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When Nonresident Motorists Meet in the United States District Courts - Jurisdiction and Venue - Olberding v. Illinois Central Railroad Co.

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WHEN NONRESIDENT MOTORISTS MEET IN THE UNITED STATES DISTRICT COURTS — JURISDICTION AND VENUE

Olberding v. Illinois Central Railroad Co.[1]

By BIRD H. BISHOP*

The instant case, decided in November of 1953 by the Supreme Court of the United States points up the necessity for a searching review of the whole field of the nonresident motorist statutes now in force in so many of our states. It is proposed, by tracing the development of these statutes, to illustrate the impact and ultimate effect of such statutes upon traditional concepts of the various bases of jurisdiction formerly relied on by Bench and Bar in deciding close questions raised under the doctrine laid down in *Pennoyer v. Neff*.[2]

In 1906, New Jersey enacted the first legislation[3] designed to give protection to New Jersey residents against nonresident motorists. This statute provided that no nonresident owner should drive an automobile upon a public highway unless he first duly executed an instrument appointing the Secretary of State his agent for the service of process as to "any action or legal proceeding caused by the operation of his registered motor vehicle within the state, against such owner". The statute further provided penalties for using the highway without having complied with this and other provisions.

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[1] Olberding v. Illinois Central Railroad Co., Inc., 74 Sup. Ct. Rep. 83 (1953).

[2] 95 U. S. 714 (1877), holding that a judgment by a state court having no jurisdiction over the defendant was void. It is not the ultimate purpose of this comment to survey in great detail the problem of what has been the interpretation given to the federal venue statute or the interrelation between this statute and 28 U. S. C. A. Sec. 1441(a) dealing with removal of cases from state to federal courts. The author recognizes the problems so presented and treats herein at p. ..., *infra*, with the effect of the Olberding case on Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 (1939), and raises a question of whether Congress should review this field with a view towards clarifying its position as to the venue situation under the nonresident motorist statutes today.

[3] N. J. Laws 1906, Ch. 113, Sec. 16(1), amended by N. J. Laws 1908, Ch. 304, Sec. 4, N. J. Comp. Stat. (1910) 3431.

Kane, a resident of New York and the defendant below, had not filed the requisite instrument with the Secretary of State of New Jersey appointing him his agent for service, and was subsequently arrested while driving in New Jersey. He was hauled before the Recorder's Court in the City of Paterson accused of violating this statute. There Kane stated that he had been arrested while he was on his way from New York to Pennsylvania, and he argued that as to him the statute was invalid as it violated the Constitution and the laws of the United States regulating interstate commerce, and that, further, it violated the 14th Amendment.[4] Both of these contentions were overruled and he was fined five dollars. On appeal, the conviction was affirmed by both the Supreme Court and the Court of Errors and Appeals of New Jersey[5] and the case came on to be heard by the Supreme Court of the United States on writ of error. The judgment was again affirmed, the Supreme Court holding that the statute was not unconstitutional.[6]

The Court prefaced its holding by noting that it had but recently broadly sustained the power of a state to regulate the use of motor vehicles on its highways in *Hendrick v. Maryland*,[7] and that the power extended to nonresidents as well as residents and included the right to enact and enforce reasonable provisions to insure safety. In the *Hendrick* case the Court had stated that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public",[7a] and undoubtedly it was with this statement before it that the Court, in the *Kane* decision said:[8]

> "We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believ-

[4] Sec. 1 of the 14th Amendment reads:
"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] Kane v. Titus, 81 N. J. L. 594, 80 Atl. 453 (1911).

[6] Kane v. New Jersey, 242 U. S. 160 (1916).

[7] 235 U. S. 610 (1915), upholding requirement that a foreign automobile be registered before entering Maryland.

[7a] *Ibid*, 622.

[8] *Supra*, n. 6, 167.

> ing that ability to establish, by legal proceedings within the state, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners."

This case made it clear that a state may, without violating the Constitution of the United States, refuse the use of its highways to a nonresident unless he in turn agrees to the appointment of some state official as his agent for service in all actions against him rising out of his use of the automobile in such state. True, a state is precluded by the 14th Amendment from any absolute refusal of the use of its highways to a nonresident, but this case was authority for any state to impose *reasonable* conditions upon nonresidents who wish to avail themselves of the use of its highways — the condition here approved being appointment of an agent for service.

Eleven years later the Supreme Court was to hear another case, *Hess v. Pawloski*,[9] of a similar nature coming up from the Supreme Judicial Court of Massachusetts[10] and rising out of a similar financial responsibility statute of Massachusetts,[11] the pertinent parts thereof reading as follows:

> "The acceptance by a nonresident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a nonresident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such nonresident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such

[9] 274 U. S. 352 (1927).
[10] Pawloski v. Hess, 253 Mass. 478, 149 N. E. 122 (1925).
[11] Mass. Gen. Laws, Ch. 90, as amended by 1923 Mass. Stat., Ch. 431, Sec. 2.

> process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said nonresident; provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action."

Hess, a resident of Pennsylvania, while operating his automobile on a Massachusetts highway, struck and injured the plaintiff Pawloski, a Massachusetts resident. The latter shortly filed suit seeking recovery for his damages and service of process was made in compliance with the statute, Hess having left Massachusetts before suit was brought. The defendant appeared specially and moved to dismiss on the ground that the Massachusetts court had no jurisdiction over him and that to allow it to attain such jurisdiction by means of the substituted service provided for in the statute would deprive him of his property without due process in violation of the 14th Amendment. His motion was dismissed and this action was affirmed by the Supreme Judicial Court of Massachusetts,[12] that court holding the statute to be a valid exercise of the police power. Trial on the merits was later had and a judgment was returned for the plaintiff, Hess again renewing his attack on the jurisdiction and excepting to the trial court's refusal to dismiss. This judgment likewise was affirmed by the Supreme Judicial Court,[13] whereupon Hess sought review by the Supreme Court of the United States.

After stating the familiar holding of *Pennoyer v. Neff*,[14] that a personal judgment against one over whom the adjudging court has no jurisdiction is void, the court stated that jurisdiction *could* be based upon service on someone authorized by the defendant to accept the same on his behalf or as his agent. It went on to discuss the fact that foreign corporations were frequently subjected to suits in states where they were merely doing business. The basis for jurisdiction in such cases, the court pointed out, did not arise from the fact that they were doing business in the

[12] Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945 (1924).
[13] *Supra*, n. 10.
[14] 95 U. S. 714 (1877).

forum without more, but from the fact that the state, having a qualified power to exclude such corporations, may, as a condition precedent to their entry, require them to submit to its jurisdiction as to matters arising out of the business there done. Thus arises an implied consent on the part of such corporations to the exercise of jurisdiction by the courts of the forum in which they do business on the terms set out above, and this implied consent served as a basis for jurisdiction over them.[15] The court reiterated its premise in the *Kane*[16] case that motor vehicles are dangerous machines, and went on to state:[17]

> "In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, *residents and nonresidents alike,* who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute *the implied consent* is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved. . . . It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents. . . . The State's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. *Hendrick v. Maryland,*[18] . . . And, in advance of the operation of a motor vehicle on its highway by a nonresident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey* . . . That case recognizes power of the State to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the nonresident *is the equivalent* of the appointment of the registrar as agent on whom process may be served. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment."

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[15] At common law four bases of jurisdiction were recognized: presence, consent, domicile and allegiance. See Beale, *The Jurisdiction of Courts over Foreigners*, 26 Harv. L. Rev. 283 (1913).

[16] *Supra*, n. 6.

[17] *Supra*, n. 9, 356. Emphasis supplied.

[18] *Supra*, n. 7.

Review here shows that although in both cases there existed a jurisdictional problem of great magnitude the Court did relatively little towards clarifying that particular point. True, decisions were reached in both holding the statutes constitutional with rather loose discussions of the doctrines of implied consent and the qualified power of exclusion, but neither took a definitive position as to the jurisdictional problem.[19] Indeed we find the Court in *Wuchter v. Pizzuti* a year after the *Pawloski* case saying:[20]

> "We quite agree, and, indeed have so held in the *Pawloski* case, that the act of the nonresident in using the highways of another state may be properly declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, . . ."

This failure to deal with specifics has been the occasion for numerous articles and case notes seeking to set forth a rationale of the real and underlying basis which exists for the exercise of jurisdiction in cases of this type.[21] For the most part these discussed the various possible bases of jurisdiction over a nonresident defendant, consisting of presence, consent, domicile and allegiance,[22] and went on to point out that the Supreme Court had never held these to be an exclusive list of such bases of jurisdiction. Nonetheless, the writers, with Mr. Austin Scott being the most vocal, show that the Courts have been prone to cling to old concepts wherever possible and have not been averse to using the fiction of implied consent when dealing with this thorny problem of jurisdiction over the nonresident motorist. To handle such matters by means of fictions, even when achieving a sound legal and sociological result, is at best an unhappy process, and it was urged on the various state and federal courts handling such matters that they

[19] See Pizzutti v. Wuchter, 103 N. J. L. 130, 134 Atl. 727 (1926), for a thorough treatment of the problem in a case dealing with a similar statute wherein the court adopted the view that the defendant, by acting within the state, had subjected himself to the jurisdiction thereof based on the power of reasonable regulation. (Reversed, Wuchter v. Pizzutti, 276 U. S. 13 (1928), for lack of proper notice to the non-resident.)

[20] *Ibid*, 19.

[21] 4 Wisconsin L. Rev. 307 (1927); 13 Tenn. L. Rev. 122 (1935); 13 St. Johns L. Rev. 278 (1939); 14 Mississippi L. J. 495 (1942); Culp, *Process in Actions Against Nonresidents Doing Business Within a State*, 32 Mich. L. Rev. 909 (1934) and *Recent Developments in Actions Against Nonresident Motorists*, 37 Mich. L. Rev. 59 (1938). See especially Austin W. Scott, *Jurisdiction Over Nonresident Motorists*, 39 Harv. L. Rev. 563 (1926), written before the Supreme Court decided the Pawloski case, *supra*, n. 7, arguing that the Massachusetts statute involved was valid.

[22] *Supra*, n. 15.

leave fiction to those paid to write it and turn more to the realities involved.[23]

The mills of the courts, like those of the Gods, grind slowly, and it was not overnight that we find them abandoning the implied consent theory and adopting the view that there exists a new basis for jurisdiction over nonresident motorists and that basis is found in a reasonable restriction by the state upon the nonresident individual's privilege of doing a "dangerous" act upon the highway of that state. The restriction, of course, was that the nonresident agrees to service of process on a designated state official. It is gratifying, therefore, to find that such a position has finally been accepted and that the views of such an eminent scholar as Mr. Scott have now been vindicated by the Supreme Court of the United States.[24]

Before discussing the *Olberding* case there should be examined three prior decisions which serve directly to point up the factual situation facing the Supreme Court in *Olberding* and to show the gradual trend of judicial thought towards acceptance of this new base for jurisdiction in nonresident motorist cases. It has been noted that in the *Pawloski*[25] case the plaintiff was a resident of the state in which suit was finally brought, and the suit itself was laid in the state court. With the passage of time, of course, many distinct variants in the nonresident situation began to pre-

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[23] In this connection note Mr. Scott's masterful presentation and discussion of the true basis for jurisdiction over the nonresident motorist in the article cited in note 21, *supra*, in which he states at pp. 581, 585, that:

"Since the Supreme Court of the United States has held in Kane v. New Jersey 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, it would seem that a state may validly provide that the operation of an automobile within the state by a nonresident shall subject him to the jurisdiction of the courts of the state in such actions, although he has not expressly consented to the exercise of jurisdiction over him. . . .

". . .

"It would seem then that it is possible in some cases for a state to exercise, through its courts, jurisdiction over a person not served with process within the state, not domiciled within or a citizen of the state, and not actually consenting to the exercise of jurisdiction. It would seem that 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 such 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." Emphasis supplied.

[24] Olberding v. Illinois Central Railroad Co., Inc., 74 Sup. Ct. Rep. 83, 85 (1953).

[25] *Supra*, n. 9.

sent themselves, and ultimately the federal courts began to face the same jurisdictional and venue problems which had plagued the state tribunals for years.

In 1950 a Delaware resident was injured on a Maryland highway in a collision with a truck owned by a New Jersey corporation doing business in Maryland. The driver of the truck was a New Jersey resident. Plaintiff, not wishing to avail herself of the State Courts here, filed suit for damages in the Federal District Court for the District of Maryland.[26] Both the individual and the corporate defendant moved to dismiss the complaint for improper venue, citing 28 U. S. C. A. Sec. 1391(a) which reads:

> "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."

In considering these motions the Court pointed out that the corporate defendant was doing business in Maryland, had complied with the Maryland statute with respect to appointment of a resident agent for service, and that its objection to the venue was untenable in view of 28 U. S. C. A. Sec. 1391(c).[27] As to the individual defendant, the Court held that his voluntary use of the Maryland highway was equivalent to a consent to be sued both in the state and federal courts of Maryland. It said:[28]

> "Section 1391(a) is, of course, literally applicable to this case and would require a dismissal of the complaint at least as to the individual defendant Dietsche were it not that *by his use of the Maryland highways and in accordance with the particular Maryland statute, he has consented to be sued by the plaintiff in this case.* . . . It is well established as a matter of federal jurisdiction and procedure that the general venue statute, being intended for the convenience of the defendant, may be waived by him, and it has been expressly held in a number of cases that under the State statutes like those in Maryland, Pennsylvania and New York, such a waiver of venue provision by a nonresident will be

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[26] Morris v. Sun Oil Co., 88 F. Supp. 529 (D. C. Md., 1950).

[27] This section of the statute reads:

"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."

[28] *Supra*, n. 26, 530, *et seq.* Emphasis supplied.

> effective as a consent to be sued both in the State and federal courts of the State where the accident occurred."

Several months later the First Circuit, in deciding a very similar situation,[29] reached the opposite conclusion and based its decision, as to the jurisdictional problem, on *the act of operating a motor vehicle in the State in question* rather than on any implied consent. In this case the plaintiff, a resident of Connecticut, brought suit in a Federal District Court for Massachusetts against an Ohio corporation for an accident between them occurring in Massachusetts. The facts showed that the Ohio corporation was not doing business in Massachusetts thus removing it from the realm of the Supreme Court's decision in *Neirbo v. Bethlehem Corporation.*[30]

The defendant appeared specially and moved to dismiss the complaint. The District Court held that the venue was improperly laid in Massachusetts and dismissed it,[31] and the First Circuit affirmed on appeal.[32] The Court pointed out the fact that under the Massachusetts statute the mere operation of a motor vehicle in that State by a nonresident is deemed equivalent to the appointment of the Registrar of Motor Vehicles as the nonresident's agent for service for actions arising out of such operation. The Court tacitly recognized, of course, that the jurisdictional requirements as approved in *Kane*[33] and *Pawloski*[34] are satisfied *where suit is brought in the state courts,* but it then went on to point out the hiatus in any assumption that the same result should obtain in a suit in the Federal District Courts of that state. In making this point it dwelt on the true basis of jurisdiction in such cases, and said:[35]

> "Here there was no express appointment of an agent nor any express contemplation of suit in Massachusetts. The agency of the Registrar of Motor Vehicles, assuming for the moment that in law it is such, was not created by any conscious or voluntary act of the defen-

[29] Martin v. Fischbach Trucking Co., 183 F. 2d 53 (1st Cir., 1950).

[30] 308 U. S. 165 (1939), laying down the rule that the *written appointment* by a corporation of a designated person conferring on him *express authority* (in compliance with a state statute) to receive service of process on behalf of the corporation amounts to a consent to be sued in that state in both federal and state courts and, thus, to a waiver of the federal venue privilege.

[31] Martin v. Fischbach Trucking Co., 9 F. R. D. 602 (D. C. Mass., 1949).

[32] *Supra*, n. 29.

[33] *Supra*, n. 6.

[34] *Supra*, n. 9.

[35] *Supra*, n. 29, 55, *et seq.* Emphasis supplied.

dant directed to that end. It is one wholly imposed by command of the law upon the doing of an act by the defendant, that is, the operation of a motor vehicle in the state. That act was, however, motivated by entirely different considerations. It would be quite unreasonable to suppose that the nonresident motorist when he drives across the Massachusetts state line realizes that he has thereby acquired an agent and has consented to be sued in the state. The agency thus imposed without conscious volition cannot realistically provide a basis for holding that the motorist has voluntarily waived the federal venue privilege which Sec. 1391 confers upon him.[36]

"We do not think, however, that the provisions of the Massachusetts nonresident motorist statute operates to create an agency in any true sense *or that the jurisdiction which Massachusetts exercises over nonresidents under that act is in reality based upon their consent to be sued.* The theory of implied agency and consent as a basis for asserting jurisdiction over a nonresident motorist was doubtless incorporated by the legislature into this statute by analogy to the procedure which had been developed in the field of jurisdiction over foreign corporations. It may well have been a concession to the conservatism of the bar which likes to cling to traditional concepts for support even when entering new fields. But the inclusion of this fictional consent does not, in our opinion, provide the real basis for the exercise of power by Massachusetts over the nonresident motorist. *That basis, we think, is afforded by the nonresident motorist's act in operating a dangerous instrumentality, a motor vehicle, in the state.* This act gives *the state* jurisdiction over him to the extent necessary to require him, by extraterritorial service of process, if need be, to answer within its

[36] Here the court set forth the following statement of Judge Learned Hand in Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (D. C., S. D., N. Y., 1915):

"'When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent'."

See also International Shoe Co. v. State of Washington, 326 U. S. 310 (1945).

borders the claims of those who may have been there injured by his act.

". . .

"It follows from what has been said that while the defendant by operating its motor vehicle in Massachusetts subjected itself *to the power of the State* to require it to answer the plaintiff's claim *in a suit in a state court,* it did not thereby voluntarily consent to be sued or waive its federal venue privilege."

In 1953 the Third Circuit decided *McCoy v. Siler,*[37] a case containing facts strikingly like those above, wherein an Iowa plaintiff brought suit in a Federal District Court for Pennsylvania against a North Carolina defendant in an action arising out of an automobile collision between them in Pennsylvania. The suit was brought and service was had under the Pennsylvania nonresident motorist statute.[38] The defendant appeared specially and moved to dismiss the action on the grounds of improper venue under 28 U. S. C. A. Section 1391(a). The District Court granted the motion, whereupon plaintiff appealed and the Third Circuit affirmed. The importance here of this case lies in the fact that again we find a federal court sweeping aside the ancient and formalized fiction of implied consent in such situations, saying:[39]

"As to the use of the fiction of consent to establish jurisdiction of a state for suit under these nonresident motorist statutes we can add little to the discussion by the First Circuit in *Martin v. Fischbach Trucking Company,*[40] . . . The fiction of consent did well enough to provide the foundation for a step in expanding the jurisdiction which a state may exercise through its courts. . . .

". . .

"We insist, . . . that there is a real distinction between the cases where a party in fact gives consent to suit by appointing an officer of the state to receive process and a case where the party is drawn into court willy-nilly without any manifestation of consent on his

[37] 205 F. 2d 498 (3rd Cir., 1953).

[38] Purdon's Ann. Statutes, Title 75, Sec. 1201, containing a provision that suits against nonresident motorists may be brought in United States District Courts as well as in the state courts in Pennsylvania.

[39] *Supra,* n. 37, 499, et seq. Emphasis supplied.

[40] *Supra,* n. 29.

> part. . . . We think that when a motorist comes into a state and has an accident and is brought into court to defend himself from the consequence of that accident, *he does not consent to anything.* He is in the state's court because the state has power to bring him there following his use of the state's highways. It seems to us unreal to say that he has 'waived' the provision of a federal statute which gives him the privilege of being sued in certain places only. It seems to us a fictitious and illogical jump to reach such a conclusion.
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> ". . .
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> "The settlement of the question here involved is not one which, either way, will shake the foundations of American jurisprudence. Nor should it arouse violent emotions among those differing in opinion upon it. There is no hardship on the plaintiff if he cannot get into federal court in . . . Pennsylvania. The state court is open to him. . . . The only policy consideration which is apparent is that we should not be astute to widen federal diversity jurisdiction."

A few months after this case was decided, the Supreme Court handed down its decision in *Olberding v. Illinois Central Railroad Co., Inc.*,[41] which had been coming up on appeal from the Sixth Circuit[42] while the *Siler* case was being decided. The Sixth Circuit below had held that in a suit brought in a District Court for Kentucky between plaintiff Railroad Company, an Illinois corporation, and defendant, a resident of Indiana, venue properly lay in the Kentucky District Court. This opinion was directly in the teeth of the *Fischbach*[43] and *Siler*[44] cases. The Supreme Court noted this conflict in granting certiorari, and, after hearing, reversed the Sixth Circuit.

The Court pointed out that the venue provisions of 28 U. S. C. A. 1391 are "not a qualification upon the *power* of the court to adjudicate, but a limitation designed for the convenience of litigants and, as such, may be waived by them". Obviously then, the plaintiff having brought his suit in the Federal District Court had waived his right to protest as to venue. But the defendant still had his right to protest as to venue until he, by affirmative action, waived it. Here it had been argued that because of the Kentucky

[41] *Supra*, n. 24.
[42] Olberding v. Illinois Cent. R. Co., Inc., 201 F. 2d 582 (6th Cir., 1953).
[43] *Supra*, n. 29.
[44] *Supra*, n. 37.

nonresident motorist statute the defendant had, by making use of the highways of Kentucky, "consented" to the appointment of an agent for the service of process, but the Supreme Court, speaking through Frankfurter, J., quickly swept away this kind of reasoning and set out for all to see its view as to the real basis for a state's jurisdiction over nonresidents such as these. It said:[45]

> "It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly' consented to be sued there. *In point of fact, however, jurisdiction in these cases does not rest on consent at all.* See Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. *The liability rests on the inroad which the automobile has made on the decision of Pennoyer v. Neff,* 95 U. S. 714, 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. We have held that this is a fair rule of law as between a *resident injured party* (for whose protection these statutes are primarily intended) and a *nonresident motorist,* and that the requirements of due process are therefore met. *Hess v. Pawloski,* 274 U. S. 352. 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 Kentucky can, consistent with the Due Process Clause of the Fourteenth Amendment, be subjected to suit in the appropriate Kentucky state court has nothing whatever to do with his rights under 28 U. S. C. A. §1391(a).*"[46]

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[45] 74 Sup. Ct. Rep. 83, 85-6. Emphasis supplied.

[46] It will be noted that 28 U. S. C. A., Section 1441(a), which reads: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or

Thus the transition from fiction to fact, while slowly and tortuously pricked out, has nonetheless been made, and these recent cases setting forth the new basis of jurisdiction have now furnished complete vindication for those views which Professor Scott set forth in his Article some twenty-five years ago.

It has now been noted that among other things the *Olberding* case results in affording recalcitrant nonresident defendants in such cases immunity from suit in any federal district other than the one in which he or the plaintiff may reside. Did Congress intend that the provisions of the federal venue statute should have such an effect? Let us review for a moment. In the *Neirbo* case[47] the facts showed that Bethlehem, a Delaware corporation, in conformity with New York law, designated William J. Brown as the person upon whom a summons might be served in the State of New York. New Jersey plaintiffs filed a bill in the Federal District Court in New York to stay or set aside a sale to Bethlehem of property in New York. The District Court for the Southern District of New York (without reported opinion) and the Court of Appeals for the Second Circuit[48] dismissed the bill for lack of venue and the Supreme Court reversed.[49] The Supreme Court in its opinion gave considerable attention to the venue problem involved, pointing out:[50]

> "The jurisdiction of the federal courts — their power to adjudicate — is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit — the place where judicial authority may be exercised — though defined by legislation *relates to the convenience of litigants* and as such is subject to their disposition."

It went on to note the fact that defendants could and did often lose the venue privilege either by failure to assert

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the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.",

does not provide a neat method of escape from suit where nonresident sues nonresident in a state court, and this for the reason that removal from a state court may only be to the district court having original jurisdiction in the same area, so that one is precluded from seeking removal from a state court and then raising his constitutional objections as to venue with the results noted in the case just mentioned.

[47] Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 (1939).

[48] 103 F. 2d 765 (2nd Cir., 1939).

[49] *Supra*, n. 47.

[50] *Ibid*, 167. Emphasis supplied.

it in time, by formal submission in a lawsuit, or by submission by conduct. It said:[51]

> "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."

The result was that in *Neirbo* it was held in effect that if a foreign corporation filed a specific consent to suit by appointing an agent for service in another state *that* consent is broad enough to act as a waiver of the benefit of the federal venue statute and operates as a consent to suits in the federal district courts in that state as well as the state courts. However, when we read the *Olberding* case we see that it is the Court's view that no such waiver exists by virtue of the mere doing of the act of *driving* in the foreign state. There is, the Court argues, no *real consent* here and no waiver can be predicated upon such act.

In the face of these cases we may well inquire as to whether the federal venue statute is realistic in a case like *Olberding*. If it is valid policy for a state to take jurisdiction because an act was done within its borders,[52] then would it not be a logical extension for Congress to act so as to authorize the federal court in that same area to take jurisdiction of the same matter. *Neirbo* tells us that the federal venue statute was enacted, among other reasons, to take into account the convenience of litigants. In the nonresident motorist case does not litigant convenience play a part? A great deal of the heart of any negligence lawsuit factually is located at or near the scene of the crash. Witnesses might well be available locally who would refuse to go to distant states to testify as would be the result *federally* of the *Olberding* decision. Thus it appears that nonresident motorists who as plaintiffs wish to take advantage of the forum offered by the federal courts at the place of the accident must see to it that they collide only with residents of such district. Such a result does not appear to be without its own Alice in Wonderland aura mentioned by Mr. Justice Frankfurter in the *Olberding* case and certainly suggests the advisability of congressional reflection on this matter thus recently brought to light.

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[51] *Ibid*, 168.

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