Catholic University Law Review

Volume 5
Issue 1 *January 1955*

Article 7

1955

Motorist Statutes and Federal Jurisdiction

Francis A. Pacienza Jr.

application would be an invaluable aid in bringing about relief from punishment for the criminal act which is the product of mental illness, without destroying our traditional concept of responsibility for crime.

This proposal could be the beginnings of rationality in the jurisprudence of insanity.

NATALIE R. YEAGER
GENNARO J. CONSALVO

Motorist Statutes and Federal Jurisdiction

An automobile collision occurs on a state highway. The injured party consults an attorney concerning the possibility of bringing an action against the negligent driver, or his principal, or the manufacturer of the car, or all of them.

A tort action being transitory in nature, the attorney may bring the action in either the federal[1] or state courts having their situs in the jurisdiction where the defendant resides. Clearly, however, this might well entail great inconvenience to the plaintiff or his witnesses and certainly may not bring the action to a "just, speedy, and inexpensive determination."

In addition, regardless of where the defendant resides, the attorney may bring the action in the courts of the state wherein the collision occurred. All forty-eight states and the District of Columbia have enacted motorist statutes[2] which universally provide that simply by driving on the state highways, a non-resident motorist becomes amenable by operation of law to suit for accidents caused by his negligent operation of his automobile. Furthermore, these statutes usually provide for the "implied appointment" of some state official as a lawful agent or attorney to receive service of process for the non-resident. No objection to jurisdiction or adjective Due Process may be raised successfully.[3] The plaintiff is thus assured of at least three forums which will adjudicate his cause.

If the defendant is sued in a state court and actually is a non-resident, he has a constitutional and statutory right of removal of the negligence action to the

---

[1] Judiciary and Judicial Procedure, 28 U. S. C. §§ 1331, 1332, 1391 (1948); Federal Rules of Civil Procedure, 28 U. S. C. Rules 4 (d) and (f) (1938).

[2] Cf. An extensive analysis of all non-resident motorist statutes in *Knoop v. Anderson,* 71 F. Supp. 832, 836-837 (N. D. Iowa 1937); GOODRICH, CONFLICT OF LAWS (3d ed. 1949), § 73 (6); Scott, *Jurisdiction Over Non-Resident Motorist,* 39 Harv. L. Rev. 563 (1926); 20 Iowa L. Rev. 654 (1935).

[3] Cf. *Hess v. Pawloski,* 274 U. S. 352 (1927) wherein the Supreme Court decided that the difference between the "formal and implied appointment" of an agent for service of process "is not substantial" under the Due Process Clause of the Fourteenth Amendment for the purpose of state jurisdiction; *Kane v. New Jersey,* 242 U. S. 160 (1916); *Hendrick v. Maryland,* 235 U. S. 610 (1915).

United States District Court on the ground of diversity of citizenship.[4] Therefore, the defendant in this instance has the choice of forums, i.e., between the federal and state courts in the territorial limits of the state where the action is instituted. The question remains whether the plaintiff has a similar choice, and this in turn highlights the question of federal jurisdiction in motor vehicle cases.

Any action may be instituted in the federal courts only if the provisions of the Judiciary Act of 1948[5] and the Federal Rules of Civil Procedure[6] are observed. Being statutory courts, the Federal District Courts are completely dependent on congressional will for their jurisdiction.[7]

As a practical matter, the attorney desiring to bring a diversity of citizenship action in the federal courts has three jurisdictional problems: (1) jurisdiction of the subject matter, (2) venue, and (3) service of process so as to secure *in personam* jurisdiction over the parties.

Subject-Matter Jurisdiction

If the case is civil in nature, and the amount in controversy exceeds $3,000, and the parties are of diverse citizenship, the United States District Courts have jurisdiction of the subject matter of the action.[8] However, this alone is insufficient. Attachment of property within the jurisdiction and substituted service of process is not permitted in the federal courts, in the absence of very stringent statutory authority.[9] Except in rare instances,[10] all United States District Court judgments in diversity of citizenship cases must be in personam.[11]

---

[4] Art. III, Cl. 2, U. S. CONST.; Judiciary and Judicial Procedure, 28 U. S. C. §§ 1441-1450. Also Cf. *Cook v. Nelson,* 186 Misc. 1081, 62 N. Y. S. 2d 875 (1946).

[5] Judiciary and Judicial Procedure, 28 U. S. C. § 1 *et seq.* (1948).

[6] Federal Rules of Civil Procedure, 28 U. S. C. Rule 1 *et seq.* (1938). Hereinafter, specific Rules will not be footnoted merely as to the code title.

[7] Art. I, Sec. 8, Cl. 9, U. S. CONST. Also Cf. The Enabling Act which grants power to the Supreme Court to prescribe the Federal Rules of Civil Procedure. Judiciary and Judicial Procedure, 28 U. S. C. § 2072 (1949), originally the Act of June 19, 1934, c. 651, §§ 1-2 (48 Stat. 1064), 28 U. S. C. 723 (b) and (c) (1934).

[8] Judiciary and Judicial Procedure, 28 U. S. C. §§ 1331, 1332 (1948); *Mississippi Publishing Corp. v. Murphree,* 326 U. S. 438, 440 (1945).

[9] Cf. Comments of William D. Mitchell, former Attorney General and Chairman of the Advisory Committee, *Federal Rules of Civil Procedure, Proceedings of the Institute at Cleveland,* 1938, published by the A. B. A., Chicago, pp. 381-382. Rule 71A (d) (3) (ii), adopted in 1951, allows service by publication in eminent domain actions for condemnation of property; 2 *Moores Federal Practice* § 4.32 (2d ed. 1948). Concerning Rule 64, authorizing attachment, garnishment, and other similar provisional remedies when available by local law, see Manella, *Attachment in Federal Courts—When Personal Service Is Not Necessary,* 13 So. Calif. L. Rev. 361 (1940); 3 Fed. Rules Service 987 (2d ed. 1948); Hart, *Attachment Without Personal Service of Summons,* 34 Corn. L. Q. 103 (1948); 11 Fed. Rules Service 804 (2d ed. 1948); 3 *Barron & Holtzoff, Fed. Prac. & Proc.,* § 1423 (1950); 14 *Cyc. Fed. Proc.,* (3d ed. 1952) § 71.04.

[10] Cf. Response of Major Edgar B. Tolman, member of the Supreme Court Advisory Committee, *Federal Rules of Civil Procedure, Proceedings of the Institute in Washington and Symposium at New York City,* 1938, published by the A. B. A., Chicago, p. 114 (1939); Note of Advisory Committee to Subdivision (e), *Federal Court Rules Annotated,* Bobbs & Merrill (2d ed. 1952), p. 283; 2 *Barron & Holtzoff,* note 9 *supra* at § 183, pp. 333-336; 2 *Moores Federal Practice,* note 9 *supra* at §§ 4.32-4.41, pp. 1002-1029.

[11] *Big Vein Coal Co. v. Read,* 229 U. S. 31 (1913). Of course, where an action is commenced in a state court by attachment or garnishment, such action may be removed to

The question of venue in motor vehicle cases was considered by the United States Supreme Court in *Olberding v. Illinois Central R. Co.*[12] There, the collision occurred in Kentucky. The plaintiff railroad company, an Illinois corporation, instituted an action in the United States District Court for the Western District of Kentucky against Olberding, a citizen of Indiana. It is important to emphasize that the collision took place in one state, the plaintiff was domiciled in another state and the defendant was a resident of still a third state. Service of process was made on the Secretary of State in Frankfort, Kentucky, pursuant to an appropriate "*Hess v. Pawloski* statute." The defendant's motion to quash the return of service of summons and to dismiss the action under Rule 12 (b) of the Federal Rules of Civil Procedure was finally sustained by the United States Supreme Court solely on the ground of improper venue.

> Congress, in conferring jurisdiction on the district courts in cases based solely on diversity of citizenship, has been explicit to confine such suits to "the judicial district where all plaintiffs or all defendants reside." 28 U. S. C. § 1391 (a).[13]

The venue qualification placed upon the power of the federal courts to adjudicate a cause is but a limitation for the convenience of the litigants, and as such, may be waived by them.[14] In the *Olberding* case, the defendant did not actually consent to waiver of federal venue. His consent was attributed to an implied agreement to be sued in the federal courts of Kentucky because he negligently drove his automobile on the state highways so as to come within the perview of the motorist statute.[15]

Mr. Justice Frankfurter made the interesting distinction to the effect that by using the state highways, the non-resident impliedly consents to be sued in the *state* court and to the appointment of the Secretary of State as his lawful agent to receive service of process. The non-resident, however, does not also impliedly consent to waive his *federal* venue rights. Such an extention of the *Hess v. Pawloski* doctrine "is surely to move in the world of Alice in Wonderland."[16]

Nevertheless, the decision in the *Olberding* case did not preclude a claim being instituted in the federal courts in a proper motor vehicle case. Two and perhaps three situations still exist under which original federal jurisdiction may be invoked by the plaintiff. First, as has been observed, the tort action being transitory, a claim may be initiated in the federal district wherein the defendant resides, is incorporated, or carries on business. All of the requirements of jurisdiction,

---

the federal court, even though there has been no personal service. Judiciary and Judicial Procedure, 28 U. S. C. § 1450 (1948); *Clark v. Wells*, 203 U. S. 164 (1906); 2 *Moores Federal Practice*, note 9 *supra* at 288.

[12] 346 U. S. 338 (1953).

[13] *Id.* at 340.

[14] *Id.*

[15] Cf. Non-resident motorist provisions of the Kentucky Code, note 11 *supra* at 340.

[16] Note 11 *supra* at 341.

venue and service of process thereby will be met.[17] Second, where states, such as New Jersey, provide for the mandatory appointment of the Secretary of State to receive service of process, or where such appointment actually has been made by the non-resident motorist, the venue requirements of the federal courts will be satisfied as so specifically indicated in the *Olberding* case,[18] and the federal courts will have complete jurisdiction though neither the plaintiffs nor the defendants reside or carry on business in that state. Third, if the collision occurs in a state wherein all of the plaintiffs reside, a claim may be brought in the United States District Court within that state,[19] even though the defendant be a non-resident. The jurisdiction and venue requirements of the federal courts pose no problem in this latter instance. The validity of service of process, however, has been placed in doubt by recent, lower federal court decisions due to an apparent conflict between Rules 4 (d) (7)[20] and 4 (f)[21] of the Federal Rules of Civil Procedure.

Service of Process

Subject-matter jurisdiction and venue of the federal courts are governed by the Judiciary Act of 1948 while service of process is controlled by the Federal Rules of Civil Procedure, primarily Rules 4 and 45[22] in motor vehicle cases. Also closely intertwined is the ever present necessity to bring in an additional party to a counterclaim, Rule 13 (h), to add a third-party defendant, Rule 14, and to join and indispensable party without whom joinder of the existing action must be dismissed, Rule 19.

---

[17] Note 1 *supra.*

[18] Note 11 *supra* at 341. Also Cf. *Kane v. New Jersey,* note 3 *supra,* where mandatory appointment annually and formally was required by a motorist statute. In this event, the rationale of *Neirbo Co. v. Bethlehem,* 308 U. S. 165 (1939) would control by analogy to a state's right to demand appointment when granting the privilege of incorporation. Actual appointment was made and upheld as the basis of federal jurisdiction in *Williams v. James et al.,* 34 F. Supp. 61 (W. D. La. 1940) and *Cheshire et ux. v. Car & General Ins. Corp. et al.,* 4 F. R. D. 353 (W. D. La. 1945). It would also appear that under 49 U. S. C. § 321 (c) (1949) which requires designation of a process agent by interstate motor carriers, constitutes another exception to the *Olberding* decision.

[19] In *Mississippi Publishing Corp. v. Murphree,* note 8 *supra,* the Supreme Court held under Rule 4 (f) that service of process may be extended to include service from one federal district to another district in the same state without more than "slightly" impairing the substantive rights of the defendant.

[20] *(d)* SUMMONS: PERSONAL SERVICE. (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or *in any manner prescribed by the law of the state in which the service is made* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. (Italics added.)

[21] *(f)* TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45. Also Cf. Note of Advisory Committee to Subdivision (f), *Federal Court Rules Annotated,* note 10 *supra* at pp. 223-224.

[22] Rule 45 (e) (1) . . . A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena. . . .

To add to the complexity of this consideration, but in an effort to resolve existing confusion, the Advisory Committee to the Supreme Court has recently submitted a sweeping preliminary draft[23] of proposed amendments to the Rules of Civil Procedure. The import of the proposed amendments to Rules 4 (e) and 4 (f) will be discussed by way of conclusion after the present state of the law is reviewed.

The United States Supreme Court decided the *Olberding* case solely on the ground of improper venue. The Court cited the case of *McCoy v. Siler*[24] in its opinion, but made no reference to the concurring observations of Judge Maris on the matter of service of process.

> . . . For extraterritorial service in the federal courts is regulated by Federal Civil Procedure rule 4 (f), 28 U. S. C. That rule restricts the service of process to the territorial limits of the state in which the district court is held unless a statute of the United States authorizes service beyond those limits. In this respect the rule is a limitation upon the provisions of Federal Civil Procedure rule 4 (d) (7) which authorizes service in the manner prescribed by state law. Since there is no federal statute authorizing extraterritorial service in a diversity case such as this one, rule 4 (f) operated to prohibit service upon the defendants. . . . The district court, therefore, did not, in my opinion, acquire jurisdiction of the person of the defendant.[25]

A recent District Court decision, *Giffen v. Ensign*,[26] serves to emphasize the importance of Judge Maris' comments concerning the validity of service of process on a non-resident motorist. In the *Giffen* case, the collision occurred on the highway in the Middle Federal District of Pennsylvania wherein the plaintiffs, husband and wife, resided. The complaint named four defendants among whom was Ensign, an Indiana resident who was not carrying on business in Pennsylvania. Again, it is important to reiterate that the collision took place in the state wherein all of the plaintiffs resided. Since only two states were involved, no venue question was raised as in the *Olberding* case.

A claim was brought in the United States District Court and the summons and complaint were served pursuant to Rule 2079 of the Pennsylvania Rules of Civil Procedure. A true and attested copy of process was sent by registered mail to the Secretary of the Commonwealth and to all of the defendants. *Inter alia,* the defendants entered a motion to quash the return of service on the ground that Rule 4 (f) is a limitation upon the provisions of Rule 4 (d) (7) which authorizes service in any manner prescribed by state law. The District Court held:

> Venue being admitted, it is our conclusion that under the provisions of Rule 4 (d) (7) and the Pennsylvania Procedural Rule 2079 proper service was had on all defendants in this case and the court has jurisdiction.[27]

It was not contended, nor indeed could it be, that the Pennsylvania motorist

---

[23] *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts,* U. S. Government Printing Office, Washington (1954).

[24] 205 F. 2d 498 (3d Cir. 1953).

[25] *Id.* at 501.

[26] 15 F. R. D. 200 (M. D. Pa. 1953); 19 Federal Rules Service, Cases, Case 2, 4 f. 22, December 30, 1953.

[27] *Id.* at 204 and 4 f. 22-5.

statute violates the guarantees of Procedural Due Process. *Hess v. Pawloski*,[28] is still uncontroverted law which recognizes that liability rests on the inroads that the automobile has made on the decision of *Pennoyer v. Neff*[29] for the protection of the resident injured party.

The sole question is one of statutory construction. What is the precise meaning and effect of Rule 4 (d) (7)? Did Congress intend to provide indirectly for a nationwide service of process in diversity of citizenship cases where a state statute provides for extraterritorial service?[30]

There is no doubt that the Federal Rules of Civil Procedure regarding service should be construed liberally to effectuate service, if actual notice of suit has been received by the defendant.[31] Furthermore, it is evident that Congress has the power to authorize the commencement of any action under federal law in any Federal District Court and to provide that process may run into any part of the United States, but it has not done so by general law.[32] Historically, original process of the United States District Courts has always been limited to the boundary of the state in diversity of citizenship cases.[33]

The argument has been made on Rule 82 to the effect that: "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts . . . ," is a general limitation on extraterritorial jurisdiction. However, the United States Supreme Court in *Mississippi Publishing Corp. v. Murphree*,[34] held that Rule 82 must be construed to refer to venue and subject-matter jurisdiction of the District Courts "rather than the means of bringing the defendant before the Court already having venue and jurisdiction of the subject matter." Clearly, if the collision occurred in the federal district wherein all of the plaintiffs reside, the Court would have jurisdiction of the subject matter and proper venue. Service of process, however, is the procedure by which the court may obtain jurisdiction over the person of the defendant so the defendant may be brought into court only at the place where Congress has declared the suit may be maintained. To this extent, the question of place of trial and service of process are in reality quite distinct.

---

[28] Note 3 *supra*.

[29] 75 U. S. 714 (1878).

[30] The significance of these questions is not limited to non-resident motorist statutes but could conceivably extend to situations where state statutes authorize *in personam* jurisdiction where a domiciliary flees the state to avoid service of process, *Milliken v. Meyer*, 311 U. S. 457 (1940); where a former resident allegedly caused a collision while in the state, *Allen v. Superior Court of Los Angeles*, 259 P. 2d 905 (Cal. 1953); where tenants or users of real estate cause injury to property while in the state, *Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (1953); and generally to all instances of constructive service (service by publication) in the absence of an appropriate federal statute on point. Cf. 4 Catholic U. L. Rev. 62 (1954).

[31] *Fakouri v. Cadais*, 147 F. 2d 667 (5th Cir. 1945); *Pierkowskie v. N. Y. Life Ins. Co.*, 147 F. 2d 928 (3d Cir. 1944); *Rovinski v. Rowe*, 131 F. 2d 687 (6th Cir. 1942).

[32] *Mississippi Publishing Corp. v. Murphree*, note 8 *supra* at 442 and cases cited therein; *Rorick v. Devon Syndicate Ltd.*, 307 U. S. 299 (1939).

[33] Cf. *Robertson v. Railroad Labor Bd.*, 268 U. S. 619, 622 (1924) and cases cited therein.

[34] Note 8 *supra* at 444-445.

Leading authorities on the Federal Rules have thought that Rule 4 (d) (7) provides for extraterritorial service of process. District Judge Alexander Holtzoff in his book on the "New Rules" states that Rule 4 (d) (7) applies specifically to motorist statutes;[35] a view which is reiterated in his commentary on *Federal Practice and Procedure.*[36] Professor Moore in his series, *Federal Practice,*[37] takes a like stand, however, his emphasis is based on the little disputed phase of Due Process. It is significant to note that the published authorities have spent little or no time construing Rule 4 (d) (7) so as to ascertain congressional intent which after all is the *sine qua non.*

In like manner, the majority of lower federal court decisions have rather cursorily construed Rule 4 (d) (7) to sanction extraterritorial service of process in conjunction with state motorist statutes.[38] The better reasoned decisions,

---

[35] Holtzoff, *New Federal Rules and the Courts,* published by the A. B. A., Chicago (1940).

[36] I *Barron & Holtzoff,* note 9 *supra* at § 184, pp. 336-345.

[37] 2 *Moores Federal Practice,* note 9 *supra* at §§ 4.16 and 4.18, pp. 937-941 and 942-949.

[38] *O'Toole v. U. S.,* 106 F. Supp. 804, 809 n. 6 (D. Del. 1952) but invalid as to a municipal corporation; *Kirksey v. Beauchesne et al.,* 98 F. Supp. 149 (D. Mass. 1951); *Roth v. W. T. Cowan Inc.,* 97 F. Supp. 675 (E. D. N. Y. 1951) concerning third party practice; *Kostamo v. Brorby et al.,* 95 F. Supp. 806 (D. Neb. 1951); *Weisler v. Matta et al.,* 95 F. Supp. 152 (W. D. Pa. 1951) concerning third party practice; *Thurman et al. v. Consolidated School Dist. et al.,* 94 F. Supp. 616 (D. Kan. 1950); *Morris v. Sun Oil Co. et al.,* 88 F. Supp. 529 (D. Md. 1950); *Mackie v. Rankin et al.,* 87 F. Supp. 614 (E. D. Mich. 1949); *Lulevitch v. Hill,* 82 F. Supp. 612 (E. D. Pa. 1949) even over a Canadian; *Magelssen v. Hale,* 81 F. Supp. 138 (W. D. Mo. 1948); *Krueger v. Hider,* 48 F. Supp. 708 (E. D. S. Car. 1943); *Malkins v. Arundel Corp. et al.,* 36 F. Supp. 948 (D. Md. 1941;) *Sussan v. Strasser et al.,* 36 F. Supp. 266 (E. D. Pa. 1941) as between federal districts in the same state on a third party defendant; *Zavis et al. v. Warren,* 35 F. Supp. 689 (E. D. Wis. 1940); *Williams v. James et al.,* note 17 *supra; Doggett v. Peek et al.,* 32 F. Supp. 889 (N. D. Tex. 1940) where service of process on agent of non-resident partners was held valid; *Peeples v. Ramspacher,* 29 F. Supp. 633 (E. D. S. Car. 1939) a questionable decision on removal; *Devier v. Geo. Cole Motor Co.,* 27 F. Supp. 978 (S. D. N. Y. 1939); *Clancy v. Balacier,* 27 F. Supp. 867 (S. D. N. Y. 1939); *Iser v. Brockway,* 25 F. Supp. 221 (W. D. Pa. 1938); *Giffen v. Ensign,* note 24 *supra; Mendenhall v. Texas Co. et al.,* 15 F. R. D. 193 (W. D. Pa. 1953) concerning third party practice; *Setterlund v. Spierer et al.,* 11 F. D. R. 601 (S. D. Mo. 1951); *Townsend v. Fletcher et al.,* 9 F. R. D. 711 (N. D. Ohio 1949); *Martin v. Fischbach Trucking Co.,* 9 F. R. D. 602 (D. Mass. 1949); *Ball et al. v. Yankee Lines et al., Co.,* 9 F. R. D. 590 (W D Pa 1950); *Buttson et al. v. Arnold,* 4 F. R. D. 492 (E. D. Pa. *General Ins. Corp. et al.,* note 17 *supra.* CONTRA: *McCoy v. Silver,* note 22 *supra* at 501; *Hartley v. Utah Const. Co.,* 106 F. 2d 953 (9th Cir. 1939) retroactive effect not given; *Arndt v. Mitchell Cadillac Rental Inc. et al.,* 115 F. Supp. 533 (D. N. J. 1953) to the effect that Rule 4 (d) (7) must be strictly construed because in derogation of the Common Law; *Camden v. Harris,* 109 F. Supp. 311 (W. D. Ark. 1953) holding that a U. S. military reservation is not a public highway; *McDaniel v. Drotman,* 103 F. Supp. 643 (W. D. Ky. 1952); *Glenn v. Holub,* 36 F. Supp. 941 (S. D. Iowa 1941) holding for necessity that the state statute must provide for reasonable, actual notice to the defendant; *Halliday v. Burlington Transp. Co.,* 36 F. Supp. 108 (W. D. Mo. 1940) held invalid notice to the defendant; *Hendrick v. Canadian Pac. Ry. Co.,* 28 F. Supp. 257 (S. D. Ohio 1939); *Angelone v. Monahan,* 9 F. R. D. 313 (D. R. I. 1949); *Barnhart et al. v. John Rogers Producing Co.,* 9 F. R. D. 590 (W. D. Pa. 1950); *Buttson et al. v. Arnold,* 4 F. R. D. 492 (E. D. Pa. 1945) to the effect that the state agency terminated with the death of the non-resident motorist; *Niemiec v. Interstate Motor Freight System et al.,* 2 F. R. D. 408 (W. D. Mich. 1942); *Whitmire v. Partin et al.,* 2 F. R. D. 83 (E. D. Tenn. 1941); *O'Brien et al. v. Richtarsic,* 2 F. R. D. 42 (W. D. N. Y. 1941) and cases cited therein concerning third party practice and ancillary jurisdiction.

however, hold that Rule 4 (d) (7) "presupposes jurisdiction of the party served," and Rule 4 (f) controls, is an indispensable or necessary party actually be outside the territorial limits of the state.[39]

Statutory construction demands that Rule 4 (d) (7) be read *in pari materia* with Rule 4 (f). Rule 4 (f) restricts all service with the exception of the subpoena and a specific United States statute to the "territorial limits of the state" in which the United States District Court sits. Is this Rule merely a "savings clause" or an "exception"? Obviously not. Rule 4 (f) would have absolutely no meaning or reason for existence if service of complaint and summons is permitted on an out-of-state motorist in a diversity of citizenship action.

An interpretation of Rule 4 (d) (7) itself: ". . . or in the manner prescribed by the law of the state *in which* the service is made . . . ," indicates that the Rule would have no extraterritorial effect of in personam jurisdiction. The United States Supreme Court held in *Wuchter v. Pizzutti*[40] that mere service of the appropriate state official without notification by registered mail to the defendant at his out-of-town address, violates adjective Due Process. Service of process, therefore, is not "made" or completely "made" until it reaches the non-resident motorist *outside* the territorial limits of the state. Then, the state "in which service is made" is actually the foreign jurisdiction of the non-resident motorist. All of which is precluded by the very wording of Rule 4 (d) (7) itself.[41]

In ascertaining the meaning of the Federal Rules of Civil Procedure, the construction given to them by the Advisory Committee to the Supreme Court "is of weight."[42] As a matter of practice, this Court has relied heavily on the legislative and administrative interpretations of acts, rules and orders and has deemed them controlling in voluminous cases in the last two decades.[43]

There is no specific annotation to Rule 4 (d) (7) by the Advisory Committee and the Supreme Court has never construed the extent of the Rule itself. However, in the proceedings of the Institutes and Symposiums which considered the "New Rules", Rule 4 (d) (7) was frequently discussed and commented upon by members of the Committee. Although the Rule has been characterized as "a kind of a catch-all,"[44] it is clear that the members of the Advisory Committee did not "think [they] could change any matter of jurisdiction."[45] As to persons outside

---

[39] *McCoy v. Silver,* note 24 *supra* at 501; *McDaniel v. Drotman,* note 38 *supra; Angelone v. Monahan,* note 38 *supra; O'Brien et al. v. Richtarsic,* note 38 *supra* concerning third party practice.

[40] 276 U. S. 13 (1928).

[41] A similar line of reasoning was employed in *Angelone v. Monahan,* note 38 *supra* at 314.

[42] *Mississippi Publishing Corp. v. Murphree,* note 8 *supra* at 444. But in *Wieland v. Son Daisy Co.,* 4 F. R. D. 250 (D. Wis. 1945), the court held that the construction of the Advisory Committee "while persuasive, cannot be accepted as authority."

[43] Cf. Mr. Justice Frankfurter concurring in *Commissioner of Internal Revenue v. Estate of Church,* 335 U. S. 632, 687 (1948).

[44] Cf. Response of Circuit Judge Charles E. Clark, member of the Advisory Committee, *Proceedings of the Institute at Cleveland,* note 9 *supra* at 205.

[45] *Id.* at 212.

the jurisdiction of the court, the plaintiff must rely on the "limited extent of federal legislation" with regard to extraterritorial service of process.[46]

> When you are making service outside the state, you proceed according to the United States statutes or these rules. See Rule 4 (e). The provision in this paragraph (7) that a summons may be served in the manner prescribed by the law of the state means personal service of the summons within the state.[47]

Finally, it is pertinent to inquire into the power of the United States District Courts to acquire in personam jurisdiction. Would substituted service of process on a non-resident motorist "abridge, enlarge or modify the substantive rights of any litigant?" This is the general limitation to the Federal Rules of Civil Procedure established by Congress in the Enabling Act.[48]

In ascertaining exactly what constituted impairment of "substantive rights" under Rule 4 (f), the United States Supreme Court decided that service of process from one federal district to another district *in the same state* was "a slight inconvenience" but not so substantive as to come within the prohibitions of the Enabling Act. In regard to service of process under Rule 4 (d) (7) in conjunction with a state motorist statute, the non-resident defendant might well be required to travel hundreds of miles to defend. While each case of necessity must be decided on its own facts, such extraterritorial service of process certainly would constitute more than "a slight inconvenience" and would not be inconsistent with the spirit of the Rules to the effect that "they shall be construed to secure a just, speedy, and inexpensive determination of every action."[49]

The mere fact that the non-resident motorist may be forced under the Police Power of a state to defend in that state, and that he may demand immediate removal of the case to the federal court, does not diminish the reality that under the *Giffen v. Ensign*[50] facts, it was not the state Police Power alone which brought the defendant before the federal court but the power of the federal court itself which is subject to the "substantive rights" limitation of the Enabling Act and even to the doctrine of *Forum Non Conveniens.*[51] To this extent, this doctrine and the general limitation of the Enabling Act are complementary, if not analogous.

This, then, is a picture of the law on motorist statutes and federal jurisdiction as it exists at this writing. As it is presently constituted, Rule 4 (d) (7) may enlarge the limits of service of process within the state, however, it alone does not vest extraterritorial jurisdiction in the United States District Courts.

---

[46] Comment of Major Tolman, *Proceedings of the Institute at Washington and Symposium at New York City,* note 10 *supra* at 114. Also Cf. *Id.* at 294 and 298.

[47] Response of Hon. George Donworth, former United States District Judge and member of the Advisory Committee, *Symposium at New York City,* note 10 *supra* at 289.

[48] "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . . ," Judiciary and Judicial Procedure, note 7 *supra.*

[49] Federal Rules of Civil Procedure, 28 U. S. C. Rule 1 as amended (1948).

[50] Note 26 *supra.*

[51] Cf. *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501 (1947) and with specific reference to the Federal Rules of Civil Procedure, *Angus v. Younger Bros.,* 49 F. Supp. 449 (W. D. La. 1943). The Doctrine is uniquely applicable in motorist cases, since the state courts have complete jurisdiction to adjudicate these tort cases for all defendants.

Proposed Amendments

In May, 1954, six years after the last general revision, the Advisory Committee on the Federal Rules of Civil Procedure published proposed amendments affecting twenty-seven rules, two of which were Rules 4 (e) and 4 (f). The amendment to Rule 4 (e) is designed to remove present confusion regarding substituted service and quasi in rem jurisdiction in diversity cases by permitting suits in conformity with state practice and available local remedies.

> (e) SAME: OTHER SERVICE. Whenever a statute of the United States *or any of these rules* or an order of court provides for service of a summons, or of notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order. *Whenever a statute or rule of court of the state in which the district court is held provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or for notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment of his property located within the state, it shall also be sufficient if service is made or the party is brought before the court under the circumstances and in the manner prescribed in the state statute or rule.*[52]

Alternative proposals for amendment of Rule 4 (f) were presented by the Committee for the recommendations of the legal profession. The first amendment permits extraterritorial service of process outside the state at any point within 100 miles of the courthouse where the district court sits as provided by law.[53] Thus, the territorial limits of service of all process conform to that which has heretofore prevailed with regard to service of a subpoena.

> (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. [All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held *and at all places without the district that are within 100 miles of the place or places designated by law for the holding of the district court* and, when a statute of the United States so provides (beyond) *within* the territorial limits (of that state) *provided in such statute.*] A subpoena may be served within the territorial limits provided in Rule 45.[54]

The more limited second alternative authorizes service on any party within the state and service within 100 miles of the place where the existing action is to be tried to bring in an additional defendant to a counterclaim, Rule 13 (h), to add a third-party defendant, Rule 14, to join an indispensable party without whose joinder the existing action must be dismissed, Rule 19, or to enforce the court's decrees in order that an entire controversy may be determined in one lawsuit.

> (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. [All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. *Process other than a subpoena may be served upon persons who are made parties pursuant to Rule 13 (h) or Rule 14, or who are indispensable parties to an existing action, or who are required to respond in proceedings for the enforcement of the court's*

[52] *Preliminary Draft of Proposed Amendments,* note 23 *supra* at 1. New matter is shown in italics.

[53] Cf. Judiciary and Judicial Procedure, 28 U. S. C. §§ 81-131 (1948).

[54] *Preliminary Draft of Proposed Amendments,* note 23 *supra* at 1-2. New matter is shown in italics; matter to be omitted is in parenthesis.

orders and judgments, within the limits thus stated and at all places without the district that are within 100 miles of the place where the action is to be or has been tried.] A subpoena may be served within the territorial limits provided in Rule 45.[55]

The Advisory Committee itself is not committed to the adoption of any of these proposals. On the contrary, the members of the Committee are "divided in opinion." Furthermore, the draft has not been approved by the Supreme Court or the Congress. Indeed, neither of these bodies has even considered it.

Doubtless, amendment is necessary, especially to allay the confusion surrounding the rules controlling service of process. Unfortunately, the manner in which the proposals have been drafted leaves much to be desired. As applied to non-resident motorist statutes, the amendments to Rules 4 (e) and 4 (f) leave questions of duplicity, ambiguity and sheer lack of power.

It is inconceivable to the author why the amendment to allow service in conformity with state procedure was tacked on to Rule 4 (e). The words merely duplicate the provisions of Rule 4 (d) (7) in more explicit terms. True, Rule 4 (e) as amended permits original jurisdiction through quasi in rem attachment and garnishment as distinguished from Rule 64 which presently authorizes such seizure only for the purpose of securing satisfaction of judgment.[56] All of this, however, leaves us with a completely hopeless Rule 4 (d) (7). Of what effect or purpose would Rule 4 (d) (7) be?[57] This in turn leads to the consideration of ambiguity which results from the tenuous relation of Rules 4 (d) (7) and 4 (e) as amended to the territorial limitation of Rule 4 (f).

The primary thing that has plagued lower court decisions and commentators on the Federal Rules is the question whether or not Rule 4 (f) is merely a "savings clause" or an "exception", particularly in regard to the utilization of state procedure in conjunction with Rule 4 (d) (7). The matter now would be further complicated by two Rules, both 4 (d) (7) and 4 (e) as amended. Are these rules restricted by the territorial limits of the state or within 100 miles of the state, or can a party be served by substituted process created by a motorist or quasi in rem statute even though he resides hundreds or thousands of miles from the district courthouse? The same problem remains whether these rules in fact or by implication allow nation-wide service of process. This is the dilemma faced in *Giffen v. Ensign*[58] which indeed, as applied to Ensign, would be reversed if either the

[55] *Id.* at 2. New matter is shown in italics.

[56] Concerning the substituted service authorized by motorist statutes, there is no property or proprietary interest upon which jurisdiction may be predicated but only upon the legal fiction of "implied consent" induced from the defendant's use of a state highway. The wording of Rule 4 (e) as amended, however, is broad enough to include this form of substituted service. Furthermore, Rule 64 is specifically subject to the territorial limitations of Rue 4 (f). Such limitation is not set forth in the proposed amendment to Rule 4 (e). Rule 71A (d) (3) (ii) is one which expressly provides that the Rule is not subject to Rule 4 (f), however, this unfettered service may be justified because of the independent eminent domain power. Cf. Note of the Advisory Committee to Rule 71, *Federal Court Rules Annotated,* note 10 *supra* at 562 and 564.

[57] Cf. note 65 *infra.*

[58] Cf. note 26 *supra* and other decisions therein involving both original and third party defendants.

present or amended version of Rule 4 (f) deemed controlling by the court. If taken alone, however, the amended provision of Rule 4 (e), if anything, lends support to the *Giffen* decision.

In the last analysis, the real crux of the question is the power of the United States District Courts to so extend the limits and scope of service of process. It is extremely difficult to discuss naked power with the enigma of duplicity and ambiguity hanging unresolved, however, an attempt will be made to do so.

The note of the Advisory Committee to the amended Rule 4 (f) concludes that "the court's power in the premises is settled by *Mississippi Pub. Corp. v. Murphree.*"[59] This is simply not true. At best, it is open to question. True, the *Murphree* case does stand for the well-established proposition that Congress has the power to authorize nation-wide service of process in diversity cases. It must be constantly remembered, however, that the Federal Rules of Civil Procedure, originally and as amended, are subject to the very general limitation imposed by the Congress itself, to wit, that "Said Rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. . . ."[60] This limitation was also considered in the *Murphree* case. In this regard, the Supreme Court held that service of process from one federal district to another district *in the same state* was "a slight inconvenience" but not so substantive so as to come within the prohibitions of the Enabling Act. At what point would an extension of service "modify substantive rights?"

If either Rule 4 (d) (7) or Rule 4 (e) as amended is construed to stand alone and, therefore, to authorize unlimited extraterritorial substituted service when supported by appropriate state procedure, then certainly there would be a modification of the substantive rights traditionally enjoyed by litigants in federal diversity cases.[61] If Rules 4 (d) (7) and 4 (e) as amended are subject to the territorial limitation of Rule 4 (f), whether or not the 100 mile extension contemplated in the amendment is "substantive" presents an extremely difficult consideration.

The Advisory Committee has drawn the analogy between the 100 mile extension and that territorial limitation which has *always* existed in regard to the subpoena. The analogy limps. If a witness is subpoenaed, he need only bring himself, or if *duces tecum* his papers, records, etc., which are usually readily accessible at least to himself. He has no interest in the outcome of the litigation but only in the largely mechanical function of presenting himself and telling the whole truth. On the other hand, the indispensable litigant, originally impleaded[62]

[59] Note of the Advisory Committee to the proposed Rule 4 (f), *Preliminary Draft of Proposed Amendments,* note 23 *supra* at 6.

[60] Judiciary and Judicial Procedure, 28 U. S. C. § 2072 as amended (1949), note 7 *supra.*

[61] In this manner, Congress unwittingly may allow federal diversity jurisdiction to be tremendously increased, especially since these proposals become effective automatically three months after they are transmitted to Congress or on August 1, 1955. Cf. Rule 86, EFFECTIVE DATE, and the *Preliminary Draft of Proposed Amendments,* note 23 *supra* at 57.

[62] If these extensions of service "modify the substantive rights" of original parties,

or subjected to a counterclaim,[63] must not only consider himself and the physical evidence at his command but must arrange for an attorney in the foreign jurisdiction to plead his cause. Then, he must summon witnesses and their records, etc., which well may involve a complicated discovery practice. All of this done by remote control of 100 or more miles.

Indeed, it may be answered that defendants are subjected to the above procedure every day in *Hess v. Pawloski* cases in state courts. This is quite true. However, it is equally true that this procedure would be a radical departure in federal diversity cases. There is no general United States statute authorizing substituted service in diversity cases *per se.* Limited federal jurisdiction is not the exception but the established rule. This Pandora's Box opened by skillful drafting techniques should be approached with extreme caution lest traditional rights be inched or "miled" away.

As has been observed, the injured motorist plaintiff is assured of at least three distinct courts which will adjudicate his cause, specifically, the federal and state courts sitting at the domicile of the non-resident and the state courts of the jurisdiction wherein the collision occurred. There is no justification for allowing this plaintiff to sit at home at still a fourth forum. To sanction this indulgence manifestly would "enlarge" the rights of the plaintiff and at the very least "modify" the rights of the defendant, original or not.

Moreover, there can be no intimation that the plaintiff will not secure a "just, speedy and inexpensive" determination of his cause in the state jurisdiction in which he is a resident. This is true in view of the fact that the federal courts are bound to apply the substantive tort law of the state in their decisions under the ruling of *Erie Ry. v. Tompkins.*[64] The very effect of this epic case was to rid the federal courts of the administrative difficulties which result when litigation is piled up in tort cases of the diversity of citizenship class.

While the author is not wholly persuaded that these extensions of service of process are prudent, he is cognizant that it is quite easy to criticize without offering a constructive alternative. Therefore, the following is proposed to resolve the duplicitous and ambiguous nature of this inquiry as well as to remove doubts concerning the power of the United States District Courts. An entirely new drafting technique should be employed which would repeal and abolish Rules 4 (d) (7), 4 (e) and 4 (f) altogether. In their place, one comprehensive "Rule 4 (e)"

---

a fortiori they would also "modify" the rights of additional parties who necessarily have comparable interest in the litigation. An impleaded defendant to a motorist case is usually considered ancillary and would not oust federal diversity jurisdiction unless the plaintiff amends his pleadings to include counts or other claims against the third party defendant. Even then, there appears to be no reason for allowing this extension, since a state action may be instituted for contribution from the joint tortfeasor.

[63] Again, even if a compulsory counterclaim is precluded in the federal courts because the party was not served in the original action, recovery may be had in an action in a state court.

[64] 304 U. S. 64 (1938).

should be inserted utilizing the best of the present rules and proposals. The revised "Rule" might read in the following manner.

> (e) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and at all places without the district that are within 100 miles of the place or places designated by law for the holding of the district court and beyond the territorial limits of that state as provided in the following subdivisions to this Rule.
>
> (1) A subpoena may be served within the territorial limits provided in Rule 45.
>
> (2) Whenever a statute of the United States or any of these rules or an order of court provides for service of summons, or of notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.
>
> (3) Whenever a statute or rule of court of the state in which the district court is held provides for service of summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or for notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment of his property located within the state, or for notice to a party residing or incorporated or doing business within the state, it shall also be sufficient if service is made or the party is brought into court under the circumstances and in the manner prescribed in the state statute or rule applicable in an action brought in the courts of general jurisdiction of that state.[65]

The last wrinkle remaining to be ironed out is the Enabling Act of 1934, now incorporated into the Judiciary Act of 1948.[66] As has been previously indicated, it is questionable if the 100 mile extension in the main clause of the revised "Rule 4 (e)" above and the scope of subsection (2) and (3) would stand attack under the "modification of substantive rights" limitation of the Act. Moreover, an attempt to increase federal jurisdiction by the indirection of ambiguous rules should be denounced. Abolition or modification of the pertinent clause in 28 U. S. C. § 2072 is the only answer. An endeavor must be made to convince the Congress that sixteen years of practical experience under the Federal Rules of Civil Procedure warrants these extensions of service to allow greater federal jurisdiction. Any other approach would only turn confusion into chaos.

FRANCIS A. PACIENZA, JR.*

---

*LL.B. Catholic University of America School of Law 1954; Candidate for LL.M., Harvard Law School, 1955.

[65] This "Rule" spells out every phase of service. To argue that Subsection (3) is too broad, to deny that the language of the present rules and proposed amendments couched in their ambiguous terms proport to do what here is set forth, would only be burying one's head in the sand of deception. It will be noticed that Rule 4 (d) (7) has been omitted. To include it would be duplicitious. Subsection (2) and (3) cover all possibilities for reaching a party not an inhabitant or found within the state, including United States statutes, state procedure, orders of court and the federal rules themselves. In addition, the state procedure authorized in Subsection (3) augments Rule 4 (d) (1) pertaining to service of residents and Rule 4 (d) (3) pertaining to service of business entities.

[66] Judiciary and Judicial Procedure, 28 U. S. C. § 2072 as amended (1949), note 7 *supra.*