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## Process - Automobiles - Nonresident Motorist Statutes - Parties & (and) Venue

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PROCESS—AUTOMOBILES—NONRESIDENT MOTORIST  
STATUTES—PARTIES & VENUE.

## I.

With automobile production and highway traffic reaching all time peaks it is not surprising that the greatest area of litigation today involves suits arising out of automobile accidents. As a consequence of the tremendous postwar increase in superhighway construction and cross-country travel, cases involving nonresident parties are on the upturn. Several legal problems may arise from such an accident. A typical fact situation might involve a collision between a resident trucker employed by an out of state employer and a nonresident motorist while pulling out from a gas station onto a state highway. The plaintiff may avail himself of the benefit of the state's nonresident motorist statute providing for substituted service of process upon nonresidents in cases arising out of the operation of motor vehicles. Such statutes are found in every state as well as the District of Columbia.<sup>1</sup> These statutes have been upheld by the United States Supreme Court as a reasonable exercise of the state's police power in protecting its citizens against the use of a dangerous instrumentality on its highways.<sup>2</sup> In spite of this Supreme Court sanction there is a great deal of contemporary litigation dealing with the construction of these statutes.<sup>3</sup> Fundamentally, the problem narrows to one of defining the nature and types of suits for which this substituted service is available. The immediate problem is one of defining a "resident" and the meaning of "operate." The former is typically in issue when members of the armed forces are involved in the litigation<sup>4</sup> or when a resident motorist becomes a nonresident between the time of the accident and the service of process.<sup>5</sup> The latter problem is raised when a plaintiff seeks to utilize the substituted service provision against an out of state owner as a result of a collision with his operator.<sup>6</sup> There also arises the problem of whether service under these statutes is to be extended to contract actions growing out of the operation of motor vehicles or whether they are limited to tort actions.<sup>7</sup> Joint tort-

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1. See *Knoop v. Anderson*, 71 F. Supp. 832, 836 (N.D. Iowa 1947) for a compilation of all the statutes.

2. *Olberding v. Illinois Central R.R.*, 346 U.S. 338 (1953); *Hess v. Pawloski*, 274 U.S. 352 (1927). Though the "dangerous instrumentality doctrine" satisfied the jurisdictional phase of due process there still might be a problem of proper notice to meet the constitutional requirement. The usual notice requirement is that the means employed be reasonably calculated to insure actual notice under the circumstances. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *Castelline v. Goldfine Truck Rental Service*, 112 A.2d 840 (Del. 1955).

3. See 30 N.Y.U.L. REV. 702 (1955).

4. *Ibid.*

5. *Ogdon v. Gianakos*, 415 Ill. 591, 114 N.E.2d 686 (1953); 32 CHI-KENT L. REV. 261 (1954). The Illinois statute provides for substituted service upon resident motorists who become nonresidents prior to service of process. SMITH-HURD ANN. ST. CH. 95½ § 23 (Supp. 1954).

6. *Larson v. Powell*, 117 F. Supp. 239 (1953); 30 NOTRE DAME LAW. 324 (1955).

7. See *Dart Transit Co. v. Wiggins*, 1 Ill. App.2d 126, 117 N.E.2d 314 (1954).

feasors in multiple party suits usually seek this extension to contract actions in order to enforce contribution by impleading another party. The decisions have gone in both directions<sup>8</sup> with a recent New Jersey case<sup>9</sup> holding that they are restricted to ex delicto actions. As a further problem of statutory interpretation a court might have to decide whether the statute extends to accidents occurring on private property.<sup>10</sup> These subjects will be treated only insofar as they relate to the topic under consideration, namely, the effect of nonresident motorist statutes upon parties plaintiff in state and federal courts, particularly when they reside in the same sister state.

## II.

### PARTIES PLAINTIFF.

Since the return of the automobile industry to full time production the cases indicate that there is increased litigation involving this particular phase of the problem. Defendants have contended that the motorist acts were intended to protect only *resident plaintiffs*.<sup>11</sup> However, these attacks have been fruitless, even in the face of actions involving alien plaintiffs.<sup>12</sup> That the law is settled in this respect is evidenced by the consistent interpretation of these statutes as encompassing actions by nonresident plaintiffs.<sup>13</sup> The courts have flatly stated that the legislatures are as interested in protecting the rights of nonresidents as they are of residents, and that if they were of a mind to discriminate they would so express themselves.<sup>14</sup> Though statutes expressly *including* nonresidents<sup>15</sup> have been enacted, the majority of jurisdictions achieve this result by decision.

There are but two variations on this otherwise consistent holding. They find their roots in a few older decisions of the States of New York<sup>16</sup> and Pennsylvania.<sup>17</sup> But these controversies appear to have been resolved recently, and we now find these jurisdictions aligning themselves with the

8. Compare *Whalen v. Young*, 15 N.J. 321, 104 A.2d 678 (1954); *with Dart Transit Co. v. Wiggins*, 1 Ill. App.2d 126, 117 N.E.2d 314 (1954).

9. *Whalen v. Young*, 15 N.J. 321, 104 A.2d 678 (1954).

10. See 30 N.Y.U.L. Rev. 702 (1955)

11. See, e.g., *Greene v. Goodyear*, 112 F. Supp. 27 (M.D. Pa. 1953); *Karagiannis v. Shaffer*, 96 F. Supp. 211 (W.D. Pa. 1951); *Ruggles v. Smith*, 175 Kan. 76, 259 P.2d 199 (1953); *White v. White*, 147 Me. 63, 83 A.2d 296 (1951); *Burns v. Godwin*, 211 Miss. 310, 51 So.2d 486 (1951); *Thomas v. Altsheler*, 191 Tenn. 640, 235 S.W.2d 806 (1951).

12. *Garcia v. Frausto*, 97 F. Supp. 583 (E.D. Mo. 1951); *Gianetto v. La Delpha*, 278 App. Div. 179, 104 N.Y.S.2d 362 (4th Dep't), *appeal denied*, 278 App. Div. 1022, 105 N.Y.S.2d 1015 (4th Dep't 1951).

13. See, e.g., *Peeples v. Ramspacher*, 29 F. Supp. 632 (E.D.S.C. 1939); *Fine v. Wencke*, 117 Conn. 683, 169 Atl. 58 (1933); *Welsh v. Ruopp*, 228 Iowa 70, 289 N.W. 760 (1940).

14. *Garon v. Poirier*, 86 N.H. 174, 164 Atl. 765 (1933).

15. See Culp, *Recent Developments in Actions Against Non-resident Motorists*, 37 MICH. L. REV. 58, 74 (1938).

16. *Gainer v. Donner*, 140 Misc. 841, 254 N.Y. Supp. 635 (Sup. Ct. 1931).

17. *Haddonleigh Estates, Inc. v. Spector Motor Service, Inc.*, 41 Pa. D. & C. 246 (C.P., Bucks 1941).

overwhelming weight of authority.<sup>18</sup> The dispute in Pennsylvania arose when Judge Boyer of the Common Pleas Court of Bucks County ruled, on the basis of a prior unrecorded decision of the same jurisdiction, that the Pennsylvania statute excluded nonresident plaintiffs.<sup>19</sup> In a subsequent federal district court decision, Judge Bard felt obligated on the basis of *Erie R. R. v. Tompkins*<sup>20</sup> to accept this as the substantive law of the state, and he followed its precedent.<sup>21</sup> However, the contrary result was achieved in the next federal decision,<sup>22</sup> the court holding that the unrecorded Bucks County ruling was nothing more than dictum. Recognizing an intent from the notes of the state procedural rules committee to include nonresident plaintiffs, Judge Gibson in the case of *Neff v. Hindman*<sup>23</sup> brought Pennsylvania squarely within the established rule. That decision has since been followed in both the state and federal district courts of Pennsylvania.<sup>24</sup> Furthermore, there was a Pennsylvania decision upholding the majority view even prior to the second federal ruling.<sup>25</sup>

In an early New York Supreme Court decision the court refused to entertain such a suit between two nonresidents.<sup>26</sup> It is noteworthy that the court expressly pointed to the fact that this action involved fellow residents of a jurisdiction which was located about a mile from the locus of the accident in New York, and, hence, a very convenient mode of bringing suit. Subsequent New York decisions have been unanimous in holding that the doors of their tribunals are open to nonresident plaintiffs.<sup>27</sup> Subsequently in a 1933 per curiam decision, the New York Appellate Division held that this is not a matter of discretion, but, rather, a matter of right.<sup>28</sup>

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18. *Lambert v. Doyle*, 70 F. Supp. 900 (E.D. Pa. 1947); *Gianetto v. La Delpha*, 278 App. Div. 179, 104 N.Y.S.2d 362 (4th Dep't), *appeal denied*, 278 App. Div. 1022, 105 N.Y.S.2d 1015 (4th Dep't 1951).

19. *Haddonleigh Estates, Inc. v. Spector Motor Service, Inc.*, 41 Pa. D. & C. 246, 247 (C.P., Bucks 1941), citing *Pekins v. Great Eastern System, Inc.*, No. 17, C.P. Pa. (Bucks), January Term, 1937. The same result was reached in New Jersey under a statute which, read prior to amendment, "by any resident of New Jersey," *Charles v. Fischer Baking Co.*, 117 N.J.L. 115, 187 Atl. 175 (Err. & App. 1936).

20. 304 U.S. 64 (1938).

21. *Lambert v. Doyle*, 70 F. Supp. 990 (E.D. Pa. 1947).

22. *Neff v. Hindman*, 77 F. Supp. 4 (W.D. Pa. 1948).

23. *Ibid.*

24. *Greene v. Goodyear*, 112 F. Supp. 27 (M.D. Pa. 1953); *Karagiannis v. Shaffer*, 96 F. Supp. 211 (W.D. Pa. 1951); *Webb v. Link*, 70 Pa. D. & C. 51 (C.P. Erie 1949).

25. *John v. Parks*, 63 Pa. D. & C. 375 (C.P. Fay. 1947).

26. *Gainer v. Donner*, 140 Misc. 841, 254 N.Y. Supp. 635 (Sup. Ct. 1931).

27. *Gianetto v. La Delpha*, 278 App. Div. 179, 104 N.Y.S.2d 362 (4th Dep't), *appeal denied*, 278 App. Div. 1022, 105 N.Y.S.2d 1015 (4th Dep't 1951); *Malak v. Upton*, 166 Misc. 817, 3 N.Y.S.2d 248 (Sup. Ct. 1938); *Hunter v. Hosmer*, 142 Misc. 382, 254 N.Y. Supp. 635 (Sup. Ct. 1931).

28. *Sobeck v. Koellmer*, 240 App. Div. 736, 265 N.Y. Supp. 778 (2d Dep't 1933).

## III.

## ACTIONS BETWEEN NONRESIDENTS OF THE SAME STATE.

Among the decisions one would expect to find some expression of an alternate proposal in order to circumvent the obvious impropriety of the rule when the action involves co-residents of the same foreign jurisdiction. But the single Montana suggestion<sup>29</sup> by Chief Justice Johnson stands alone. While intimating that an amendment might be in order under such circumstances, the Chief Justice said:

"It seems clear to us that the object of the act is to further the safety of highway traffic within the state and afford a practicable remedy for damages arising from negligence on the highways, by providing for service of summons within the state where it would otherwise be impossible, or virtually so. The act cannot be construed liberally to effect that object by limiting its application to plaintiffs resident in Montana, and in [*sic*] absence of a direct provision in the act to that effect, we cannot impute an intent to discriminate in favor of resident plaintiffs and against nonresident plaintiffs. Ordinarily the better place for suit is where the accident occurred and where usually the evidence, physical and otherwise, will be available. If the plaintiffs had been residents of North Dakota, there would be no more reason why they should be compelled to go to Washington to sue than if they have been residents of Montana. *There might be some reason where, as here, both plaintiffs and defendants were residents of Washington, but if so that is a matter of policy for the legislature to decide.* In any event it seems clear from this analysis that the real question of policy arising from the circumstances of these cases is not that the plaintiffs are nonresidents of Montana, but rather that they happen to be *residents of the same state as the defendants*; and even assuming that the court might read into the statute an intention to protect only residents as distinguished from nonresidents, it is obviously not possible to read into it an intent to protect all but residents of the same state as the defendants, or all but residents living closer to the defendants than to Montana." (Emphasis added.)<sup>30</sup>

In the light of present day statutes<sup>31</sup> it is apparent that the legislatures have not deemed this change worthy of consideration.

Since the basic rule appears to be firmly entrenched it might be well to analyze the usual rationale in upholding it, and then offer some reasons for amendment in the case of parties residing in the same foreign state. Foremost among the reasons for upholding the rule is that of convenience

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29. State *ex rel.* Gallagher v. District Court, 112 Mont. 253, 114 P.2d 1047, 1053 (1941).

30. *Ibid.*

31. Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947).

in accumulating the witnesses and evidence.<sup>32</sup> Second, that the case should be heard in a court familiar with the law of the locus of the accident since its substantive law will prevail.<sup>33</sup> Third, the Connecticut<sup>34</sup> and Delaware<sup>35</sup> courts have expressed a fear that a refusal to entertain a suit by nonresident plaintiffs might raise a question of discrimination forbidden by the privileges and immunities clause of article IV of the Constitution.<sup>36</sup> However, this clause has never been clearly defined and a thorough look at the few privileges which the Supreme Court has asserted over the years as belonging to state citizenship<sup>37</sup> makes it apparent that these privileges are quite limited. Furthermore, the Supreme Court has frequently stated that article IV does not forbid reasonable discrimination.<sup>38</sup> On the other hand, we find three fundamental propositions in support of modification of the rule. Certainly there is substance to the contention that the witnesses and evidence will be more accessible in the state of the locus of the accident. But this argument loses a great deal of its vitality when it faces the situation where both parties are residents of the same foreign state. Very often the witnesses are passengers in the respective autos and they too are nonresidents. It is in this area of the subject that revision is needed. Clearly there is a patent inconvenience in parties residing in identical jurisdictions going to a foreign sovereignty to have their cause heard. The thought of two Massachusetts residents traveling to North Carolina<sup>39</sup> as opposing parties would appear to add great weight to the Montana dictum of Chief Justice Johnson. But the decisions involving identical factual situations consistently adhere to the usual rule.<sup>40</sup> Second, there is the state's interest in easing the strain on already overcrowded court dockets.<sup>41</sup> We find Mr. Justice Holmes speaking strongly in *Douglas v. New York, N.H. & H.R.R.*<sup>42</sup> in opposition to the imposition of additional litiga-

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32. See, e.g., *Hoagland v. Dolan*, 259 Ky. 1, 10, 81 S.W.2d 869, 873 (1935); *Burns v. Godwin*, 211 Miss. 310, 51 So. 2d 486, 487 (1951); *State ex rel. Rush v. Circuit Court*, 209 Wis. 246, 244 N.W. 766, 767 (1932).

33. See, e.g., *Peeples v. Ramsbacher*, 29 F. Supp. 632, 635 (E.D.S.C. 1939); *Hoagland v. Dolan*, 259 Ky. 1, 10, 81 S.W.2d 869, 873 (1935); *Garon v. Poirier*, 86 N.H. 174, 175, 164 Atl. 765 (1933); *Sobeck v. Koellmer*, 240 App. Div. 736, 265 N.Y. Supp. 778, 779 (2d Dep't 1933).

34. *Fine v. Wencke*, 117 Conn. 683, 684, 169 Atl. 58 (1933).

35. *Beach v. D. W. Perdue Co.*, 35 Del. (5 Harr.) 285, 288, 163 Atl. 265, 266 (Super. Ct. 1932).

36. U.S. CONST. art. IV, § 2.

37. *La Tourette v. McMaster*, 248 U.S. 465 (1919); *Corfield v. Coryell*, 6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823), cited favorably in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 394 (1873).

38. E.g., *Toomer v. Witsell*, 334 U.S. 385 (1948); *Canadian Northern Ry. v. Eggen*, 252 U.S. 553 (1920).

39. See *Alberts v. Alberts*, 217 N.C. 443, 8 S.E.2d 523 (1940).

40. E.g., *Burns v. Godwin*, 211 Miss. 310, 51 So. 2d 486 (1951); *State ex rel. Rush v. Circuit Court*, 209 Wis. 246, 244 N.W. 766 (1932).

41. *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387 (1929).

42. *Ibid.*

tion on crowded state tribunals. In this day of procedural reform such reasoning should carry weight with the legislatures. Third, the allied notion that residents ultimately bear the costs of operating the courts.<sup>43</sup> On the basis of this analysis, it would be desirable for the legislatures to expressly exclude litigants residing in the same sovereignty from the ambit of these acts. This would add virtue to the convenience doctrine so often asserted in favor of allowing nonresident plaintiffs to utilize the benefits of these statutes. As to the question of constitutional conflict, prior analogous decisions would indicate that such a proposal would be within constitutional limits. Despite the absence of square holdings rising above the level of state appellate rulings, older statutes in New Jersey,<sup>44</sup> Florida,<sup>45</sup> and Tennessee<sup>46</sup> excluding actions by nonresidents, were upheld on the oft-used distinction between citizenship and residence.<sup>47</sup> Supreme Court rulings on this same distinction<sup>48</sup> would indicate that these state decisions were proper.

The ultimate effect of these decisions would indicate a trend toward a further liberalization of the doctrine of *Pennoyer v. Neff*<sup>49</sup> protecting nonresidents from constructive service of process in suits in personam. Certainly the volume of contemporary motor travel as well as the ease with which state lines may be crossed dictates a need for some liberalization of a rule set down in 1878. A further extension of the rule has led to the problem of implied waiver of venue in the federal courts.<sup>50</sup>

#### IV.

#### VENUE.

The 1953 decision in the case of *Olberding v. Illinois Central R.R.*<sup>51</sup> finally ended the serious conflict which had arisen in the lower federal courts over the waiver of the federal venue privilege through the use of the highways of a state having a nonresident motorist statute. The problem arose as a result of the wording of § 1391(a) of the United States Code which reads, "A civil action wherein jurisdiction is founded only on

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43. *Ibid.*

44. See *Charles v. Fischer Baking Co.*, 14 N.J. Misc. 18, 182 Atl. 30 (Sup. Ct. 1935), *aff'd*, 117 N.J.L. 115, 187 Atl. 175 (Err. & App. 1936).

45. See Culp, *Recent Developments in Actions Against Non-resident Motorists*, 37 MICH. L. REV. 58, 75 (1938).

46. *Ibid.*

47. *State ex rel. Cochran v. Lewis*, 118 Fla. 536, 159 So. 792 (1935); *Charles v. Fischer Baking Co.*, 14 N.J. Misc. 18, 182 Atl. 30 (Sup. Ct. 1935), *aff'd*, 117 N.J.L. 115, 187 Atl. 175 (Err. & App. 1936).

48. *Canadian Northern Ry. v. Eggen*, 252 U.S. 553 (1920); *La Tourette v. McMaster*, 248 U.S. 465 (1919).

49. 95 U.S. 565 (1878).

50. See, *e.g.*, *Urso v. Scales*, 90 F. Supp. 653 (E.D. Pa. 1950); *Krueger v. Hider*, 48 F. Supp. 708 (E.D.S.C. 1943).

51. 346 U.S. 338 (1953).

diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.”<sup>52</sup> The majority of the lower federal courts had ruled that the motorist impliedly consented to the waiver of venue by using the highways by drawing an analogy to those cases holding that a corporation waived its federal venue privilege by designating a state officer to receive personal service of process.<sup>53</sup> The Supreme Court has clearly stated in the past that the venue privileges are not constitutional rights but rather privileges for the convenience of the parties which may be waived.<sup>54</sup> However, the doctrine of waiver by implied consent was rejected quite emphatically by the highest court. In refusing to carry over the corporate analogy Justice Frankfurter said:

“But to conclude from this holding (*Hess v. Pawloski*, upholding the constitutionality of nonresident motorist statutes) that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued and has thus waived his federal venue rights is surely to move in the world of Alice in Wonderland.”<sup>55</sup>

In taking this realistic view the court pointed out that the facts differ from the corporate situation in which there is an express appointment of an agent upon whom process could be served. The court pointed out that this doctrine could be applied to an individual as a condition to carrying on activities within a state. Such an express appointment was constitutionally upheld under the original New Jersey motorist statute.<sup>56</sup>

The *Olberding* case received a great deal of comment by legal writers<sup>57</sup> with a majority proposing a legislative formula similar to the recent amendment to the venue statute as applied to corporations. The amendment provides that:

“A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.”<sup>58</sup>

Hence, the *Olberding* problem is nonexistent insofar as the corporate situation is concerned. This distinction has been criticized by some legal

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52. 28 U.S.C. § 1391(a) (1952).

53. See 28 So. CALIF. L. REV. 196 (1955).

54. See *Olberding v. Illinois Central R.R.*, 346 U.S. 338 (1953).

55. *Id.* at 341.

56. *Id.* at 342.

57. 39 CORNELL L.Q. 334 (1954); 22 GEO. WASH. L. REV. 616 (1954); 28 So. CALIF. L. REV. 196 (1955); 23 U. CIN. L. REV. 128 (1954); 15 U. PITT. L. REV. 650 (1954).

58. 28 U.S.C. § 1391(c) (1952).

writers<sup>59</sup> and the dissent in the *Olberding* case on the grounds that uncertainty in the law has been created by having a different procedural rule for corporations. However, it is extremely common to find the corporate rules of law differing from those applicable to individuals in both form and substance. Furthermore, the plaintiff may still have the case heard in a neutral jurisdiction, either in the state courts, or in the federal court in the district in which the action is pending. In addition, in the case of defective venue, the district court can transfer the suit to the residence of one of the parties.<sup>60</sup> Consequently, the venue privilege is preserved without impairing the legislative aim in enacting the nonresident motorist statutes.

## V.

### CONCLUSION.

With reference to the state courts, the constitutionality of these nonresident motorist statutes has been clearly asserted. That such statutes are essential is beyond question. The question of the availability of these statutes to nonresident plaintiffs even when all the parties to the action reside in the same state is also settled. A state court facing the problem as a matter of first impression could follow the uniform rule that the benefits of these statutes are to be extended to nonresident plaintiffs with the assurance that the same result has been achieved in the twenty-one jurisdictions in which the problem has arisen.<sup>61</sup> On a federal level the problem of venue is at least settled. Hence, a serious procedural uncertainty has been removed. Congress now has an opportunity to observe its effect. It can then determine whether an amendment similar to that adopted for corporate venue purposes is to be extended to individuals or whether the status quo is to be maintained.

*Robert P. Garbarino*

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59. 22 GEO. WASH. L. REV. 616 (1954).

60. 28 U.S.C. § 1406(a) (1952).

61. *Greene v. Goodyear*, 112 F. Supp. 27 (M.D. Pa. 1953); *Garcia v. Frausto*, 97 F. Supp. 583 (E.D. Mo. 1951); *Peeples v. Ramspacher*, 29 F. Supp. 632 (E.D.S.C. 1939); *Highway Steel & Mfg. Co. v. Kincannon*, 198 Ark. 134, 127 S.W.2d 816, *appeal dismissed without opinion*, 308 U.S. 504 (1939); *Fine v. Wencke*, 117 Conn. 683, 169 Atl. 58 (1933); *Beach v. D. W. Perdue Co.*, 35 Del. (5 Harr.) 285, 163 Atl. 265 (Super. Ct. 1932); *Dart Transit Co. v. Wiggins*, 1 Ill. App.2d 126, 117 N.E.2d 314 (1954); *Welsh v. Ruopp*, 228 Iowa 70, 289 N.W. 760 (1940); *Ruggles v. Smith*, 175 Kan. 76, 259 P.2d 199 (1953); *Hoagland v. Dolan*, 259 Ky. 1, 81 S.W.2d 869 (1935); *White v. White*, 147 Me. 63, 83 A.2d 296 (1951); *Burns v. Godwin*, 211 Miss. 310, 51 So. 2d 486 (1951); *State ex rel. Gallagher v. District Court*, 112 Mont. 253, 114 P.2d 1047 (1941); *Herzoff v. Hommel*, 120 Neb. 475, 233 N.W. 458 (1930); *Garon v. Poirier*, 86 N.H. 174, 164 Atl. 765 (1933); *Gender v. Rayburn*, 15 N.J. Misc. 704, 194 Atl. 441 (Cir. Ct.), *aff'd*, 119 N.J.L. 243, 195 Atl. 513 (Err. & App. 1937); *Malak v. Upton*, 166 Misc. 817, 3 N.Y.S.2d 248 (Sup. Ct. 1938); *Alberts v. Alberts*, 217 N.C. 443, 8 S.E.2d 523 (1940); *Weissenberger v. Freeman*, 6 Ohio Supp. 185 (C.P. 1941); *Thomas v. Altsheler*, 191 Tenn. 640, 235 S.W.2d 806 (1951); *State ex rel. Rush v. Circuit Court*, 209 Wis. 246, 244 N.W. 766 (1932).