

December 1963

## Procedure—Effect of Dismissal of Venue-Giving Defendant

Frank Thomas Graff Jr.  
*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Civil Procedure Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

Frank T. Graff Jr., *Procedure—Effect of Dismissal of Venue-Giving Defendant*, 66 W. Va. L. Rev. (1963).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol66/iss1/13>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

or qualification on the absolute promise to pay. This case shows an early disposition of the court to reject the results which would obtain under the single contract theory.

The question may arise as to how a situation similar to the one involved in the principal case would be treated under the Uniform Commercial Code. A recent Pennsylvania case is of particular interest in this respect because it was decided after the effective date of the Code in that state. According to *First Nat'l Bank of Philadelphia v. Anderson*, 5 Bucks 287, 7 D.&C.2d 661 (Pa. 1956), a similar result would be reached. There, the maker of a promisory note alleged that the payee under the note had failed to complete the work called for in the related contract and had supplied defective material. He further asserted that *P*, the assignee of the note, had failed to ascertain whether the contract supporting the note had been satisfactorily completed by the payee, and died therefore not occupy the status of a holder in due course. The court held that one taking a negotiable note was not obliged to inquire into the performance of the underlying contract in order to qualify as a holder in due course.

Thus, it would appear that West Virginia is in line with the strong majority view as to the defenses of which the assignee takes free as a holder in due course. Further, with regard to the problems raised in this comment, the Uniform Commercial Code will not effect a change in the law of this jurisdiction.

*John Ralph Lukens*

---

### **Procedure—Effect of Dismissal of Venue-Giving Defendant**

Administrator of an estate brought a wrongful death action against three *Ds* in *X* county and only one of the *Ds* was a resident of *X* county. Accident occurred in *Y* county. During the trial, *P* dismissed the action as to the *D* who was the resident of *X* county and through whom the *P* obtained venue as to the nonresident *Ds*. The case was then tried on the merits and a verdict was returned for *P*. After the adverse verdict, one of the nonresident *Ds* made a motion to set aside the verdict on the grounds that the court lacked venue. Motion was overruled and *D* appealed. *Held*, affirmed. When *D* proceeded with the trial of the case without raising the question of venue in any manner, he subjected himself to a trial of the case

on its merits. This constituted a waiver of the right to object to venue. *Lester v. Rose*, 130 S.E.2d 80 (W. Va. 1963).

The West Virginia Code on the subject of venue in general provides that any action may be brought in the circuit court of any county where any of the defendants may reside. W. VA. CODE ch. 56, art 1, § 1 (Michie 1961).

In the instant case, the dismissal of the venue-giving defendant gave the nonresident defendant the right to object to venue. A discussion of the problems involved in different types of dismissals of the venue-giving defendant may be found in Miller, SOME PROBLEMS IN VENUE AND JURISDICTION, 49 W. Va. L. Q. 112 (1943).

The right to object to improper venue is a personal privilege which may be waived by the party entitled to assert it. *Hutchinson v. Steinke*, 353 S.W.2d 137 (Mo. App. 1962). A nonresident defendant, by pleading to the merits and participating in the trial, however, does not waive the right to object to venue when a resident defendant is eliminated. *Jordan v. Martin Distrib. Co.*, 90 Ga. App. 186, 82 S.E.2d 263 (1954). Any objection to venue by a nonresident defendant after the dismissal of the resident defendant, must be made timely and before a verdict is returned. *Stevens v. Gilliam*, 220 Ark. 867, 251 S.W.2d 241 (1952). A nonresident defendant also waives the right to object to venue when, after the dismissal of the resident defendant, he files an additional pleading to the merits of the case. *Harley v. Harley*, 217 Ga. 205, 121 S.E.2d 640 (1961).

The nonresident defendant might be faced with the problem of the dismissal of the resident defendant in four situations: (1) before motion or answer by any of the defendants; (2) after motion but before answer; (3) after both motion and answer but before trial; and (4) during the trial as in the instant case.

In the first situation, it is clear that an objection to venue by a nonresident defendant can be raised either by motion or answer. W. VA. R.C.P. 12(b). If the nonresident defendant makes a motion, he must assert all defenses then available to him by motion or they are waived. *Spencer v. Northwest Orient Airlines*, 201 F. Supp. 504 (S.D. N.Y. 1962). Although there is some authority for the proposition that any defense then available by motion and not asserted in a motion may be asserted by answer, the *Spencer* case,

*supra*, represents the better view. 1A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE ¶ 370 (1960).

Second, where the nonresident defendant has already made a motion, but before his answer, the resident defendant is dismissed, it seems that the nonresident defendant should be able to challenge venue by either motion or answer. A waiver of defenses only occurs if the defendant fails to raise a defense "then available" to him. W. VA. R.C.P. 12(g) & (h). For this reason it would appear that the nonresident defendant would not waive any defense not available to him at the time he made his motion. In *Frank v. Brownell*, 149 F. Supp. 928 (D.D.C. 1957), defendant's failure to object to venue was not a waiver where the complaint was insufficient to put the defendant on notice of an issue upon which an objection to venue could be made.

In the third and fourth situations which occur after the answer and either before or during the trial, the basic question is how soon the nonresident defendant must raise the objection to venue after the dismissal of the resident defendant before the right to object is waived. In the light of the *Harley* case, *supra*, in which waiver occurred when the nonresident defendant filed an additional pleading, it would appear that any affirmative action by the nonresident defendant, other than an objection to venue, might constitute a waiver of the right to object to venue. This would indicate that an objection to venue should be made immediately after the dismissal of the resident defendant regardless of the stage of the proceedings and before any other action is taken.

*Frank Thomas Graff, Jr.*

---

#### Sales—Notice Filing Under Uniform Commercial Code

D loaned money to A, a restaurateur, who by a security agreement, conveyed the contents of his restaurant and all after-acquired property to D, who filed a financing statement in accordance with the Uniform Commercial Code. P then entered into a conditional sale contract with A for the sale of a cash register, delivered the chattel to A, but failed to file a financing statement within the ten-day grace period specified by the Uniform Commercial Code. A subsequently defaulted on both obligations. D sold the cash register. P brought an action of tort for conversion. The trial court