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FEDERAL PROCEDURE-VENUE-USE OF STATE NONRESIDENT MOTORIST STATUTE TO IMPLY WAIVE

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FEDERAL PROCEDURE—VENUE—USE OF STATE NONRESIDENT MOTORIST STATUTE TO IMPLY WAIVER—An Illinois corporation brought suit based on diversity of citizenship in a United States district court in Kentucky against a resident of Indiana, alleging a cause of action arising from a collision which occurred on a Kentucky highway. Plaintiff secured personal jurisdiction over defendant by serving process upon the Secretary of State of Kentucky who in turn gave notice to the defendant in accordance with the Kentucky nonresident motorist statute.[1] Defendant entered a special appearance and moved that the case be dismissed on the ground of improper venue.[2] The motion was overruled and the Court of Appeals for the Sixth Circuit affirmed.[3] On certiorari the United States Supreme Court *held,* reversed, Justices Reed and Minton dissenting. Implied appointment of an agent for service of process under a nonresident motorist statute does not waive the privilege of venue conferred by federal statute. *Olberding v. Illinois Central R. Co.,* 346 U.S. 338, 74 S.Ct. 83 (1953).

Since the Supreme Court's approval of a state nonresident motorist statute in 1927,[4] all of the states and the District of Columbia have enacted substantially similar statutes,[5] which prescribe, essentially, that the use of state highways by a nonresident motorist shall be deemed the equivalent of an appointment of a designated state official as agent of the nonresident to accept service of process in any action growing out of such use of the highways.[6]

[1] Ky. Rev. Stat. (1953) §§188.020, 188.030. The Kentucky statute in substance provides that a nonresident motorist who operates his automobile on the state's highways makes the secretary of state his agent for service of process in any civil action arising out of such operation. There is also specified a procedure for serving summons on the secretary of state, who in turn is to notify the nonresident defendant by registered mail.

[2] 28 U.S.C. (Supp. V, 1952) §1391(a).

[3] Olberding v. Illinois Central R. Co., (6th Cir. 1953) 201 F. (2d) 582.

[4] Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927).

[5] For a listing of these statutes, see Knoop v. Anderson, (D.C. Iowa 1947) 71 F. Supp. 832.

[6] See Culp, "Process in Actions against Non-Resident Motorists," 32 MICH. L. REV. 325 (1934); Culp, "Recent Developments in Actions against Nonresident Motorists," 37 MICH. L. REV. 58 (1938); Scott, "Hess and Pawloski Carry On," 64 HARV. L. REV. 98 (1950); Scott, "Jurisdiction over Nonresident Motorists," 39 HARV. L. REV. 563 (1926).

These statutes provide a method for acquiring jurisdiction over the defendant in the state in which the cause of action accrued. Although the extent of their application depends upon the specific terms of each statute, it has been held that they may operate for the benefit of nonresident plaintiffs,[7] and may apply equally to defendants who are residents of other states[8] and those who are residents of other countries.[9] Furthermore, service of process under authority of these statutes confers personal jurisdiction in federal courts within the state as well as in state tribunals.[10] A venue problem arises, however, when both plaintiff and defendant in a federal court are nonresidents of the district in which a diversity suit is filed. Section 1391(a) of the Judicial Code requires that cases in which jurisdiction is based on diversity of citizenship be brought in the "judicial district where all plaintiffs or all defendants reside."[11] Though not a qualification upon the power of the court to adjudicate, the venue provision is a limitation designed for the convenience of litigants. Therefore, unless this requirement is waived, an objecting defendant should be granted a dismissal, or a transfer to a district where venue is proper.[12] It was the attempt to predicate an implied waiver of the venue privilege on provisions of the nonresident motorist statute that led to the procedural issue in the principal case. Extending the doctrine announced by the Supreme Court in *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*,[13] which held that when a foreign corporation appoints a resident agent to accept service of process in a state in which it is doing business such appointment amounts to a waiver of the federal venue privilege, the district courts almost consistently ruled that the implied appointment of an agent for service of process by driving on state highways is likewise a waiver of federal venue.[14] Although waiver of venue is commonly found in "submission through conduct,"[15] these decisions go one step further in equating the agency which is created by implied appointment under the nonresident motorist statutes to the agency created by formal appointment by a foreign corporation.[16] The rationale of

[7] Neff v. Hindman, (D.C. Pa. 1948) 77 F. Supp. 4.

[8] See Peeples v. Ramspacher, (D.C. S.C. 1939) 29 F. Supp. 632.

[9] Lulevitch v. Hill, (D.C. Pa. 1949) 82 F. Supp. 612.

[10] Rule 4(d)(7), Federal Rules of Civil Procedure, 28 U.S.C. (1946).

[11] 28 U.S.C. (Supp. V, 1952) §1391(a).

[12] 28 U.S.C. (Supp. V, 1952) §1406(a): "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[13] 308 U.S. 165, 60 S.Ct. 153 (1939). In 1948, revised 28 U.S.C. §1391(c) adopted the doctrine of the Neirbo case by enlarging venue possibilities as to corporate defendants.

[14] Falter v. Southwest Wheel Co., (D.C. Pa. 1953) 109 F. Supp. 556; Archambeau v. Emerson, (D.C. Mich. 1952) 108 F. Supp. 28; Jacobson v. Schuman, (D.C. Vt. 1952) 105 F. Supp. 483. *Contra,* Waters v. Plyborn, (D.C. Tenn. 1950) 93 F. Supp. 651.

[15] Neirbo Co. v. Bethlehem Shipbuilding Corp., note 13 supra, at 168.

[16] For an extension of the Neirbo waiver theory as applied to corporations, see Knott Corp. v. Furman, (4th Cir. 1947) 163 F. (2d) 199, cert. den. 332 U.S. 809, 68 S. Ct. 111 (1947), which held that jurisdiction exercised by a state over a foreign corporation doing business within its boundaries is based on an implied consent and that consequently the corporation waives its federal venue privilege by doing business in the state. The failure

these cases seems to be that the very fact of agency rather than the manner of appointment constitutes the waiver. The conflict of opinion resulting in the circuit courts[17] is resolved by the decision in the principal case in favor of the nonresident defendant. In considering the underlying theory of the nonresident motorist statutes, the Court refuses to extend the procedural device of implied agency beyond the purpose for which it was devised, that of circumventing the requirement of personal service within the state.[18] It is evident that the conclusion reached does not adversely affect the interests of the resident plaintiff for whose protection these statutes were enacted. Nor does the conclusion place undue burden on the nonresident plaintiff, who retains the privilege of trial in a neutral jurisdiction, either in the state courts, or, on defendant's motion for removal, in the federal court in the district in which the action is pending.[19] The result of the principal case preserves the defendant's privilege of venue without impairing the functional utility of the nonresident motorist statutes.

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to distinguish between implied and actual consent led to contrary results in at least three other circuits: Robinson v. Coos Bay Pulp Corp., (3d Cir. 1945) 147 F. (2d) 512; Moss v. Atlantic Coast Line R. Co., (2d Cir. 1945) 149 F. (2d) 701; Cummer-Graham Co. v. Straight Side Basket Corp., (9th Cir. 1943) 136 F. (2d) 828. This question was mooted by the 1948 amendment to the Judicial Code which broadened the venue provisions as to corporate defendants. See note 13 supra.

[17] Martin v. Fishbach Trucking Co., (1st Cir. 1950) 183 F. (2d) 53; Olberding v. Illinois Central R. Co., (6th Cir. 1953) 201 F. (2d) 582; McCoy v. Siler, (3d Cir. 1953) 205 F. (2d) 498. The First and Third Circuits held no waiver of venue privilege.

[18] The Court does conclude, however, that a waiver of venue may be found "in situations where a state may validly require the designation of an agent for service of process as a condition of carrying on activities within its borders, and such designation has in fact been made." Principal case at 342, citing Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30 (1916), which upheld the New Jersey statute requiring the nonresident motorist *formally* to designate the secretary of state as agent upon whom process might be served.

[19] 28 U.S.C. (Supp. V, 1952) §1441(a).