similar recourse to the employee intentionally harmed by his employer. If the employer were self insured, the compensation paid, plus costs, could be applied in mitigation of damages. Against an insured employer, the insurer could be subrogated to part of the employee's cause of action.[23] Those states which have comparable third party clauses[24] could achieve this result by applying them, either by analogy, or directly on the ground that the employer-employee relationship was severed by the action of the employer, who would then be in the position of a third party.[25] However, a statutory enactment would probably be necessary in some instances.[26]

If this recommended procedure were applied to the *Bevis* case the employee could obtain both the speedy relief afforded by the compensation act and full monetary satisfaction for all damages, punitive as well as actual. The employer could not limit or insure against liability for his intentional torts, yet would not suffer a double loss. Such an outcome would be more in harmony with the liberal purposes of the compensation acts.

SUBSTITUTED SERVICE AND WAIVER OF FEDERAL VENUE UNDER "NEIRBO"

Venue relates to the place of trial.[1] Parties to litigation enjoy it as a personal privilege, hence they may waive that privilege and consent to a different situs for trial.[2] *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, held

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between compensation and a common law procedure. If he chooses to accept compensation, the employer alone may proceed against the third party with any excess recovery over the compensation paid, plus costs, going to the employee. For a classification and discussion of the third party clauses, see Behrendt, *supra* note 17, at 231; Note, 7 MONTANA L. REV. 89 (1946).

23. The Oregon, Washington, and West Virginia acts expressly permit an employee who has been injured by his employer's willful and wanton misconduct to accept compensation and sue the employer for any excess damages. ORE. COMP. LAWS ANN. § 102-1753 (1940); WASH. REV. STAT. ANN. § 7680 (1932); W. VA. CODE ANN. § 2527 (1943). In Texas, dependents of an employee who has died due to the intentional misconduct or gross negligence of his employer may sue at common law for exemplary damages. TEX. STAT., REV. CIV., ART. 8306, § 3 (1948).

24. See note 22 *supra*.

25. *See* Boek v. Wong Hing, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930).

26. It has been contended that in the third party cases the employer or insurer could be subrogated against the third party by analogy to the indemnity principle that subrogation takes place where one party has been subjected to liability for the fault of another. See Behrendt, *supra* note 17, at 240; Hardman, *supra* note 21, at 183. If this were applied to the employer's intentional tort cases, a double recovery by the employee could be prevented without resorting to statutory provisions, even though he were allowed both compensation and a common law action.

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1. General Investment Co. v. Lake Shore Ry., 260 U.S. 264 (1922); Lee v. Chesapeake & O. Ry., 260 U.S. 653 (1922).

2. 28 U.S.C. 1406(b) (1948). Commercial Cas. Ins. Co. v. Stone Co., 278 U.S. 177, 179 (1928); Seaboard Rice Milling Co. v. Chicago, R.I. & P. Ry. Co., 270 U.S. 363 (1925); Grover Tank & Manf. Corp. v. New England Terminal Co., 125 F.2d 71 (1st Cir. 1942). "The privilege accorded may be lost by failure to assert it seasonably, by formal

that by appointment of an agent to receive service of process in a foreign state a corporation waives its federal venue privilege.[3] The question has now arisen whether something less than express appointment of an agent is equivalent to waiver.

In *Martin v. Fischbach Trucking Co.*[4] a Connecticut resident sued an Ohio corporation in a federal district court in Massachusetts to recover for personal injury and property damage resulting from an automobile collision in Massachusetts. Jurisdiction over the defendant was founded on Massachusetts' non-resident motorist statute.[5] Plaintiff argued that under the statute the defendant had appointed the Registrar of Motor Vehicles as its agent to receive process, thereby waiving venue under the *Neirbo* doctrine. The district court dismissed for lack of venue. On appeal the First Circuit affirmed, reasoning that this result was not foreclosed by *Neirbo* since in that case *express* appointment of an agent had been made.

Historically it appears that the First Circuit was not justified in concluding that the *Neirbo* doctrine is tied to express appointment of an agent to receive process. Justice Frankfurter in that momentous decision relied heavily on two old cases, Ex parte *Schollenberger*[6] and *Baltimore & Ohio R. R. v. Harris.*[7] In the former it was decided that since the corporation had complied with the Pennsylvania statute requiring foreign corporations to appoint resident agents to receive process as a condition to doing business within the state, the corporation was "found" there for jurisdiction AND venue purposes. Having qualified for jurisdiction, the corporation was subjected to venue. For perhaps the first time venue was the equation of jurisdiction. *Neirbo* likewise equates the two. The fact that the federal venue statute prior to 1887 provided for suit where the defendant could be found[8] and subsequent ones did not would seem to make no difference—a corporation has no legal existence outside the state of its incorporation,[9] and therefore can no more be

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submission in a cause, or by submission through conduct. Such loss of the privilege may be regarded negatively as a waiver or positively as a consent to be sued." Urso v. Scales, 90 F. Supp. 653, 654 (E.D. Pa. 1950).

3. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939).

The venue requirement in diversity cases is that the suit must be brought in the district where all of the plaintiffs or defendants reside, or if the defendant is a corporation then in any district where the defendant is doing business. 28 U.S.C. 1391 (1948).

4. 183 F.2d 53 (1st Cir. 1950).

5. MASS. GEN. LAWS c. 90, §§ 3A, 3B (1923).

6. 96 U.S. 369 (1878).

7. 12 Wall. 65 (U.S. 1870).

8. 18 STAT. 470 (1875): ". . . and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found."

9. Early thought as to the legal existence of a corporation was metaphorical. The classical doctrine was that a corporation "must dwell in the place of its creation and cannot migrate to another sovereignty." Bank of Augusta v. Earle, 13 Pet. 519, 688 (U.S. 1839). *Ex parte* Schollenberger displaced metaphor with common sense and provided a

"found" in a foreign state than it can be said to have *voluntarily* waived its venue privilege in a state beyond the present venue statute. Both fictions have been mere tools employed by the courts to facilitate suit against a foreign corporation.[10]

Neirbo's reliance on *Harris* is doubly significant: *Schollenberger* looked to *Harris* to determine what was valid jurisdiction over a foreign corporation. In *Harris* Congress had passed a statute allowing a Maryland corporation to extend its railroad into the District. This statute did *not* require the appointment of a resident agent. Nevertheless, the Supreme Court held that merely coming in and doing business under this statute was a consent to suit in the District of Columbia. And since *Schollenberger* equated this jurisdiction to venue, it impliedly referred to *Harris* in order to define that action which would subject a foreign corporation to venue.[11] Thus the facts of *Schollenberger* were well within the principle formulated.

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new way of looking at corporations; for *Schollenberger* recognized that consent may give venue and that the defendant consented, not to be found, but to be sued. Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 169 (1939).

10. The problem has as its roots the view taken in Dartmouth College v. Woodward, 4 Wheat. 518 (U.S. 1819), as to the nature of a corporation—that it is a creature of law. If it is a creature of law, it must be the creation of the law of some particular jurisdiction. But under the doctrine of Bank of Augusta v. Earle, 13 Pet. 519 (U.S. 1839), a corporation was permitted to do business in states other than that of its incorporation. As a result of this decision it became necessary to determine where a corporation might be sued. Lafayette Ins. Co. v. French, 18 How. 404 (U.S. 1855), permitted suits in foreign state courts if an agent had been appointed there to receive process. Baltimore & O. R.R. v. Harris, 12 Wall. 65 (U.S. 1870), extended *Lafayette* by holding that if the corporation did business in a foreign territory under a permissive statute, it consented to suit there. *Ex parte* Schollenberger, 96 U.S. 369 (1878), imposed federal jurisdiction upon a corporation if it had appointed an agent to receive service of process in conformity with a state statute. With this decision corporations acknowledged defeat on jurisdictional grounds in their attempt to limit suits in foreign courts. They now carried forward their attack in terms of venue.

Lee v. Chesapeake & O. Ry., 260 U.S. 653 (1922), established that a plaintiff waives venue by suing defendant in a state court of a jurisdiction in which neither reside (defendant subsequently removing). Corporations met crushing defeat with the decision of *Neirbo,* where it was held that when a corporation appointed an agent within a state, as required by state statute, not only were requirements of federal jurisdiction met, but the corporation had waived venue and consented to suit in the federal courts within that state.

In 1948, Congress concurred in this historical trend by enacting the policy of *Neirbo* into the venue statute. The policies leading to the enactment of statutes granting jurisdiction over a foreign person, natural or corporate, indicate a need that this described trend in relation to venue be extended beyond the narrow situation where a corporation doing business in a foreign state is required to appoint an agent to receive process. See note 15 *infra.*

11. The reply to the *Harris* argument has been that *Neirbo* did not adequately dispose of *In re* Keasbey and Mattison Co., 160 U.S. 221 (1891). There "the Court had to deal with a question of venue, depending upon the 'residence' of a foreign corporation in the Southern District of New York where the suit was brought. The corporation had been doing business in the state, but had not filed any consent to be sued; although, when the suit was brought, there was a statute in New York requiring foreign corporations doing business in New York to file such consents. Although Ex parte Schollenberger was already nearly twenty years old, the Court did not extend the doctrine there an-

It is true that before the *Martin* case there was deviation from the holding of *Harris*.[12] A statute obligating a corporation to appoint an agent when it comes in and does business will not support a "waiver" of venue unless there is compliance with the statute,[13] or the statute specifically provides for jurisdiction should the agent not be appointed.[14] But the principle drawn from *Harris*—that express appointment of an agent, or actual consent, is not indispensable to waiver—had not been rejected.

If a mere fictional agent, state supplied, could waive venue for a foreign resident, the result would be in accord with the previously presented rationale of *Neirbo*.[15] The reasoning behind the resident agent cases supports this proposition. Judge Learned Hand has realistically pointed out that a corporation does not actually "consent" to suit in a foreign state by appointment of an agent to receive process; it merely conforms with a condition placed upon its doing business there.[16] Thus, it follows that the corporation might refuse

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nounced in support of the venue; but declared that the action would not lie." Moss v. Atlantic Coast Line R. Co., 149 F.2d 701, 702 (2d Cir. 1945). The New York statute in *Moss* did not grant jurisdiction unless an agent were appointed. Any surviving importance of *Keasby*, therefore, relates to this situation.

12. Occasional dicta cling to the *Harris* holding. *See* Gibson v. United States Lines, 74 F. Supp. 776, 782 (D. Md. 1947). This case sets forth a rationale of *Neirbo* similar to that formulated in this note.

13. *Compare* Moss v. Atlantic Coast Line R. Co., *supra* note 12, and Donahue v. Henry Co., 78 F. Supp. 91, 93 (S.D.N.Y. 1948) *with* Knott v. Furman, 163 F.2d 199 (4th Cir. 1947).

14. In Knott v. Furman, *supra* note 13, a Virginia statute was involved which provided that "If any company shall do business in this state without having appointed the Secretary of the Commonwealth its true and lawful attorney as required herein, it shall by doing such business in the State of Virginia be deemed to have thereby appointed the Secretary of the Commonwealth its true and lawful attorney." VA. CODE ANN. § 3846a (1946).

Donahue v. Henry Co., *supra* note 13, involved a New York statute which required foreign corporations to obtain a certificate of eligibility before transacting business within the state; the statute prescribed penalties for failure to conform, but it did not appoint a state officer to act as agent upon the corporation's failure to do so. N.Y. GEN. CORP. LAW §§ 210, 215.

Thus it can be seen that the essential principle of *Harris* rather than that of *In re* Keasbey has been controlling where the state statute provides jurisdiction regardless of whether an agent is appointed to receive process.

The Indiana and Illinois statutes on this point are very similar to the Virginia statute. See IND. ANN. STAT. § 25-313 (Burn Repl. 1946); ILL. ANN. STAT. c.32, § 111 (1933).

A foreign corporation doing business in one of the states with Virginia type statutes without appointing an agent "consents" to suit in the federal as well as the state courts. Knott v. Furman, 163 F.2d 199 (4th Cir. 1947).

15. In the area of control over a foreign corporation and of control over non-resident motorists, the conditions placed upon the latter are grounded in the public policy of the regulating state. It is submitted that if the venue objection is sustained, valid jurisdiction over non-resident motorists would become in effect a nullity so far as original suit in the federal court is concerned and where both parties are non-residents. To prevent nullification of jurisdiction was a moving factor in the recognition of a waiver of venue in the corporate resident agent cases. See note 10 *supra*.

16. Smolik v. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148, 151 (S.D. N.Y. 1915). "When it is said that a foreign corporation will be taken to have consented to the

to make the appointment, but it could be sued as if it had done so, should the state statute so provide.

Many courts, including the First Circuit, have taken the position that the provisions of the non-resident motorist statutes allowing services of process on a state officer instead of the real defendant (who is notified by registered mail)[17] do not involve a true agency.[18] The theories have been that these provisions place conditions upon the non-resident in return for the privilege of using the highways of the state, or that the basis of the state's power is the operation of a dangerous instrumentality within the state.[19] But it should not matter that the agency is fictional if the consent therefrom need only be fictional and in reality based upon policy decisions of a sovereign. Non-residents use the highways of Massachusetts; the law of that state appoints an agent for them for purposes of receipt of process. The "consent" of a corporation doing interstate business in a foreign state, such as the defendant in *Neirbo,* is only one step removed from the "consent" of the non-resident motorist; and in those states whose statutes provide for service upon a state officer when a corporation does business within the state without appointing an agent, the consent is exactly the same.[20] The corporation is forced to appoint an agent, or is taken to have done so, while the non-resident motorist has the intermediate step of appointment performed for him. And both situations are alike in that "consent" is given in return for a privilege—to use the highways or to do business in a state.

The purpose of the venue requirement is to prevent placing an undue burden on the defendant.[21] In order to determine whether this burden would be imposed upon the present defendant and those similarly situated by a decision contra to that of the First Circuit, it is important to inquire where suit may be instituted. The defendant may be brought to trial in the district where he resides, or in the district where the plaintiff resides; and if the de-

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

17. See IND. ANN. STAT. § 47-1043 (Burns Supp. 1949); MASS. GEN. LAWS c. 90, § 3C (1937).

18. Other courts have taken the view, however, that the non-resident motorist statutes establish a true agency through operation of law, and have adhered to this position to the extent of refusing recovery against the defendant's executor or administrator for the reason that the death of the defendant had terminated the agency. Harris v. Owens, 142 Ohio St. 379, 52 N.E.2d 522 (1943); Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935). See Note, 26 IND. L.J. 93 (1950).

19. RESTATEMENT, CONFLICT OF LAWS § 84, 1948 Supplement.

20. See n. 32 *infra.*

21. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939).

fendant is a corporation, it may be sued where it is doing business. The defendant may also be sued in the state court under the provisions of the state non-resident motorist statute. However, if suit is brought in the state court, the defendant may remove to the federal courts.[22] Therefore, if the defendant may be sued in the state courts, or in the federal court if he desires to remove, the burden would be no greater if he were allowed to *begin* his action in the federal court[23] sitting in the particular state in question.[24]

Actually, the *Martin* decision gives the non-resident defendant an unwarranted advantage over his non-resident opponent. The former with his power to remove, has a *choice* of forum while the plaintiff is restricted to the state court.[25] Although theoretically this should make no difference in the outcome of litigation,[26] at times the calendar of the federal court is less crowded and very often federal procedure is superior.[27] Fairness and the manner in which federal jurisdiction is provided[28] indicate that the plaintiff, who normally may choose where the suit is to be tried, should also have access to the federal court for any reason he may desire if the defendant is allowed a choice.[29] This was one of the grounds for the adoption of the *Neirbo* doc-

22. 28 U.S.C. 1441 (1948). Under Lee v. Chesapeake & O. Ry., 2660 U.S. 653 (1922), plaintiff waives venue because he sued defendant in the state court and removal is geared to suit in "any" state court. Defendant could hardly be heard to deny that he waived venue in the federal court when it was he who removed.

23. See Note, 19 CHI-KENT L. REV. 135 (1940).

24. A possible extension of the rule advocated herein could lead to the result that where basic jurisdiction is present in a federal court, venue, where not provided for, would be satisfied by "waiver." The present outermost reaches of such jurisdiction are exemplified by International Shoe Co. v. Washington, 326 U.S. 310 (1945). Such application of the "waiver" rule is not to be feared but to be desired as an implementation to recognized jurisdiction. Feared evils from trial inconvenience should present little opposition because of 28 U.S.C. 1404(a) (1948), and the doctrine of forum non conveniens.

However, the direction which the law has taken as to jurisdiction over foreign corporations which do not appoint a resident agent, see Baltimore & O. R.R. v. Harris, 12 Wall. 65 (U.S. 1870), and *compare* Moss v. Atlantic Coast Line R.R., 149 F.2d 701 (2d Cir. 1945), *with* Knott v. Furman, 163 F.2d 199 (4th Cir. 1947), is some indication that as to jurisdiction over non-residents there will have to be a statute granting jurisdiction in order for jurisdiction to be equated to venue.

25. Inequality also exists as a consequence of the *Martin* decision. A local plaintiff, when suing a non-resident, has access to the federal courts while a non-resident plaintiff, suing the same defendant in the same state, is denied such. Yet, in both instances the requirements of federal jurisdiction are present.

26. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), 13 IND. L.J. 564 (1938); Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945); Angel v. Bullington, 330 U.S. 183 (1947).

27. See Note, 25 IND. L.J. 365 (1950).

28. See 28 U.S.C. 1331, 1332, 1359, 1441 (1948). Since removal jurisdiction is geared to original jurisdiction, plaintiff and defendant generally have an equal opportunity to litigate in the federal courts.

29. Since the court seems reluctant to apply the *Neirbo* doctrine to this situation and since the granting of jurisdiction to the federal courts is a legislative matter, perhaps Congress should put the parties on an equal status by withdrawing the defendant's removal privilege in this particular instance or by granting the plaintiff the right to sue in the federal courts.

trine;[30] and as the purpose of the doctrine is present here, courts should interpret it to cover this situation.[31] Already *Neirbo* has been applied to the present fact situation by several district courts.[32]

TESTAMENTARY CAPACITY AS AFFECTED BY INSANE DELUSIONS

The right to dispose of property by will is neither absolute nor immune from challenge. Appellate cases in large numbers bear witness to the eagerness and frequency with which grasping or aggrieved heirs question the validity of a testamentary disposition. Together with fraud and undue influence, one of the most frequently used grounds for contest is mental

30. See MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 57 (1949).

31. The *Neirbo* doctrine has received unqualified acceptance from many writers. See Notes, 53 HARV. L. REV. 660 (1940); 49 YALE L.J. 724 (1940); Comment, 15 TEMPLE L.Q. 92 (1940).

32. In Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945), the court reasoned: "The precise question is whether by his use of the Maryland highways, in accordance with the Maryland statute, the defendant has consented to be sued in the State court by the form of service prescribed by the Act. No point has been made here that personal service on a defendant in this state is less effective as bearing on consent than if the less direct form of service authorized by the act had been had. I think it logically follows from the principle of the *Neirbo* and *Schollenberger* cases that the defendant's consent to be sued in the federal court is implied from his voluntary use of the Maryland highways."

For cases allowing suit in the federal courts see Urso v. Scales, 90 F. Supp. 653 (E.D. Pa. 1950); Morris v. Sun Oil Co., 88 F. Supp. 529 (D. Md. 1950); Blunda v. Craig, 74 F. Supp. 9 (E.D. Mo. 1947); Krueger v. Hider, 48 F. Supp. 708 (E.D. S.C. 1943); Andrews v. Joseph Cohen & Sons, 45 F. Supp. 732 (S.D. Tex. 1941); Malkin v. Arundel Corp., 36 F. Supp. 948 (1941); Williams v. James, 34 F. Supp. 61 (W.D. La. 1940). *Contra*: Waters v. Plyborn, 93 F. Supp. 651 (E.D. Tenn. 1950). In the *Waters* case an unsuccessful argument of waiver was based on subjection to the Tennessee non-resident motorist statute. The court reasoned that one has a right to pass freely from state to state, Edwards v. California, 314 U.S. 160 (1941), that this right is curtailed by non-resident motorist statutes, Hess v. Pawloski, 274 U.S. 352 (1927), and that in the curtailing of a right the citizen assumes a burden. There is in the non-resident motorist statutes an element of compulsion. But a corporation does not have the rights of a natural person, cannot move freely from one state to another to transact business. It gives up no right when it takes on its burden. There is, therefore, no compulsion on the corporation. Waiver and compulsion being inharmonious, the court refused to extend the *Neirbo* doctrine.

The vulnerability of the reasoning in the *Waters* case is apparent. It is assumed that a corporation could be kept out of a state. As to corporations doing interstate business that assumption is probably fallacious. See Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917). See also Southern Pac. R.R. v. Arizona, 325 U.S. 761 (1945) (excluding the railroad totally would have been greater interference with interstate commerce than regulating the length of its trains—a regulation struck down). A better assumption would be that corporations engaging in interstate commerce have a right similar to that of individuals to go from state to state. And corporations doing interstate business have been held to have "waived" venue (see *Neirbo*). Thus, the distinction between the abridgment of a right of an individual and the assumption of a burden by a corporation in exchange for a privilege seems invalid.