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## Civil Practice Act Cases

R. C. Bartlett

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## CIVIL PRACTICE ACT CASES

APPEAL AND ERROR—DECISIONS REVIEWABLE—WHETHER ORDER QUASHING SERVICE OF SUMMONS ON GROUND THAT THE SAME WAS NOT PROPERLY SERVED IS A FINAL ORDER UPON WHICH AN APPEAL MAY BE BASED—Before the Illinois Supreme Court could reach the prime problem involved in *Brauer Machine & Supply Company v. Parkhill Truck Company*<sup>1</sup> it found it necessary to dispose of the preliminary question as to whether a final appealable order existed therein. A motion had been made in the trial court, in that case, to quash the service of process on the ground that defendant was a non-resident corporation not doing business in Illinois. Service of process on the Secretary of State as its purported agent, consonant with the pertinent statute,<sup>2</sup> was claimed to be invalid hence insufficient to confer jurisdiction. The trial court granted the defendant's motion but entered no other order so that the case remained nominally pending on the docket. The circumstances were such that, unless the defendant voluntarily appeared, the cause could not proceed and, if review of such order was not permitted, a stalemate would ensue. It was held that, for all practical purposes, the order granting the motion to quash the service was a final order capable of supporting appellate review.

Jurisdiction to review the decisions of the nisi prius courts is conferred, in most cases, by statutory provision which limits the same to final or so-called "appealable" orders<sup>3</sup> except in a few enumerated instances where limited review of interlocutory orders is sanctioned.<sup>4</sup> The essence of finality typically involves a determination of the material issues between the parties of such nature that the same might be said to be settled thereby.<sup>5</sup> Tested in such light, the order in the instant case was far from being a final one for it in no way purported to deal with the merits of the case. Squarely in point with the instant decision, how-

<sup>1</sup> 383 Ill. 569, 50 N.E. (2d) 836 (1943), affirming 318 Ill. App. 56, 47 N.E. (2d) 521 (1943). The principal question concerned the right to serve process on the Secretary of State as agent for a non-resident motorist whose truck had travelled over the highways of this state in order to reach its point of destination but which truck had come to rest upon private property at the time when the injury occurred in the unloading thereof. On that issue, the court held that the operation of Ill. Rev. Stat. 1943, Ch. 95½, § 23, had to be confined to suits brought for injury produced during the actual use of the highway by the vehicle of the non-resident. It indicated that the statute would be unconstitutional if expanded to meet the situation presented by the instant case. For a related problem, see *Jones v. Pebler*, 371 Ill. 309, 20 N.E. (2d) 592, 125 A.L.R. 451 (1939), and note thereon in 17 CHICAGO-KENT LAW REVIEW 69.

<sup>2</sup> Ill. Rev. Stat. 1943, Ch. 95½, § 23.

<sup>3</sup> Ill. Rev. Stat. 1943, Ch. 110, § 201.

<sup>4</sup> *Ibid.*, § 202, sanctions appeal from interlocutory orders granting injunction, overruling motions to dissolve the same, enlarging the scope of an injunction, appointing a receiver or enlarging his powers. See also note on *LeMenager v. Northwestern Barb Wire Co.*, 296 Ill. App. 568, 16 N.E. (2d) 824 (1938), in 17 CHICAGO-KENT LAW REVIEW 74.

<sup>5</sup> *City of Park Ridge v. Murphy*, 258 Ill. 365, 101 N.E. 524 (1913); *Thompson v. Industrial Commission*, 377 Ill. 587, 37 N.E. (2d) 350 (1941).

ever, is the holding of the United States Supreme Court in the case of *Rosenberg Brothers & Company v. Curtis Brown Company*<sup>6</sup> where the trial court had entered a similar order upon an identical motion to quash service. Such decision was construed to be a final judgment supporting appeal as it amounted to a conclusive determination on a collateral point which effectively terminated the pending litigation although not settling the real controversy. While it is true that upon the decision of such motion the court could not properly enter judgment dismissing the suit unless requested, the plaintiff's forgetfulness to so move should be deemed overcome by his action in seeking review.<sup>7</sup>

It should be remembered, though, that an adverse decision upon such motion, that is one upholding the service of process, is clearly not an appealable order.<sup>8</sup> The fact that the defendant is thereby forced to litigate the merits of the case or suffer default does not prevent him from assigning error on such ruling for the right so to do is expressly preserved by rule of court<sup>9</sup> and has been recognized by judicial decision.<sup>10</sup>

VENUE—NATURE OR SUBJECT OF ACTION—WHETHER OR NOT TERM "TRANSACTION," AS USED IN STATUTE FIXING VENUE IN CIVIL ACTIONS, REQUIRES THAT THE SAME BE LIMITED TO DEALINGS WHICH ARE ADVERSARY OR WILL INCLUDE TRANSACTIONS WITH THIRD PERSONS OUT OF WHICH NO CAUSE OF ACTION HAS ARISEN—Section 7 of the Illinois Civil Practice Act purports to fix venue in civil actions generally as the county where one or more of the defendants reside or "in which the transaction or some part thereof occurred out of which the cause of action arose."<sup>1</sup> In *LaHam v. Sterling Canning Company*,<sup>2</sup> the court was called upon to interpret the "transaction" portion of this statute as applied to a rather complicated situation. The facts therein disclosed that the plaintiff was a resident of Wisconsin, as were also the principal defendants. The latter had learned that a canning factory at Sterling, Whiteside County, Illinois, could be purchased at a price which would yield a substantial profit but they lacked sufficient capital or credit to make the purchase. They offered the plaintiff a one-third interest if he would help finance the deal. He accepted, and a preliminary agreement was made between them in Wisconsin. Subsequently, the two defendants, acting for themselves and for the plaintiff, contracted

<sup>6</sup> 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372 (1923).

<sup>7</sup> See, for example, *Luner v. Gelles*, 314 Ill. App. 659, 42 N.E. (2d) 313 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 97, where appeal from an order denying a motion for new trial was treated as an appeal from the final judgment subsequently rendered.

<sup>8</sup> *Thomas v. Ritholz*, 310 Ill. App. 166, 33 N.E. (2d) 932 (1941). But see *Snyder v. Whitney*, 310 Ill. App. 297, 34 N.E. (2d) 95 (1941).

<sup>9</sup> Ill. Rev. Stat. 1943, Ch. 110, § 259.21.

<sup>10</sup> *In re Rackliffe's Estate*, 366 Ill. 22, 7 N.E. (2d) 754 (1937); *Albers v. Bramberg*, 308 Ill. App. 463, 32 N.E. (2d) 362 (1941).

<sup>1</sup> Ill. Rev. Stat. 1943, Ch. 110, § 131. Section 132 also uses the quoted language when fixing venue in suits against corporations. As the same considerations are involved in both sections, no attempt has been made to discriminate between them.

<sup>2</sup> 321 Ill. App. 32, 52 N.E. (2d) 467 (1943).

with the owner for the purchase of the plant. A down payment was made, all negotiations were carried on and the contract was completely executed in Chicago, where the final payment and delivery of the deed occurred. In the meantime, an Illinois corporation was formed by the parties to take title to and to operate the plant. Plaintiff claimed that it was agreed that he was to have a one-third interest in the corporation instead of in the partnership originally planned. Such modification of the original plan occurred in Wisconsin. The plaintiff contended that the capital structure of the corporation was different from that planned and was one which, in fact, deprived him of his one-third interest by permitting friends and relatives of the principal defendants to share in the enterprise. By subsequent wrongful acts, plaintiff claimed, the profits had been siphoned off to the benefit of the defendants leading eventually to the practical ouster of plaintiff from his position as shareholder. On these facts, a suit in chancery was instituted in the Circuit Court of Cook County, which suit was met with a challenge to the jurisdiction of the court. Plaintiff invoked the statute above referred to, relying on that part of the whole transaction which took place in Chicago as the basis for jurisdiction, and the trial court agreed with him. On appeal from an interlocutory injunction granted following such decision, the Appellate Court for the First District concluded that jurisdiction was lacking since nothing that had occurred in Cook County afforded plaintiff any basis for complaint and the events there were but incidental to the making of the original agreement in Wisconsin or its breach by defendants by conduct occurring in Whiteside County.

The "transaction" portion of the pertinent statute is unique with Illinois, having been first enacted in 1933,<sup>3</sup> though somewhat similar language appears in the Civil Practice Act sections dealing with joinder,<sup>4</sup> and also in the Evidence Act.<sup>5</sup> Apart from such light as may be thrown by decisions on questions of joinder or of evidence, then, the proper application of the venue provision must be determined by the Illinois courts without the benefit of judicial thought on the question in other jurisdictions. Prior to the instant case, little content has been provided by judicial interpretation in this state since only six cases have reached the appellate stage and but two of them have had the benefit of consideration by the Illinois Supreme Court.<sup>6</sup> The statute has, however, been

<sup>3</sup> See Illinois Civil Practice Act Annotated (Foundation Press, Chicago, 1933), p. 21. Prior thereto, venue was limited to the county in which one or more of the defendants resided, except that under the Chancery Act it might be fixed where a defendant might be found: Cahill's Ill. Rev. Stat. 1931, Ch. 22, § 3.

<sup>4</sup> Ill. Rev. Stat. 1943, Ch. 110, §§ 147-8.

<sup>5</sup> Ibid., Ch. 51, § 2.

<sup>6</sup> *Mapes v. Hulcher*, 363 Ill. 227, 2 N.E. (2d) 63 (1936), noted in 14 CHICAGO-KENT REVIEW 384; *Furst v. Brady*, 375 Ill. 425, 31 N.E. (2d) 606, 133 A.L.R. 558 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 293 and 20 CHICAGO-KENT LAW REVIEW 26; *Whalen v. Twin City Barge & Gravel Co.*, 280 Ill. App. 596 (1935); *Rembke v. Bieser*, 289 Ill. App. 136, 6 N.E. (2d) 900 (1937); *Reiter v. Illinois Nat. Casualty Co.*, 291 Ill. App. 30, 9 N.E. (2d) 358 (1937); *Consolidated Gasoline Co. v. Lexow*, 316 Ill. App. 257, 44 N.E. (2d) 927 (1942), noted in 22

held constitutional in *Mapes v. Hulcher*<sup>7</sup> as not violating due process and serving merely to codify the legislative power to determine venue in transitory actions.

The fundamental purpose of the legislature in permitting suits elsewhere than in the county of defendant's residence was indicated, in the *Mapes* case, to be one by which administrative convenience might be served for the court recognized that local geographical and physical surroundings might be more conveniently proved in one county than in another. Certainly, witnesses to the occurrence would be more readily available at the scene than at a distance. The plaintiff's choice of forum has, therefore, been approved in personal injury cases brought where the accident occurred,<sup>8</sup> and the fact that service of process was had in such county on a defendant personally present there, rather than in the county of his residence, has been held immaterial.<sup>9</sup> Such purpose would also seem to be served by the decision in *Reiter v. Illinois National Casualty Company*<sup>10</sup> where the complaint charged a conspiracy to convert plaintiff's shares in a casualty company. Venue in Cook County was upheld because some of the acts forming part of the alleged conspiracy occurred in that county.

Less apparent was the holding in *Furst v. Brady*<sup>11</sup> where the primary question was whether the protection afforded by a policy of liability insurance, the policy itself not being physically present in the state, could serve to support the appointment of an administrator for a non-resident decedent. Appointment had been attempted where the fatal automobile accident had occurred on the ground that the policy protection constituted an asset of the estate. The Supreme Court held that it was a sufficient basis for administration and that the "transaction" portion of the statute applied. Such result was achieved because the court concluded

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CHICAGO-KENT LAW REVIEW 19. In *People ex rel. Dahlin v. Lepman*, 282 Ill. App. 305 (1935), the "transaction" question was raised but venue was upheld on the basis of the residence of two of the defendants in the county in which the suit was commenced. In *Wilson v. Griffith*, 288 Ill. App. 32, 5 N.E. (2d) 591 (1936), a suit on a contract was held to have been improperly dismissed on motion after default judgment where the venue issue was not raised by the motion, so that the plaintiff had no opportunity to join issue on the "transaction" question. In *Canright v. General Finance Corp.*, 33 F. Supp. 241 (1940), it was said that the designation of an agent for service of process by a non-resident corporation was a consent that the corporation might be sued in any court, state or federal, having jurisdiction and that the place where certain avoidable preferences were alleged to have occurred would be a proper place for suit.

<sup>7</sup> 363 Ill. 227, 2 N.E. (2d) 63 (1936), noted in 14 CHICAGO-KENT REVIEW 384.

<sup>8</sup> In *Whalen v. Twin City Barge & Gravel Co.*, 280 Ill. App. 596 (1935), plaintiff's injuries were sustained in Scott County while working on a dredge anchored in the Illinois River. Suit in such county was approved.

<sup>9</sup> *Rembke v. Bieser*, 289 Ill. App. 136, 6 N.E. (2d) 900 (1937).

<sup>10</sup> 291 Ill. App. 30, 9 N.E. (2d) 358 (1937). *McSurely, J.*, concurred in an order striking plaintiff's brief, but dissented from the conclusion that venue lay in Cook County.

<sup>11</sup> 375 Ill. 425, 31 N.E. (2d) 606, 133 A.L.R. 558 (1940), reversing *In re Brady's Estate*, 303 Ill. App. 139, 24 N.E. (2d) 748 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 293 and 20 CHICAGO-KENT LAW REVIEW 26.

that had the deceased lived he might have sued on the policy in the same county in which the accident had happened and that right passed, at that place, to his administrator.

The case closest to the instant one, however, is *Consolidated Gasoline Company v. Lexow*.<sup>12</sup> There the plaintiff filed suit in St. Clair County for an accounting and for reformation of an oil and gas lease with "other relief of a transitory or personal character." All defendants resided in Madison County, but jurisdiction in the St. Clair court was based solely on allegations that the lease in question "was made and executed partly in the County of St. Clair and partly in the County of Madison." Motion by defendants to dismiss for lack of venue was held to have been improperly granted, particularly since that motion was signed by the attorneys for the defendants rather than by the parties personally.<sup>13</sup> It was argued that it was physically impossible for a lease to have been executed partly within and partly without the county of suit, but the court said: "If one party to the lease signed in Madison county and another party thereto signed in St. Clair county, certainly the transaction would occur partly in one and partly in the other. Contrary to the contention of the appellees, it would not depend upon who signed last, nor where the instrument was delivered."<sup>14</sup> That case tended to give liberality to the interpretation of the statute in question, since until both parties had executed the document no lease in fact existed, but steps leading to that end were, apparently, regarded as sufficiently a part of the "transaction" to sustain venue. Any seeming conflict between that case and the instant one can be resolved by noting that the action there was based on the lease itself, while in the instant case the suit was not brought on the contract of sale made in Cook County but rather on the oral agreement formulated in Wisconsin, or the subsequent wrongs in Whiteside County.

The present case, then, goes beyond these earlier cases for it was argued that the term "transaction" embraced the entire series of agreements, dealings and acts of the parties from the time the preliminary contract was made; that without the acquisition of the plant the oral agreement could not have been consummated; and that, if any step occurred in Cook County, the courts thereof had jurisdiction. For answer thereto, the court said: "If that were true a party could fix venue at any place where an incident preliminary to the acts or omissions upon which a cause of action is based, might have occurred, and if a series of events or so-called transactions in one county had been most amicable but had in later years given rise to a cause of action through acts committed in another county, plaintiff could nevertheless fix the venue in the former

<sup>12</sup> 316 Ill. App. 257, 44 N.E. (2d) 927 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 19.

<sup>13</sup> Being in the nature of a plea to the jurisdiction, the same should be personally pleaded or it will be treated as a submission to jurisdiction: *Pratt v. Harris*, 295 Ill. 504, 129 N.E. 277 (1920); *Thomas v. Ritholz*, 310 Ill. App. 166, 33 N.E. (2d) 932 (1941); *McGuire v. Outdoor Life Pub. Co.*, 311 Ill. App. 267, 35 N.E. (2d) 817 (1941).

<sup>14</sup> 316 Ill. App. 257 at 260, 44 N.E. (2d) 927 at 928.

county by contending that the relationship through the years constituted one transaction. We do not think it was the intention of the legislature to fix venue at places where preliminary or incidental events occurred or where acts of inducement, as distinguished from the component facts of a cause of action, may have taken place."<sup>15</sup> By its decision, then, the court imposes the requirement that the transaction concerned be one out of which the cause of action arises. It definitely becomes the *sine qua non* to venue. Such "transaction" must also necessarily refer to some course of dealing between the parties themselves and should not depend upon dealings with third persons from which no dispute could arise.

The joinder section of the Civil Practice Act provides that, subject to rules, all persons may join in one action, as plaintiffs, in whom any right to relief in respect of or "arising out of the same transaction or series of transactions" is alleged to exist.<sup>16</sup> Though the phraseology is different, it might be reasonable to suppose that the term "transaction," particularly when used in the same statute, should possess the same sense. But the factual situations involving joinder of parties will seldom be analogous to those dealing with venue. There may be cases in which it will be sought to join a defendant for purpose of placing venue in the county of his residence, but generally this will not be so. In the usual case the several defendants will be joined so that the plaintiff may obtain relief against all of them, or the plaintiffs will be joined so that the entire liability of the defendant may be determined at once. On the other hand, in cases in which resort to the venue section is necessary, the parties plaintiff and defendant will be clearly known and the locale of the suit alone will be in question. Seldom, then, will the two questions coincide. As a result, the instant case may have little value as precedent in other than venue matters, but on that score it is a case of importance.

Fundamentally, the idea of venue concerns itself with the element of trial convenience and it was, no doubt, that fact which prompted the legislature to enact the "transaction" provision.<sup>17</sup> Trial convenience, however, does not mean convenience to the attorneys, but rather some convenience to the parties themselves or to the court, as by way of accessibility of evidence or witnesses. For that reason, the choice of venue should be limited to those counties directly connected with the particular cause of action.

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<sup>15</sup> 321 Ill. App. 32 at 43, 52 N.E. (2d) 467 at 472.

<sup>16</sup> Ill. Rev. Stat. 1943, Ch. 110, § 147, concerns joinder of plaintiffs, and § 148 deals with joinder of defendants.

<sup>17</sup> In a note to Section 7 of the Civil Practice Act, found in Illinois Civil Practice Act Annotated (Foundation Press, Chicago, 1936 Supplement), p. 21, appears the statement: "Though transactions and parts of them out of which causes of action arise may have various meanings, the one here intended is one based on trial convenience, balancing all factors involved." See also Sunderland, "The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act," 1 U. of Chi. L. Rev. 188 at 191 (1933).