in Louisiana.

notion that the owner "consents" by voluntarily keeping property within the state. But this is groundless, for surely Balk did not consent to the process of Maryland courts when his debtor, Harris, took a trip to Baltimore and was garnished there by Epstein. Yet the Supreme Court found that the mere presence of Harris gave the obligation he owed Balk a sufficient Maryland situs to sustain the jurisdiction and make valid the judgment Epstein obtained against Harris.<sup>49</sup> The debt there was an "ordinary" one,<sup>50</sup> and it was not "contingent," both considerations which distinguish it from the obligation of the insurer prior to judgment in favor of the claimant and against the insured.<sup>51</sup>

*In re Riggle's Will* did involve appointment of a New York administrator of a deceased resident of Illinois to be sued on an accident occurring in Wyoming.<sup>52</sup> But an action had already been commenced against the deceased during his lifetime, and the problem is one of substitution.

3. *By a nondomiciliary of the forum.*—In the *Robinson* case, which launched this movement, there apparently was some doubt whether the deceased was a domiciliary of New Hampshire or merely a temporary resident. The court did emphasize that he was more than a transient.<sup>53</sup> But in all subsequent cases<sup>54</sup> he has been, apparently, only a transient, in the same sense that the typical defendant under non-resident motorist statutes has been. And no court since *Robinson* has characterized this as an important fact. None of the cases decided to date involve an attempt to appoint a representative for a deceased nonresident who "entered" through the operation of his vehicle by another, as an employee or bailee. When the similar question has arisen under nonresident motorist statutes the courts have generally resolved in favor of exercising jurisdiction.<sup>55</sup> But the attention here

49. *Harris v. Balk*, 198 U.S. 215 (1905). See 1 EHRENZWEIG § 29 (1959); Swenson, *Conflict of Laws Problems Under the Iowa Garnishment Statutes*, 34 IOWA L. REV. 605 (1949).

50. 198 U.S. at 223; Riesenfeld, *Creditors' Remedies and the Conflict of Laws—Part One: Individual Collection of Claims*, 60 COLUM. L. REV. 658, 670-78, esp. at 676 (1960).

51. After judgment has been obtained against the insured the action is transitory and can be maintained anywhere the insurer is subject to suit. See note 133 *infra*.

52. 18 Misc. 2d 988, 188 N.Y.S.2d 622 (Surr. Ct. 1959), 35 NOTRE DAME LAW. 288 (1960). The New York antecedents of this case are discussed at note 44 *supra*.

53. 87 N.H. 114, 174 Atl. 772, 775 (1934).

54. *Berry v. Smith*, 85 Ga. App. 710, 70 S.E.2d 62 (1952) involved a Georgia resident who died leaving a small amount of property within the state. Apparently to establish the necessity for domiciliary administration rather than the right to ancillary administration, the court relied upon the line of cases finding liability insurance to be an asset of the deceased.

55. Stumberg, *Extension of Nonresident Motorist Statutes to Those Not Operators*, 44 IOWA L. REV. 268-71 (1955); Annot., 53 A.L.R.2d 1164, 1177-87 (1957).

has been directed to location of the "asset" rather than the presence of the deceased at any particular time. The effect of the insured's presence or absence from the state seems technically irrelevant, except in the limited function place of death may play, which is discussed below.

The problem of agents and bailees of the owner is not apt to become important in this line of cases. The standard automobile liability policies contain clauses<sup>56</sup> which make agents and bailees insureds under the policy; there appears to be no reason why the process discussed would not be as available against their estates as it has been against the estate of the named insured.

A factor of seemingly small significance but one sometimes mentioned in the cases is the place of death of the deceased insured. It may, under local rules allocating probate proceedings among the several counties of the state, determine which state court may appoint the administrator.<sup>57</sup> Apart from this, it seems more probable that courts which seem to reject petitions because the particular probate court which issued the letters was without jurisdiction are ruling because of reservations more fundamental than that.<sup>58</sup>

4. *Insurance against legal liability by an insurer somehow "present" in the state.*—Because the appointment of an administrator of a non-resident depends generally upon the presence of assets within the state subject to administration,<sup>59</sup> the prime attention in the cases has been given to the question whether (a) a policy insuring the deceased against legal liability is property or asset and (b) if so, where located. The Iowa legislature has solved that problem for local purposes by enacting a declaration that the policy of a deceased nonresident motorist is an asset having situs in Iowa for the purpose of any civil action for injuries arising out of a motor vehicle acci-

56. Not untypical is:

The following persons are insured under this Policy:

1. The named insured . . .

3. Any other person with respect to the owned automobile, provided the actual use thereof is with the permission of the named insured. . . .

57. See, e.g., *Kimbell v. Smith*, 64 N.M. 374, 328 P.2d 942 (1958), pointing out that administration of the estate of a nonresident who died within the state is properly located, under New Mexico probate statutes, in the county of death or where the greater part of the estate is located while administration of a nonresident who died outside the state is governed by another section, authorizing it in any county where any personal estate may be.

58. In *Day v. Hart*, 232 Miss. 516, 99 So. 2d 656 (1958), the court declined to decide whether the liability policy of a Louisianan killed in a Mississippi collision was an asset there, saying that the existence of assets was not necessary for administration of estates of nonresidents who died within rather than without the state.

59. RESTATEMENT, CONFLICT OF LAWS § 467(b) (1934); 3 BEALE, CONFLICT OF LAWS 1450-51 (1935). For appointments in the absence of or doubtful existence of assets, see notes 77, 78 *infra*.

dent.<sup>60</sup> The Iowa court had previously approved the device here under discussion and not surprisingly employed the statute in a case subsequent to its enactment.<sup>61</sup>

Although other courts have not had such legislative assistance, there is no square holding that the rights of the insured against the company are not an asset sufficient to found administration. In what must be regarded as the leading case disapproving the appointment of an ancillary administrator, *In re Rogers' Estate*,<sup>62</sup> the Kansas court was troubled by the fact that no immediately enforceable right arose until judgment had been entered against the insured and became final. But it avoided what it called that difficult question by ruling that, if this right constitutes an asset, it was not in Kansas, under the long standing Kansas rule that situs of personal property becomes fixed at decedent's domicile upon death.<sup>63</sup> The Colorado court has adopted the *Rogers* view in a strong dictum, although the precise holding was that the petition was not filed within the required time.<sup>64</sup>

Oklahoma disposed of the question on an even narrower ground—that if it was an estate it was not located in Lincoln county, where the accident occurred;<sup>65</sup> whether it might have sustained administration in Pottawatomie county, where the deceased died, was not decided. Two federal district courts have also refused to allow suits against administrators appointed by state courts on the ground that the asset was not in the state<sup>66</sup> or was in some county other than the appointing county,<sup>67</sup> and the latter did express doubt that the policy constituted an asset, although ruling on the narrower ground of location.

*In re Roche's Estate*,<sup>68</sup> often cited with *Rogers' Estate* as a leading authority opposed to ancillary administration, stands for much less when examined. The action was between New Yorkers. There was some doubt that the action could have been maintained in New York: the majority points to the fact that it was a claim by an employee

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60. IOWA CODE § 321.512 (1958); Note, 36 IOWA L. REV. 668 (1951).

61. The statute evidently was enacted in response to the suggestion of *Liberty v. Kinney*, 242 Iowa 656, 47 N.W.2d 835 (1951), and was applied in *In re Fagin's Estate*, 246 Iowa 946, 66 N.W.2d 920 (1954). The statute does not exactly comply with the suggestion of the *Liberty* case, which indicated that the practice could be approved "only if a license to do business in the state, and so residence of the insurer therein, is properly and sufficiently proven." The section enacted is silent on the connection of the insurer with the state. See note 85 *infra*.

62. 164 Kan. 492, 190 P.2d 857 (1948).

63. 190 P.2d at 861.

64. *Wheat v. Fidelity & Cas. Co. of New York*, 128 Colo. 236, 261 P.2d 493, 496 (1953) (dictum).

65. *In re Reardon's Estate*, 203 Okla. 54, 219 P.2d 998 (1950); *accord*, *In re Wilcox' Estate*, 137 N.E.2d 301 (Ohio App., Vinton County 1955).

66. *Hendrix v. Rossiter*, 155 F. Supp. 44 (S.D. Ga. 1957).

67. *Feil v. Dice*, 135 F. Supp. 851 (D. Idaho 1955).

68. 16 N.J. 579, 109 A.2d 655 (1954).

against a co-employee,<sup>69</sup> and the dissent reports that on oral argument it was suggested that New York statute of limitations had run.<sup>70</sup> Further, the majority saw the device as an attempt to make the New Jersey nonresident motorist statute (a) available to a nonresident plaintiff, as it was not at that time,<sup>71</sup> and (b) available against the estate of a deceased nonresident, as it was not at that time.<sup>72</sup> These cumulative objections to proceeding in the case weaken the force of declarations that there was no property within the state within the meaning of probate sections authorizing ancillary administration. The following passage reveals the mingled motives:

The liability insurance policy, in its very nature, provided no reason for ancillary administration in New Jersey. There was no judgment to be satisfied under its terms; indeed, action had not been commenced. The policy does not have a situs in New Jersey. It was issued by a foreign corporation in New York to a resident of New York; and, while the indemnity company was and is authorized to transact its business in New Jersey, the policy was not delivered in the exercise of that power, and New Jersey has no interest in its enforcement which confers jurisdiction through ancillary administration to determine the underlying issue of liability in tort as between the nonresident insured and the nonresident injured third persons. This is axiomatic.<sup>73</sup>

Apart from those specifically mentioned, the cases uniformly find sufficient "property" or "asset" or "estate" from the fact that a company somehow connected with the state issued the policy to an insured who becomes involved in an accident there. On the whole, the connection established is that the company is licensed or authorized to do business and usually is doing business in fact. But mere designation of an attorney for receipt of process without either licensing or conduct of business has been held enough.<sup>74</sup> Scant weight must be given to place of issuance of the policy or physical location of the document itself.<sup>75</sup>

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69. 109 A.2d at 657.

70. 109 A.2d at 665.

71. *Charles v. Fischer Baking Co.*, 117 N.J.L. 115, 187 Atl. 175 (1936). It is now N.J. STAT. ANN. § 39:7-2 (Supp. 1959).

72. It was extended to foreign representatives by N.J. Laws 1958, ch. 59, § 1. This reduces but does not wholly eliminate the motivation to resort to the ancillary administrator device.

73. 109 A.2d at 658. Apparently the defendants urged that the doctrine of *forum non conveniens* should be applied, for the dissenters marshalled reasons why it would be inapplicable to the case. 109 A.2d at 664. The majority did not resort to the doctrine to support its dismissal.

74. *In re Lawson's Estate*, 18 Ill. App. 2d 586, 153 N.E.2d 87 (1958). In *Power v. Plummer*, 93 N.H. 37, 35 A.2d 230 (1943) the court held it sufficient that the company was licensed at the time the administrator was appointed although it had not been doing business in New Hampshire or licensed there at the time of the collision.

75. In *Hendrix v. Rossiter*, 155 F. Supp. 44 (S.D. Ga. 1957) the court seemed to attach significance to an affidavit of a local agent of the insurer that the policy in question had issued to the deceased in Spokane rather than

The clear suggestion of all of the attention given to location of the asset is that absent some connection between the insurer and the state (more at least than that its insured passed through) ancillary administration would be improper.<sup>76</sup> The Utah court in 1957 took the broad step of dispensing with the requirement that the insurer be vulnerable to process in the state. The decedent was a resident of Minnesota killed in a Utah collision. Her Wisconsin insurer was neither licensed in Utah nor otherwise subject to service there. The court nevertheless held that appointment of an administrator was proper, indicating that Utah probate practice does not require the presence of estate.<sup>77</sup> Although the court admitted doubts about the full faith and credit status of any resulting judgment against the administrator, "still such judgment would be one link in the determination of the liability of the Insurance Company for such injuries, and in order to obtain such judgment the appointment of an administrator is a necessary step."<sup>78</sup> Whether a judgment which binds no one is a very vital link in the determination of liability may be doubted.

More surprising because less necessary is *Day v. Hart*,<sup>79</sup> a 1958 decision from Mississippi. A Mississippi resident was killed while riding in Lincoln County, Mississippi, as a passenger of a Louisiana resident, Day, who held a policy issued by a company doing business in Mississippi. The court noticed the authorities holding this to be sufficient asset but held that on this issue they were "not controlling." "Our own statutes, in our opinion, clearly confer upon the Chancery Court of Lincoln County jurisdiction to render the decree appealed from."<sup>80</sup> The reference was to what appears to be a conventional survivorship statute permitting certain designated survivors of the victim to pursue the claim the victim would have had, had he lived, against

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through the local office, and that the policy document was not in Chatham County, Georgia. In *In re Riggle's Will*, 18 Misc. 2d 988, 188 N.Y.S.2d 622 (Surr. Ct. 1959), the court reported that the policy owned by the deceased Illinois resident had been issued in New York, which it found a factor favoring local administration.

Proof that insurance exists has been in issue in only one reported case. *In re Fagin's Estate*, 246 Iowa 946, 66 N.W.2d 920 (1954). The court found it sufficiently established by unobjected-to hearsay.

76. See, e.g., *Liberty v. Kinney*, 242 Iowa 656, 47 N.W.2d 835 (1951), in which the case was remanded for further proof of licensing or authorization.

77. *In re Leigh's Estate*, 6 Utah 2d 299, 313 P.2d 455 (1957). See also *Miller v. Stiff*, 62 N.M. 383, 310 P.2d 1039, 1041 (1957): "Our statute by its most literal reading does not seem to make the existence of assets, in the sense urged by the defendant, a jurisdictional requirement under the present circumstances; but if assets are required under reasonable construction, then an asset does exist in this state."

78. 6 Utah 2d at 304, 313 P.2d at 458.

79. 232 Miss. 516, 99 So. 2d 656 (1958).

80. 99 So. 2d at 659.

the person or corporation, or both that would have been liable if death had not ensued, and the *representatives of such person shall be liable for damages*, notwithstanding the death, and the fact that death was instantaneous, shall, in no case affect the right of recovery.<sup>81</sup>

What seems a clear legislative attempt to resort to the device of appointment of a local administrator without regard to the presence of insurance was construed out of existence by the Supreme Court of Missouri, which held that the following words:

Where a nonresident of the state negligently causes such injury or death in this state, and such nonresident is killed or dies, the probate court of the county where the casualty occurred shall have power to appoint a representative of such deceased for the purpose of being sued and defending any such foregoing action herein.<sup>82</sup>

did not make the cause of action for wrongful death survive against the "representative" appointed under the section; it survived only against his "legal representative."<sup>83</sup> Since the representative so appointed was not liable, no valid judgment could be rendered against him.

A very similar statute enacted in South Carolina in 1949<sup>84</sup> seems not yet to have been tested;<sup>85</sup> it too omits any reference to insurance of the nonresident.

## II. THE STATUS OF THE JUDGEMENT

This survey of attempts to reach the estate of the deceased nonresident shows that the nearly unanimous view of the courts which have examined legislative attempts to reach the foreign administrator is that such statutes are valid. Less unanimous but still overwhelming approval has been given to the alternative device of appointing a local administrator of the deceased nonresident.<sup>86</sup> But there has still

81. MISS. CODE ANN. § 1453 (Supp. 1958). (Emphasis added by court.)

82. MO. REV. STAT. § 537.020(3) (1949). Like the Mississippi act, *supra* note 81, it was part of a general survival statute; unlike the Mississippi act it expressly authorized appointment of an administrator to be sued.

83. *Harris v. Bates*, 364 Mo. 1023, 270 S.W.2d 763 (1954); *Crump v. Treadway*, 276 S.W.2d 226 (Mo. 1955). Perhaps as a result of these cases the section was repealed. MO. REV. STAT. § 537.020 (Cum. Supp. 1957). The Missouri court willingly accepted, however, service upon the foreign administrator of the deceased nonresident motorist. *State v. Cross*, 314 S.W.2d 889 (Mo. 1958).

84. S.C. CODE § 10-212 (1952). Unlike the Mississippi and Missouri sections, *supra* notes 81-82, the South Carolina act is limited to nonresident motorists; it does not reach other nonresident deceased tort-feasors.

85. See *Norwood v. Parthemos*, 230 S.C. 207, 95 S.E.2d 168 (1956); *Gregory v. White*, 151 F. Supp. 761 (W.D.S.C. 1957). See also *In re Fagin's Estate*, 246 Iowa 496, 66 N.W.2d 920, 927 (1954) (dissenting opinion), pointing out that the Iowa statute, *supra* notes 60-61, does not contain any requirement that the policy be issued by an Iowa licensed insurer.

86. It may be suggested that with the spreading of statutory authorization for service on the nonresident's domiciliary representative—half the states

been no decision which either allows or denies subsequent effect—by full faith and credit or otherwise—to a judgment ultimately entered against either type of administrator in favor of an injured claimant who invokes either procedure. Yet unless somebody, including the judges who decide the cases, thought that the judgment would have value, there has been a lot of wasted effort and money employed in the processes just discussed. What efficacy can such judgments have?

#### A. Judgments Against a Nonresident Domiciliary Administrator

Again looking first to the judgment obtained against the foreign administrator, it has been widely predicted by writers exploring those cases that the judgments will be recognized, either voluntarily or under the compulsion of full faith and credit, at the domiciliary administration.<sup>87</sup> But the courts have been much less confident, contenting themselves usually with the observation that the question may never arise because the judgment may never be presented abroad.<sup>88</sup> Indeed, no case has been discovered in which the court

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now authorize this process—the half measure of appointment of a local representative will fall into dis-use. But there are still non-auto torts which are within the scope of that process, although discussion of liability insurance other than automobile is outside the scope of this symposium. And when the threat of service upon administrators becomes more common and more widely appreciated than it is at present, the heirs of the deceased may find ways to avoid accommodating the auto injury claimants in the appointment of a domiciliary administrator. Should the claimant journey to the domicile of the decedent to seek, as creditor, an appointment of an administrator there, he will surely be held to have submitted his claim to that jurisdiction.

Cases which have resisted utilization of a local administrator have been discussed in connection with the particular objection involved. The following is a comprehensive listing of those cases which have approved the device: *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); *In re Lawson's Estate*, 18 Ill. App. 2d 586, 153 N.E.2d 87 (1958); *In re Fagin's Estate*, 246 Iowa 496, 66 N.W.2d 920 (1954); *Liberty v. Kinney*, 242 Iowa 656, 47 N.W.2d 835 (1951); *Gordon v. Shea*, 300 Mass. 95, 14 N.E.2d 105 (1938); *Day v. Hart*, 232 Miss. 516, 99 So. 2d 656 (1958); *In re Kresovich's Estate*, 168 Neb. 673, 97 N.W.2d 239 (1959); *Robinson v. Dana's Estate*, 87 N.H. 114, 174 Atl. 772 (1934); *Power v. Plummer*, 93 N.H. 37, 35 A.2d 230 (1943); *Kimbell v. Smith*, 64 N.M. 374, 328 P.2d 942 (1958); *Miller v. Stiff*, 62 N.M. 383, 310 P.2d 1039 (1957); *In re Riggle's Will*, 18 Misc. 2d 988, 188 N.Y.S.2d 622 (Surr. Ct. 1959); *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). Most are cited in Annot., 67 A.L.R.2d 936 (1959).

For a non-automobile case see *In re Reilly's Estate*, 63 N.M. 352, 319 P.2d 1069 (1958).

87. The sole exception seems to be *Stumberg, Extension of Nonresident Motorist Statutes to Those Not Operators*, 44 IOWA L. REV. 268, 275 (1959) (suggests that the interests of the domiciliary state should prevail). For full faith and credit: *Holt, Extension of Non-Resident Motorist Statutes to Non-Resident Personal Representatives*, 101 U. PA. L. REV. 223, 237, 241 (1952); *Scott, Hess and Pawloski Carry On*, 64 HARV. L. REV. 98, 103-04 (1950); Note, 57 YALE L.J. 647, 654 (1948); Comment, 57 MICH. L. REV. 406, 409 (1959).

88. *E.g.*, *Brooks v. National Bank*, 251 F.2d 37, 43 (8th Cir. 1958); *State v.*

approving proceedings against the foreign representative has observed that it would honor, even on "comity," a foreign judgment rendered against one of its own administrators.<sup>89</sup>

The source of the doubts is an ancient conception<sup>90</sup> that an administrator was a creature of the appointing court who lost his official clothing when he wandered abroad.<sup>91</sup> Prime consequences of this conception were three: (1) the administrator could not sue as such outside the state of his appointment,<sup>92</sup> (2) he could not be sued outside of it,<sup>93</sup> and (3) a judgment purporting to run against him could be ignored by the appointing court and probably as well by others.<sup>94</sup>

The first consequence is only remotely involved here. It is tending to disappear, and it is interesting to note that in at least a few of the cases surveyed here the action was brought *by* foreign administrators without provoking even an objection.<sup>95</sup> The arguments condemning the prohibition against suit by an administrator abroad seem persuasive but will not be explored here.<sup>96</sup>

Lack of capacity to be sued is not, as some early cases thought it to be,<sup>97</sup> a necessary concomitant of lack of capacity to sue. Professor Ehrenzweig's helpful resurrection of the distinction between active and passive capacity has made clear that there are two questions, each controlled by separate considerations.<sup>98</sup> And it is still the overwhelm-

Cross, 314 S.W.2d 889, 895 (Mo. 1958); *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876, 881 (1950).

89. Comment, 57 MICH. L. REV. 406, 409 (1959), points to the supposed embarrassment of refusing Nebraska enforcement of a Missouri judgment against a Nebraska administrator when Nebraska itself has a statute authorizing rendition of judgments against foreign (including Missouri) administrators. Since there is a point to rendition of such judgments apart from full faith and credit, Nebraska seems to have a tolerable escape from such embarrassment.

90. 1 EHRENZWEIG 62 (1959) denies the antiquity of the notion, finding it "foreign to early common law thought" and blames it upon the territorialist Story.

91. See 3 BEALE, CONFLICT OF LAWS 1553 (1935); GOODRICH, CONFLICT OF LAWS 562 (3d ed. 1949).

92. RESTATEMENT, CONFLICT OF LAWS § 507 (1934). Goodrich regards the rule as well settled, although productive of some inconvenience. GOODRICH, CONFLICT OF LAWS 549-550 (3d ed. 1949). See Buchanan and Myers, *The Administration of Intangibles in View of First National Bank v. Maine*, 48 HARV. L. REV. 911 (1935), who regarded it both as settled (*id.* at 921-24) and as necessary (*id.* at 950-53).

93. RESTATEMENT, CONFLICT OF LAWS § 512 (1934); see notes 96-100 *infra*.

94. RESTATEMENT, CONFLICT OF LAWS § 514 (1934); see notes 104-116 *infra*.

95. In both *Feil v. Dice*, 135 F. Supp. 851 (D. Idaho 1955), and *In re Roche's Estate*, 16 N.J. 579, 109 A.2d 655 (1954), the action was brought by a foreign-appointed administrator; although both cases refused to entertain the action neither mentioned the foreign source of the administrator's capacity as troublesome.

96. See 1 EHRENZWEIG 46-50 (1959); Cheatham, *The Statutory Successor, the Receiver and the Executor in the Conflict of Laws*, 44 COLUM. L. REV. 549, 556, 560 (1944).

97. *E.g.*, *Ingersoll v. Coram*, 211 U.S. 335, 364 (1908). Even more modern cases have not escaped the notion. See *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556, 558 (1925).

98. 1 EHRENZWEIG 37-38, 63 (1959).

ing rule that the administrator is immune from suit outside the state of his appointment.<sup>99</sup> Early pronouncements, particularly those of the Supreme Court of the United States, regarded it as so elementary that no identification of its source seemed necessary.<sup>100</sup> Although the Supreme Court never expressly found it to be constitutional in origin, the New York Court of Appeals did strike down a New York statute which purported to make a foreign administrator subject to suit in New York courts when service could be obtained, basing its action on federal due process grounds.<sup>101</sup> It has since had reason to regret that decision; it sustained the New York statute authorizing exercise of jurisdiction over the foreign representative of the deceased non-resident motorist partly by falling back on the fictitious "consent" arising from the decedent's voluntary use of the state's highways.<sup>102</sup> But at present the major argument to be made in favor of holding that the foreign administrator can be sued is by reference to the very type of statute here under discussion—which is to assume that they must be "valid" because there are so many of them.

The real question is: "What does valid mean?" The tendency to lump due process and full faith and credit considerations into a single question is easy and understandable and seldom does any harm.<sup>103</sup> But here it may. Capacity to be sued is a matter ("procedural" if you will) defined by the forum in which the litigation in question is pending. And that forum can grant or withhold capacity

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99. See *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1 (1841). An excellent Note, *Amenability to Suit of Foreign Executors and Administrators*, 56 COLUM. L. REV. 915 (1956), collects the many cases so holding.

Professor Ehrenzweig regards the rule as so riddled with exceptions that it cannot be said any longer to exist. 1 EHRENZWEIG 63 (1959).

100. See *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1, 5 (1841) ("both upon principle and authority"). It has since been suggested that the only question was application of a federal statute to a case arising in the District of Columbia. See Holt, *supra* note 87, at 238-39.

101. *Helme v. Buckelew*, 229 N.Y. 363, 128 N.E. 216 (1920) (doubting authority to commence action against foreign representative upon personal service in New York); *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925) (holding unconstitutional provision for substitution of foreign executor after death of defendant).

102. *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876, 881 (1950).

103. See *Alton v. Alton*, 207 F.2d 667, 683-84 (3d Cir. 1953) (Hastie, J., dissenting). The assumption that they present but a single question led the author of Note, 56 COLUM. L. REV. 915, 931 n. 138 (1956), to conclude that the upholding of foreign service in *Leighton v. Roper*, *supra* note 101, "foreclosed" the issue of full faith and credit to any judgment rendered against the administrator. Professor Ehrenzweig indulges in something of the same circularity. In 1 EHRENZWEIG § 23 he approves rendition of judgments against the foreign administrator but postpones discussion of their status abroad to § 64, where he takes up "the troublesome problem of privity between several administrators." (p. 65) But in § 64, where he does discuss the privity problem, he says only that "once the administrator's extrastate standing to sue and to be sued were unambiguously established as has been suggested above (§§ 14 f., 23), there would be no need for privity between administrators for the purpose of enforcing foreign judgments."

within the very wide range permitted by the federal constitution, with the prime limits more to be found in standards of equal protection than in due process. It is true that if the only possible consequence of rendition of a judgment would be to present it elsewhere for a faith and credit to which it is not entitled, the harrassment of entertaining the litigation at all might constitute a violation of due process.<sup>104</sup> But generally the conferring of capacity to be sued and the rendition of a judgment against the person so endowed should not be regarded as a denial of due process so long as it may have some legitimate effect without the aid of the courts of a sister state or, more specifically, without being binding upon the domiciliary administrator in the court of his appointment.

There is a difficulty with the argument, of course. It is that the number of areas in which full faith and credit can be denied to the judicial acts of sister states is diminishing. A parallel can be detected in the case of foreign decrees affecting local land. It has been the rule that although the foreign decree which orders conveyance or transfer was issued by a court having jurisdiction over the parties, and although the decree where entered can be enforced without denying due process,<sup>105</sup> the state in which the land is located need not honor it.<sup>106</sup> Although not yet overruled, recent state decisions have shown a tendency to abandon it.<sup>107</sup> Professor Currie's recent attack seems well calculated to demolish it entirely.<sup>108</sup> It is submitted that this is not because the rule was never justified, but that in a commercial society, which we have become, the reasons which once supported it are no longer strong enough to maintain it.

More closely analagous to the case at hand is the doctrine that statutory successors of corporations are not bound by judgments rendered against them outside the state of their appointment. That rule too seems to be on its way out. In *Morris v. Jones*<sup>109</sup> the Supreme Court held that a judgment rendered by a Missouri court in favor of Missouri residents was entitled to full faith and credit in an Illinois proceedings to liquidate an Illinois insurance association. The majority distinguished between procedures for establishing claims and proce-

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104. Cf. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915).

105. See *Deschenes v. Tallman*, 248 N.Y. 33, 161 N.E. 321 (1928) (holding effective a compelled foreign conveyance of New York land although New York would not have recognized the judgment ordering conveyance).

106. See *Fall v. Eastin*, 215 U.S. 1 (1909).

107. See, e.g., *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959) (departing from *Fall v. Eastin* in the jurisdiction from which it came). The court refused to honor that portion of a Wyoming decree purporting to affect title directly but honored the determination of apportionment of marital property by the Wyoming court.

108. Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

109. 329 U.S. 545 (1947).

dures for allowing them, reasoning that while the latter might be an affair which Illinois alone could regulate, the former was not a Missouri intrusion into the affairs of Illinois. The aptness of the analogy must be conceded. The concern was with both insolvency administration and insurance liquidation, matters long thought of such high local concern that full faith and credit had to yield.<sup>110</sup> Over the protest of the dissenters,<sup>111</sup> these considerations were thought insufficient to compel Missouri creditors to suffer the inconvenience of traveling to Illinois to establish their claims.

Despite its aptness, the case can be distinguished on two grounds. One is that in *Morris* the Missouri action had been commenced four years before the Illinois liquidator had been appointed.<sup>112</sup> Continuing the exercise of a properly acquired jurisdiction after death or insolvency can and should be distinguished from commencing a new action after a representative or liquidator abroad has been appointed.<sup>113</sup> The other is that, despite an observable tendency to expand the application of full faith and credit in commercial settings, there has as yet been no breach in the unwillingness to apply the doctrine against decedents' estates.<sup>114</sup>

Appraising the rule today is difficult. It is true that during the past half century "res judicata has steadily gained ground."<sup>115</sup> And writers have unanimously denied that continued refusal to recognize foreign judgments can be squared with the demands of full faith and credit.<sup>116</sup> Yet even if the broad rule be abandoned, there is the more narrow but quite practical barrier that it will often be impossible for the foreign plaintiff to comply with the non-claim statute of the domiciliary state, which requires the submission of claims against the estate within a period of time much shorter than the ordinary statute of limitations.<sup>117</sup> Even if service of process on the foreign administrator should be regarded (as it should) as compliance with the non-claim statute, many if not most such actions will

110. See Cheatham, *supra* note 95.

111. 329 U.S. at 554 (Frankfurter, Black and Rutledge, JJ.).

112. 329 U.S. at 547. "In the second place, against the convenience of the administration of assets in Illinois is the hardship on the Missouri creditor if he were forced to drop his Missouri litigation, bring his witnesses to Illinois, and start all over again." *Id.* at 553-54.

113. 1 EHRENZWEIG 65 (1959). RESTATEMENT, CONFLICT OF LAWS § 512, comment b (1948 Supp.), takes a contrary position. Compare *In re Klipple's Estate*, 101 So. 2d 924 (Fla. App. 1958), with *In re Riggle's Will*, 18 Misc. 2d 988, 188 N.Y.S.2d 622 (Surr. Ct. 1959). See note 44 *supra*.

114. See generally Scoles, *Conflicts of Laws and Creditors' Rights in Decedents' Estates*, 42 IOWA L. REV. 341, 349-54 (1957).

115. 1 EHRENZWEIG 223 (1959).

116. *Ibid.*; Scoles, *supra* note 113; Note, 56 COLUM. L. REV. 915, 931 (1956); Comment, 1958 WIS. L. REV. 425, 446.

117. ATKINSON, WILLS § 127 (2d ed. 1953); Note, *Conflict of Laws: Effect of Time Limitations on Proof of Claims in Probate*, 1958 WIS. L. REV. 451.

be apt to fall outside the period.<sup>118</sup> And in this context it is worth remembering that *Morris v. Jones* held only that the Missouri judgment could not be denied recognition as a judgment, not that the Illinois court could not apply to it reasonable rules about allowance and distribution which also applied to Illinois claims.<sup>119</sup>

What would be the consequence of continuance of the rule that full faith and credit does not apply, or that a non-claim statute will bar participation? It is submitted that it should not be a total denial of respect in F-2, the domiciliary state. If available procedures exist for pursuing the insurance company in that or other states (including the state of rendition), the company is not in a position to maintain that its interests are in any way harmed or that the legitimate interest of F-2<sup>120</sup> in a unitary, speedy administration of the estate are harmed by compelling it to pay the judgment to the extent of the policy limits. The obligation of the insurer to satisfy the judgment is not an asset of the estate in the sense that it is payable to the estate (except to indemnify an actual loss), nor is it subject to distribution among creditors or heirs of the deceased. Those reasons which support a rule denying full faith and credit to the judgment in an F-2 proceeding to liquidate and distribute the estate of the deceased are not applicable to a proceeding against the insurance company.

Absence of fundamental reasons does not prevent some technical obstacles from arising, however. A not untypical insuring clause obligates the company

to pay for an insured all damages which the insured shall be legally obligated to pay because of [bodily injury or property damage] arising out of the ownership, maintenance or use, including loading and unloading, of the owned automobile or a non-owned automobile.

If the judgment is not entitled to enforcement against the estate could the insured be said to be "legally obligated" to pay it? It is too late to argue that a policy of automobile liability insurance is merely a contract to indemnify the insured for payments he has in fact made; the prevalence of statutes permitting enforcement by the judgment holder against the insurer makes clear the general view that the judgment creditor has an interest in the policy.<sup>121</sup> And it would seem that a court could justifiably conclude that the judgment is a valid judgment establishing a legal obligation even though it is in a limited context unenforceable. This result should follow whether

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118. Scoles, *supra* note 113, at 345-46.

119. 329 U.S. at 553.

120. But see *Crump v. Treadway*, 276 S.W.2d 226, 229 (Mo. 1955) (contra).

121. See 8 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4831-33 (1942).

the proceeding against the insurance company takes place in F-1, the rendering jurisdiction, F-2, the domiciliary court, or some third state in which the insurance company is subject to suit.<sup>122</sup> Indeed, it may be argued (and it will be in a moment) that the question is not at all one of either *res judicata* or full faith and credit.

The statutory procedures for enforcement against the insurer after judgment obtained against the insured present certain mechanical problems. Those which permit the action immediately or after some stated period during which the judgment remains unpaid, without obtaining execution unsatisfied or other proof of inability to enforce against the insured,<sup>123</sup> present the least problem. Even those which require some showing of ineffectual attempts to collect from the insured as a condition to bringing the action<sup>124</sup> should be satisfied by a refusal by the administrator or probate court to honor the judgment. The greatest difficulty would seem to be encountered in those states which have no statutory authorization for direct suits by the judgment holder, relegating him to garnishment or similar procedures.<sup>125</sup> A minimizing factor may be found, however, in the fact that insurers, to comply with the laws of states requiring such clauses, will insert in policies issued in non-requiring states the equivalent of the statutory command as a policy clause. For example, the following clause is found in a policy issued in Utah by an insurer doing a nationwide business, even though Utah has no statutory authorization for suit upon the policy:

[A]ny person or organization or the legal representative thereof having secured such judgment or written agreement, shall be entitled to recover under this policy to the extent of the insurance afforded. . . . Bankruptcy or insolvency of the insured or his estate shall not relieve [the company] of any obligations.

Thus to say that rendition of a judgment against a foreign administrator would offend some unspecified clause of the constitution because the judgment would not be entitled to full faith and credit in the domiciliary court is not necessary.<sup>126</sup> Neither is it necessary to go to the other extreme and urge that because it was properly ren-

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122. The claimant may sue the insurer in one state upon a judgment rendered in another, even though the insured himself could not have been sued in that state because not subject to service of process there. *Yeats v. Dodson*, 345 Mo. 196, 127 S.W.2d 652 (1939), *modified in other respects*, 138 S.W.2d 1020 (1939).

123. *E.g.*, CALIF. INS. CODE § 11580 (no time period); ALA. CODE ANN. tit. 28, § 12 (1940) (judgment not satisfied in 30 days).

124. More difficult cases are presented by statutes which demand execution unsatisfied as a condition precedent to bringing the action against the insurer. *E.g.*, IOWA CODE § 516.1 (1958).

125. See 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4838 (1942).

126. See notes 17-18 *supra*.

dered it is necessarily entitled to be paid in the domiciliary administration without inquiring behind it.<sup>127</sup>

### *B. Judgments Against a Locally Appointed Administrator*

Very similar considerations affect the status abroad of judgments rendered against the ancillary administration. Here again no court has claimed that such a judgment would be entitled to full faith and credit; a few have expressly disclaimed any intention of rendering a judgment having effect beyond the borders of the state.<sup>128</sup> This is consistent both with the general view of ancillary administration that the administrator acquires control only over assets within the appointing jurisdiction<sup>129</sup> and with the long standing corollary of this view that there is no "privity" between the ancillary and domiciliary administrations and that hence no *res judicata* effect can be given the judgment.<sup>130</sup> That this latter doctrine has been pushed to ridiculous extremes in some older cases can be admitted; there seems to be no reason why Jones as domiciliary administrator should not be bound by judgments rendered against the same Jones as ancillary administrator in another jurisdiction.<sup>131</sup> And if Jones does appear voluntarily to defend he could well submit to the jurisdiction; his appearance would seem to be at least impliedly—if not expressly—authorized by the appointing court to which he is accountable. But that result can be rejected without arriving at the polar conclusion that a judgment against an ancillary administrator, appointed at the behest of creditors hostile to the estate, should be binding upon the domiciliary administration. Indeed, it should be noted that the recent attacks on the doctrine of lack of privity between administrators have excepted the narrow rule which would be applicable here—that domiciliary recognition can be refused to a judgment against a mere ancillary administrator.<sup>132</sup> Nor would acceptance of this view relieve the ancillary administrator from undertaking a *bona fide* defense of the

127. See authorities collected *supra* note 86.

128. *In re Fagin's Estate*, 246 Iowa 496, 66 N.W.2d 920, 924 (1954): "Appellee (Iowa administrator) will have recourse only against the Iowa property, viz., whatever insurance coverage decedent carried on his automobile subject to such claims. No one claims any other property is threatened."

129. See ATKINSON, WILLS 590 (2d ed. 1953); GOODRICH, CONFLICT OF LAWS 534-39 (3d ed. 1949).

130. RESTATEMENT, CONFLICT OF LAWS § 514 (1934); 1 EHRENZWEIG 221-22 (1959); Note, *Conflicts of Laws—Extended Application of Res Judicata in Administration of Decedents' Estates*, 55 MICH. L. REV. 261 (1956).

131. A leading case holding that a judgment against Jones in one state is not binding upon him in the other is *Nash v. Benari*, 117 Me. 491, 105 Atl. 107 (1918).

132. See 1 EHRENZWEIG 222 (1959): "Moreover, the risk of fraud could be further reduced by continuing to deny recognition to judgments obtained by or against a mere ancillary administrator." See also Note, 55 MICH. L. REV. 261, 265 (1956).

claim asserted against him; both the due process clause of the Constitution and the cooperation clause of the policy would deter collusion.<sup>133</sup>

Following this discussion of full faith and credit to judgments against either domiciliary or ancillary administrations is a good, if belated, time to suggest that in a proceeding against the insurance company following the rendition of a judgment there is no question of full faith and credit involved. Full faith and credit and *res judicata* prevent inquiring behind a judgment to determine whether it is correct, on facts and law. But the obligation of the insurer under its policy is to discharge liability which the insured is legally obligated to pay. So long as that judgment is valid in the court of rendition, in that it does not violate the standards of fairness due process demands, it is of no moment that the courts of some other state would not be obliged to honor it in some or all proceedings; the suit is not upon the judgment but upon the contractual obligation of the insurer, to which the rendition of a valid judgment is but a condition precedent.<sup>134</sup>

### III. CONCLUSION

Only a very bold man would predict that the domiciliary administration can continue to refuse to honor a foreign judgment against the local administrator. But there is an abundance of old law to that effect, and there is almost none to the contrary. Further, there are good reasons to support continued refusal to honor such judgments—the concern of the local jurisdiction with expeditious, prompt and concerted administration of the assets of the deceased. Even less reason can be given to hold the local administrator in “privity” with a foreign-appointed domiciliary administrator and thus bound by a judgment rendered against that ancillary administrator—their interests may well be hostile rather than compatible. But the reasons which relieve the domiciliary administration from the obligation to respect the foreign judgment are not applicable to the decedent’s liability insurer, and the objections based upon those reasons should not be available to the insurer. Thus the judgment should be enforceable in

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133. See *American Surety Co. v. Sutherland*, 35 F. Supp. 353 (N.D. Ga. 1940).

134. That it need not be a local judgment, see note 121 *supra*; *In re International Reinsurance Corp.*, 29 Del. Ch. 34, 48 A.2d 529 (1946). In *Continental Auto Ins. Underwriters v. Menuskin*, 222 Ala. 370, 132 So. 883 (1931), the court approved recovery in Alabama upon a complaint alleging a Tennessee judgment, but it indicated that this was because of a policy clause and that action under the Alabama statute could be only upon Alabama judgments. Whether that dictum would be followed may be doubted. *United States Cas. Co. v. Wilson*, 262 Ala. 32, 76 So. 2d 506 (1954) (sustaining complaint over objection that it failed to plead that the judgment rendered was an Alabama judgment).

the state of rendition, in the domiciliary state (apart from the administration itself) or in any third state where the insurer can be sued.

In truth what has happened is that we have developed a direct action against the insurer<sup>135</sup> without statutory authorization. It is in one important way to be preferred to the known forms of direct action statutes in that it does not expose the insurer to the status of a named party to the action. As the Iowa court has said:<sup>136</sup>

In ultimate effect appellant is not the real party in interest. The real party is the insurance company and the real issue whether it must defend in Iowa where the collision occurred, or in the decedent's home jurisdiction. . . .

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135. For the present status of direct action statutes see MacDonald, *Direct Action Against Liability Insurance Companies*, 1957 Wis. L. Rev. 612; Speidel, *Extraterritorial Assertion of the Direct Action Statute; Due Process, Full Faith and Credit and the Search for Governmental Interest*, 53 Nw. U.L. Rev. 179 (1958).

136. *In re Fagin's Estate*, 246 Iowa 496, 66 N.W.2d 920, 924 (1954). Only one court has refused to hear the insurer's objection to appointment of an ancillary administrator on the ground that the company was an "interloper" without standing to be heard: *Berry v. Smith*, 85 Ga. App. 710, 70 S.E.2d 62, 64 (1952). It seems probable, however, that the decedent was a domiciliary of the state.