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Article 12

Courts - Use of State Highway Held No Waiver of Federal Venue Statute

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COURTS–USE OF STATE HIGHWAY HELD NO WAIVER OF FEDERAL VENUE STATUTE

Plaintiff, a resident of Iowa, brought an action in a federal district court in Pennsylvania against residents of North Carolina, for damages resulting from a motor vehicle accident which occurred in Pennsylvania. Service was made following the provisions of a Pennsylvania statute which provides that a non-resident motorist constitutes the Secretary of Revenue his agent for service in courts of the Commonwealth when he uses its highways.[1] The defendant maintained that venue was lacking because the federal statute provides that: "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."[2] It was held that not withstanding the Pennsylvania non-residence motorist statute, mere operation of a motor vehicle on Pennsylvania highways did not constitute a waiver of the federal venue statute. *McCoy v. Siler*, 205 F. 2d 498 (C.A. 3d, 1953).

This is the most recent of several decisions[3] which limit, if they do not reverse, the hitherto well established principle upon which this class of cases has been decided.[4] Ever since 1877 when the United States Supreme Court upheld a Pennsylvania statute which required foreign corporations to designate a state official as agent for service of process, the principle that such an appointment "waives" the federal statute has been expanded.[5] In the case of *Neirbo Co. v. Bethlehem Shipbuilding Corp.*,[6] it was held that the defendant waived the provisions of the federal act by designating a state officer to receive service of process. It was also pointed out that the privileges of the federal act may be lost by failure to assert it seasonably, by formal submission to a cause, or by submission through conduct.

In the present case the precise question was whether or not the defendant's conduct, in using the highways of the Commonwealth constituted submission to a loss of privilege under the act.

[1] Pa. Stat. Ann. (Purdon, 1929) Title 75, § 1201.

[2] 62 Stat. 935 (1948), 28 U.S.C.A. § 1391(a) (1950).

[3] Martin v. Fischbach Trucking Co., 183 F. 2d 53 (C.A. 1st, 1950); Moss v. Atlantic Coast Line R. Co., 149 F. 2d 701 (C.A. 2d, 1945); Cumner-Graham Co. v. Straight Side Basket Corp., 136 F. 2d 828 (C.A. 9th, 1943); Waters v. Plyborn, 93 F. Supp. 651 (E.D. Tenn., 1950).

[4] Consult Kilpatrick v. Texas & P. Ry. Co., 166 F. 2d 788, 791 (C.A. 2d, 1948) where Learned Hand, J. writes, "It is settled that . . . a state may give judgment in personam against a non-resident who has only passed through its territory, if the judgment be based upon a liability incurred while he was within its borders. . . . The presence of the obligor within the state subjects him to its law . . . and allows it to impose upon him any obligation which its law entails upon his conduct."

[5] Ex Parte Schollenberger, 96 U.S. 369 (1877).

[6] 308 U.S. 165 (1939).

The reasoning that such conduct should constitute submission to a loss of privilege, is based upon the legal fiction that every man is conclusively presumed to know the law. If the law of a state obliges him to appoint a state official as his agent for service when he enters upon its roads, he should be deemed to know it. His voluntary entry, therefore, is submission through conduct.[7] A more practical reason, however, is that witnesses are more likely to be available in the locale, and that depositions are unsatisfactory substitutes for the trier of the facts.[8]

The view that mere operation of a motor vehicle on a state's highways is *not* submission through conduct is exemplified by the decision in *Martin v. Fischbach Trucking Co.*,[9] from which the *Neirbo* case was distinguished on the grounds that the defendant therein made an actual designation of a state official for service. This view was followed in *Waters v. Plyborn*,[10] and by the majority in the instant case. If this view were to be followed uniformly it would seem that only an express appointment of a state official for the purpose of receiving service would be effective to waive the federal statute.

Whether one interpretation, or the other, of non-resident motorist statutes is to prevail, it is a matter of some importance to litigants that the interpretation be uniform throughout the country. Interstate automobile, truck, and bus travel is a commonplace affair, and in the actions arising from such travel, the forum for trying them should be certain. Otherwise, much needless litigation concerning venue will result.

Since the first non-resident motorist act in 1923, enacted by Massachusetts,[11] was held constitutional,[12] every state in the union and the District of Columbia have enacted similar statutes.[13] Federal and state courts have almost uniformly upheld them.[14] *Hess v. Pawloski*[15] definitely confirmed the power of the states to require the appointment of a state official for service, and to exercise in personam jurisdiction over the defendant non-resident motorist. This power was qualified in *Wuchter v. Pizzutti*[16] by

[7] Cases cited notes 27–29 infra.

[8] Burnett v. Swenson, 95 F. 2d 524 (W.D. Okla., 1951).

[9] 183 F. 2d 53 (C.A. 1st, 1950).

[10] 93 F. Supp. 651 (E.D. Tenn., 1950).

[11] Mass. Acts (1923) C. 431, § 2.

[12] Hess v. Pawloski, 274 U.S. 352 (1927).

[13] Consult McCoy v. Siler, 205 F. 2d 498, 502 n. 18 (C.A. 3d, 1953).

[14] Morrow v. Asher, 55 F. 2d 365 (N.D. Tex., 1932); Cohen v. Plutschak, 40 F. 2d 727 (D.C. N.J., 1930); Moore v. Payne, 35 F. 2d 232 (W.D. La., 1929); Jones v. Paxton, 27 F. 2d 364 (D.C. Minn., 1928); Shushereba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931); Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930); State ex. rel. Cronkhite v. Belden, 193 Wis. 145, 211 N.W. 916 (1927).

[15] 274 U.S. 352 (1927).

[16] 276 U.S. 13 (1928).

requiring that the statute must provide for actual notice to the defendant.

The power of the states to compel appointment was held to have been part of their regulatory powers, because: "Motor vehicles are dangerous machines; and . . . their use is attended by serious dangers to persons and properties."[17]

In contradistinction to the grounds on which the non-resident motorist acts were upheld, are the grounds on which the states were upheld in requiring foreign corporations, doing business within the state, to appoint agents, whether state officials or not, for receiving service of process. These grounds were said to be the qualified power to exclude the corporations from the state.[18]

In an early case,[19] it was said that the mere transaction of business in a state by non-resident natural persons does not imply consent to be bound by the processes of its courts. It is clear that the first thinking on this subject was to the effect that the state could exercise its power to acquire in personam jurisdiction of a non-resident within its boundaries, but that no implication of the non-resident's submission through conduct or waiver of personal immunities arose. Later, the *Neirbo* case made the whole question one of public policy, saying that it would be intolerable to afford immunity to corporations doing business in other states outside of those in which such corporations had been created or recognized. *Krueger v. Hider*,[20] followed *Neirbo* and went even further, holding that no express appointment of an agent for service is necessary, but that such appointment will be implied from the non-resident's activities.[21]

In the *Schollenberger* case it was held that the intention of the Pennsylvania legislature in requiring foreign corporations to appoint agents for service was to have these cases not confined to courts *of* the state, but courts *in* the state, where the laws of the state would apply. This follows the Supreme Court in decisions from 1856,[22] and was further expounded by the court in *Neirbo*, as follows: "As to diversity cases, Congress has given the federal courts cognizance, concurrent with the courts of the several states."[23]

It may therefore be reasoned that the appointment of a state official for service, by a non-resident motorist, waives the privilege of venue (or

[17] Ibid., at 356.

[18] Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co., 243 U.S. 93 (1917).

[19] Flexner v. Farson, 248 U.S. 289 (1919).

[20] 48 F. Supp. 708 (E.D. S.C., 1943).

[21] See, for discussion of subject "submission through conduct," Steele v. Dennis, 62 F. Supp. 73 (D.C. Md., 1945).

[22] Lafayette Ins. Co. v. French, 59 U.S. 404 (1856).

[23] 308 U.S. 165, 171 (1939).

alternatively gives consent to be sued)[24] because the non-resident must be deemed to understand the concurrent jurisdiction of the federal courts and state courts, and to be prepared to answer in either. That anyone may expressly waive his personal immunity is beyond argument,[25] but that he may do so by implication is not conceived in the present case and its several predecessors.[26]

There are, however, some District courts and one Court of Appeals which have had no hesitancy in applying the rule in the *Neirbo* case to the cases in point, and finding that the defendant waived his privilege by submission through conduct. *Falter v. Southwest Wheel Co.*[27] held that the out-of-state motorists had consented to be sued in Pennsylvania, and that the District Court was in Pennsylvania. *Kostamo v. Brorby*[28] found that by the mere use of a Nebraska road, the non-resident motorist waived the federal rule. There are many cases to the same effect.[29]

In *Jacobson v. Schuman*,[30] it was said:

> To say that the court may retain jurisdiction [if justice requires] even though the venue is improper, would stretch section 1391 too far. But this is what the courts have done through legal fiction, [which] is dangerous in a country of realistic men and women.[31]

It is submitted that the final determination of this split of opinion in the federal courts is not the most pressing matter deserving resolution by the Supreme Court of the United States but until it is resolved much needless litigation will result.

CARRIERS–DUTY OF CARRIER TO NOTIFY CONSIGNOR OF NON-DELIVERY IN "ORDER-NOTIFY" SITUATION

Plaintiff-consignor brought an action based on counts in tort and breach of contract against the terminal carrier of goods shipped on an "order-notify" bill of lading for failure of the carrier to notify consignor of

[24] "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference." Ibid., at 168.

[25] 62 Stat. 937 (1948), 28 U.S.C.A. § 1406 (b) (1950).

[26] Cases cited note 3 supra.

[27] 109 F. Supp. 556 (W.D. Pa., 1953).

[28] 95 F. Supp. 806 (D.C. Nebr., 1951).

[29] Olberding v. Illinois Central R. Co., 201 F. 2d 582 (C.A. 6th, 1953); Garcia v. Frausto, 97 F. Supp. 583 (E.D. Mo., 1951); Urso v. Scales, 90 F. Supp. 653 (E.D. Pa., 1950); Canright v. General Finance Corp., 33 F. Supp. 241 (E.D. Ill., 1940).

[30] 105 F. Supp. 483 (D.C. Vt., 1952).

[31] Ibid., at 486.