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## NOTES AND COMMENTS

### BRINGING IN NEW PARTIES: EFFECT OF STATUTE OF LIMITATIONS

Plaintiffs have many times in the past found that after a suit has been commenced it was impossible or impracticable to proceed with the case for the reason that insufficient parties were before the court to permit a complete determination of the controversy.<sup>1</sup> Methods were devised quite early to make possible the addition of such parties<sup>2</sup> so as to make it unnecessary to dismiss the suit and begin anew.<sup>3</sup> When such new parties were brought in, however, a question would be likely to arise as to whether or not it could be claimed that the action, as so amended, was barred by the statute of limitations if the addition of such new parties did not occur until the period thereof had run.<sup>4</sup>

The framers of the Illinois Civil Practice Act attempted to meet and settle these problems but have seemingly left open to dispute just how effective the new procedure is to cover all of them, judging by the decision in the recent case of *Piper v. Epstein*.<sup>5</sup> A wrongful death action had been there instituted in apt time against certain defendants. Shortly before the expiration of the year from date of death which marked the period of limitation,<sup>6</sup> summons was issued against certain additional defendants upon order of court and served on them on the last day of the year. Two days after the year had expired, an amended complaint was filed which for the first time named these additional parties as defendants and charged them with negligently causing the wrongful death. Despite objection, the trial court found it had jurisdiction of such additional defendants and pronounced judgment on a verdict found against them. On appeal, the Illinois Appellate Court for the First District affirmed the judgment on the ground that, although an original action is not

<sup>1</sup> Although this situation would probably arise more often in equity cases, *Giese v. Terry*, 382 Ill. 34, 46 N. E. (2d) 90 (1943), it could exist in a law action: *Connolly v. Cottle*, 1 Ill. (Breese) 364 (1830).

<sup>2</sup> Cahill Ill. Rev. Stat. 1931, Ch. 110, §§ 39 and 41.

<sup>3</sup> The only judgment possible on a plea of nonjoinder at one time was one abating the action: *Chitty, Pleading*, Vol. 1, Ch. 1, \*46. Later, amendment was permitted so as to add necessary parties but summons against such new parties so added issued only after amendment: Cahill Ill. Rev. Stat. 1931, Ch. 1, §§ 3, 4, and 5.

<sup>4</sup> *Miller's Heirs and Devisees v. M'Intyre*, 31 U. S. (6 Pet.) 61, 8 L. Ed. 320 (1832); *Dunphy v. Riddle*, 86 Ill. 22 (1877).

<sup>5</sup> 326 Ill. App. 400, 62 N. E. (2d) 139 (1945). *Matchett, P. J.*, took no part in the decision.

<sup>6</sup> Ill. Rev. Stat. 1945, Ch. 70, § 2.

deemed commenced until the filing of a complaint,<sup>7</sup> the only statutory provision purporting to regulate the addition of new parties merely requires that such persons be brought in by the service of summons.<sup>8</sup> Service thereof within the limitation period was deemed sufficient to confer jurisdiction. It was also held that the subsequent filing of the amended complaint related back to the commencement of the original action<sup>9</sup> and was, consequently, deemed to be filed within the period of limitation.

Under the former practice prevailing in this state<sup>10</sup> as well as under the Civil Practice Act prior to its amendment in 1937,<sup>11</sup> a cause of action at law was deemed commenced, within the meaning of the applicable statute of limitation, by the issuance of summons. In 1937, the legislature amended the Civil Practice Act<sup>12</sup> so as to assimilate the practice to that which heretofore prevailed in equity. At the present time, therefore, an original action is not begun until a complaint is filed. The addition of new parties, plaintiff or defendant, to an action commenced in time has, however, always presented a problem as to just when the action may be said to have been commenced as to such new parties.

With reference to the addition of parties plaintiff, especially where made necessary because of a failure to join persons asserting a joint interest in the first instance, the former rule seems to have been that the addition of such persons by the filing of an amended pleading naming them involved no problem of the statute of limitations since the amendment was said to relate back to the commencement of the original suit.<sup>13</sup> If the original action was begun in time, the rights of the party so added as plaintiff were not affected by the fact that the amendment naming him was not made until after the statute had run as the operation thereof was said to be conditionally suspended.<sup>14</sup> Where the additional party plaintiff joining in the suit promptly brought seeks to enforce an independent right, however, the rule was and still is that the amended

<sup>7</sup> Ill. Rev. Stat. 1945, Ch. 110, § 129.

<sup>8</sup> *Ibid.*, § 149.

<sup>9</sup> *Ibid.*, § 170(2).

<sup>10</sup> Cahill Ill. Rev. Stat. 1931, Ch. 110, § 1; *Chicago & Northwestern Ry. Co. v. Jenkins*, 103 Ill. 588 (1882). Equity actions, however, were not "commenced" until the filing of a bill of complaint: Cahill Ill. Rev. Stat. 1931, Ch. 22, § 4; *Johnson v. Davidson*, 162 Ill. 232, 44 N. E. 499 (1896).

<sup>11</sup> Smith-Hurd Ill. Rev. Stat. 1935, Ch. 110, § 129.

<sup>12</sup> Laws 1937, p. 989; Ill. Rev. Stat. 1945, Ch. 110, § 129. For the earlier equity practice, see Cahill Ill. Rev. Stat. 1931, Ch. 22, § 4.

<sup>13</sup> Cahill Ill. Rev. Stat. 1931, Ch. 110, § 39; *Houghland v. Avery Coal & Mining Co.*, 246 Ill. 609, 93 N. E. 40 (1910).

<sup>14</sup> *Price v. Goodrich*, 141 Ill. App. 568 (1908). The same rule would seem to be in operation in this state today by reason of Ill. Rev. Stat. 1945, Ch. 110, § 170(2).

pleading does not relate back so the defense of the statute of limitations is available against such added plaintiff.<sup>15</sup> Such would also be the holding if the original plaintiff sought, by amendment, to add new and independent claims against the same defendant after the statute had run.<sup>16</sup>

The problem of adding new defendants by amendment after the limitation period has expired is complicated by the fact that such defendants have a vested right not to be forced to defend stale claims,<sup>17</sup> and legislation purporting to preserve such claims ought to be clear and certain.<sup>18</sup> Under the former practice, at least in equity actions, no suit was regarded as commenced against such additional defendants until after amendment had been made.<sup>19</sup> The rule in law actions, however, seems to have been that it was the issuance and service of process rather than the making of the amendment which operated to prevent the further running of the statute of limitations.<sup>20</sup> The reason for such distinction lay in the fact that no summons could issue in equity cases until a bill of complaint had been filed, while summons at law issued as a matter of right upon the filing of a praecipe or an amended praecipe. When the legislature changed the method of commencing an action to adopt the practice heretofore followed in equity cases, it is but natural to suppose they intended also to adopt the equitable view as to the manner of adding new parties. Such, at least, seems to be the doctrine that has been applied, since the adoption of the Civil Practice Act, according to the Illinois Supreme Court decision in the case of *Fitzpatrick v. Pitcairn*.<sup>21</sup> There a

<sup>15</sup> *Mann v. City of Chicago*, 315 Ill. App. 179, 42 N. E. (2d) 862 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 100.

<sup>16</sup> *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367 (1895). The same rule prevails since the adoption of the Civil Practice Act: *Nolan v. Sloan*, 305 Ill. App. 71, 26 N. E. (2d) 990 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 59; *In re Whipple's Estate*, 285 Ill. App. 491, 2 N. E. (2d) 366 (1936).

<sup>17</sup> *N. & G. Taylor Co. v. Anderson*, 275 U. S. 431, 48 S. Ct. 144, 72 L. Ed. 354 (1928); *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365 (1877); *Allis-Chalmers Mfg Co. v. City of Chicago*, 297 Ill. 444, 130 N. E. 736 (1921).

<sup>18</sup> *Carlin v. Peerless Gaslight Co.*, 283 Ill. 142, 119 N. E. 66 (1918); *George v. George*, 250 Ill. 251, 95 N. E. 167 (1911).

<sup>19</sup> *Miller's Heirs and Devisees v. M'Intyre*, 31 U. S. (6 Pet.) 61, 81 L. Ed. 320 (1832); *McGrew v. Bayard*, 96 Ill. 146 (1880); *Clark v. Manning*, 95 Ill. 580 (1880).

<sup>20</sup> *Proctor v. Wells Bros. Co.*, 262 Ill. 77, 104 N. E. 186, Ann. Cas. 1915B 273 (1914); *Glover v. Insull*, 213 Ill. App. 268 (1919). The same view appears to have been applied after the adoption of the Civil Practice Act and prior to the 1937 amendment of Section 5 thereof: *Grewenig v. American Baking Co.*, 293 Ill. App. 604, 13 N. E. (2d) 183 (1938); *Thompson v. Otis*, 285 Ill. App. 523, 2 N. E. (2d) 370 (1936).

<sup>21</sup> 371 Ill. 203, 20 N. E. (2d) 280 (1939), affirming 296 Ill. App. 531, 16 N. E. (2d) 764 (1938). *Shaw, C.J.*, and *Orr, J.*, dissented. See also *Trust Co. of Chicago v. McDermott Brewing Co.*, 293 Ill. App. 621, 11 N. E. (2d) 866 (1937), *abst. opin.* The rule as to adding a non-resident defendant, against whom the statute would be tolled, is discussed in *Nelson v. Richardson*, 295 Ill. App. 504, 15 N. E. (2d) 17 (1938).

suit for wrongful death was originally begun in apt time against a railroad corporation but amended after the year had expired to name the operating receiver thereof as defendant. Service upon such receiver also occurred more than one year after the accident. It was held that a motion to dismiss, based on the statute of limitations, was properly granted for the reason that no suit existed against the receiver until after the amendment, and that the amendment could not be held to relate back.<sup>22</sup>

The only distinction between the Piper case and the situation involved in the Fitzpatrick case would seem to be that, in the former, summons was issued and service had just prior to the expiration of the statutory period although the amended pleading stating a cause of action against the additional defendants was not filed until afterwards. On principle, it would seem that if an original suit cannot be treated as commenced until a complaint is filed,<sup>23</sup> then an amended suit, particularly as to new parties, should not be deemed commenced until some amended pleading has been placed on file asserting a claim against them. Such was the former rule in equity<sup>24</sup> and would still seem to be the rule from analogy to situations where the amended pleading asserts entirely new causes against the same defendant.<sup>25</sup>

The Appellate Court in the Piper case, however, bases its contrary holding on the tenuous ground that (1) there is no express statutory provision declaring when an action is commenced against new parties other than one which declares such new parties "shall be brought in by the service of a summons,"<sup>26</sup> and (2) that the amended complaint when filed, provided it is based on the "same transaction or occurrence" as that named in the original complaint, relates back to the original filing.<sup>27</sup> There can be no quarrel with the correctness of these statements as to the contents of the Civil Practice Act, but the inferences drawn therefrom seem to be erroneous.

<sup>22</sup> The court indicated that the rule of *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 15 N. E. (2d) 838 (1938), which permitted an amendment charging a different manner of committing the tort made the basis of the original complaint after the statute had run, and Ill. Rev. Stat. 1945, Ch. 110, § 170(2), which authorized that practice, should be confined to the situation therein applicable: 371 Ill. 203 at 210, 20 N. E. (2d) 280 at 283. The Appellate Court, in the instant case, does not appear to have considered the Fitzpatrick case or to have attempted to distinguish it from the case at hand.

<sup>23</sup> Ill. Rev. Stat. 1945, Ch. 110, § 129.

<sup>24</sup> See cases cited, note 19 ante.

<sup>25</sup> *Nolan v. Sloan*, 305 Ill. App. 71, 26 N. E. (2d) 990 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 59.

<sup>26</sup> Ill. Rev. Stat. 1945, Ch. 110, § 149.

<sup>27</sup> *Ibid.*, § 170(2).

No jurisdiction can be acquired over a defendant except by service of summons unless he sees fit to voluntarily submit. In common law days, no summons or writ could issue in a law action except upon praecipe duly filed.<sup>28</sup> If additional parties were necessary, an amended praecipe was required to entitle the clerk of the court to issue additional process. The sections of the Civil Practice Act and the rules thereunder authorizing the clerk of the court to issue an original or alias summons<sup>29</sup> contain no authority for process against additional parties. For that reason, Section 25 of the Civil Practice Act was necessary, for without it no new process could be issued by the clerk. That section directs that such new process shall issue only upon order of court and shall bear suitable legend to show the authority for its issuance.<sup>30</sup> It is difficult to see, however, upon what basis such an order could rest unless some sufficiently amended pleading had first been filed to show the necessity for bringing in new parties. Although amendment could occur later in a law action under the former practice, it was a vital basis for the addition of new parties in equity proceedings on the same theory that made original process therein invalid if issued before bill of complaint had been filed.<sup>31</sup> Now that the use of initial process is controlled by the necessity for first filing a complaint, it would seem that additional summons to new parties would likewise depend on the filing of an amended complaint naming such parties. A reading of all the pertinent sections together, especially in the light of the earlier practice, would seem to support this conclusion. There certainly does not seem to be any basis for inference that Section 25 of the Civil Practice Act is in anyway intended to repeal the statute of limitations, so that any amendment to support additional process ought to be filed before the statute has run.

The other point relied upon by the Appellate Court is likewise superficially correct but seems equally insufficient upon analysis. An amendment to a pleading which purports to state a cause of action growing out of the "same transaction or occurrence" as that named in the original complaint undoubtedly relates back and saves a cause of action, at least as between the original parties, from the bar of the statute of limitations for the legislature has expressly so provided.<sup>32</sup> The occasion for such

<sup>28</sup> Puterbaugh, *Common Law Pleading and Practice*, 10th Ed., p. 18, indicates that in Illinois a praecipe was no longer regarded as necessary, but contains the recommendation that the cautious pleader file one to "guide the clerk in preparing the summons." See also Black., *Com.*, III, 273.

<sup>29</sup> Ill. Rev. Stat. 1945, Ch. 110, § 129, § 259.3, and § 259.5.

<sup>30</sup> *Ibid.*, § 149.

<sup>31</sup> *Hodgen v. Guttery*, 58 Ill. 431 (1871).

<sup>32</sup> Ill. Rev. Stat. 1945, Ch. 110, § 170(2). See also *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 15 N. E. (2d) 838 (1938).

a provision in the Illinois Civil Practice Act is readily understood when the earlier practice on this point is borne in mind. Prior to 1929, a pleading amendment made after the statute of limitations had run, even though obviously relating to the cause of action originally intended to be asserted, came too late if the initial pleading had been insufficient to state a cause of action.<sup>33</sup> The statutory addition of that year,<sup>34</sup> while it corrected some of the hardships of the earlier practice left some room for doubt since it left open the question whether the cause of action stated in the amended pleading was "substantially the same" as that set out in the original pleading. The present statute, consequently, goes farther than the earlier ones in that it is necessary to support amendment only to show that the amended cause grew out of the "same transaction or occurrence" as that set forth in the original complaint whether it is substantially the same or entirely different in theory from that described therein.<sup>35</sup>

As applied to amendments in a suit between the same parties begun in apt time it is not unfair to say that the legislature, by enacting Section 46(2) of the Civil Practice Act, contemplated a conditional suspension of the statute of limitations as to all claims between them connected with the same transaction made the basis of the original suit provided such claims were added before that suit terminated. No one could contend, however, that the pendency of such suit should operate to suspend the statute, even between the same parties, as to matters entirely independent of the occurrence referred to in the original complaint, and clearly such claims could not be added by amendment after that statute had run,<sup>36</sup> even though they could have been included in the first instance.<sup>37</sup>

The problem then resolves itself into the question whether it was the legislative intention to likewise conditionally suspend the statute of limitations not only as to the parties to the original cause but also as to any parties who might subsequently be brought in. There is no language in Section 46 of the Civil Practice Act which would support any inference that such was the legislative intention for the provision authoriz-

<sup>33</sup> *Heffron v. Rochester German Ins. Co.*, 220 Ill. 514, 77 N. E. 262 (1906).

<sup>34</sup> Laws 1929, p. 578; Cahill Ill. Rev. Stat. 1929, Ch. 110, § 39.

<sup>35</sup> *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N. E. (2d) 714 (1937); *Mueller v. Bittle*, 321 Ill. App. 363, 53 N. E. (2d) 56 (1944), *abst. opin.* See also Hinton, Ill. Civil Practice Act Lectures (University of Chicago, 1934), pp. 65-8 and p. 71.

<sup>36</sup> *Friend v. Alton R. Co.*, 283 Ill. App. 366 (1936).

<sup>37</sup> Ill. Rev. Stat. 1945, Ch. 110, § 168(1), permits joinder of even unrelated causes of action as between the same plaintiff and defendant.

ing the addition of new parties, by amendment prior to final judgment, does not contain the same saving clause as is found in the subsequent paragraph permitting amendments relating to the same transaction or occurrence. Conversely, the provision for conditional suspension of the statute of limitations makes no reference to any amendment adding new parties, but rather purports to speak of amendments designed to furnish a more adequate statement of the original cause of action disclosed in the initial complaint between the original parties. There is grave doubt that the section in question would be constitutional if it did purport to suspend the statute of limitations as to new parties for the title of the statute does not appear to be broad enough to encompass such a subject matter.<sup>38</sup> Moreover, as repeal by implication is not favored in this state,<sup>39</sup> any new party so added would have the right to claim that such statute was unconstitutional as interfering with his vested rights if given such interpretation.<sup>40</sup> The decision of the Illinois Supreme Court in the Fitzpatrick case definitely points out that Section 46 is not broad enough to permit amendment to add new parties after the statute has once run, and in that respect it agrees with cases from other jurisdictions having comparable statutes.<sup>41</sup>

Under these circumstances, Section 46(2) of the Illinois Civil Practice Act should be read as if it permitted amendment as between the original parties at any time provided the statute of limitations had not run

<sup>38</sup> Ill. Const. 1870, Art. IV, § 13. See also Hinton, *op. cit.*, p. 67.

<sup>39</sup> *Village of Glencoe v. Hurford*, 317 Ill. 203, 148 N. E. 69 (1925); *Hunt v. Chicago Horse and Dummy Ry. Co.*, 121 Ill. 638, 13 N. E. 176 (1887). A subsequent law which is general does not abrogate or repeal a former one which is special and intended to operate on a particular subject: *Village of Ridgway v. Gallatin County*, 181 Ill. 521, 55 N. E. 146 (1899).

<sup>40</sup> *Board of Education v. Blodgett*, 155 Ill. 441, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348 (1895).

<sup>41</sup> *Roth v. Scruggs*, 214 Ala. 32, 106 So. 182 (1925); *Davis v. Chrisp*, 159 Ark. 335, 252 S. W. 606 (1923), cert. den. 263 U. S. 710, 44 S. Ct. 36, 68 L. Ed. 518 (1923); *Sherman v. S. K. D. Oil Co.*, 185 Cal. 534, 197 P. 799 (1921); *Jackson v. Lacy*, 37 Cal. App. (2d) 551, 100 P. (2d) 313 (1940); *McEvoy v. City of Waterbury*, 92 Conn. 664, 104 A. 164 (1918); *Deep Vein Coal Co. v. Dowdle*, 218 Ind. 495, 33 N. E. (2d) 981 (1941); *Garrity v. State Board of Ad'm of Educational Insts.*, 99 Kan. 695, 162 P. 1167 (1917); *Leatherman v. Times Co.*, 88 Ky. 291, 11 S. W. 12, 3 L. R. A. 324 (1889); *Ciotte v. Ullrich*, 267 Mich. 136, 255 N. W. 179 (1934); *Pierson v. Davis*, 70 Mont. 106, 224 P. 235 (1924); *Jennings Sewer Dist. v. Pitcairn*, — Mo. App. —, 187 S. W. (2d) 750 (1945); *Lewis v. Hines*, 81 N. H. 24, 120 A. 728 (1923); *Shaw v. Cook*, 78 N. Y. 194 (1879); *Crossman v. Consolidated Edison Co. of New York*, 48 N. Y. S. (2d) 701 (1944); *Home Real Estate, Loan & Ins. Co. v. Locker*, 214 N. C. 1, 197 S. E. 555 (1938); *Mitchell v. Hines*, 101 Okla. 38, 223 P. 182 (1924); *Girardi v. Laquin Lumber Co.*, 232 Pa. St. 1, 81 A. 63 (1911); *Mockel v. Pawtucket Gas Co.*, 48 R. I. 485, 139 A. 308 (1927); *Webb v. United States Fidelity & Guaranty Co.*, 165 Va. 388, 182 S. E. 557 (1935); *Hoge v. Blair*, 105 W. Va. 29, 141 S. E. 444 (1928). *Contra*: *Aetna Mills v. Davis*, 242 Mass. 255, 136 N. E. 380 (1922). It should be noted, though, that in all these cases both amendment of pleadings and service of process occurred after the limitation period had expired. No case presents the identical situation found in the Piper case.

when the original action growing out of the transaction or occurrence was begun, and even as if it permitted amendment to add new parties where necessary provided such amendment occurred before the expiration of the period of limitation, but that its scope be confined to those situations only. It should not be read to permit the introduction of new parties by amendment filed after the statute of limitations has provided them with a valid bar to suit even though they may have been connected with the same transaction or occurrence which is made the basis of the original suit. In much the same way, it should be understood that process against such additional parties ought not to issue except upon order of court based upon an amended pleading filed in apt time. Without such an amended pleading, the court has no foundation for its order directing the issuance of new process as it cannot know who such additional parties are or whether their presence is necessary for a "complete determination of the controversy," and it is only in the latter case that any warrant exists for the addition of such new parties. Summons issued before that time should possess no more significance than if it had issued in the first instance without the filing of an original complaint. If these views are the law, the practice to be followed in adding new parties can be assimilated to that which existed heretofore and precedents of long standing can still serve as landmarks in the law