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were valid on their face, *i.e.*, to facilitate communications, this goal could just as easily have been accomplished away from the bargaining table.

Conclusion

The need for a bargaining atmosphere conducive to stable bargaining relationships is the basic policy underlying the LMRA. This policy is effectuated in part by allowing the Board to determine appropriate bargaining units and to certify official bargaining agents. Thus, where one party attempts via direct coalition bargaining to alter the bargaining unit, Board policy will operate to prevent such unilateral change because of the disruptive effect upon bargaining stability. Moreover, where the presence of outside union representatives on the bargaining committee of a single union creates such confusion, uncertainty and disruption upon the negotiations that effective bargaining is rendered difficult, the Board should for the same policy reasons not require the employer to bargain. Unfortunately, the Board failed to see this similarity in *General Electric* and thus allowed the union to accomplish indirectly what it could not otherwise accomplish directly.

WAYNE L. BELL

SAVING STATUTE'S EFFECT ON LIMITATIONS OF ACTIONS WITH LONG-ARM JURISDICTION

To prevent inequities in the application of statutes of limitations, American jurisdictions have enacted saving statutes to toll or suspend the running of the period of limitation while the defendant is absent from the state.¹ Recently, however, legislatures in all states have

¹*E.g.*, The Texas saving statute provides:

If any person against whom there shall be cause of action shall be without the limits of this State at the time of the accruing of such action, or at any time during which the same might have been maintained, the person entitled to such action shall be at liberty to bring the same against such person after his return to the State and the time of such person's absence shall not be accounted or taken as a part of the time limited by any provision of this title.

TEX. REV. CIV. STAT. ANN. art. 5537 (1958).

enacted nonresident motorist statutes² which permit the state courts to exercise in personam jurisdiction over nonresident defendants in cases arising from motor vehicle accidents occurring within the particular state.³ The question which has been presented in about one-half of the states is whether the saving statute should continue to toll the

²ALA. CODE tit. 7, § 199 (Supp. 1967); ALASKA STAT. § 09.05.020 (1962); ARIZ. REV. STAT. ANN. § 28-502 (1956); ARK. STAT. ANN. § 27-342.1 (Supp. 1967); CAL. VEHICLE CODE § 17451 (West Supp. 1968); COLO. REV. STAT. ANN. § 13-8-2 (1963); CONN. GEN. STAT. ANN. § 52-62 (Supp. 1969); DEL. CODE ANN. tit. 10, § 3112 (Supp. 1966); D.C. CODE ANN. § 40-423 (1967); FLA. STAT. ANN. § 48.171 (1969); GA. CODE ANN. § 68-801 (1967); HAWAII REV. LAWS § 230.33 (Supp. 1965); IDAHO CODE ANN. § 49-1602 (1967); ILL. ANN. STAT. ch. 95½, § 9-301 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1043 (Repl. Vol. 1965); IOWA CODE ANN. § 321-498 (1966); KAN. STAT. ANN. § 8-401 (1964); KY. REV. STAT. ANN. § 188.020 (1963); LA. REV. STAT. ANN. § 13:3474 (1968); ME. REV. STAT. ANN. tit. 29, § 1911 (Supp. 1968); MD. ANN. CODE art. 66½, § 115 (Repl. Vol. 1967); MASS. ANN. LAWS ch. 90, §§ 3A, 3B (1967); MICH. STAT. ANN. § 9.2103 (1968); MINN. STAT. ANN. § 170.55 (1960); MISS. CODE ANN. § 9352-61 (Supp. 1966); MO. ANN. STAT. § 506.210 (Supp. 1968); MONT. REV. CODES ANN. § 53-203 (Repl. Vol. 1961); NEB. REV. STAT. § 25-530 (Repl. Vol. 1964); NEV. REV. STAT. § 14.070 (Repl. Pages 1967); N.H. REV. STAT. ANN. § 264:1 (Repl. Vol. 1966); N.J. STAT. ANN. § 39:7-2 (1961); N.M. STAT. ANN. § 64-24-3 (Repl. Vol. 1960); N.Y. VEH. & TRAF. LAW § 253 (McKinney 1960); N.C. GEN. STAT. § 1-105 (Supp. 1967); N.D. CENT. CODE § 39-01-11 (1960); OHIO REV. CODE ANN. § 2703.20 (Baldwin Repl. Part 1964); OKLA. STAT. ANN. tit. 47, § 391 (1962); ORE. REV. STAT. § 15.190 (Repl. Part 1967); PA. STAT. ANN. tit. 75, § 2001 (1960); R.I. GEN. LAWS ANN. § 31-7-6 (Supp. 1967); S.C. CODE ANN. § 46-104 (Supp. 1968); S.D. CODE § 33.0809 (Supp. 1960); TENN. CODE ANN. § 20-224 (Supp. 1968); TEX. REV. CIV. STAT. ANN. art. 2039a (1964); UTAH CODE ANN. § 41-12-8 (Repl. Vol. 1960); VT. STAT. ANN. tit. 12, § 891 (1959); VA. CODE ANN. § 8-67.1 (Supp. 1968); WASH. REV. CODE § 46.64.040 (Supp. 1967); W. VA. CODE ANN. § 56-3-31 (1966); WIS. STAT. ANN. § 345.09 (Supp. 1969); WYO. STAT. ANN. § 1-52 (Supp. 1967).

³*E.g.*, The Texas nonresident motorist statute provides:

Section 1 .The acceptance by a nonresident of this State or by a person who was a resident of this State at the time of the accrual of a cause of action but who subsequently removes therefrom, . . . of the rights, privileges and benefits extended by law to such persons of operating a motor vehicle . . . within the State of Texas shall be deemed equivalent to an appointment by such nonresident . . . of the Chairman of the State Highway Commission of this State . . . to be his true and lawful attorney and agent upon whom may be served all lawful process in any civil action . . . growing out of any accident, or collision in which said nonresident . . . may be involved while operating a motor vehicle or motorcycle within this State . . . and said acceptance or operation shall be a signification of the agreement of said nonresident . . . that any such process against him . . . served upon said Chairman . . . shall be of the same legal force and validity as if served personally.

Service of such process shall be made by leaving a certified copy of the process issued in the hands of the Chairman . . . and such service shall be sufficient upon said nonresident, . . . provided, however, that notice of such service and a copy of the process be forthwith sent by registered mail by the Chairman . . . to the nonresident defendant . . .

TEX. REV. CIV. STAT. ANN. art. 2039a (1964) .

period of limitation when there is a method for acquiring personal jurisdiction under the state's nonresident motorist statute.⁴

This precise question was recently presented to the Supreme Court of Texas in *Vaughn v. Deitz*.⁵ On January 11, 1964, the parties in *Vaughn* were involved in an automobile collision on a Texas highway. At the time of the accident all of the parties were residents of that state. In June of 1964 the defendants, Virgil A. Vaughn and his wife, left Texas and established residence in Florida. With the exception of several brief visits, they did not return to Texas. On January 18, 1966, plaintiffs instituted an action to recover damages for personal injuries received in the collision. As provided in the Texas nonresident motorist statute,⁶ service was had on the Chairman of the State Highway Commission as the defendants' designated agent to receive process. The defendants were given proper notice of the action by registered mail.

The trial court granted defendants' motion to dismiss on the ground that the action was barred by the two-year limitation on initiating actions for personal injuries.⁷ The Court of Civil Appeals of Texas reversed the judgment of the trial court and remanded the suit for trial.⁸ On appeal the Texas supreme court, in a four-to-three decision, affirmed the holding of the appellate court. The court held that the clear wording of the saving statute tolled the running of the two-year limitation period so long as the defendants were not *physically* present in Texas.⁹

The dissenting judges argued that "the presence or absence of a defendant [for the purposes of the saving statute] must be solved in terms of jurisdiction over the person."¹⁰ Since a defendant is subject to the personal jurisdiction of the Texas court under the non-resident

⁴See cases cited notes 13 & 14 *infra*.

⁵430 S.W.2d 487 (Tex. 1968).

⁶TEX. REV. CIV. STAT. ANN. art. 2039a (1964).

⁷The Texas statute of limitations provides:

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

....

6. Action for injury done to the person of another.

TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

⁸*Deitz v. Vaughn*, 423 S.W.2d 113 (Tex. Civ. App. 1967).

⁹The court further held that there had been no violation of defendants' constitutional privilege of equal protection of the laws since notice was more complicated when the defendant was a nonresident. "Absence from the state is not an unreasonable or arbitrary basis of classification where the statutes of limitation are concerned . . ." 430 S.W.2d at 490.

¹⁰430 S.W.2d at 491.

motorist statute, it followed that the period of limitation should continue to run notwithstanding the defendants' continued physical absence from Texas.

A typical nonresident motorist statute, such as that involved in *Vaughn*, provides for service upon a state official as the defendant's agent to receive process for any claim arising out of an automobile accident occurring within the state.¹¹ By virtue of such statutes, a plaintiff is no longer precluded from gaining personal service on the nonresident defendant by reason of the defendant's absence. While the nonresident motorist statutes are not in direct conflict with either the statutes of limitations or saving statutes,¹² courts deciding cases in which all three statutes have been involved have had difficulty in interpreting the earlier legislation in the light of the more recent nonresident motorist statutes. A majority of the courts faced with the problem have held that the period of limitation continues to run while the defendant is out of the state if the plaintiff can get a personal judgment against him.¹³ A minority of the courts, as in *Vaughn*, have continued to apply the saving statute and have thus suspended the statute of limitations during the defendant's absence, permitting the limitation period to run only while the defendant is physically within the state.¹⁴

In states where it has been held that the statute of limitations is not tolled but continues to run in situations similar to *Vaughn*, the

¹¹TEX. REV. CIV. STAT. ANN. art. 2039a (1964).

¹²Compare TEX. REV. CIV. STAT. ANN. art. 5537 (1968) with TEX. REV. CIV. STAT. ANN. art. 2039a (1964) and TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

¹³Burkhardt v. Bates, 296 F.2d 315 (8th Cir. 1961), *aff'g* 191 F. Supp. 149 (N.D. Iowa); Bond v. Golden, 273 F.2d 265 (10th Cir. 1959) (applying Kansas law); Puchek v. Elledge, 160 F. Supp. 286 (N.D. Ind. 1958); Smith v. Pasqualetto, 146 F. Supp. 680 (D. Mass. 1956), *rev'd on other grounds*, 246 F.2d 765 (1st Cir. 1957); Peters v. Tuell Dairy Co., 250 Ala. 600, 35 So. 2d 344 (1948); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Hurwitch v. Adams, 52 Del. 247, 155 A.2d 591 (1959); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E. 2d 17 (1938); Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711 (1952); Hammel v. Bettison, 362 Mich. 396, 107 N.W.2d 887 (1961); Haver v. Bassett, 287 S.W.2d 342 (Mo. Ct. App. 1956); Cal-Farms Ins. Co. v. Oliver, 78 Nev. 479, 375 P.2d 857 (1962); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967); Fuller v. Stuart, 3 Misc. 2d 456, 153 N.Y.S.2d 188 (Sup. Ct. 1956); Jarchow v. Eder, 433 P.2d 942 (Okla. 1967); Whittington v. Davis, 221 Ore. 209, 350 P.2d 913 (1960); Will v. Malosky, 432 Pa. 246, 247 A.2d 788 (1968); Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910 (1954); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964); Bergman v. Turpin, 206 Va. 539, 145 S.E.2d 135 (1965); Smith v. Forty Million, Inc., 64 Wash. 2d 912, 395 P.2d 201 (1964); *cf.* Dibble v. Jensen, 129 So. 2d 162 (Fla. Dist. Ct. App. 1961).

¹⁴Macri v. Flaherty, 115 F. Supp. 739 (E.D. S.C. 1953); Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957); Lemke v. Bailey, 41 N.J. 295, 196 A.2d 523 (1963); Coutts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

courts have avoided the operation of the saving statute by: (1) employing the fiction of constructive presence,¹⁵ (2) declaring the saving statute inapplicable when the defendant is amenable to service in the state by his agent,¹⁶ and (3) finding the statute inoperative so long as the courts of that state have personal jurisdiction over the defendant.¹⁷

By applying the fiction of constructive presence, some courts have determined that the effect of the term "absence" in the saving statute can be avoided. The rationale is that the statute will not be applicable since the defendant is constructively present in the state through his appointed agent. This fiction was utilized in *Hurwitch v. Adams*,¹⁸ where it was stated:

The fictional presence of a defendant by an agent imposed by law upon the defendant, brings the defendant within the State for purposes of service and the same fiction causes the period of limitations to run.¹⁹

In place of the constructive presence approach, some courts have relied upon the argument that absence, as contemplated by the saving statute, is merely that which prevents the plaintiff from obtaining service on the defendant within the state.²⁰ One of the functions of the nonresident motorist statute is to provide the plaintiff with a means of acquiring in-state service on the defendant.²¹ Constructive service on the defendant's agent has the same effect as if the defendant had been personally served within the state.²² In *Kokenge v. Holthaus*²³ the Iowa supreme court did not attempt to rely on the fiction of constructive presence, but found that the saving statute was inapplicable when service was attainable in the state under the nonresident motorist statute.

¹⁵*Hurwitch v. Adams*, 52 Del. 247, 155 A.2d 591 (1959); *cf.* *Arrowood v. McMinn County*, 173 Tenn. 562, 121 S.W.2d 566 (1938); *Smith v. Forty Million, Inc.*, 64 Wash. 2d 912, 395 P.2d 201 (1964).

¹⁶*Kokenge v. Holthaus*, 243 Iowa 571, 52 N.W.2d 711 (1952); *Bolduc v. Richards*, 101 N.H. 303, 142 A.2d 156 (1958); *Busby v. Shafer*, 75 S.D. 428, 66 N.W.2d 910 (1954); *Snyder v. Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964).

¹⁷*See Hammel v. Bettison*, 362 Mich. 396, 107 N.W.2d 887 (1961); *Whittington v. Davis*, 221 Ore. 209, 350 P.2d 913 (1960); *Arrowood v. McMinn County*, 173 Tenn. 562, 121 S.W.2d 566 (1938); *cf.* *Jarchow v. Eder*, 433 P.2d 942 (Okla. 1967).

¹⁸52 Del. 13, 151 A.2d 286 (Super. Ct.), *aff'd*, 52 Del. 247, 155 A.2d 591 (1959).

¹⁹151 A.2d at 28.

²⁰*See* cases cited note 16 *supra*.

²¹*E.g.*, TEX. REV. CIV. STAT. ANN. art. 2039a (1964); VA. CODE ANN. § 8-67.1 (Supp. 1968).

²²*E.g.*, ILL. ANN. STAT. ch. 95½, § 9-301 (Smith-Hurd 1958); TEX. REV. CIV. STAT. ANN. art. 2039a (1964).

²³243 Iowa 571, 52 N.W.2d 711 (1952).

The third alternative was utilized by the court in *Whittington v. Davis*²⁴ to avoid the application of the saving statute. Basing its decision on the concept of the court's jurisdictional power over the non-resident, it was held that the court's jurisdiction was not affected by the defendant's absence or residence out of the state. As stated by the court:

The availability of the right to compel the attendance of the defendant or to obtain and enforce a valid judgment against him is all that a plaintiff is entitled to. When such a right is present there is no cause to apply the tolling [saving] statute at all.²⁵

Although the plaintiff in *Whittington* did not make use of the service procedure provided in the nonresident motorist statute, this procedure had been available to him at all times, and the court had been fully competent to render a personal judgment against the defendant. As the powers of the court were not suspended by the defendant's absence, it was determined that the statute of limitations should continue to run.²⁶

In *Vaughn* and in the other cases where it has been held that the statute of limitations is tolled while the defendant is physically absent

²⁴221 Ore. 209, 350 P.2d 913 (1960).

²⁵350 P.2d at 915.

²⁶See cases cited note 17 *supra*.

Underlying these legal arguments are the detrimental effects the courts found would occur when the limitation statute was tolled. Suits could be postponed indefinitely although they may be maintained at any time. *Bolduc v. Richards*, 101 N.H. 303, 142 A.2d 156 (1958); *Maguire v. Yellow Taxi Corp.*, 253 App. Div. 249, 1 N.Y.S.2d 749 (1938) (dissenting opinion); *Whittington v. Davis*, 221 Ore. 209, 350 P.2d 913 (1960); *Bergman v. Turpin*, 206 Va. 539, 145 S.E.2d 135 (1965); see *Snyder v. Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964). The plaintiff would have the power to delay the suit until the defendant could no longer contact and produce his witnesses. *Jarchow v. Eder*, 433 P.2d 942 (Okla. 1967); *Whittington v. Davis*, 221 Ore. 209, 350 P.2d 913 (1960); *Bergman v. Turpin*, 206 Va. 539, 145 S.E.2d 135 (1965). Even if the witnesses were still available, it may be that the years have dimmed their memories, and their testimony is no longer useful as evidence for the defense. *Peters v. Tuell Dairy Co.*, 250 Ala. 600, 35 So. 2d 344 (1948); *Bolduc v. Richards*, 101 N.H. 303, 142 A.2d 156 (1958). Apparently these arguments lead to the conclusion that the saving statute will not be permitted to reintroduce those evils which the statute of limitation was enacted to correct. 3 J. SUTHERLAND, STATUTORY CONSTRUCTION § 7103 (3d ed. 1943).

The minority view may even encourage the plaintiff to delay bringing his suit until after the statute of limitations would normally run against personal injury actions. If there is a chance that the defendant has a counterclaim, the plaintiff could wait until the statute had run as to defendant's claim in order to prevent the defendant from interposing his counterclaim into the plaintiff's action. The plaintiff would have nothing to lose and everything to gain by such a delay.

from the state, the usual basis for this result has been that the clear wording of the statute precludes a different interpretation. There is no wording in the nonresident motorist statute to indicate that it is to take precedence over the saving statute.²⁷ Since the two statutes are not in direct conflict, courts following the minority view have simply given full effect to both.²⁸ It has been further stated that any inequities resulting from a literal interpretation of these statutes should be remedied by the legislature.²⁹

Thus, courts in those jurisdictions which have not been presented with the problem in *Vaughn* will have the benefit of several arguments to determine whether they will follow the majority or minority views. It is likely that this determination will ultimately have to be made unless there is an attempt to resolve this particular conflict by the legislatures of those states.³⁰

It should be noted further that a problem related to the one presented in *Vaughn* may arise in a broader range of extraterritorial jurisdiction. The United States Supreme Court has expanded the traditional limits of a state's jurisdiction over persons outside the borders of the forum state.³¹ In light of these decisions, several states enacted general "long-arm" statutes³² to affirmatively acknowledge the intent of the state to take advantage of this power (at least with respect to causes of action arising from specified conduct within the state) and to provide procedures to bring the out-of-state defendant into court. However, even in those states which as yet have no long-arm legislation, it seems that the courts would still have jurisdiction in the constitutional sense over an out-of-state defendant.³³ Hence, if those states presently have a statutory procedure which is within the limits of due process to serve and to give proper notice to the out-of-state defendant, then the courts may assert this expanded jurisdiction over him.³⁴ Thus, the problem involving the saving statute's continued

²⁷*Staten v. Weiss*, 78 Idaho 616, 308 P.2d 1021 (1957); *Couts v. Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950).

²⁸Cases cited note 14 *supra*.

²⁹*Gotheiner v. Lenihan*, 20 N.J. Misc. 119, 25 A.2d 430 (Sup. Ct. 1942).

³⁰*E.g.*, TENN. CODE ANN. § 20-224 (Supp. 1968); VT. STAT. ANN. tit. 12, § 892 (Supp. 1968).

³¹*Compare Pennoyer v. Neff*, 95 U.S. 714 (1877) with *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³²*E.g.*, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968); see generally 22 WASH. & LEE L. REV. 152 (1965).

³³See *St. Clair v. Righter*, 250 F. Supp. 148 (W.D. Va. 1966).

³⁴*McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (service by registered mail under statute providing for such method on out-of-state insurance companies);

applicability may soon be tested in three possible legal settings: (1) in states with long-arm statutes providing for substituted in-state service on an agent appointed in the statute,³⁵ (2) in states with long-arm statutes but where process generally must be presented to the defendant in person,³⁶ or (3) in states where there is no long-arm statute, or where the court has decided to go beyond the terms of an existing long-arm statute.³⁷

In those states which have long-arm statutes providing for substituted service on a state official as defendant's agent, courts following the majority view would have little difficulty applying the same reasoning utilized to avoid the operation of the saving statute under the non-resident motorist statute since the service provisions of the two statutes are similar.³⁸ So long as the defendant has an agent in the state to receive process, he may be deemed constructively present for purposes of the application of the saving statute. In addition, since service may be had in the state on the designated official, the argument that the saving statute applies only when the plaintiff is not able to obtain in-state service would similarly make the saving statute inapplicable. Furthermore, since jurisdiction over the defendant is available at all times, the jurisdictional argument could easily be met.³⁹

The result would be less certain, however, in the other two judicial settings. In those jurisdictions where the plaintiff must seek the defendant out of the state for service of process, the court would not be justified in saying that the defendant is amenable to service inside the state, nor could it be argued that the defendant is constructively present since there is no agent appointed for him within the state. Thus it would seem that the court could avoid the application of the saving statute only on the basis of jurisdiction.

In those states which have no long-arm statute, it is doubtful that a court could even assert jurisdiction over the out-of-state defendant. Although there may be jurisdiction in the sense that it would not violate due process if the defendant were before the court, that

International Shoe Co. v. Washington, 326 U.S. 310 (1945) (service on salesman in the state); Milliken v. Meyer, 311 U.S. 457 (1940) (personal service out of state on domiciliary as provided by statute).

³⁵*E.g.*, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968).

³⁶*E.g.*, N.Y. CIV. PRAC. LAW § 302 (McKinney Supp. 1968).

³⁷*See* St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966).

³⁸*Compare* ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968) *with* TEX. REV. CIV. STAT. ANN. art. 2039a (1964).

³⁹*Burris v. Alexander Mfg. Co.*, 51 Misc. 2d 543, 273 N.Y.S.2d 542 (Sup. Ct. 1966) (applying Tennessee law).