cers employed by local health departments which have not legally established fees for the services in question.

Acts 1949, ch. 157, § 418, as added by Acts 1965, ch. 358, § 6, the same being Burns § 35-519, provides:

> "The board of each local health department shall prescribe the duties of all officers and employees. It shall fix compensation of all officers and employees."

Thus, there can be no doubt that the board has the authority to fix the salary of the local health officer. However, the health officer's right to retain fees for issuing certificates is established by statute. I know of no instance wherein a local administrative agency has the authority to require an employee to turn over fees granted him by statute as a condition precedent to receiving a salary from that agency. Conversely, I know of no law which would prohibit an administrative agency, when determining the remuneration it will pay an employee, from taking into consideration other remuneration attached to his position.

OFFICIAL OPINION NO. 60

December 29, 1967

MOTOR VEHICLES—Applicability of Nonresident Motorist Statute in Justice of the Peace Court.

Opinion Requested by Hon. John H. Hesseldenz, Justice of the Peace, Center Township, Marion County.

I am in receipt of your inquiry concerning the applicability of the nonresident motorist statute to actions before Justices of the Peace. The same question has been asked by

Judge George T. Patton, Justice of the Peace in South Bend, Indiana. Numerous informal inquiries in addition indicate there is some considerable doubt throughout the State as to the applicability of this statute to Justice of the Peace Courts.

Acts 1943, ch. 145, § 1, as last amended by Acts 1963, ch. 232, § 1, the same being Burns § 47-1043, often called the "non-resident motorist statute," provides:

> "The operation by a nonresident, or by any resident of this state who may thereafter become a nonresident of this state, or by his duly authorized agent, of a motor vehicle upon a public street or highway or any other place within this state shall be deemed equivalent to an appointment by such person of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which such person may be involved while so operating or so permitting to be operated a motor vehicle on any such street or highway, or any other place within this state and such operation shall be signification of his agreement that any such process against him, which is so served, shall be of the same legal force and validity as if served upon him personally. Such appointment of the secretary of state shall be irrevocable and binding upon his executor or administrator. The action may be filed in the county of the residence of the plaintiff or in the county where the accident or collision occurred, at the election of the plaintiff, and service of such process shall be made by leaving a copy thereof, with a fee of two dollars, for such defendant to be served, with the secretary of state, or in his office, and such service shall be sufficient service upon such person provided that notice of such service and copy of the process are forthwith sent by registered mail to the defendant, and the defendant's return receipt is appended to the original process and filed therewith in the court. In the event that the

defendant refuses to accept or claim such registered mail, then such registered mail shall be returned by the secretary of state to the plaintiff or to his attorney, and the same shall be appended to the original process, together with an affidavit of the plaintiff or of his attorney or agent to the effect that such summons was delivered to the secretary of state, together with a fee of two dollars, and was thereafter returned unclaimed by the post office department, and such affidavit, together with the returned envelope including said summons, shall be considered sufficient service upon such defendant.

"Where such nonresident has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident in the same manner and on the same notice as is provided in the case of the nonresident himself. When an action has been duly commenced under the provisions of this section by service upon a nonresident who dies thereafter, the court shall allow the action to be continued against his executor or administrator upon motion with such notice as the court deems proper.

"The court in which the action is brought may order such continuances as may be reasonable to afford the defendant opportunity to defend the action."

Most, if not all states, have similar statutes. See, Note, Nonresident Motorist Statutes—Their Current Scope, 44 Iowa L. Rev. 384 (1959).

Nonresident motorists statutes such as the above represent a comparatively recent innovation in the law, but that innovation has been approved by the United States Supreme Court. In *Hess v. Pawlowski,* 274 U.S. 352 (1927), a Pennsylvania resident, involved in an automobile accident in Massachusetts and sued in that state after his return to Pennsylvania, contested the jurisdiction of the Massachusetts court and challenged the constitutionality of that state's nonresident motorist statute. The Supreme Court upheld the

statute (which was worded much like Indiana's) and said, at 356 of 274 U.S.:

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern Ry. Co. v. Eggen,* 252 U.S. 553, 561-562. The State's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick v. Maryland,* 235 U.S. 610, 622. And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey,* 242 U.S. 160, 167. That case recognizes power of the State to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. Cf. *Pennsyl-*

> *vania Fire Insurance Co. v. Gold Issue Mining Co., supra,* 96; *Lafayette Ins. Co. v. French,* 18 How. 404, 407-408. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment."

One sentence from the above quotation is of special import: "It [the nonresident motorist statute] makes no hostile discrimination against nonresidents but tends to put them on the same footing as residents." There is no doubt that an action in tort arising out of defendant's use of an automobile could properly be brought against a resident of the State in a Justice of the Peace Court. 2 R.S. 1852, ch. 1, § 10, as amended by Acts 1861, ch. 69, § 2, the same being Burns § 5-208, provides in part that "Justices of the peace shall have jurisdiction [except as limited herein] to try and determine suits founded on contracts or torts." Acts 1957, ch. 322, § 9, the same being Burns § 5-205a, provides:

> "Each justice of the peace shall have jurisdiction in civil actions up to and including the amount of five hundred dollars and said jurisdiction shall be coextensive with the boundaries of the county of which any such township is a part."

To permit an action to be brought against a nonresident motorist in a Justice of the Peace Court through service on the Secretary of State (assuming the action is within the $500 limit and the Court is in the proper county) would be to put nonresidents on the same footing as residents.

Further, it should be noted that the nonresident motorist statute contains no indication that its application is to be restricted to certain courts. (In fact, neither the word "court" nor any synonum thereof appears in the statute.) Thus it is apparent that the Legislature intended the statute to be universally employed by all courts. There is within that statute no basis for distinguishing between Justice of the Peace Courts and other courts of record. Absent such a distinction the language of 2 R.S. 1852, ch. 1, § 75, the same being Burns § 5-213, is appropriate:

> "In all cases not in this act specially otherwise provided, proceedings before justices, shall be governed by the practice and usages of circuit courts, and the rules of the common law so far as the same are in force in this State."

Although I can find no decision by either the Indiana Supreme Court or the Indiana Appellate Court relating to the power of a Justice of the Peace Court to acquire jurisdiction over a nonresident motorist, there is an Appellate Court opinion concerning the acquisition of jurisdiction over a nonresident in a different situation. The opinion in *Worthington v. Qualkinbush,* 40 Ind. App. 554, 82 N.E. 534 (1907), short enough to be reproduced in its entirety, reads as follows:

> "The question for decision is whether jurisdiction of a nonresident of the State and of the United States, who owns a farm in this State, conducts the same by a resident agent and maintains an office thereon, can be obtained in a suit, growing out of matters connected with such agency, before a justice of the peace through service of process upon said agent.
>
> "The jurisdiction of a justice of the peace is limited to his township. Section 1498, Burns 1901, § 1431 R.S. 1881. [With the exception of justices in counties whose population is not less than 250,000 nor more than 550,000, the jurisdiction of Justices of the Peace is now county-wide. See 1966 O.A.G. No. 30, p. 213.] Section thirty-two of 'An act concerning proceedings in civil cases,' approved April 7, 1881 [Acts 1881, p. 245, c. 38] (§ 310 Burns 1901, § 309 R.S. 1881), [now Burns § 2-703] is as follows: 'When a corporation, company, or individual has an office or agency in any county for the transaction of business, any action growing out of, or connected with, the business of such office may be brought in the county where the office or agency is located, at the option of the plaintiff, as though the principal resided therein; and service upon any agent or clerk employed in the office

> or agency shall be sufficient service upon the principal; or process may be sent to any county, and served upon the principal.'
>
> "This is a civil action. It grows out of the business of such office. It is brought in the county and in the township where the same is located, and its facts bring it within the letter of the statute. *Rauber v. Whitney* (1890), 125 Ind. 216. It is also within the reason. The agent who represents the appellant when a man is to be hired to clear land, to plow and to do other work, ought to represent him in a suit to recover for such services."

The decision in *Qualkinbush* demonstrates that Justices of the Peace are not prohibited from acquiring jurisdiction over nonresidents but may do so in certain statutorily defined instances through proper service of process. I believe that the nonresident motorist statute defines such an instance.

The *Qualkinbush* decision also introduces an additional factor, that of venue, a factor concisely defined in *Bledsoe v. State,* 223 Ind. 675, 678, 64 N.E. 2d 160, 161 (1945), as follows:

> " 'Venue . . . relates to and defines the particular county or territorial area within the State . . . in which the cause . . . must be brought or tried.' "

In other words, while all Justices of the Peace courts have the general power to acquire jurisdiction over nonresident motorists, in any particular case, only justices in certain counties or townships can acquire jurisdiction over any given nonresident motorist. This limitation on justices in a particular case is established by Acts 1949, ch. 21, entitled "AN ACT to provide for the venue of civil actions against nonresident motorists." Section 1 of that Act, the same being Burns § 2-709, provides:

> "Civil actions against nonresident motorists may be brought in the county of the residence of the

> plaintiff or in the county where the accident or collision occurred, at the election of the plaintiff."

(The nonresident motorist statute, Burns § 47-1043, set out above, contains similar language.)

Thus, only in Justice of the Peace Courts located in the county of the plaintiff's residence or the county where the accident occurred does venue lie in any given instance. Since the jurisdiction of Justices of the Peace located in counties having a population over 550,000 or under 250,000 is coextensive with the boundaries of the county in which the township wherein they hold office is situated (See 1966 O.A.G., p. 213; Burns §§ 5-205a, 5-205b), such justices would have proper venue if either the plaintiff resides or the accident occurred within that county. The jurisdiction of those justices located in counties within the aforementioned population limits is restricted to their particular townships, so such justices would have proper venue only if either the plaintiff resides or the accident occurred in that particular township.

The procedure for acquiring jurisdiction over a nonresident motorist is described in § 47-1043, *supra,* which reads in part:

> ". . . service of such process shall be made by leaving a copy thereof, with a fee of two dollars, for such defendant to be served, with the secretary of state, or in his office, and such service shall be sufficient service upon such person provided that notice of such service and a copy of the process are forthwith sent by registered mail to the defendant, and the defendant's return receipt is appended to the original process and filed therewith in the court. In the event that the defendant refuses to accept or claim such registered mail, then such registered mail shall be returned by the secretary of state to the plaintiff or to his attorney, and the same shall be appended to the original process, together with an affidavit of the plaintiff or of his attorney or agent to the effect that such summons was delivered to the secretary of state, to-

> gether with a fee of two dollars, and was thereafter returned unclaimed by the post office department, and such affidavit, together with the returned envelope including said summons, shall be considered sufficient service upon such defendant."

Failure to follow the proper procedure results in the failure to gain jurisdiction over the defendant. See, for example, *Penrose v. McKinzie*, 116 Ind. 35, 18 N.E. 384 (1888), wherein it was held that the Justice of the Peace had not acquired jurisdiction over a nonresident (not a nonresident motorist) since process (not directed to an officer) was served on defendant outside the state by plaintiff's attorney rather than by an "officer authorized to serve the same" as required by 2 R.S. 1852, ch. 1, § 20, the same being Burns (1964) § 5-306.

Care should be taken to serve process on the Secretary of State properly. Justices of the Peace of townships not located in Marion County cannot direct such process to their constables for service. 2 R.S. 1852, ch. 2, § 6, the same being Burns § 49-3407, limits the jurisdiction of constables to their respective counties. Thus the constable of a Justice of the Peace Court located in Lake County cannot serve process on the Secretary of State in Marion County.

However, 2 R.S. 1852, ch. 6, § 3, the same being Burns § 49-2803, provides:

> "When no provision is otherwise made for the service of process, in any county, from any court, the sheriff of such county shall serve the same."

Since a Justice of the Peace in Lake County is given the authority to effect the service of process on the Secretary of State in Marion County, and since there is no provision made for the service of such process, then the statute above would apply. Justices of the Peace in counties other than Marion should direct process issued in accord with the nonresident motorist statute to the Sheriff of Marion County for service on the Secretary of State. The two dollar fee for the Secretary of State must accompany the serving of process on that

officer; the sheriff's fee for service of process should accompany the delivery of the process to be served to that officer. The return date on such process should be sufficiently advanced to give the nonresident defendant opportunity to appear.

In conclusion, it is my opinion that the nonresident motorist statute applies to proceedings in Justice of the Peace Courts, and that in any given cause a Justice of the Peace can acquire jurisdiction over a nonresident motorist by directing process to the Sheriff of Marion County (excepting justices located in Marion County who can direct process to their constables) to be served on the Secretary of State, along with the proper fee, if the justice holds office either in the county in which the plaintiff resides or in the county in which the accident occurs (except when, as discussed above, the jurisdiction of the justice is limited to his township) and the amount in controversy is no more than five hundred dollars.

OFFICIAL OPINION NO. 61

December 29, 1967

ELECTIONS—Paying Expenses of Election of School Board Members.

Opinion Requested by Mr. Edward A. Bell, Secretary, State Election Board.

This is in answer to the letter of Mr. John G. Krupa, Clerk of the Lake Circuit Court of November 15, 1967, which you referred to this office. That letter presents the question of whether the costs of electing school board members of the Hammond School City should be paid (1) jointly