the counter-injunction might lead to such an impasse that proceedings under the act would be suspended, and the entire situation reduced to a bickering over jurisdiction, entirely unbecoming to the dignity of our judicial system.

Another solution to the problems presented in the principal cases, whether state court injunctions are held valid or invalid, would of course be a redrafting of Section 56 to provide for suit against the defendant railroad in the district of the residence of the defendant or in which the cause of action arose, or, if neither of these are suitable, in the nearest *convenient* district in which the defendant shall be doing business at the time of commencing such action. Or if the existing statute were construed as giving the federal courts discretion to dismiss suits brought under the act, instead of making the exercise of jurisdiction mandatory,[23] a plea of forum non conveniens like that which operates at civil law might also afford a solution.[24]

Procedure—Tolling of the Statute of Limitations—Foreign Corporation Ceasing to Do Business within State—[Minnesota].—The plaintiff sued to recover the purchase price on a sale of securities made illegal by the Minnesota Blue Sky Law.[1] The defendant, a New York corporation, after the cause of action accrued, formally ceased doing business in Minnesota. As a statutory qualification for selling securities in Minnesota, it had irrevocably appointed the commissioner of securities as its agent for service of process,[2] and in compliance with statutory provisions for withdrawing from the state, it appointed the secretary of state its agent for service of process in actions arising from business transacted in Minnesota.[3] The statutory period for suing on a liability created by statute had elapsed,[4] and the defendant pleaded the statute of limitations as a defense. The plaintiff demurred on the ground that the defendant was "out of the state" within the meaning of the tolling provision of the statute of limitations[5] and that in consequence the statutory period had not "run." On appeal

[23] Note 16 supra.

[24] Foster, The Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217 (1930); Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929).

[1] Minn. Stat. (Mason, 1927) § 3996-4. The statute requires certain securities to be registered before they are sold. The defendant sold such securities without registering them. The plaintiff sued as one of the class of persons whom the statute was intended to protect and also on a claim of fraud. The latter claim was not stressed at trial because the former was a sufficient basis for recovery if the plaintiff's action was not barred by the statute of limitations. The sole question involved in this appeal, whether the statute of limitations had tolled, has been an issue in nine cases, including the instant one, having similar fact situations and involving the interpretation of the same Minnesota statutes. City Co. of New York, Inc. v. Stern, 110 F. (2d) 601 (C.C.A. 8th 1940); Chase Securities Corp. v. Vogel, 110 F. (2d) 607 (C.C.A. 8th 1940); Shepard v. City Co. of New York, Inc., 24 F. Supp. 682 (Minn. 1928); Donaldson v. Chase Securities Corp., 296 N.W. 518 (Minn. 1941). The other four cases in lower state courts are unreported.

[2] Minn. Stat. (Mason, 1927) § 3996-11. [3] Minn. Stat. (Mason, 1927) § 7494.

[4] Minn. Stat. (Mason, 1927) § 9191. The statutory period during which the action must be brought is six years. The cause of action in the instant case accrued in April 1929, and the defendant withdrew from the state in August 1934.

[5] Minn. Stat. (Mason, 1927) § 9200.

from an order sustaining the demurrer, *held*, that the defendant was not "out of the state" within the meaning of the tolling provision and that the action was barred by the statute of limitations. *Pomeroy v. Nat'l City Co.*[6]

While statutes of limitations are designed to obviate stale claims because of the difficulty of evidentiary proof caused by a lapse of time,[7] the tolling provisions in such statutes recognize that a real availability for asserting the claim should exist for the period of the running of the statute.[8] The Minnesota statute in the instant case provided for a tolling of the statute (1) if when the "action accrues against a person, he is out of the state," or (2) if "after a cause of action accrues, he departs from and resides out of the state."[9] Some courts have construed similar provisions as preventing application of the statute of limitations to a foreign corporation, even though it is "doing business" within the state, because it is not a "resident" or a "person" within the state.[10] This interpretation has been upheld by the Supreme Court of the United States as not discriminating unreasonably against foreign corporations.[11] The Minnesota court, however, has adopted the more widely held view that a foreign corporation "doing business" within the state may use the statute of limitations as a defense.[12]

The instant case raises the more difficult problem of whether a foreign corporation which has ceased "doing business" in the state is "out of the state" within the meaning of the tolling provision. In construing such provisions most courts have held that the statute of limitations does not toll where substituted service will obtain jurisdiction sufficient for a personal judgment against a resident defendant who has temporarily left the state.[13] The court in the present case employed this test and based its decision

[6] 296 N.W. 513 (Minn. 1941). [7] 1 Wood, Limitation of Actions § 5 (Moore's ed. 1916).

[8] Cases cited in note 13 infra; Tolling The Statute of Limitations During the Debtor's Absence, 46 Harv. L. Rev. 706 (1933).

[9] Minn. Stat. (Mason, 1927) § 9200. Nearly every state has a tolling provision in its statute of limitations and most of them contain approximately the same provisions. See for example, Cal. Code Civ. Proc. (Deering, 1937) § 351; Iowa Code (1939) § 11013; Me. Rev. Stat. (1930) c. 95, § 110; Mich. Stat. Ann. (Henderson, 1938) § 27.609; Tex. Ann. Rev. Civ. Stat. (Vernon, 1925) art. 5537; Tolling The Statute of Limitations During the Debtor's Absence, 46 Harv. L. Rev. 706 (1933).

[10] Williams v. Metropolitan Street R. Co., 68 Kan. 17, 74 Pac. 600 (1903); State v. Nat'l Accident Society of New York, 103 Wis. 208, 79 N.W. 220 (1899); Barstow v. Union Consolidated Silver Mining Co., 10 Nev. 386 (1875); Rathbun v. Northern Central R. Co., 50 N.Y. 656 (1872). But cf. Comey v. United Surety Co., 217 N.Y. 268, 111 N.E. 832 (1916) (insurance company allowed to plead statute of limitations). Kansas, New York and Wisconsin have amended their tolling provisions in an attempt to modify such strict interpretations. Kan. Gen. Stat. Ann. (Corrick, 1935) § 60-309; N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1940) § 19; Wis. Stat. (1939) § 330.30.

[11] Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. (U.S.) 137 (1873).

[12] St. Paul v. Chicago, M. & St. P. R. Co., 45 Minn. 387, 48 N.W. 17 (1891); McLaughlin v. Aetna Life Ins. Co., 221 Mich. 479, 191 N.W. 224 (1922); Huss v. Central Railroad and Banking Co., 66 Ala. 472 (1880); Pennsylvania Co. v. Sloan, 1 Ill. App. 364 (1878); Lawrence v. Ballou, 50 Cal. 258 (1875).

[13] Clegg v. Bishop, 105 Conn. 564, 136 Atl. 102 (1927); Crowder v. Morphy, 61 Wash. 626, 112 Pac. 742 (1911); State ex rel. Shipman v. Allen, 132 Mo. App. 98, 111 S.W. 622 (1908); Nunez v. Taylor, 91 Ky. 461, 16 S.W. 128 (1891); Quarles v. Bickford, 64 N.H. 425, 13 Atl. 642 (1888); Rutland Marble Co. v. Bliss, 57 Vt. 23 (1886); State v. Furlong, 60 Miss. 839

on the fact that a state official was named by statute an agent for service of process on the defendant corporation.[14] Under this construction, the statute would toll only as to natural persons actually residing out of the state and having no agent for service in the state. Consequently, such a statute would not toll as to non-resident automobile drivers in states having laws appointing a state official as agent for service of process on these drivers.[15]

In *City Company of New York v. Stern*,[16] relied upon by the dissenting judge in the instant case, the view was taken upon a strict construction of the Minnesota statute that the corporation had departed from and no longer "resided" within the state. This appeared to make doing business within the state the prerequisite for the running of the statute of limitations.[17] The test is thus analogous to the physical presence test used by a minority of courts in cases involving residents temporarily absent or non-resident drivers.[18] As a result of this approach a claim against the defendant corporation might be prosecuted at any time in the future, despite the fact that the withdrawal statute clearly presupposes that such claims will at some time be cut off,[19] and despite the policy of the statute of limitations. In the *Stern* case emphasis was placed on the fact that the statutory agent was appointed by means of a "contract" between the state and the foreign corporation for the benefit of the citizens of the state and not for the benefit of the corporation.[20] But this fact should have no bearing on an interpretation of the tolling provision, which was intended to protect plaintiffs who, through no fault of their own, could not reduce a claim to judgment within the statutory period allowed. If the plaintiff can obtain a judgment, however, there is no reason for tolling the statute.

(1883); Blodgett v. Utley, 4 Neb. 25 (1875); Penley v. Waterhouse, 1 Iowa 498 (1885); Buchnam v. Thompson, 38 Me. 171 (1851). See note 18 infra for cases contra.

[14] Minn. Stat. (Mason, 1927) § 7494. Ohio and Oklahoma have used this test in cases involving fact situations similar to the instant one. Title Guaranty and Surety Co. v. McAllister, 130 Ohio St. 537, 200 N.E. 831 (1936); Walker v. Meyers Construction Co., 175 Okla. 548, 53 P. (2d) 547 (1936); cf. Nelson v. Richardson, 295 Ill. App. 504, 15 N.E. (2d) 17 (1938) (non-resident driver); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W. (2d) 566 (1938) (non-resident driver).

[15] Nelson v. Richardson, 295 Ill. App. 504, 15 N.E. (2d) 17 (1938); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W. (2d) 566 (1938); Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933).

[16] 110 F. (2d) 601 (C.A.A. 8th 1940). This case was reversed by the United States Supreme Court on March 31, 1941, on the basis of the Minnesota Supreme Court's decision in the Pomeroy case. 61 S. Ct. 823 (1941).

[17] City Co. of New York, Inc. v. Stern, 110 F. (2d) 601, 603, 604 (C.C.A. 8th 1940).

[18] Roth v. Holman, 105 Kan. 175, 182 Pac. 416 (1919); Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 Pac. 954 (1917); Anthes v. Anthes, 21 Idaho 305, 121 Pac. 553 (1912); Parker v. Kelley, 61 Wis. 552, 21 N.W. 539 (1884); Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S. (2d) 749 (1938), aff'd 278 N.Y. 576, 16 N.E. (2d) 110 (1938) (non-resident driver); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934) (non-resident driver).

[19] "Such appointment of said agent shall continue in force as long as any cause of action, right, or claim against said corporation survives in this state." Minn. Stat. (Mason, 1927) § 7494. See Pomeroy v. Nat'l City Co., 296 N.W. 513, 516 (Minn. 1941); dissent in City Co. of New York, Inc. v. Stern, 110 F. (2d) 601, 606 (C.C.A. 8th 1940).

[20] City Co. of NewYork, Inc. v. Stern, 110 F. (2d) 601, 604 (C.C.A. 8th 1940).

A more desirable solution would require revision of the tolling provisions in the light of modern procedural methods. The New York tolling provision has been amended to provide that the statute of limitations will run if the defendant has designated "in pursuance of law . . . . a resident of the state on whom a summons may be served."[21] Although this section applies to persons and corporations, it does not seem to be sufficiently specific, for the New York court has held, in a non-resident driver case, that the agent must be one voluntarily appointed and not one named by statute.[22]

Taxation—Tax on Apple Growers—Use of Proceeds for Advertising of State-grown Apples—[Michigan].—In 1939 the State of Michigan, anxious to promote the sale of home-grown apples, passed the "Baldwin Apple Act" providing for a tax upon the producers of Michigan apples, the proceeds from which were to be used to set up a commission with the sole task of advertising Michigan apples.[1] The complainant, representative of a group of disgruntled apple growers, sought to enjoin enforcement of the statute on the ground that it was an unconstitutional discrimination and that it was, in addition, a tax levied for a private rather than a public purpose. The lower court upheld these contentions. On appeal by the state to the Michigan Supreme Court, *held*, that the singling out of apple growers for the imposition of a specific tax is not discriminatory and that apple growing in Michigan is an industry sufficiently invested with a public interest to be the beneficiary of a tax. Judgment reversed. *Miller v. Michigan State Apple Com'n.*[2]

The least troublesome of the issues concerns the power of the legislature to classify for taxation purposes. The Michigan constitution authorizes specific taxes and provides only that they shall operate uniformly upon the class designated.[3] There is no question that the tax in the principal case operated uniformly upon the class of Michigan apple-growers.[4] Moreover, the instances are infrequent in which a legislature's classification for tax purposes has been the basis of invalidation.[5] Michigan specific taxes upon heirs,[6] chain stores,[7] employment agencies,[8] drivers of vehicles,[9] and sellers of liquor[10] have been declared constitutional.

[21] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1940) § 19.

[22] Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S. (2d) 749 (1938), aff'd 278 N.Y. 576, 16 N.E. (2d) 110 (1938).

[1] Mich. Stat. Ann. (Henderson, Supp. 1940) § 12.1220. The amount of the tax was one cent upon each bushel or two cents upon each one hundred pounds, payable when shipped. § 12.1220(9).

[2] 296 N.W. 245 (Mich. 1941).

[3] "The legislature may by law impose specific taxes, which shall be uniform upon the classes upon which they operate." Mich. Const. art. 10, § 4.

[4] Apples sold directly to cider and/or vinegar plants were exempt; each grower might produce three hundred bushels each year tax free. Mich. Stat. Ann. (Henderson, Supp. 1940) § 12.1220(9).

[5] 26 R.C.L. 249–51 (1920).

[6] Union Trust Co. v. Durfee, 125 Mich. 487, 84 N.W. 1101 (1901).

[7] Smith Co. v. Fitzgerald, 270 Mich. 659, 259 N.W. 352 (1935).

[8] Brazee v. People of Michigan, 241 U.S. 340 (1916).

[9] Jasnowski v. Board of Assessors, 191 Mich. 287, 157 N.W. 891 (1916).

[10] People v. Palasz, 191 Mich. 556, 158 N.W. 166 (1916).