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clause of the Constitution required the Maryland court to give effect to a New York statute¹⁶ said to be penal in nature. In that case, however, the plaintiff sought to *enforce* a judgment based upon a foreign statute. The purpose of the proceedings in the instant case was to *procure* a judgment, the attempted basis for recovery being a foreign statute.¹⁷ Even considering the distinction between enforcing and procuring judgments, the question of whether foreign judgments under penal statutes are entitled to full faith and credit is itself still an open one.¹⁸

It is apparent, considering the great weight of authority supporting the decision of the Tennessee court, that the federal court reached an erroneous decision. That the court realized its inadvertence is evident, for subsequent to the decision of the Tennessee court in the instant case, the federal court granted a rehearing and reversed itself.¹⁹ Oddly enough the *Huntington* case, upon which the court's original opinion was based, contained dictum which virtually compelled the reversal.

Jerry Mosca

CONFLICT OF LAWS—WAIVER OF VENUE— STATE NON-RESIDENT VEHICLE STATUTE

An Illinois corporation brought suit in a federal district court of Kentucky against an Indiana resident for damages arising from an automobile accident occurring in the State of Kentucky. With jurisdiction in federal court based on diversity of citizenship, service of process upon defendant was made in accordance with the Kentucky Non-Resident Motorist Statute.¹ Defendant challenged venue as being improperly laid in a district not the residence of either party.² A motion to dismiss on this ground was overruled and the jury trial resulted in a verdict for the plaintiff. The Sixth Circuit Court of Appeals affirmed the judgment of the district court.³ *Held*, on appeal, reversed. Defendant did not waive his federal venue privilege by virtue of the state non-resident motorist statute. *Olberding v. Illinois Central R.R.*, 74 Sup. Ct. 83 (1953).

16. See note 6 *supra*.

17. See notes 1 and 2 *supra*.

18. Compare *Fauntleroy v. Lum*, 210 U.S. 230 (1908), with *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

19. *Doggrell v. Southern Box Co.*, 208 F.2d 310 (6th Cir. 1953).

20. *Huntington v. Attrill*, 146 U.S. 657, 683 (1892). "The test is not by what name the statute is called by the Legislature or the courts of the state in which it was passed, but whether it appears, to the tribunal which is called upon to enforce it, to be . . . , a punishment of an offense against the public, or a grant of a civil right to a private person." (Italics supplied.)

1. KY. REV. STAT. §§ 188.020-030 (1953).

2. 28 U.S.C. § 1391(a) (Supp. 1950): "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

3. *Olberding v. Illinois Central R.R.*, 201 F.2d 582 (6th Cir. 1953).

Jurisdiction is the right which a court has to hear and determine a cause.⁴ Formerly, states were powerless to enforce in personam judgments against non-residents who were parties to litigation arising from acts accruing within the state unless process could be served upon them while within the state.⁵ Because of the increased ease of interstate travel made possible by the advent of the automobile, there arose the problem of attaining personal jurisdiction over non-resident motorists who became involved in causes of action ensuing from their use of the state's highways. In an effort to remedy this situation, New Jersey in 1906 enacted legislation making it a misdemeanor for a non-resident motorist to fail to appoint the Secretary of State as his agent to receive service of process.⁶ Following the Supreme Court's approval⁷ in 1926 of a Massachusetts statute which provided that one who operates his automobile on the state's highways *automatically* makes the Secretary of State his agent for the service of process in any civil action arising out of such operation,⁸ all states and the District of Columbia have enacted similar legislation.⁹ Commonly referred to as a non-resident vehicle act the above universally adopted statute is basically a legislative device incorporated by a state to secure personal jurisdiction over non-resident motorists.¹⁰ Service of process under this statute confers personal jurisdiction in federal courts as well.¹¹

The non-resident vehicle act being primarily for the protection of resident citizens¹² a problem of venue is raised when neither party to a cause of action resides within the state. Venue, as distinguished from jurisdiction, relates only to the place of trial.¹³ A state cannot by legislation modify or repeal a Congressional statute on the venue of federal courts.¹⁴ However, being essentially a personal privilege intended for the convenience of the litigating parties,¹⁵ venue may be waived by "failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."¹⁶ It is clear that unless by some act the defendant waives this privilege, he is not properly before the court and is entitled to have the suit dismissed or transferred to the proper district.¹⁷ Of the courts which

4. See, e.g., *Herrington v. Thompson*, 61 F. Supp. 903, 904 (W.D. Mo. 1945).

5. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

6. For the Supreme Court's decision upholding the constitutionality of this statute, see *Kane v. New Jersey*, 242 U.S. 160 (1916).

7. *Hess v. Powloski*, 274 U.S. 352 (1926).

8. MASS. GEN. LAWS c. 431 § 2 (1923).

9. For a complete listing of these statutes, see *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947).

10. See *Blunda v. Craig*, 74 F. Supp. 9, 10 (E.D. Mo. 1947).

11. FED. R. CIV. P. 4(d)(7); *Blunda v. Craig*, 74 F. Supp. 9 (E.D. Mo. 1947).

12. See e.g., *Olberding v. Illinois Central R.R.*, 74 Sup. Ct. 83, 84 (1953); *Knoop v. Anderson*, 71 F. Supp. 832, 849 (N.D. Iowa 1947).

13. See *Riley v. Union Pac. R.R.*, 177 F.2d 673, 675 (7th Cir. 1949).

14. *Murphree v. Mississippi Pub. Corp.*, 326 U.S. 438 (1945).

15. See *Lee v. Chesapeake & O. Ry.*, 260 U.S. 653, 655 (1922).

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

17. 28 U.S.C. § 1406(a) (Supp. 1950): "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be

hold that non-resident motorists waive their right of objecting to venue by virtue of the non-resident vehicle act, the vast majority¹⁸ maintain that the statute presents a situation analogous to that of the rule pertaining to foreign corporations as announced in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*¹⁹ There the defendant, a Delaware corporation, when sued by a non-resident of New York in a federal district court of New York, was held to have waived its federal venue privilege by designating one of its agents to receive service of process within the State of New York. The federal district courts with but one exception have found the above analogy to be applicable.²⁰ Of the three cases which to date have been appealed from the district courts to the circuit courts of appeal,²¹ the sixth circuit, in the instant case, was alone in holding that venue was waived.

The Supreme Court, in rejecting the analogy, reasoned that in the *Neirbo* case waiver was based upon the *express* appointment of a resident agent by the corporation as a prerequisite to doing business in the state, whereas the non-resident motorist is held to impliedly waive merely by the act of driving his car upon a state's highways. The motive behind the granting of jurisdiction upon the basis of this statute is not consent, but rather one of a social nature, *i.e.*, desire to protect the state's citizens.

It seems obvious that our present venue statute erroneously assumes that either the residence of the plaintiff or the defendant is the most convenient place of trial. What is more natural or efficient than holding a trial in the district where the cause of action accrues? Although the field is in need of statutory revision,²² the holding of waiver, however commendable from a practical viewpoint, cannot be justified upon this crutch of fictional consent. The court here rightly refused to allow such construction of so substantial a privilege.

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in the interest of justice, transfer such case to any district or division in which it could have been brought."

18. For several recent cases using theory expressed by the *Neirbo* case, see *Falter v. Southwest Wheel Co.*, 109 F. Supp. 556 (W.D. Pa. 1953); *Archambeau v. Emerson*, 108 F. Supp. 28 (W.D. Mich. 1952); *Jacobson v. Schuman*, 105 F. Supp. 483 (D. Vt. 1952); *Burnett v. Swenson*, 95 F. Supp. 524 (W.D. Okla. 1951); *Urso v. Scales*, 90 F. Supp. 653 (E.D. Pa. 1950).

19. 308 U.S. 165 (1939).

20. *E.g.*, *Falter v. Southwest Wheel Co.*, 109 F. Supp. 556 (W.D. Pa. 1953); *Archambeau v. Emerson*, 108 F. Supp. 28 (W.D. Mich. 1952); *Jacobson v. Schuman*, 105 F. Supp. 483 (D. Vt. 1952). *Contra*: *Waters v. Plyborn*, 93 F. Supp. 651 (E.D. Tenn. 1950).

21. *McCoy v. Siler*, 205 F.2d 498 (3rd Cir. 1953); *Olberding v. Illinois Central R.R.*, 201 F.2d 582 (6th Cir. 1953); *Martin v. Fishbach Trucking Co.*, 183 F.2d 53 (1st Cir. 1950).

22. See *Jacobson v. Schuman*, 105 F. Supp. 483, 485 (D. Vt. 1952).