

# The Nonresident Motorists Statute and Federal Venue Provisions

Darrell L. Peck

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Darrell L. Peck, *The Nonresident Motorists Statute and Federal Venue Provisions*, 37 Marq. L. Rev. 321 (1954).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol37/iss4/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## THE NONRESIDENT MOTORISTS STATUTE AND FEDERAL VENUE PROVISIONS

The nonresident motorists statutes generally provide that the use of the state highways by a nonresident shall be deemed to be an appointment of a state officer as an agent for the service of process in any action arising out of such use.<sup>1</sup> The constitutionality of such a statute is beyond question<sup>2</sup> and every jurisdiction in the United States has adopted it in some form.<sup>3</sup> This is a convenient method for residents of the state to obtain service of process on the nonresident motorist. Other nonresidents may also avail themselves of the statute.<sup>4</sup>

Service of process under the nonresident motorists statute is sufficient to give jurisdiction to the federal district court as well as to state courts.<sup>5</sup> A problem of venue arises, however, when one nonresident attempts to commence an action in the federal district court in the state against another nonresident by service of process under the nonresident motorists statute.

The recent case of *Olberding v. Illinois Central Railroad Co.*<sup>6</sup> is typical of the problem. The defendant, a resident of Indiana, was driving his car in Kentucky when he collided with a railroad overpass. A train operated by the plaintiff, an Illinois corporation, was subsequently derailed on the overpass as a result of the damage caused by the defendant's accident. The plaintiff brought suit in the federal court in Kentucky, serving process on the defendant under the Kentucky nonresident motorists statute. The defendant appeared specially and moved for dismissal on the ground of improper venue. Under the federal statutes, a civil action in which federal jurisdiction is based solely on diversity of citizenship may be brought only in the judicial district where either the plaintiff or the defendant resides.<sup>7</sup> However, the District Court overruled the defendant's motion to dismiss, stating

---

<sup>1</sup> WIS. STATS. (1951) §85.05(3), the Wisconsin nonresident motorists statute, was repealed by the legislature in the 1953 spring session. However, the statute was reenacted *in toto* by the fall session as §85.05(6). See Griffin, McClelland, and Peck, *Survey of 1953 Wisconsin Legislation*, 37 MARQ. L. REV. 233 (1954) at 245.

<sup>2</sup> *Kane v. New Jersey*, 242 U.S. 160 (1916) upheld the validity of the first such statute which required the motorist to actually appoint an agent for service of process in New Jersey. *Hess v. Pawloski*, 274 U.S. 352 (1926) held that such a statute, similar to the present form of the statute, which made use of the highways the equivalent of actual appointment of an agent for the service of process, did not violate the constitution.

For a general discussion of the nonresident motorists statutes, see Scott, *Jurisdiction over Nonresident Motorists*, 39 HARV. L. REV. 563 (1926); Comment, 64 HARV. L. REV. 98 (1950).

<sup>3</sup> For a complete list of the various state nonresident motorists statutes, see Knoop v. Anderson, 71 F. Supp. 832 (Iowa 1947) at 836.

<sup>4</sup> *State v. Circuit Court for Dane County*, 209 Wis. 246, 244 N.W. 766 (1932).

<sup>5</sup> Fed. Rules Civ. P., Rule 4(d) (7); *Blunda v. Craig*, 74 F. Supp. 9 (Mo. 1947).

<sup>6</sup> 74 S.C. 83 (1953).

<sup>7</sup> U.S.C.A. §1391 (a).

that the defendant had made an implied waiver of his federal venue rights by using the state highways when such act constituted an appointment of an agent for the service of process in the state.<sup>8</sup> The Court of Appeals affirmed the judgment for the plaintiff,<sup>9</sup> but the United States Supreme Court reversed, holding that the venue provision had not been waived.

Although the same decision as in the *Olberding* case had been rendered in several lower federal courts,<sup>10</sup> it did not come without some surprise. Had the case been decided before 1939, there would have been little doubt that one nonresident could not bring suit against another in a judicial district where neither of them resided.<sup>11</sup> This would clearly have been a violation of the federal venue provision. However, in 1939 the *Neirbo* decision was handed down.<sup>12</sup> This case set forth the rule of implied waiver of venue, stating that, when a nonresident corporation was required, as a condition of doing business in a state, to appoint an agent for service of process, this was a consent to be sued in any court in the state and therefore an implied waiver of the federal venue provision which would ordinarily prevent a suit between two nonresidents in the federal court in that state.<sup>13</sup> The *Neirbo* case, although contrary to most prior decisions on the question,<sup>14</sup> remains the settled law of the land and has even been extended by Congress.<sup>15</sup>

When the same problem of venue arose in federal court suits between two nonresident motorists, the district courts drew an analogy to the *Neirbo* case and found that the appointment of an agent for the service of process, implied from the nonresident's use of the highways, also constituted a consent to be sued in any court in the state and therefore was an implied waiver of the federal venue provision.<sup>16</sup> This rule

<sup>8</sup> F. Supp. (1953).

<sup>9</sup> 201 F. 2d 582 (6th Cir., 1953).

<sup>10</sup> *McCoy v. Siler*, 205 F. 2d 498 (3rd Cir., 1953); *Martin v. Fishbach Trucking Co.*, 183 F. 2d 53 (1st Cir., 1950); *Waters v. Plyborn*, 93 F. Supp. 651 (E.D. Tenn. 1950).

<sup>11</sup> *De Laet v. Seltzer*, 1 F. Supp. 1022 (E.D.N.Y. 1932).

<sup>12</sup> *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939).

<sup>13</sup> "The consent, therefore, extends to any court sitting in the state which applies the laws of the state." *Ibid.* at 171.

<sup>14</sup> For a summary of the law before the *Neirbo* case, see Note, 119 A.L.R. 676 (1939). This article was supplemented after the *Neirbo* case by Note, 128 A.L.R. 1447 (1940).

<sup>15</sup> 28 U.S.C.A. §1391 (c).

<sup>16</sup> *Burke v. Greer*, 114 F. Supp. 671 (M.D. Ga. 1953); *Falter v. Southwest Wheel Co.*, 19 F. Supp. 556 (W.D. Pa. 1953); *Archambeau v. Emerson*, 108 F. Supp. 28 (W.D. Mich. 1952); *Jacobson v. Schuman*, 105 F. Supp. 483 (Vt. 1952); *Garcia v. Fausto*, 97 F. Supp. 583 (E.D. Mo. 1951); *Kostamo v. Brorby*, 95 F. Supp. 806 (Neb. 1951); *Burnett v. Swenson*, 95 F. Supp. 524 (W.D. Okla. 1951); *Thurman v. Consolidated School District*, 94 F. Supp. 616 (Kan. 1950); *Urso v. Scales*, 90 F. Supp. 653 (E.D. Pa. 1950); *Morris v. Sun-Oil Co.*, 88 F. Supp. 529 (Md. 1950); *Steele v. Dennis*, 62 F. Supp. 73 (Md. 1945); *Krueger v. Hider*, 48 F. Supp. 708 (E.D.S.C. 1943); *Andrews*

was unquestioned for ten years until the United States Court of Appeals for the First Circuit refused to accept it in the case of *Martin v. Fishbach Trucking Co.*<sup>17</sup> Because it was contrary to what had come to be looked upon as an established rule, the *Martin* case provoked a great deal of criticism from legal writers.<sup>18</sup> However, the Supreme Court has now expressed its approval of the *Martin* case by its decision in the *Olberding* case.

The distinction between the *Neirbo* case and the *Olberding* case, of course, is apparent. In the *Neirbo* case the nonresident corporation had expressly appointed a state official as its agent for the service of process. In the *Olberding* case the nonresident defendant had merely driven his car into the state and the appointment of an agent for the service of process had been implied from this act. Thus there was an express appointment of an agent in the one case and an implied appointment in the other. In both cases, if the action is not to be dismissed for improper venue, waiver of the federal venue provision must be implied from the appointment of an agent for the service of process. It has long been recognized that there may be a waiver of the venue provisions implied from conduct.<sup>19</sup> But if a waiver were found in the *Olberding* case, it would be a waiver implied from the appointment of an agent for the service of process which, in turn, was implied from the use of the highways. This would be an act implied from another act which is also implied. The distinction is unquestionably genuine. However, it appears to be based on a technicality.

It is doubtful that this technicality in itself was the reason for distinguishing the *Olberding* case from the *Neirbo* case. The identical problem had arisen in the case of a nonresident corporation doing business in the state without expressly consenting to the appointment of an agent for the service of process there. The mere fact of doing intrastate business in a state is sufficient to subject a nonresident corporation to the jurisdiction of the courts of that state by service of process on a designated state officer.<sup>20</sup> Applying the same analogy to the

---

v. Joseph Cohen & Sons, 45 F. Supp. 732 (S.D. Tex. 1941); *Malkin v. Arundel Corp.*, 36 F. Supp. 948 (Md. 1941); *Williams v. James*, 34 F. Supp. 61 (W.D. La. 1940).

<sup>17</sup> *Supra*, n. 10.

<sup>18</sup> *Baylor and Steininger, The Effect of the Non-Resident Motorists Statute on Federal Venue Provisions*, 32 NEB. L. REV. 383 (1953); Recent Decision, 28 NOTRE DAME LAW. 567 (1953); Recent Case, 66 HARV. L. REV. 1317 (1953); Note, 38 CORNELL L. Q. 624 (1953); Note, 31 N. C. L. REV. 339 (1952); Note, 26 IND. L. J. 285 (1951); Note, 24 SO. CALIF. L. REV. 498 (1951); Comment, 36 IOWA L. REV. 705 (1951); Comment, 3 STAN. L. REV. 347 (1951); Recent Case, 19 GEO. WASH. L. REV. 559 (1951); Recent Decision, 39 GEO. L. J. 143 (1951); Recent Case, 35 MINN. L. REV. 404 (1951); Recent Decision, 49 MICH. L. REV. 1072 (1951); Recent Case, 36 VA. L. REV. 1102 (1950).

<sup>19</sup> *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924); *Commercial Casualty Insurance Co. v. Consolidated Stone Co.*, 278 U.S. 177 (1929).

<sup>20</sup> *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

*Neirbo* case as was applied in the nonresident motorists cases before the *Olberding* decision, the *Knott* case<sup>21</sup> held that the appointment of an agent for the service of process, which was implied from doing business in the state, constituted an implied waiver of the federal venue provision. Although this was a waiver implied from an implied act, almost identical to that which was overruled in the *Olberding* case, the Supreme Court refused to reverse the decision,<sup>22</sup> and the result of the *Knott* case has since been enacted into statute by Congress.<sup>23</sup>

Apparently then, the fact that the appointment of an agent for service of process is implied in the *Olberding* case and is express in the *Neirbo* case is not the real basis of the distinction. Since the facts are identical in all other respects, the distinction must be founded, to some extent at least, on the fact that the defendant was a nonresident corporation in the one case, and a nonresident motorist in the other. Obviously there are many legal distinctions between the rights of a corporation and those of an individual. One that is frequently made is that a state may forbid a nonresident corporation from doing intrastate business without violating the Constitution while it may not prevent an individual nonresident from entering the state. But this could hardly be the reason for distinguishing the *Olberding* case from the *Neirbo* case because the right of the state to prevent nonresidents from entering its boundaries has long been established.<sup>24</sup> In *Hess v. Pawloski*,<sup>25</sup> the Supreme Court said:

"And in advance of the operation of a motor vehicle on its highways 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. [Citation omitted].<sup>26</sup> That case recognizes power of the state to exclude a nonresident until the formal appointment is made."

Consequently, a state may impose the duty of expressly appointing an agent for the service of process on a nonresident motorist as well as on a nonresident corporation. It is doubtful, then, that the *Olberding* case can be distinguished from the *Neirbo* case on that ground.

However, it cannot be denied that there is a difference between the corporation's act of carrying on business in the state and the motorist's act of driving through the state. Carrying on business, although a somewhat indefinite concept,<sup>27</sup> entails some regular or systematic transactions. At least, single or occasional acts by the corpora-

<sup>21</sup> *Knott Corporation v. Furman*, 163 F. 2d 199 (4th Cir., 1947).

<sup>22</sup> Cert. den., 332 U.S. 809 (1947); Rehearing den., 332 U.S. 826 (1947).

<sup>23</sup> 28 U.S.C.A. §1391 (c) provides that "a corporation may be sued in any judicial district in which it . . . is doing business. . . ."

<sup>24</sup> *Kane v. New Jersey*, 242 U.S. 160 (1916).

<sup>25</sup> 274 U.S. 352 (1926) at 356.

<sup>26</sup> *Supra*, n. 24.

<sup>27</sup> *Supra*, n. 20.

tion will not subject it to the jurisdiction of the state.<sup>28</sup> On the other hand, the act of a nonresident motorist in driving on the highways of the state may merely be a single, isolated act in that state; and yet, this is sufficient to bring him within the jurisdiction of the state.

However, even this distinction hardly seems a sufficient basis for differentiating the *Olberding* case from the *Neirbo* case. The purpose of subjecting a nonresident motorist to the jurisdiction of the state is exactly the same as the purpose for so subjecting a nonresident corporation. Although the act of one may be isolated and the act of the other fairly regular, either may give rise to a cause of action in favor of persons in the state. It is necessary that this person be able to sue the nonresident in the most convenient court. Yet under the decision in the *Olberding* case, the nonresident motorist cannot be sued in the federal court in the state where the cause of action arose while the nonresident corporation can be sued there.<sup>29</sup>

Of course, not being able to sue in the federal court in the state where the cause of action arose does not deprive the plaintiff of his day in court. Under the federal venue provisions for diversity of citizenship cases,<sup>30</sup> the plaintiff may still bring suit in the federal court in his own state or in the federal court in the state where the defendant resides. However, it is usually impossible to bring suit in the state where the plaintiff resides because the defendant cannot be served with process there. Suit in the state where the defendant resides is usually not very convenient for the plaintiff. More important still is the fact that it will usually be too inconvenient for any witnesses to the accident to appear in a trial in that state. For example, if the plaintiff resides in Massachusetts and the defendant in California, and the accident occurred in New York where several eyewitnesses reside, the inconvenience of a suit in the federal court in California is apparent.

There are additional factors which make it more advantageous to bring suit in the federal court of the state where the accident occurred. In the suit the applicable law would be that of the state where the cause of action arose, and the federal court sitting in that state would probably be more familiar with that law than would any other federal court.

The plaintiff could also initiate the suit, if he wished, in the state court of the state where the accident occurred, obtaining service of process on the defendant under the nonresident motorists statute. That court, of course, would be the one most familiar with the applicable state law. Also, this court would probably be just as conven-

<sup>28</sup> *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1922).

<sup>29</sup> *Supra*, n. 23 and n. 21.

<sup>30</sup> 28 U.S.C.A. §1391 (a).

ient for the witnesses to the accident as the federal court in the same state. However, the federal court is usually preferred by a nonresident of the state when the requisite amount (\$3,000) is involved in the suit. There are several reasons for this. The calendars of the state courts, especially those in the more populous counties, are usually far more crowded than those of the federal courts. This means the difference between a delay of only a few months and one of two to four years. Another factor is the fact that an attorney from the plaintiff's own state, one whose capabilities are known to the plaintiff, could conduct the suit in the federal court, whereas, in the state court, the plaintiff would have to retain an attorney from that state to prosecute the case for him.

The most persuasive reason of all for allowing the plaintiff to sue in the federal court in the state where the accident occurred is the unequal treatment which would otherwise result. If the plaintiff does sue in the state court where the accident occurred, the defendant can have the case removed to the federal court in that same state.

"... 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 defendants, to the district court of the United States for the district and division embracing the place where such action is pending."<sup>31</sup>

In diversity of citizenship cases, such removal is allowed even when none of the parties to the action is a citizen of the state in which the action is brought.<sup>32</sup> The fact that suit could not originally have been brought in that district is immaterial.<sup>33</sup>

So the result is this. The defendant may have the action in the federal court if he chooses but the plaintiff may not. When the defendant, who is supposedly the wrongdoer, has such a choice, why should it be denied to the plaintiff who has suffered the injury? Venue is a privilege for the convenience of the defendant. But it is difficult to see how it would be any more inconvenient for the defendant to have to defend the action in the federal court of the state where the accident occurred than it is for him to defend it in a state court in the same state.

Objection by the defendant's attorney to venue in the federal court in the state where the accident took place has already become a legal maneuver to delay trial of the case.

"As lawyers, we would do as Neff did in *Martin v. Fishbach* and make the venue objection. Result? Mitchell has to go to the

<sup>31</sup> 28 U.S.C.A. §1441 (a).

<sup>32</sup> 28 U.S.C.A. §1441 (b).

<sup>33</sup> Bunn, *Jurisdiction and Practice of the Courts of the United States* (5th ed. 1949), Chap. 6, §5.

expense and trouble of starting over again in the Massachusetts state court and he is softened up for a settlement.

"From the lofty viewpoint of jurisprudence, however, nothing could be more absurd than to countenance such monkey-shines. Meaningless technicalities such as these drag the lawyer down in public esteem."<sup>34</sup>

The plaintiff is therefore required to commence his action in the state court if he wishes to sue in the state where the accident occurred. Or if he prefers to bring suit in a federal court, he must sue in the state of the defendant's residence where service of process is possible, but where few, if any, witnesses would be able to attend.

The reason for denying the plaintiff the use of the federal court in the state where the cause of action arose is difficult to understand.

"Where the federal court has jurisdiction and process can be validly served, venue should not prevent an action from being tried in the federal court which is most convenient for witnesses and parties and where, in the interest of justice for all, it should be tried."<sup>35</sup>

If the purpose of denying the use of the federal courts to the plaintiff is an attempt to discourage federal court suits based solely on diversity of citizenship and to thereby lighten the load on the federal courts, it seems to be a very poor policy. This would only increase the burden on the state courts, many of which are already far behind on their calendars.

However, although there are many reasons for finding an implied waiver of the federal venue provision in the case of a nonresident motorist, perhaps the decision in the *Olberding* case should not be criticized too severely. It is true that to imply the waiver would be an extension of the *Neirbo* case (although not of the *Knott* case). Perhaps the Court hesitated to carry the doctrine of implied waiver of venue any further because this might possibly have set too broad a precedent for other situations when there would not be such persuasive reasons for implying the waiver.

In any event, since the Supreme Court has taken its stand in the *Olberding* case, the only possibility of securing the right of a nonresident plaintiff to sue another nonresident in the federal court in the state where the cause of action arose now appears to be a change in the federal statutes.<sup>36</sup>

"The policy of the federal venue statute would be protected and judicial administration facilitated by allowing suit at the scene

<sup>34</sup> Keffe, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569 (1952) at 584.

<sup>35</sup> *Ibid.* at 587.

<sup>36</sup> Note, 38 CORNELL L. Q. 624 (1935); Note, 31 N. C. L. REV. 339 (1953); Recent Decision, 39 VA. L. REV. 985 (1953).

of the accident. If, however, the decision in the instant case [*Martin v. Fishbach*] is justified by strict construction of the statutory provision, there would appear to be a strong argument for amending the statute to correct the present situation."<sup>87</sup>

Such a statutory change could attain the result desired in the case of nonresident motorists without any danger of expanding the concept of implied waiver of venue too far. It would therefore seem that Congress should enlarge the venue provisions to allow suit against a nonresident motorist in the state where the cause of action arose when the plaintiff is not a resident of that state.

DARRELL L. PECK

---

<sup>87</sup> Comment, 36 IOWA L. REV. 705 (1951) at 708.