William and Mary Review of Virginia Law

Volume 2 (1954-1956)
Issue 1

Article 9

May 1954

Federal Procedure - Federal Jurisdiction and the Nonresident Motorist Statutes

Richard E. Day

FEDERAL PROCEDURE—FEDERAL JURISDICTION AND THE NONRESIDENT MOTORIST STATUTES

The Illinois Central Railroad Company, an Illinois corporation, brought suit in the United States District Court for the Western District of Kentucky against Olberding, a resident of Indiana, for damages caused by the alleged negligence of the defendant in the operation of his truck while on temporary business in Kentucky, where defendant collided with an overpass of the railroad, causing a subsequent derailment. Jurisdiction was based upon diversity of citizenship.[1] Defendant was apprised of the action by service of process on the Kentucky Secretary of State in accordance with the Kentucky Nonresident Motorist Statute.[2] In a special appearance, the defendant moved that the case be dismissed on the ground of improper venue. The motion was overruled, and the ensuing trial resulted in a verdict for the plaintiff, which was affirmed by the Court of Appeals for the Sixth Circuit. On appeal to the Supreme Court, *held,* reversed, since the defendant did not waive his rights under the federal venue statute[3] merely by operating his truck on the Kentucky highways, notwithstanding the Kentucky Nonresident Motorist Statute. Justices Reed and Minton dissented. *Olberding* v. *Illinois Central R. Co.,* ___ U. S. ___, 74 Sup.Ct. 83, 98 L.Ed. (Advance p. 7), (1953).

"Venue" does not arise until an action is started,[4] and does not refer to "jurisdiction" at all.[5] "Jurisdiction" of the court means the inherent power to decide a case; whereas, "venue" designates the particular county or city in which a court with jurisdiction may hear and determine the case.[6] "Jurisdiction" is of three kinds: of the subject matter, of the person, and to render the particular judgment which was given. To obtain jurisdiction of the person of the defendant it is generally stated that one of the following is required: (1) the presence of the defendant within the state; (2) the domicile of the defendant within the state; (3) the allegiance of the defendant to the state; or (4) the defendant's consent. How-

1. 28 U.S.C., 1946 ed., Supp. V §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.").
2. KRS 188:020—188:030.
3. *Op. cit.*
4. State *ex rel.* Helmes v. District Court of Ramsey County, 206 Minn. 357, 287 N.W. 875 (1939).
5. Arganbright v. Good, 46 Cal.App.2dSupp. 877, 116 P.2d 186 (1941).
6. Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp., 145 Va. 317, 133 S.E. 812 (1926); Stanton Trust & Savings Bank v. Johnson, 104 Mont. 235, 65 P.2d 1188 (1937).

ever, it has been shown that these are not the only possible bases of jurisdiction, unless resort is made to fictions.[7]

As a matter of jurisdiction, it was originally the rule, as laid down in *Pennoyer* v. *Neff*,[8] that "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."[9] The advent of the automobile, with the attendant new problems of a highly mobile public and the increasing number of accidents resulting from its use, has necessitated the inauguration of adequate measures of control. To meet this need, states enacted statutes subjecting nonresident motorists operating automobiles within the state to the jurisdiction of the courts of the state. In *Kane* v. *New Jersey*[10] the Supreme Court of the United States held that a state may forbid a nonresident to operate an automobile within the state unless he has authorized a state official to receive service of process in actions brought against him arising out of the operation of the automobile within the state. Of this early New Jersey Nonresident Motorist Statute[11] Justice Brandeis, speaking for the Court, said: "It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners."[12] The decision in *Hess* v. *Pawloski*[13] went one step further by not requiring a nonresident operating a motor vehicle within the state *expressly* to authorize a state official to accept service of process, as in the New Jersey statute, but, under the Massachusetts statute,[14] provided that the operation by a nonresident of a motor vehicle on the public way shall be deemed equivalent to an appointment by him of a public officer as his attorney upon whom may be served all lawful processes in an action against him, growing out of any accident or collision in which he may be involved while operating a motor vehicle on such way. The Massachusetts statute is a more convenient method of subjecting nonresidents to the jurisdiction of the courts and is the form generally followed today,[15] as in the Kentucky Nonresident Motorist Statute, *supra*. All such

7. Scott, *Jurisdiction Over Nonresident Motorists*, 39 Harv.L.Rev. 563, 570 (1926).
8. 95 U.S. 714 (1877).
9. *Id.* at 727.
10. 242 U.S. 160 (1916).
11. P.L. 1908, p. 13.
12. 242 U.S. 160, 167 (1916).
13. 274 U.S. 352, 47 Sup.Ct. 632, 71 L.Ed. 1091 (1927).
14. General Laws c. 90, as amended in St. 1923, c. 431, §2.
15. For the comparable Virginia statute see Virginia Code of 1950, §8-67.1 (Cum. Supp. 1952).

statutes require the actual service of process on the defendant to constitute due process.[16]

These nonresident motorist statutes grant jurisdiction upon the same basis employed to give jurisdiction over foreign corporations doing business within the state. In both instances it is attempted to base jurisdiction upon implied consent, reasoning under such statutes that the nonresident motorist, or foreign corporation, agrees to make the secretary of state, or other appropriate state official, his agent for service of process in any civil action arising out of the operation of his vehicle, or business, respectively, within the state, as a prerequisite to the privilege of such operations within the state. The difficulty of basing jurisdiction upon such a fiction is that it is often impossible to find any intent on the part of the defendant to consent at all. It has been stated that a better basis of jurisdiction over persons "not present within the state, not domiciled in nor citizens of the state, and not consenting to the exercise of jurisdiction . . . may be stated in the form of a general proposition, as follows: If a state may, without violating any constitutional limitation, forbid the doing of certain kinds of acts within the state unless and until the person doing the acts has consented to the jurisdiction of the courts of the state as to causes of action arising out of such acts, the state may validly provide that the doing of such acts shall subject him to the jurisdiction of the courts of the state as to such causes of action."[17] Whatever the basis is, the constitutionality of such legislation is now well established and is not subject to attack for lack of due process.

Having considered the problem of jurisdiction over the nonresident, the next question is the satisfaction of the venue requirements. In cases where the defendant resides outside the state, venue is determined by the plaintiff. Thus, in each of the above cases venue, as well as jurisdiction, was satisfied. In the *Olberding* case, now under consideration, jurisdiction was satisfied by compliance with the recognized procedure of service under the Nonresident Motorist Statute, but the federal venue statute[18] provides that an action wherein jurisdiction is founded only on diversity of citizenship may generally be brought only in the district where all plaintiffs or all defendants reside. The question decided here is that

16. Windsor v. McVeigh, 93 U.S. 274 (1876); Roller v. Holly, 176 U.S. 398 (1900); McDonald v. Mabee, 243 U.S. 90 (1917).
17. Scott, *Jurisdiction Over Nonresident Motorists*, 39 Harv.L.Rev. 563, 572 (1926).
18. 28 U.S.C., 1946 ed., Supp. V §1391(a).

such process does not waive the venue requirements under the federal venue statute. The *Olberding* case is compared with the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*[19] In that case it was held that the express consent of the foreign corporation to be sued in the courts of the state, as exemplified by the signing of a proper authorization required by the New York statute,[20] extended to the federal courts sitting in that state. In following the trend of the reasoning of the Supreme Court in these previous decisions, logic would seem to indicate that the nonresident motorist should receive like protection and not be barred from bringing suit in the federal court in the state in which the accident occurred merely because the action is brought "wherein jurisdiction is founded only on diversity of citizenship". The only way that this may be done, apparently, would be for the defendant expressly to waive the federal venue right, or impliedly waive it either by not objecting or by the defendant's removing to the federal court an action originated in a state court.

It is submitted that this venue restriction in federal courts, where jurisdiction is based upon diversity of citizenship, would equally apply in any such action brought in the federal courts against a foreign corporation where that corporation has not expressly appointed the required statutory agent under statutes such as the Virginia statute, which states that "doing such business in Virginia shall be signification of its agreement that any such process or notice so served shall be of the same legal force and validity as if served upon it in the State of Virginia."[21] The *Olberding* decision is contra to *Knott Corp* v. *Furman,*[22] which upheld the Virginia statute, stating that "since the defendant unquestionably did business in the state within the meaning of the statute . . . there would seem to be no question as to its having appointed a process agent. The defendant must be presumed to have knowledge of the law of the state; and, when it did business in the state with knowledge of the provision of the law . . . it necessarily consented to the appointment of the process agent therein provided."[23] Thus, the *Furman* case held that such "implied" consent to be so served waived the federal venue requirement, even though jurisdiction of that case rested solely upon diversity of citizenship.

19. 308 U.S. 165, 60 Sup.Ct. 153, 84 L.Ed. 167 (1939).
20. General Corporation Law §210.
21. Virginia Code of 1950, §13-217.
22. 163 F.2d 199 (4th Cir. 1947).
23. *Id.* at 203.

Both the majority opinion by Justice Frankfurter and the dissenting opinion by Justice Reed indicate that they recognized this apparent inequity. Justice Reed pointed out the injustice of the situation in having a different doctrine of venue applied to motor torts committed by foreign corporations doing business in a state from that which is applied to an individual motorist driving through the state. He saw no substantive difference between signing an agreement, as in the *Neirbo* case, and the acceptance by the act of driving and enjoying the privilege of using the highways under the Kentucky statute.

Justice Frankfurter was quick to point out that "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."[24] He maintained that Congress has been explicit in confining to "the judicial district where all plaintiffs or all defendants reside" all cases based solely on diversity of citizenship. He said that, while this is meant to be for the convenience of litigants and may be waived by them, the defendant has not consented to be sued in that district, because he has in fact not consented to anything. Justice Frankfurter continued to indicate that jurisdiction in these cases does not rest on consent at all, but is a fiction of previous analysis that the nonresident has "impliedly" consented to be sued there by his use of the highways, and that "The liability rests on the inroad which the automobile has made on the decision of *Pennoyer* v. *Neff* . . . as it has on so many aspects of our social scene. The potentialities of damage by wayfaring motorists, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against the absentee motorist provided only that he is afforded an opportunity to defend himself."[25] Thus, he clearly indicates the need for such provisions as are found in the nonresident motorist statutes. The federal statute being as it is, however, he finds it necessary to base his decision on the existing situation created by Congress: "But to conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued and has thus waived his federal venue rights is surely to move in the world of Alice in Wonderland. The fact that a non-resident motorist who comes into Ken-

24. 74 Sup.Ct. 83, 85 (1953).
25. *Ibid.*

tucky can, consistent with the Due Process Clause of the Fourteenth Amendment, be subjected to suit in an appropriate Kentucky state court has nothing whatever to do with his rights under [the federal venue statute]."[26] His conclusion is reconciled with the *Neirbo* case by his showing that there the defendant had designated an agent in New York "upon whom a summons may be served within the state of New York". This was held to be an "actual consent" which extended to all courts sitting in New York, both federal and state. In the *Olberding* case no such designation was required or made, other than the act of driving a motor car on the highways of Kentucky, and therefore, the *Neirbo* case was considered by Justice Frankfurter to be inapplicable.

It is submitted that the result of this decision is inconsistent with the purpose of the nonresident motorist statutes and that Congress should enact legislation to remedy the apparent inequity caused by the federal venue statute. Both the majority and the minority opinions indicate the need for the correction, but the decision has left it up to Congress to act.

Richard E. Day

26. *Ibid.*