So it would seem that the legislature's use of the word "practice" could well be construed to include service of process. However, the constitutional issue of due process still remains. Historically, service of process was not a right of the defendant's but a command to appear in the king's court.[13] It has gradually acquired a different significance, however, with the growth, in Anglo-American countries, of the due process concept.[14] This is understood to mean, in this connection, that a defendant must have the opportunity to be heard before judgment can be rendered.[15] A corollary to this principle is that he must know that a suit is pending against him.[16] Mere knowledge on his part that such a suit has been brought is not sufficient.[17] The most that is required, however, is reasonable notice, such notice as would advise the average man that he should appear in court and defend his rights.[18] The due process requirement does not demand that traditional methods be used.[19] Therefore, so long as a prescribed method of service conforms to the requirement that reasonable notice be given, no constitutional objection is apparent.

Hence, there would seem to be no reason why a majority of the judges of the Municipal Court could not promulgate rules for service of summons. It is unfortunate that the court, in properly invalidating Rule 10A, has precluded such action.

Practice—Substituted Service on Non-resident Motorist—Liability of Foreign Corporations—[Illinois].—An agent of the defendant, a non-resident corporation, injured the plaintiffs while driving a car "on behalf of" the defendant. In an action for damages service of process was made on the defendant in accordance with the provisions of an Illinois statute: "The use and operation by a non-resident of a motor vehicle over the highways of the State of Illinois, shall be deemed an appointment .... of the Secretary of State to be his .... attorney upon whom may be served all legal process in any action ...., growing out of such use ...."[1] The defendant challenged the application of the statute to a non-resident corporation when the car is driven by an employee. On appeal from a judgment for the defendant, *held*, affirmed.

[13] Prewitt v. Caudill, 250 Ky. 698, 704, 63 S.W. (2d) 954, 957 (1933); Shipman, Common Law Pleading 17 (3d ed. 1923).

[14] See Murray v. Hoboken Land and Improvement Co., 59 U.S. 272, 276 (1855) and Davidson v. New Orleans, 96 U.S. 97, 101 (1877) for statements that "by the law of the land" in Magna Carta have the same connotation as our phrase "due process of law." See also Straub v. Palmer, 74 N.Y. 183 (1878); Mason v. Eldred, 73 U.S. 231, 239 (1867); Galpin v. Page, 85 U.S. 350, 368 (1873); Riverside Cotton Mills v. Menefee, 237 U.S. 189 (1914).

[15] Pinney v. Providence Loan Co., 106 Wis. 396, 82 N.W. 308 (1900); Furgeson v. Jones, 17 Ore. 204, 20 Pac. 842 (1888).

[16] Strode v. Strode, 6 Idaho 67, 52 Pac. 161 (1898); Nat'l Metal Co. v. Greene Consol. Copper Co., 9 Ariz. 192, 80 Pac. 397 (1905).

[17] Scott v. McNeal, 154 U.S. 34 (1894); Hobby v. Bunch, 83 Ga. 1, 10 S.E. 113 (1889); Davies v. Thompson, 61 Okla. 21, 160 Pac. 75 (1916).

[18] Roller v. Holly, 176 U.S. 398 (1900); City of Norfolk v. Young, 97 Va. 728, 34 S.E. 886 (1900); Commonwealth v. O'Keafe, 298 Pa. 169, 148 Atl. 73 (1929).

[19] Hurtado v. California, 110 U.S. 516 (1884) (information instead of indictment does not violate due process); Maxwell v. Dow, 176 U.S. 581 (1900) (jury of less than twelve).

[1] Ill. L. 1929, p. 646; Ill. Rev. Stat. 1937, c. 95½ § 23.

Liability under the statute is "confined to personal operation of a motor vehicle by a non-resident owner." *Jones et al. v. Pebler et al.*[2]

Statutes permitting substituted service on a "fictitious agent" in actions against non-resident motorists have been passed in many states.[3] They have been held constitutional as a rightful exercise of the police power.[4]

Because substituted service is said to be "in derogation of the common law" the courts of many states construe their statutes strictly.[5] Of the three states where statutes similar to that of Illinois have been construed,[6] two—New York[7] and Michigan[8]—limited the application of the statute to those non-residents who personally drove their automobiles. A legislative amendment was necessary in both states to extend the acts to non-residents operating through agents.[9] The court in the instant case accepted as binding the strict construction of the New York and Michigan courts. The statutes of these states, however, had not been construed by the courts at the time the Illinois statute was enacted.[10] Although it is presumed that the legislature intends a statute adopted from another state to receive the construction given it by

[2] 296 Ill. App. 460, 16 N.E. (2d) 438 (1938).

[3] Culp, Process in Actions against Non-resident Motorists, 32 Mich. L. Rev. 325 (1934) (lists thirty-five states). See also 20 Iowa L. Rev. 654, 660–2 (1935) (collection of thirty-three statutes).

[4] Hess v. Pawloski, 274 U.S. 352, 356 (1927); Wuchter v. Pizzutti, 276 U.S. 13, 18 (1928); Rest., Conflicts of Laws § 84 (1934).

[5] O'Tier v. Sell, 252 N.Y. 400, 169 N.E. 624 (1930); Day v. Bush, 18 La. App. 682, 139 So. 42 (1932); Morrow v. Asher, 55 F. (2d) 365 (D.C. Tex. 1932); Brown v. Cleveland Tractor Co., 265 Mich. 475, 251 N.W. 557 (1933); Flynn v. Kramer, 271 Mich. 500, 261 N.W. 77 (1935); Kirchner v. N. and W. Overall Co., 16 F. Supp. 915 (S.C. 1936); Wood v. White *et al.*, 97 F. (2d) 646 (App. D.C. 1938). *Contra:* Poti v. New England Road Machinery Co., 83 N.H. 232, 140 Atl. 587 (1928); Salzman v. Attrean, 142 Misc. 245, 254 N.Y. Supp. 288 (1931).

[6] The following six states have or had statutes similar to Illinois: New York (now amended), Michigan (now amended), Wisconsin, Oklahoma, Oregon, and Washington. To date only the first three have been construed. For suggestion of Oregon interpretation see Nelson v. Smith, 69 P. (2d) 1072, 1073, 1077 (Ore. 1937).

[7] O'Tier v. Sell, 252 N.Y. 400, 169 N.E. 624 (1930), reversing 226 App. Div. 434, 235 N.Y. Supp. 534 (1929). *Cf.* Sexauer Mfg. Co. v. Grimm, 217 Wis. 422, 259 N.W. 262 (1935) (implies a liberal construction).

[8] Brown v. Cleveland Tractor Co., 265 Mich. 475, 251, N.W. 557 (1933) followed in Flynn v. Kramer, 271 Mich. 500, 261 N.W. 77 (1935).

[9] The present New York statute was derived from § 285a of the Highway Law. The former § 285a, as added by N.Y.L. 1928, c. 465, and amended by N.Y.L. 1929, c. 10 (to include a non-resident whose car was being operated "with his consent, express or implied"), was repealed by N.Y.L. 1929, c. 54, which repealed the amendment before it took effect and reenacted N.Y.L. 1928, c. 465. Reenactment amended by N.Y.L. 1930, c. 57 (to include operation "with consent, express or implied").

Michigan statute enacted by Mich. Acts 1929, No. 80, amended by Mich. Acts 1935, No. 110.

[10] Ill. Rev. Stat. 1937, c. 95½, § 23, enacted by Ill. L. 1929, p. 646 (approved June 25, 1929). First New York case decided June 27, 1929—O'Tier v. Sell, 226 App. Div. 434, 235 N.Y. Supp. 534 (1929).

the courts of that state prior to its adoption,[11] the interpretations of the foreign state court made after adoption usually are not binding.[12]

The approach of the Illinois court, adopted from the leading case of *O'Tier v. Sell*,[13] was to emphasize "operate," interpreting it to mean personal manipulation. Then the court limited "non-resident" to that meaning consistent with "operate." The effect is to exclude from the scope of the statute such non-residents as corporations, partnerships, or individuals operating through agents. These "non-residents," however, could have been included had "operate" been construed to mean "to direct the working of."[14] A lower New York court reached this conclusion after the *O'Tier* decision when it held a foreign corporation to be included in "non-resident."[15] In addition, the manner in which the Illinois legislature modified the wording of the New York act[16] is some indication that it intended to include corporations. Instead of "*operation* by a non-resident" the Illinois statute[17] reads "*use and operation*"; instead of "in any action . . . . growing out of any accident . . . . in which such non-resident may be involved, while *operating* . . . . ," the Illinois act reads "in any action . . . . growing out of such *use* or resulting in damage or loss . . . . , and said *use or operation*. . . . ."

In narrowing the possible scope of the statute, the court has apparently disregarded the reasons for the legislation, the problems to be solved, and the objects to be attained. Prior to the enactment of the statute a non-resident who avoided the jurisdiction ran slight risk of being sued. The prohibitive expense of transporting witnesses, parties, and evidence to the new jurisdiction often gave the reckless non-resident a practical immunity. The statute has attempted to solve this problem by extending liability to the non-resident where it would normally attach were he a resident, by requiring him to answer an action for damages in a court near the scene of the accident. If these considerations support jurisdiction over non-resident individuals, they seem no less relevant when the defendant is a non-resident corporation or individual operating through agents,[18] who are often financially irresponsible. The large proportion of cars owned and operated by foreign corporations and partnerships was as obvious to the legislature as was the fact that a corporation can perform such physical acts as operating a car only through agents. To nullify the force of the statute as to this group of non-residents is to sacrifice the probable intent of the legislature to the concept—"in derogation of the common law."

[11] Rhoads v. Chicago and Aurora Railway Co., 227 Ill. 328, 334, 81 N.E. 371, 373 (1907); People v. Griffith, 245 Ill. 532, 540, 92 N.E. 313, 316 (1910); Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 633, 113 N.E. 979, 981 (1916); People v. Northern Trust Co., 289 Ill. 475, 482, 124 N.E. 662, 665 (1919); People v. Linn, 357 Ill. 220, 226, 191 N.E. 450, 453 (1934); Kerner v. Thompson, 365 Ill. 149, 155, 6 N.E. (2d) 131, 134 (1936).

[12] Rhoads v. Chicago and Aurora Railway Co., 227 Ill. 328, 334, 81 N.E. 371, 373 (1907); People v. Griffith, 245 Ill. 532, 540, 92 N.E. 313, 316 (1910); Wilcox v. Bierd, 330 Ill. 571, 588, 162 N.E. 170, 177 (1928).

[13] 252 N.Y. 400, 169 N.E. 624 (1930).

[14] 7 Oxford English Dictionary 144 (1933).

[15] Bischoff v. Schnepp, 139 Misc. 293, 249 N.Y. Supp. 49, 50 (1930).

[16] McKinney's Consol. L.N.Y. 1929, Book 62-A, § 52. For present New York law see McKinney's Consol. L.N.Y. 1929, Book 62-A, § 52 (Supp. 1937).

[17] Ill. Rev. Stat. 1937, c. 95½, § 23.

[18] Culp, *op. cit. supra* note 3, at 346.

Although the word "owner" appears nowhere in the Illinois statute, the court says liability is "confined to personal operation by a non-resident *owner*."[19] Cited in support of this position is a case[20] decided under the New York act, but after an amendment which specifically stated the requirement of ownership. It is unlikely that the court foresaw the ultimate significance of this requirement. Suppose a non-resident individual injures an Illinois citizen while personally operating a car owned by a third party. If service is made under the statute with the ownership requirement, the court must deny validity merely because the non-resident operator did not *own* the car. Such a result could not have been contemplated by the court. The "potential harm" is as great whether the operator or another holds title.[21]

Taxation—Constitutionality of Use Tax—Burden on Interstate Commerce— [Washington].—The plaintiff sought to enjoin the state tax commissioners from collecting a use or compensating tax which a Washington statute[1] imposed upon the privilege of using within its boundaries any article of tangible personal property not already subject to local or out-of-state sales tax. The plaintiff's equipment, which could only be purchased outside of the State of Washington, was stored within the state until used in the operation, maintenance and repair of the plaintiff's intermingled intrastate and interstate telephone and telegraph system. *Held*, for the plaintiff. Exaction of the tax is an unlawful burden upon interstate commerce. *Pacific Telephone and Telegraph Co. v. Henneford et al., Tax Commissioners.*[2]

As a result of the depression many states turned to the sales tax as a source of much needed revenue.[3] The inapplicability of these taxes to interstate sales because of the interstate commerce clause, led to many out-of-state purchases and consequently to loss of business by local merchants and revenue by the states.[4] In an effort to prevent this avoidance of the sales tax, a number of states have recently turned to the use tax, as was the situation in the instant case.[5]

The adoption of the use tax has not solved the problems arising from state taxation of interstate commerce. Although it has widened the field of state taxation in foreign-purchase home-consumption cases, the problem of determining when goods are a part of interstate commerce, and as such subject to state taxation, still remains. Immunity from state taxation depends on the supreme courts' ever-varying determination of the requisite degree of closeness to a prior or subsequent transportation into or out of the

[19] Jones *et al.* v. Pebler *et al.*, 296 Ill. App. 460, 16 N.E. (2d) 438 (1938).

[20] Wallace v. Smith, 238 App. Div. 599, 265 N.Y. Supp. 253 (1933).

[21] Culp, *op. cit. supra* note 3, at 345.

[1] Wash. L. 1935, c. 180, § 4, 726–728; amended in Wash. L. 1937, c. 191, 943–946.

[2] 81 P. (2d) 786 (Wash. 1938).

[3] Twenty states now have general sales taxes: Alabama, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, Wyoming.

[4] Perkins, The Sales Tax and Transactions in Interstate Commerce, 12 N. C. L. Rev. 99, 100 (1933); Ahern, State Sales and Use Taxes, 25 Geo. L. J. 714 (1937).

[5] Eleven states—California, Colorado, Iowa, Kansas, Michigan, Mississippi, Ohio, Oklahoma, Utah, Washington and Wyoming—now have separate use taxes, while Arkansas and Louisiana include a use tax provision in their sales tax.