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FEDERAL PROCEDURE-VENUE-WAIVER OF TITLE 28, UNITED STATES CODE, SECTION 1391(a), UNDER NONRESIDENT MOTORIST STATUTES

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FEDERAL PROCEDURE—VENUE—WAIVER OF TITLE 28, UNITED STATES CODE, SECTION 1391(a), UNDER NONRESIDENT MOTORIST STATUTES—A Connecticut resident brought a suit based on diversity of citizenship in a United States district court in Massachusetts against an Ohio corporation, alleging a cause of action arising from an automobile collision upon a Massachusetts highway. Plaintiff secured personal jurisdiction over the defendant by serving process upon the Registrar of Motor Vehicles for the Commonwealth of Massachusetts and by giving notice to defendant in accordance with the Massachusetts nonresident motorist statute.[1] Upon defendant's motion, the action was dismissed for improper venue. *Held,* defendant is not a Massachusetts resident for purposes of federal venue as defined by Title 28, United States Code, section 1391(c).[2] The operation of defendant's motor vehicle on Massachusetts highways did not amount to a voluntary consent to be sued or a waiver of the federal venue privilege. Dismissal affirmed. *Martin v. Fischbach Trucking Co.,* (1st Cir. 1950) 183 F (2d) 53.

In the years since the Supreme Court's approval of a Massachusetts statute prescribing that by using the highways of that state, a nonresident motorist shall be deemed to appoint a state officer as his agent for accepting service of process in suits arising out of such use,[3] all of the states and the District of Columbia

[1] Mass. Gen. Laws (Ter. ed. 1932) c. 90, §§3A, 3B.

[2] 28 U.S.C. (Supp. 1950) §1391(c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[3] Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927); for a discussion of the theo-

have adopted substantially similar statutes.[4] Such legislation avoids the inconvenience of pursuing the defendant to a place where personal service can be had and provides a method for acquiring jurisdiction over the defendant in the state where the cause accrued. Most states by specific statutory provision or judicial interpretation allow nonresident plaintiffs to take advantage of their nonresident motorist statutes to gain personal jurisdiction over defendants residing outside the state.[5] Futhermore it is settled that service of process under authority of these statutes is effective to confer personal jurisdiction in federal courts within the state as well as in state tribunals.[6] When both plaintiff and defendant in a federal court are nonresidents of the district in which a diversity suit is filed, however, a venue problem is presented. It is evident that unless some act has been done to waive the requirements of the federal venue statute,[7] an objecting defendant should be granted a dismissal for improper venue or a transfer to a district where venue is proper.[8] Venue relates not to the power of a court to adjudicate but to the convenience of the locality for trial. It is a personal privilege which may be waived "by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."[9] The decision in *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*[10] sharply broadened the waiver of venue concept in diversity of citizenship suits. That case held that when a foreign corporation appoints an agent for accepting service of process in a state in which it is doing business, the appointment amounts to a consent to be sued in that state, hence a waiver of the federal venue objection.[11] The theory of the *Neirbo* case has been consistently applied by the district courts to suits arising under various nonresident motorist statutes.[12] In doing so, these decisions have proceeded one step

retical basis of these statutes, see Scott, "Jurisdiction over Nonresident Motorists," 39 HARV. L. REV. 563 (1926).

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

[5] Culp, "Recent Developments in Actions Against Nonresident Motorists," 37 MICH. L. REV. 58 at 74 (1938); for a typical interpretation of these statutes, see Peeples v. Ramspacher, (D.C. S.C. 1939) 29 F. Supp. 632.

[6] 28 U.S.C. §723(c), Rule 4(d)(7), Fed. R.Civ.P.; 2 MOORE'S FEDERAL PRACTICE, 2d ed., 937, 942 (1948); Blunda v. Craig, (D.C. Mo. 1947) 74 F. Supp. 9.

[7] 28 U.S.C. (Supp. 1950) §1391(a): "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

[8] 28 U.S.C. (Supp. 1950) §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."

[9] Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 165, 168, 60 S.Ct. 153 at 155 (1939).

[10] 308 U.S. 165, 60 S.Ct. 153 (1939).

[11] In 1948, revised Title 28 U.S.C. §1391(c), supra note 2, adopted the immediate reforms of the Neirbo case in statutory form by enlarging the venue possibilities as to corporate defendants. See MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 194 (1949).

[12] Krueger v. Hider, (D.C. S.C. 1943) 48 F. Supp. 708; Steele v. Dennis, (D.C. Md. 1945) 62 F. Supp. 73; Morris v. Sun Oil Co., (D.C. Md. 1950) 88 F. Supp. 529; Urso v. Scales, (D.C. Pa. 1950) 90 F. Supp. 653; Whitmire v. Partin v. Milton, (D.C. Tenn. 1941) 5 Fed. Rules Serv. 14a.62, case 2. See dicta in Williams v. James, (D.C. La. 1940) 34 F. Supp. 61; also see Malkin v. Arundel Corporation, (D.C. Md. 1941) 36 F. Supp. 948.

beyond the actual holding of the Supreme Court, since nonresident motorist statutes do not provide for the creation of an agency by formal appointment such as was involved in the *Neirbo* case. Through the efficacy of statutes enacted under the police powers, an agency is deemed to spring up from the doing of a voluntary act within the jurisdiction.[13] Nevertheless the district courts have held the implied appointment to be equally strong as a consent to be sued as is an actual appointment of a process agent.[14] The rationale of these cases is that it is the fact of the agency rather than the manner of appointment which acts as a waiver of venue. The instant case gives regard to the underlying theory of these statutes and refuses to treat the implied appointment as a consent to be sued, since the agency was imposed upon the nonresident without conscious volition and therefore is not a realistic basis for a voluntary venue waiver. The court treats the agency as a procedure useful only as a means to circumvent the requirement of personal service within the state and not as an agency or consent to be sued in any true sense. If a statute were to be enacted requiring only adequate notice to the nonresident to defend, and eliminating the fiction of an implied agency, the statute would theoretically be a valid exercise in the state's police powers, but would provide no basis for finding a consent to be sued under the theory of the *Neirbo* case. The principal case is certainly correct in its observation that the formal appointment is understood by its maker to be a consent to effective suit within the state while the average nonresident motorist is oblivious to the effect of his use of the highways. By comparing the voluntariness of the method of appointment in the two situations rather than the resulting agencies, the principal case employs the sounder reasoning. It undoubtedly is the more practical application of waiver principles since it recognizes the implied agency as a fiction and refuses to give it effect beyond the purpose for which it was devised. It should be noted, however, that if state legislation continues to utilize the implied appointment fiction, it is not an unreasonable result to find a consent to be sued, since the *Neirbo* case itself was a very liberal extension of the waiver doctrine.

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[13] GOODRICH, CONFLICT OF LAWS, 3d ed., 200 (1949); see note 3 supra.

[14] An excellent discussion of the Neirbo waiver theory and a holding that it extends to implied appointments is contained in Knott Corp. v. Furman, (4th Cir. 1947) 163 F. (2d) 199, cert. den. 332 U.S. 809, 68 S.Ct. 111 (1947), rehearing den. 332 U.S. 826, 68 S.Ct. 164 (1947).