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Judgements - Consent to Jurisdiction - Use of Highway by Non-Resident Motorist as Waiver of Federal Venue Statute

Clinton R. Ottmar

ceedings,[22] because profits of a business depend upon capital invested, general business conditions, and the skill and business capacity of the owners.[23] This reasoning is undoubtedly sound if business losses are non-compensable.

If, however, it is conceded that injury to a business is compensable, as the instant case holds, there ought to be no quarrel with the admission of such evidence and a showing of its effect on the market value of the property. In fact, where income such as rents and profits is derived from the intrinsic nature of the property itself, and not from a business conducted thereon, such income is an element to be considered in determining market value.[24] And where the business itself is being taken by the condemning authority,[25] or being paid for by statutory command,[26] or where there is no other means of determining market value[27] evidence of profits has been admitted as having probative value.

It is submitted that fundamental changes in policy with regard to allowing recovery for business losses in eminent domain proceedings, where the principle of denial is so universally accepted, should probably be wrought by legislative enactment rather than by judicial decision.

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JUDGMENTS—CONSENT TO JURISDICTION—USE OF HIGHWAY BY NON-RESIDENT MOTORIST AS WAIVER OF FEDERAL VENUE STATUTE. Plaintiffs, residents of Minnesota, were passengers in the vehicle of defendant A who was a resident of California. This vehicle collided in Nebraska with that of defendant B, residents of Iowa. Plaintiff sued in federal court in Nebraska, serving defendant B personally and defendant A by substituted service pursuant to the provisions of the Nebraska non-resident motorist statute.[1] Defendant A appeared specially to object to venue and requested dismissal as to him. Plaintiffs moved to dismiss this motion and requested transfer of the case to the District of Minnesota. In asserting its jurisdiction and retaining the trial, the court *held* that mere use of Nebraska roads by defendant A constituted a waiver of the federal venue privilege.[2] *Kostamo v. Brorby,* 95 F. Supp. 806 (D. Neb. 1951).

Remedial statutes have been passed in all states in an effort to impose liability on "hit-and-run" non-resident drivers. New Jersey

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[22] Los Angeles v. Deacon, 119 Cal. App. 491, 7 P.2d 378 (1932); Gauley & E. Ry. v. Conley, 84 W.Va. 489, 100 S.E. 290, 292 (1919); see note, 7 A.L.R. 164 (1921).

[23] Gauley & E. Ry. v. Conley, *supra* note 22.

[24] Oregon Mesabi Corp. v. C. D. Johnson Lumber Corp., 169 F.2d 641, 644 (1948) (evidence of profits from ranch and farm lands admissible); City and County of Denver v. Quick, 108 Colo. 111, 113 P.2d 999, 1001 (1941) (evidence of profit from livestock raising admissible).

[25] Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W. 2d 22, 26 (1929).

[26] *In re* Board of Water Supply of City of New York, 211 N.Y. 174, 105 N.E. 213 (1914).

[27] *In re* State Reservation, 16 Abb. N.C. 159 (N.Y. 1884).

[1] Neb. Rev. Stat. §25-530 (1943) Cum. Supp. (1949).

[2] 28 U.S.C. §1391 (a) (a civil action wherein jurisdiction is founded only on diversity of citizenship may, . . . be brought only in the judicial district where all plaintiffs or defendants reside).

pioneered in 1908 with an act which forbade the use of its highways by a non-resident without first authorizing a state official to receive service of process for him in actions arising out of the operation of the motor vehicle within the state.[3] When constitutionally attacked on the basis of the commerce clause, it was upheld.[4] Later, a Massachusetts statute provided that operation of a motor vehicle on its highways by a non-resident would be deemed equivalent to an appointment by him of a designated public officer as his attorney upon whom process may be served.[5] It was upheld as not contravening the due process clause.[6] To satisfy the due process requirement, non-resident motorist statutes generally provide that operation of the vehicle shall be deemed signification of the non-resident's agreement that any summons served under its provisions shall be of the same force and validity as if personally served on him within the state.[7] Where defendant has appeared specially to object to jurisdiction because he has not personally receipted for the service mailed to him, it would seem obvious that he has the notice requisite to confer jurisdiction.

Whereas Section 51 of the Judicial Code[8] restricts civil suits, with the exception of corporate suits, to the district of defendant's residence, defendant can waive all defenses and objections[9] either by formal submission or by conduct.[10] A landmark case[11] held that appointment by a corporation of an agent within the state to receive service of process upon it constituted a waiver of the federal venue privilege and subjected the corporation to suit in either the state courts or the federal court within the state. Ironically, the fiction employed in order to allow corporations to sue and be sued outside of the chartering state was applied in reverse to expand the *Neirbo* rule to actual persons served under a non-resident motorist statute.[12] While plaintiff could sue in the state court, defendant could have the case removed to a federal court within the state whenever the amount in controversy exceeded $3,000. As the jurisdiction of the federal court on removal is, in a limited sense, derivative, the federal court within a state obtains jurisdiction, in diversity cases, wherever the state would have it.[13] Revision of the United States Code in 1948[14] expanded the *Neirbo* doctrine and made it statutory in regard to corporations, but did not alter its application to the non-resident motorist situation, where it has subsequently continued to be effective.[15] However, in 1950 a contrary rule suddenly appeared, based upon the realistic view that the agency was not consciously or voluntarily created.[16] The legalistic weakness of this position is that all

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[3] Laws of New Jersey, p. 613 (1908).
[4] Kane v. New Jersey, 242 U.S. 160 (1916).
[5] Mass. Gen. Laws c. 90, §3 (1921) as amended by Stats. Ch. 431 §2 (1923).
[6] Hess v. Pawloski, 274 U.S. 352 (1927).
[7] *E.g.*, N.Y. Cons. Laws, c. 71 Vehicle and Traffic Laws §52, as amended by N.Y. Laws, c. 57 (1930).
[8] 28 U.S.C. §112.
[9] Fed. R. Civ. P. 12 (h).
[10] Commercial Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1929).
[11] Neirbo Co. v. Bethlehem Corp., 308 U.S. 165 (1939).
[12] Steele v. Dennis, 62 F.Supp. 73 (D.Md. 1945).
[13] Buffington v. Vulcan Furniture Mfg. Corp., 94 F.Supp. 13 (W.D.Ark. 1950).
[14] 28 U.S.C. §1391 (a) (omitted "or may be found").
[15] Morris v. Sun Oil Co., 88 F.Supp. 529 (D.Md. 1950).
[16] Martin v. Fishbach Trucking Co., 183 F.2d 53 (1st Cir. 1950).

persons are conclusively presumed to know the law; it has, however, met with limited approval[17] on the ground that the analogy to the *Neirbo* case should be rejected.

As the federal venue statute was designed for the convenience of defendants, it would seem that the involuntary waiver rule of the instant case deprives the non-resident not of any substantial right, but only of an advantage over residents. The majority view as enunciated by the instant case, while admittedly fictitious, is not only more consonant with justice but embraces elements which militate against the minority view, namely, (a) convenience of attending witnesses, (b) elimination of frequently unsatisfactory depositions, (c) elimination of unnecessary expenses, (d) fairness to all who use the highways.

Clinton R. Ottmar

REAL PROPERTY—ADJOINING LANDOWNERS—EASEMENTS—LIGHT AND AIR. Plaintiff and defendant owned adjoining lots which had been acquired through a common grantor. Defendant erected a concrete wall ten feet high and three inches from the party line and plaintiff's kitchen windows, thus preventing the free passage of light and air. Plaintiff brought suit in equity to compel the defendant to remove the wall. The lower court decreed that the height of the wall be reduced to six feet, having found that the common grantor's subsequent separate conveyance created an easement of light and air by implication because of necessity. Defendant appealed. It was *held* that plaintiff had not established that defendant's land had become the servient tenement; that there was no absolute necessity upon which the court could base an implied easement, since a small amount of light and air was admitted through the kitchen windows, thus constituting only a partial obstruction; and that construction of a skylight in the kitchen ceiling would supply ample amounts of light and air. *Maiorella v. Arlotta,* 364 Pa. 557, 73 A.2d 374 (1950).

An easement to light and air cannot, in Pennsylvania, be acquired by prescription.[1] Neither is the English doctrine of ancient lights a part of the law of that state,[2] that doctrine being in almost complete disrepute in the United States.[3] Easements to light and air acquired by express grant are, however, recognized.[4] In that state equity has also refused to order the removal of a wall shutting out light and air, even where it was maliciously constructed, and of that type commonly referred to as "spite fence", the court instead has held that where a defendant is lawfully entitled to erect the wall upon his land, the court will not inquire into the motive for so doing.[5] It would therefore seem obvious that the plaintiff in the instant case had no alternative except to attempt to establish an easement by implication because of necessity. This court held he had failed

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

[1] Haverstick v. Sipe, 33 Pa. 368 (1859).

[2] Beckershoff v. Bomba, 112 Pa. 294, 170 Atl. 449 (Super. Ct. 1934). "Ancient lights" is the doctrine that long-continued enjoyment of lights and windows creates a prescriptive right to continued unobstructed use therof. 3 Words and Phrases 388 (Perm. ed. 1940).

[3] Humble, *Limitations On The Use of Property By Its Owners,* 5 Va. L. Rev. 297, 306 (1918).

[4] Rennyson's Appeal, 94 Pa. 147, 153 (1880).