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tion of the employment as well as during its continuance.[38] If held otherwise the employer would be at the mercy of an unscrupulous employee, who on receipt of a given trade secret could decamp with impunity. While authorities are generally silent as to how long this duty continues after the termination of the employment, it is reasonable to assume that the duty will be said to exist as long as revelation or use of such information has the power to harm the owner.[39]

In the principal case it was urged, unsuccessfully, that defendant's loyalty was relaxed as to information of areas in which the plaintiff was no longer interested. The court intimated that such defense might be made if it could be proven that such areas of interest had been abandoned. It has been held, however, that the employee may not be the judge of what his employer may or may not be interested,[40] and a constructive trust has been decreed as to property of a type only occasionally purchased by the plaintiff, where there was no showing that he would have in fact purchased the property.[41]

The extension of the rule[42] to the more mundane kind of employees and to the less technical types of information is a salutary example of the development of the conscience of business.[43]

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Venue—Waiver Under Non-Resident Motorist Statutes

B of Texas was injured by the allegedly negligent operation of an automobile by A of New York in the State of Vermont. Service was made on the Commissioner of Motor Vehicles in accordance with the provisions of the Vermont non-resident motorist statute,[1] and suit commenced in the federal district court sitting in Vermont. The court denied defendant's motion to dismiss for failure to satisfy the federal

[38] Wooley's Laundry v. Silva, 304 Mass. 383, 23 N. E. 2d 899 (1939); State v. Kirkwood, 357 Mo. 325, 208 S. W. 2d 257 (1948).

[39] It has been held, however, that it is not necessary that the owner should have suffered any actual loss. Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937).

[40] Pratt v. Shell Petroleum Corp., 100 F. 2d 833 (9th Cir. 1937).

[41] Whitten v. Wright, 206 Minn. 423, 289 N. W. 509 (1940).

[42] See notes 3 through 6 *supra*.

[43] But see, *Simpson, Equity, Annual Survey of American Law*, 839 (1946). ("In view of the ease with which any business practice can be labeled 'confidential,' and of the fact that enforcement of covenants not to compete by employees is justified only where the interest of the former employer materially outweighs both the public interest in free competition and in the dissemination of useful knowledge, and the employee's interest in being able to learn and apply his skill to his own advantage, all these decisions (as to confidential information) seem dubious. Certainly the tendency which they manifest cannot be extended if freedom of individual enterprise is to be preserved. A fictional extension of the 'trade secret' concept should not be allowed to become the tool of monopoly.").

[1] VT. REV. STAT. § 428 (1947), as amended Vt. Public Acts, 1951, § 209.

venue requirement that except as otherwise provided by law, a civil action in which the jurisdiction is based only on diversity of citizenship may be brought only in the judicial district where all plaintiffs or all defendants reside;[2] holding that by A's action in using the highways of the State of Vermont he was deemed to have appointed the Commissioner of Motor Vehicles as his agent for the receipt of process, and such statutory appointment also constituted a consent to the venue of the federal court in that district.[3]

Since the non-resident motorist statutes were held constitutional[4] if they provided for notice to the non-resident,[5] the federal courts have been confronted with the problem of whether the non-resident operating his vehicle in a state with a non-resident motorist statute thereby waives his federal venue privilege. The weight of authority[6] is that such action constitutes a waiver, the courts having found the situation analogous to that of a foreign corporation,[7] and thereby having a basis for the application of the rule of the *Neirbo* case[8] which held that the appointment by a foreign corporation of a statutory agent for the service of process was a consent to suit in the federal as well as in the state courts of a state.

The rationale of these decisions is that the general venue statute is not a limitation on the jurisdiction of the federal courts,[9] but merely a privilege accorded to the defendant which he may waive or[10] to which he may consent, either expressly or impliedly.[11] As the *Neirbo* case held that the appointment of an agent for process by a foreign corporation in accordance with state law constituted a consent to the venue of the federal courts of the district, it would follow that an individual may also waive his non-resident immunity by the statutory

[2] 28 U. S. C. A. § 1391(a) (Supp. 1950).
[3] Jacobson v. Schuman, 105 F. Supp. 483 (D. Vt. 1952).
[4] Hess v. Pawloski, 274 U. S. 352 (1927).
[5] Wuchter v. Pizzuti, 276 U. S. 13 (1928).
[6] Oberding v. Illinois Central Ry., 201 F. 2d 582 (6th Cir. 1953); Archambeau v. Emerson, 108 F. Supp. 28 (W. D. Mich. 1952); Garcia v. Fausto, 97 F. Supp. 583 (E. D. Mo. 1951); Burnett v. Swenson, 95 F. Supp. 529 (W. D. Okla. 1951); Kostamo v. Brorby, 95 F. Supp. 806 (D. Neb. 1951); Urso v. Scales, 90 F. Supp. 653 (E. D. Pa. 1950); Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945); Krueger v. Hider, 48 F. Supp. 708 (E. D. S. C. 1943); Williams v. James, 34 F. Supp. 61 (W. D. La. 1940); O'Donnell v. Slade, 5 F. Supp. 265 (M. D. Pa. 1933). *Contra:* Martin v. Fischbach Trucking Co., 183 F. 2d 53 (1st Cir. 1950); Waters v. Plyborn, 93 F. Supp. 651 (E. D. Tenn. 1950).
[7] Urso v. Scales, 90 F. Supp. 653, 655 (E. D. Pa. 1950).
[8] Neirbo v. Bethlehem Steel Corp., 308 U. S. 165 (1939); 128 A. L. R. 1437 (1940).
[9] Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 549 (2d Cir. 1914).
[10] It would seem that the word "consent" would imply an affirmative action as opposed to the negative character of "waiver"; however, the courts seem to use the terms interchangeably in discussing this problem.
[11] Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U. S. 177, 179 (1929).

appointment of an agent on whom process may be served.[12]

It has been contended that if the *Neirbo* decision is based on the conception that an express appointment of a statutory agent for service of process (and thereby impliedly contemplating suit in that district) constitutes a consent to be sued in both the federal and local courts of a state, this line of reasoning is not applicable to the non-resident motorist.[13] In the latter case there is neither conscious nor voluntary consent.[14] Nevertheless, in deciding in accordance with the terms of a Virginia statute[15] that a foreign corporation without the actual appointment of an agent for process was deemed to have appointed such agent by doing business within the state, Judge Parker stated: "There is a distinction between express and implied consent, but this consent has relation to the origin of the cause of action, not to the effect on venue . . . there is no reason for any distinction between express and implied waiver, however, when it comes to the waiver of venue. . . ."[16]

A distinguishing characteristic of the *Neirbo* case and the non-resident motorist case has been based also on the nature of the parties.[17] A corporation, lacking the rights of a natural person, accepts the burden of a statutory agent and the accompanying result of venue waiver in order to obtain a privilege. An individual, on the other hand, has a constitutional right to pass freely from state to state, and the non-resident motorist statute imposes both an abridgement of his constitutional right and a burden on him. This abridgement has been found justified by the police power of the state,[18] and it is questionable whether the necessity to answer for wrongs committed within a state can properly be considered a "burden" rather than a just responsibility; the pervading purpose of the non-resident motorist statutes is the protection of those injured, not the advantage and ease of the non-resident tortfeasor.[19]

[12] Krueger v. Hider, 48 F. Supp. 708, 710 (E. D. S. C. 1943); O'Donnell v. Slade, 5 F. Supp. 265, 268 (M. D. Pa. 1933).

[13] Martin v. Fischbach Trucking Co., 183 F. 2d 53, 55, 56 (1st Cir. 1947).

[14] Conceding that the non-resident motorist is, in actuality, ignorant of the legal consequences of his use of the roads of a sister state, all persons are presumed to know the law. Kostamo v. Brorby, 95 F. Supp. 806, 808 (D. Neb. 1951). It would seem, however, that the "consent" in both situations is a legal fiction employed by the courts to obtain what they deem to be a just end. As stated by Learned Hand, J.: "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 . . . the limits of that consent are as independent of any actual intent as the consent itself . . ." Smolik v. Philadelphia & Reading Coal & Iron Co., 22 Fed. 148, 151 (S. D. N. Y. 1915).

[15] VA. CODE § 3846a (1-4) (Supp. 1948), comparable to the North Carolina Resident Process Act, N. C. GEN. STAT. § 55-38 (1943, recompiled 1950).

[16] Knott Corp. v. Furman, 163 F. 2d 199, 204 (4th Cir. 1947).

[17] Waters v. Plyborn, 93 F. Supp. 651, 652 (E. D. Tenn. 1950).

[18] Kane v. New Jersey, 242 U. S. 160, 167 (1916).

[19] Davis v. Warren, 35 F. Supp. 689 (E. D. Wis. 1940).

If the non-resident plaintiff is refused access to the federal court sitting in the state where the injury occurred, he may bring suit in the state of his residence, in that of the defendant, or in the state court of the state in which the tort occurred. The first of these possibilities is ordinarily precluded by an inability to obtain service on the defendant; normally, the second would subject the plaintiff to additional expense and difficulty. In respect to the third alternative, the federal court may be preferable for many reasons, such as the uniform and relatively simpler procedure and less crowded court calendars.[20]

If the case is tried in a federal forum, it ordinarily would be to the ultimate benefit of both parties, plaintiff and defendant, to have adjudication by the federal court situated in the state where the injury occurred. By the general rule, tort liability is governed by the law of the situs of the tort;[21] therefore, many of the complexities arising from the conflicts of laws would be avoided. In allowing suit in the federal court of the situs, witnesses would be within a reasonable distance and the jury enabled to determine the case without dependence on the relatively unsatisfactory use of depositions.

The primary objection to be made of the confused status of this phase of the law is to the danger inherent in an arbitrary decision that the defendant has, or has not, waived his federal venue privilege without due consideration of the ". . . estimate of conveniences which would result from requiring (him) to defend where (he) has been sued."[22]

In 1948, the *Neirbo* rule was incorporated into statute,[23] providing a partial cure for the venue problems involving foreign corporations. There should be comparable legislative action to elucidate the non-resident motorist statute situations. It is submitted that a statute should be enacted providing that the non-resident motorist statutes should operate as consent to federal venue subject to the approval of the court based on a due consideration of the elements of justice and fair play as embodied in the doctrine of *forum non-conveniens*.[24] To a great

[20] In many of the cases in which the non-resident plaintiff commences suit against the non-resident defendant in the state court of the state in which the tort occurred, the defendant may have the right of removal from the state court to the federal court of the district, and if he exercises this right, the alleged wrongdoer is accorded an opportunity denied the innocent. There is no apparent purpose of justice to be served by such a holding. Knott Corp. v. Furman, 163 F. 2d 199, 205 (4th Cir. 1947); Burnett v. Swanson, 95 F. Supp. 524, 525 (W. D. Okla. 1951).

[21] GOODRICH, CONFLICTS OF LAWS 260 *et seq.* (3d ed. 1949); RESTATEMENT, CONFLICTS § 378 *et seq.* (1934).

[22] Learned Hand, J., in discussing the analogous problem of the "presence" of a foreign corporation. Hutchinson v. Chase & Gilbert, 45 F. 2d 139, 141 (2d Cir. 1930).

[23] 28 U. S. C. A. § 1391(c) (Supp. 1950); and similar state statutes, note 15 *supra*.

[24] 28 U. S. C. A. § 1404 (1950).

extent, such a procedure would terminate the confusion existant in an area where the courts seeking to enforce the literal language of Federal Rule 1 that the federal rules ". . . should be construed to secure the just, inexpensive, and speedy determination of every action,"[25] are hampered by the literal meaning of the venue statute, and have been forced to resort to a nebulous legal fiction which could conceivably violate our ". . . traditional notions of fair play and substantial justice. . . ."[26]

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[25] FED. R. CIV. P. 1.

[26] A test applied by some courts in the determination of the "presence" of a foreign corporation. See: International Shoe Co. v. State of Washington, 326 U. S. 310, 316 (1945); 161 A. L. R. 1057 (1946); Milliken v. Meyer, 311 U. S. 457, 463 (1940); MacDonald v. Mabee, 243 U. S. 90, 91 (1916). According to L. Hand, J., in Kilpatrick v. Tex. & Pac. Ry., 166 F. 2d 788, 791 (2d Cir. 1948), the issue of corporate presence is "indistinguishable" from that of *forum non conveniens.*