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**Venue–Nonresident Motorist Statutes and Actions in Federal Courts**

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compensated for only one week of a two-week suspension of operations, did not consent to the subsequent time, has received support in at least one court. *Schettino v. Adm'r*, 138 Conn. 253, 83 A.2d 217 (1951). The court said that, although the company exercised its right to declare a shutdown pursuant to a contract, "to say that this action of the company was, in effect, the voluntary act of the plaintiff because the contract which his union made with the company empowered the company to take that action, gives a very strained interpretation to the agreement. . . . Certainly the employees who where not eligible for vacation have not, by any reasonable interpretation to be placed upon the terms of the bargaining agreement, consented to any action by the company which would permit the designation of a period of vacation without pay for them."

The principal case does not stand for the proposition that a worker cannot give consent to the cessation of operations through his legal agent. However, the statute, as interpreted in this case, requires that the consent be unequivocal and explicit in its terms. The act does not permit implied consent and informal agreement. The literal language of section 4 (8), *supra*, must be complied with in each of its particulars before one can be considered voluntarily unemployed under it. This means that the consent must be clearly shown and the dates upon which the vacation is to be given must be specified and not left to the discretion of the employer.

R. H. R.

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**Venue—Nonresident Motorist Statutes and Actions in Federal Courts.**—*D*, a resident of Indiana, while driving a truck upon a highway of Kentucky, collided with a railroad overpass owned by *P*, an Illinois corporation. Action was brought in the United States District Court for the Western District of Kentucky. Jurisdiction was based on diversity of citizenship. Process was served upon *D* in accordance with the Kentucky nonresident motorist statute which in substance provides that a nonresident motorist who operates his automobile on the state's highway makes the secretary of state his agent for service of process in any civil action arising out of such operation. There is also set up a procedure for serving the summons on the secretary of state, who in turn is to notify the nonresident defendant by registered mail. Ky. Rev. Stat. §§ 188.020-188.030 (Baldwin, 1943). *D* entered a special appearance and moved that the case be dismissed on the ground of im-
proper venue. The motion was overruled and the United States Court of Appeals for the Sixth Circuit affirmed. 201 F.2d 582 (6th Cir. 1953). To resolve a conflict between circuits, the Supreme Court granted certiorari. Held, in reversing judgment, D having not consented to be sued in the district court where action was commenced has thus not waived his venue privilege under 28 N.S.C. § 1391a (Supp. 1952). This section 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." Olberding v. Illinois R.R., 74 Sup. Ct. 281 (1953).

The usual provisions for securing jurisdiction over the nonresident in the nonresident motorist statutes were held constitutional in Hess v. Pawloski, 274 U.S. 352 (1927); as a result of this decision state courts can validly serve the nonresident motorist; federal courts can do so by virtue of Rule 4 (d) of Title 28 of the United States Code.

The courts of appeals were divided on the issue presented in the principal case. In accord with the decision in the latter was Martin v. Fishbach Trucking Co., 183 F.2d 53 (1st Cir. 1950); contra was McCoy v. Siler, 205 F.2d 498 (3d Cir. 1953). The district courts with near unanimity have held contra to the Olberding decision. Falter v. Southwest Wheel Co., 109 F. Supp. 556 (W.D. Pa. 1953); Archambeau v. Emerson, 108 F. Supp. 28 (W.D. Mich. 1952); Krueger v. Hider, 48 F. Supp. 708 (E.D. S.C. 1943).

Their conclusion, that a nonresident by using the highways of a state, having a statute like that of Kentucky, impliedly waived the federal statute pertaining to venue in diversity cases was derived by analogy of the facts to one or two corporation cases. In Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), the Supreme Court recognized that the actual appointment by a corporation of an agent for service of process also constituted a consent to the venue of the federal court of the district. The lower courts reasoned that the nonresident motorist also appointed an agent by using a state's highways and that there was no essential difference between actual consent to be sued through the formal appointment of an agent and an implied consent to be sued derived from an implied appointment.

Those decisions coming after 1947 relied for support also upon the fourth circuit decision in Knott Corp. v. Furman, 163 F.2d 199 (4th Cir. 1947), cert. denied, 332 U.S. 809 (1947), rehear-
ing denied, 332 U.S. 826 (1947). There it was held that an actual appointment was not necessary but the mere doing of business by a corporation in the state under a statute by which a state officer is appointed as agent constituted a waiving of the federal venue statute. To the lower courts, the logical conclusion of these two decisions was that what is true as to foreign corporations is true as to nonresident motorists. See Jacobson v. Schuman, 105 F.Supp. 483 (D. Vt. 1952). The issue in the Knott case pertaining to corporations is now academic in the light of 28 U.S.C. § 1391c (Supp. 1952). This section, enacted in 1948, permits a corporation to "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."

Whereas the lower courts found no substantial difference between actual consent to be sued through the formal appointment of an agent and an "implied consent" to be sued derived from implied appointment, the Supreme Court in the Olberding case did find an essential difference. It was that the formal appointment of an agent is tantamount to an actual consent to waive the venue statute while an appointment by use of a highway was no consent at all. "Implied consent" is a nonentity, said the Supreme Court in the principal case, a misapprehension that such is the reason why a nonresident can be subjected constitutionally to a state's jurisdiction. To the lower courts the misconception that implied consent waived the question of jurisdiction of person seemed logically applicable in waiving the federal venue statute. See Krueger v. Hider, 48 F.Supp. 708, 710 (E.D.S.C. 1943). "In point of fact," said the Olberding opinion, "jurisdiction (over the person) in these cases does not rest on consent at all," but rather on "a fair rule of law between a resident injured party and a nonresident motorist, and the requirements of due process are therefore met. Hess v. Pawloski, 274 U.S. 352 (1927)." See Culp, Recent Developments in Actions against Nonresident Motorists, 37 Mich. L. Rev. 59 (1938) (presents the view that the constitutional basis of jurisdiction over the person is the states' general police power arising from the possibilities of damage by wayfaring motorists); Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563 (1926) (contends that the basis of jurisdiction is the power of the state to exclude the motorist).

The Supreme Court in the Olberding decision found no consent present either as to jurisdiction over the person or as to waiv-
ing venue, in other words, found no contract between state and motorist.

In the *Neirbo* case, with a reassertion in the *Olberding* opinion, the Court said a consent was shown in the act of actually appointing an agent to receive process which resulted in a "true contract" between state and corporation. The corporation by appointing an agent to receive process received in return from the state a privilege to transact business within the state. By this contract, the Court said the corporation consented to permit the state to have jurisdiction over it and to waive the provisions of the federal venue statute. This is a large modification by the Court of the contract into which the state and corporation entered. Their contract dealt only with service of process. The corporation did not consent to waive its privilege under the federal venue statute but the Court in the *Neirbo* case, with a reiteration in the *Olberding* decision, said it did. That the Supreme Court extended the matter of the corporation-state contract seems an inescapable result of the *Neirbo* opinion.

The Supreme Court in the principal case inferentially indicated that no contract existed between motorist and state as there was between corporation and state. But rather, in the motorist case, the validity of the process provisions of the nonresident motorist statute rests upon "a fair rule of law." This rule of law, the Court in the *Olberding* case was unwilling to extend so as to declare the federal venue statute inoperative in the motorist case.

It would seem that this rule of law could have been more properly extended than a contract enlarged as was done in the *Neirbo* case. Though perhaps more proper to extend, no reason for an extension seems to exist.

True, in a situation like the principal case, if the plaintiff wants his case heard in a federal court, he will have to bring his witnesses to a jurisdiction where the venue of the action will lie. But what good reason exists for having the case heard in a federal rather than in a state court? The basis for diversity cases being heard in a federal court is that a nonresident may be prejudiced by a jury chosen from the locale where one of the parties resides. But in the type of case under discussion, both parties are nonresidents and thus the above basis for a federal court hearing is not present.

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