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Federal Venue—Waiver by State Non-Resident Motor Statutes

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FEDERAL VENUE—WAIVER BY STATE NON-RESIDENT MOTOR STATUTES

Resident of Iowa sued resident of North Carolina in a federal district court in Pennsylvania for damages resulting from an automobile accident which occurred in Pennsylvania. *Held* (2-1): Venue was lacking because non-resident defendant's use of state highways did not constitute waiver of 28 U. S. C. § 1391(a) providing that suit in federal court, based solely on diversity of citizenship, may be brought only where either plaintiff or defendant resides. *McCoy v. Siler,* 205 F. 2d 498 (3d Cir. 1953).

The weight of judicial opinion has been that a motorist is deemed to waive the personal privilege conferred by the federal venue statute when he subjects himself to a state non-resident motorist statute through his act of driving on state highways. *Olberding v. Illinois Central R. Co.,* 201 F. 2d 583 (6th Cir. 1953), *cert. granted,* 345 U. S. 950 (1953); *Falter v. Southwest Wheel Co.,* 109 F. Supp. 556 (W. D. Pa. 1953); *Archambeau v. Emerson,* 108 F. Supp. 28 (D. C. Vt. 1952). *Contra: Martin v. Fischbach Trucking Co.,* 183 F. 2d 53 (1st Cir. 1950); *Waters v. Plyborn,* 93 F. Supp. 651 (E. D. Tenn. 1950).

The argument that a state non-resident motorist statute can effect waiver of the federal venue privilege is based on analogy from *Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U. S. 165 (1939). There, the corporate defendant had appointed an agent to receive process in compliance with statutory requirements governing foreign corporations doing business in New York. By so acting, it was held, the corporation waived its rights under the applicable federal venue statute and consented to suit in a federal court in New York.

In the *Neirbo* case, Mr. Justice Frankfurter said at 175, quoting *Ex Parte Schollenberger,* 96 U. S. 369, 377 (1877):

> In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that "state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case."

For the corporation, the "state legislation" was the statute; the "consent of parties" was the express appointment of the agent; the "state of facts" was the doing of business in New York.

Reasoning from the *Neirbo* case to the non-resident motorist: The "state legislation" is the non-resident motorist statute, and the "consent" is the use of state highways, from which is inferred consent to the appointment of an agent for service of process.

In the *Neirbo* case there was an express written appointment, which does not appear in the motorist cases. But consent has been implied from merely "doing business." *Knott Corp. v. Furman,* 163 F. 2d 199 (4th Cir. 1947). However, earlier cases have contended that the distinction between express and implied consent explicitly recognized in *Neirbo Co. v. Bethlehem Shipbuilding Corp., supra* at 173 n. 15, is crucial. *Robinson v. Coos Bay Pulp Corp.,* 147 F. 2d 512 (3d Cir. 1945); *Moss v. Atlantic Coast Line R. Co.,* 149 F. 2d 701 (2d Cir. 1945); *Cummer-Graham Co. v. Straight Side Basket Corp.,* 136 F. 2d 828 (9th Cir. 1943).

In any event, the isolated act of driving within a state creates the "minimum contact" necessary to sustain the applicability of a statute giving state courts jurisdiction over the motorist. *Hendrick v. Maryland,* 235 U. S. 610 (1915); *Kane v. New Jersey,* 242 U. S. 160 (1916); *Hess v. Pawloski,* 274 U. S. 352 (1927). However, it does not bring about a state of facts analogous to that ascribed to a corporation found to be doing business within a state. To characterize driving as "doing business" is to employ an obviously illfitting metaphor.

If, then, it is not the "state of facts" which authorizes federal courts to exercise jurisdiction, but the state law itself, this would be in clear contravention of the rule in *Erie R. R. v. Tompkins,* 304 U. S. 64 (1938). For although federal courts must conform to state substantive law, this does not extend to procedural rules such as venue, over which the federal government has exclusive regulatory power. *Blunda v. Craig,* 74 F. Supp. 9 (E. D. Mo. 1947); *Simon v. Southern R. Co.,* 236 U. S. 115 (1915); *Foote v. Kansas City Life Ins. Co.,* 92 F. 2d 744 (5th Cir. 1937).

It is submitted that public policy should allow suits in federal courts for torts committed by non-resident motorists. Interstate automobile travel is no longer an isolated adventure, and to prohibit suit in federal court for torts committed thereby is unrealistic. But in view of the explicit language of the federal venue statute, legislative action is required.

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The issues involved here have recently been resolved by the United States Supreme Court in Olberding v. Illinois Central R. Co., *22 U. S. L. Week 4008 (U. S., Nov. 9, 1953). Distinguishing the* Neirbo *case on the ground that it referred to an express consent not found here, the court concluded that to find an actual waiver of federal venue rights on the part of a motorist who never consented to anything "is surely to move in the world of Alice in Wonderland," and held that venue was lacking under 28 U. S. C. § 1391(a).*