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# Some Problems in Venue and Jurisdiction

Lewis H. Miller
*Judge of the Fifth Judicial Circuit*

# SOME PROBLEMS IN VENUE AND JURISDICTION

LEWIS H. MILLER *

ORDINARILY the question of venue in civil cases is a simple one and but few problems arise not promptly met and decided in a very great majority of the reported cases. Statutory provisions, either declaratory of the common law or prescribing place of suit in specific instances, have cleared the field of uncertainty and doubt but unusual situations often arise after venue has been quite properly laid and all defendants legally before the court. With these matters this article will undertake to deal in the hope that a few suggestions may be of benefit to the bench and bar of this state.

Chapter 56, article 1, section 1 of the *West Virginia Code*, dealing with the subject of venue in general provides:

> "Any action or other proceeding at law or suit in equity, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
>
> "(a) Wherein any of the defendants may reside, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is . . . "

Section 2 of the same article provides:

> "Any action, suit or proceeding may be brought in any county wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein, in the following instances:
>
> "(a) When the defendant, or if more than one defendant, one or more of the defendants, is a corporation;
>
> "(b) When the defendant, or if more than one defendant, one or more of the defendants, are served in such county with process or notice commencing such action, suit or proceeding."

It will be observed that by virtue of either section, depending upon the facts, one or more defendants to the action or suit may be sued in any county if service of process is had upon at at least one of them in the county where suit is brought, ignoring for the present the instances wherein a corporation is sued with a natural person and jurisdiction acquired over all other defendants in that manner Assuming for the purposes of this discussion that all defendants are properly before the court, either

* Judge of the Fifth Judicial Circuit, Ripley, W. Va.

under section 1 or 2 and have been served with process in different counties, how may the trial court lose jurisdiction on account of situations arising after the institution of the suit or during the trial thereof?

It is submitted that four several conditions may arise depriving the court of jurisdiction: (a) failure to prove liability against the resident defendant, (b) death of the resident defendant prior to trial, (c) marriage of the plaintiff with the resident defendant, or (d) compromise between the plaintiff and the resident defendant with a dismissal of the suit as to him before trial. In each instance the resident defendant will be considered the party upon whom process was served in the county of suit.

## I

The experience generally encountered is failure to show liability against the resident defendant. Such a status very often arises in actions *ex delicto* involving claims for personal injury and property damage coupled with the ambitions of the plaintiff to have the case tried in the county of his residence. In some instances persons temporarily in a county other than their residence, not the county where the cause of action arose, have been served with process and through such service other defendants residing in different counties brought into such county to answer suit. In one case[1] the trial court was prohibited from further procedure when it appeared that the plaintiff had no claim against the defendant served with process in the county where suit was brought. The result of the case hinged entirely upon the liability of the defendant served in the county of suit, and plaintiff failing in this effort the entire case was abated as to all the defendants without regard to their possible or probable liability to the plaintiff.

In a later action,[2] in which one of the defendants was a corporation, the natural defendant being a resident of a county other than that of suit and served in the county of his residence, the proposition was raised that jurisdiction to try the action should not depend upon the actual liability of the defendant through whom jurisdiction over all the defendants was acquired but upon the good faith of the plaintiff in joining such defendant as a party to the action. Although recognizing a respectable line of

[1] Wolfe v. Shaw, 113 W. Va. 735, 169 S. E. 325 (1933).
[2] Gunnoe v. West Virginia Poultry Co-Op. Ass'n, 115 W. Va. 87, 174 S. E. 691, 93 A. L. R. 944 (1934).

authority supporting this view the court in passing upon the contention said:

> "The question is urged that inasmuch as the plaintiff acted in good faith in joining the West Virginia Poultry Co-Operative Association, and inasmuch as it had reasonable grounds to believe that liability existed on its part, that its joinder is proper and gives venue as to Erdlen, even though no cause of action may exist as against the corporation. There is substantial authority to this effect. At the same time, we are of the opinion that the more distinct and better rule, and that probably having the weight of authority behind it, is to the effect that venue depends upon the actual existence of the cause of action, and not upon the mere *bona fides* of the plaintiff in making his selection of defendants. We believe that making the matter of venue depend upon the good faith of the plaintiff based upon a reasonable belief in liability, although we recognize the plausibility of a great deal that can be said in favor of it, would involve the question in uncertainties and speculations that are highly undesirable in dealing with a question so fundamental."

It is now well established that a failure to prove liability against the resident defendant, or against a corporation when jurisdiction over all defendants arises out of service upon it, will result in an abatement of the entire action, provided the nonresident defendants raise the issue by timely plea in abatement.

## II

The second problem relates to the effect of the death of the resident defendant *pendente lite* upon the status of the other defendants. Chapter 56, article 8, section 2, among other things provides:

> ". . . . if it occur as to any of several plaintiffs or defendants, the suit or action may proceed for or against the others, if the cause of suit or action survive to or against them."

In construing this section it has been held that it merely prevents a total abatement in case of the death of a coplaintiff or codefendant and has nothing to do with reviving a suit for or against a personal representative.[3] The quoted portion is a flat declaration that the death of a party either plaintiff or defendant joined with others does not produce an abatement of the suit. It must be conceded that the general terms of the stat-

[3] Henning v. Farnsworth, 41 W. Va. 548, 23 S. E. 663 (1895).

ute would operate upon a situation where several defendants are before the court by virtue of service upon one of them in the county of suit and upon the others wherever found. There is no exception favoring that class of cases. If the action could not survive as to the remaining defendants then the result would be entirely different but it must be borne in mind that as a general rule actions do not abate on account of the death of one of several joint defendants.[4]

There is another principle, often operating with great force, that jurisdiction properly acquired is retained no matter what subsequent events may transpire. This rule is almost universal and is not varied unless the plaintiff works a forfeiture resulting in an abatement of the action. But where the change in parties or the subsequent event is beyond the control of the plaintiff the suit or action should not abate and this certainly comprehends a situation where one of the defendants dies though he be the party through whom venue as to the others was laid in a certain place or county. It would seem that nothing short of a statute abating a suit under this condition will defeat the right of a plaintiff to proceed against the surviving defendants. In West Virginia there is no such statute and in its absence jurisdiction once acquired will be exercised until the power of the court has ceased under the law.

This view may work some few hardships upon defendants in tort actions, or in other cases where the rule applies, and prevent them from defending suits in the county of their residence but any other conclusion would work a greater hardship upon a plaintiff and deprive him of the benefit the law affords pertaining to venue. The rights of parties to a legal controversy should not depend upon uncertain shifting from place to place unless brought about by the conduct of the party in whose favor the right exists.

Assuming the death of the resident defendant *pendente lite* and further assuming that no liability attached to his conduct, as developed at the trial, what effect is produced as to the liability of the remaining defendants? Jurisdiction over all defendants is conceded unless the question is raised by proper plea. All the cases disclose that unless the nonresident defendants promptly and properly raise the question of lack of liability upon the part of the resident defendant they submit themselves to the jurisdiction of the trial court. Where a court has general jurisdiction

[4] 1 AM. JUR. Abatement and Revival § 62.

over subject matter the unrestricted appearance of defendants amounts to a waiver of all rights to raise jurisdictional issues. This jurisdiction over all the defendants carries with it the power and right to decide liability of any of them no matter what the result of the trial might have been as to the resident defendant. His death before trial should not operate to control the result as to the others even though the evidence discloses he was entirely without fault. There was a proper time when this matter could have been determined but in the absence of a plea in abatement and a trial of the issues arising thereon prior to a determination of the merits of the case this phase becomes a closed book.

If a plea in abatement is filed within time and the resident defendant dies prior to trial it is submitted that his death should not deprive the remaining defendants from showing lack of liability on his part and thus defeat the right of the plaintiff to proceed to trial upon the merits of the case. But again the abatement arises not out of the death of this particular defendant but because of no liability on his part properly presented as a timely issue.

## III

A very interesting situation may easily develop from the marriage of the plaintiff with the resident defendant after the institution of the suit but before trial. In a well considered case[5] the Supreme Court of Appeals of West Virginia said:

> "An action at law by a husband against his wife for damages for personal injuries is against the policy of the law of this state and cannot be maintained, though sustainable under the law of the state where the injuries were received."

Thus we have the established law of the state as a matter of policy when the parties to the suit are married at the time of the happening of the event giving rise thereto. The rule is carried to the extent of denying relief even though remediable in the state where the cause of action arose. It will be observed that the case is authority only where a personal injury is involved.

What effect does the marriage of a plaintiff with a resident defendant have upon the rights of the nonresident defendants when such marriage was consummated after suit but prior to trial? In the first place there is no reason why a marriage should

[5] Poling v. Poling, 116 W. Va. 187, 179 S. E. 604 (1935).

not operate to destroy any right of action either of the parties might have against the other for a tort. The common law excluded the right of a wife to sue her husband for a tort committed by him against her before the marriage and there is no statute in West Virginia enlarging her right in this respect. This situation effectively bars her right to join her husband in a suit with other defendants or to sue him alone because there is no right of action which she may assert against him. And due to the question of policy there is no reason why the husband is not also barred from maintaining a suit against the wife for personal injury.

Suppose jurisdiction to try the case in a certain county depends upon the liability of the resident defendant and during the pendency of the suit the plaintiff and resident defendant intermarry does this abate the suit as to the remaining defendants? The answer may depend upon the steps taken by the other defendants to preserve all their rights. Probably this defense could not be made upon the merits of the case but must be specially pleaded by the objecting defendants. It would not amount to a strict plea in abatement but one going to the very right of the plaintiff to maintain the suit in his or her present capacity. A plea of a similar nature was employed in the case of *Kuhns v. Fair*[6] and treated as a plea in bar although partaking of the nature of a plea in abatement. As a basic policy of procedure no special plea should be required but the result made to hinge upon the destruction of the right of action against the resident defendant on account of the marriage. When this right is destroyed there is nothing left between these two parties to be tried in court. Under such a condition the jurisdiction of the court extends beyond the parties and becomes one of subject matter—the right to deal with the controversy itself. But no matter what method is employed to present the issue the very fact of the marriage should work a complete abatement of the suit. This result is the consequence of the acts of the plaintiff and in strict keeping with the broad policy announced in the case of *Poling v. Poling.* It is a natural incident from the conduct of the plaintiff and not a termination beyond his or her control.

As a matter of practice it is much better to file a special plea akin to a plea of *puis darrein* continuance bringing the fact of marriage to the attention of the court. The effect of such

[6] 22 S. E. (2d) 455 (W. Va. 1942).

plea is to abate the suit on account of facts arising after the time within which a plea in abatement may be filed.

## IV

Another problem which may be encountered is a compromise between the plaintiff and resident defendant before trial. In the ordinary case a dismissal of one defendant from the suit at the instance of the plaintiff does not work an abatement of the suit. But, assuming the remaining defendants properly raise the issue by a proper plea, should the court retain jurisdiction over the suit and try it as to the other defendants? It seems impossible to argue in favor of such a course. Again, as in the case of marriage, the plaintiff is the moving factor and the dismissal of the resident defendant from the suit is at the instance of the plaintiff. He used this defendant to bring others into court; he destroyed all further action as to him by the compromise and it seems the whole cause perished when the prop that supported it fell by the wayside. If this procedure is permitted a plaintiff can easily defeat the requirement of actual liability on the part of the resident defendant and join him for the sole purpose of bringing other parties into a strange county for trial. Such improper use of a venue statute should not prevail.

There are probably cases where a compromise of this nature is made in good faith with complete satisfaction to the parties involved but the tendency to fraud outweighs the few instances of fair dealing. In the end the consideration of such an important matter is not based upon the probable benefits a plaintiff or defendant may enjoy but upon the question of public policy underlying a principle of law. Is it sound policy to permit a plaintiff to control the rights of citizens of the state to the extent of compelling them to go into distant counties through the use of another with whom he composes his differences and still insist upon a trial of the others? If so nonresident defendants would be subjected to hazards and injustices, if not collusion, between a plaintiff and designing resident defendant. The right to defend a cause in the county of one's residence should not be taken away without reasonable compliance with the law.

No case has been found in this state deciding this particular issue but following some well established principles to a natural conclusion it should be held as a matter of law that a plaintiff under the circumstances set forth loses all the benefits of his

suit when he effects a compromise with the party through whom other defendants were brought into court. In other words the entire suit should immediately abate and the remaining defendants discharged from that forum. If the plaintiff desires to sue again he has that right and may do so in any county he is able to find one of them.

## V

As a sequence to the discussion above some attention might be given to the necessary steps to be employed by the nonresident defendants in order to preserve all their rights. Of course the answer to particular problems depends upon the facts. If the nonresident defendants wish to contest the existence of liability on the part of the resident defendant, as in the case of *Wolfe v. Shaw*,[7] they should appear and file within due time a plea in abatement to the jurisdiction of the court. Under the statute[8] the issue on such plea is tried first and if found against the defendant other defenses may be made. If the parties go to trial on the merits of the case, although a plea in abatement is timely filed, all benefit of the plea is lost and jurisdiction over the defendants admitted.[9] In the case of *Wolfe v. Shaw* resort was had to a writ of prohibition to prevent the trial from entertaining the action but the record discloses a plea in abatement was first filed and a trial had thereon resulting in an adverse decision to the defendants supporting it. The Supreme Court of Appeals did not hold that a writ of prohibition might be used as a substitute for a plea in abatement but did hold that upon the trial of the issue arising upon such plea it clearly appeared that the plaintiff had no cause of action against the resident defendant. Quoting from a former opinion[10] the court said:

> "Whenever it appears that a court is proceeding in a cause without jurisdiction, prohibition will issue, regardless of the existence of other remedies."

Since jurisdiction in these cases goes to the person rather than the cause of action it may be waived and will be unless the defect is pleaded in abatement. It is not such a jurisdictional question that may be raised for the first time upon a writ of error in the appellate court.

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[7] 113 W. Va. 735, 169 S. E. 325 (1933).
[8] W. VA. CODE ANN (Michie, 1937) c. 56, art. 4, § 38.
[9] Robinson v. Engle, 107 W. Va. 589, 149 S. E. 836 (1929).
[10] Midland Investment Corp. v. Ballard, 101 W. Va. 591, 133 S. E. 316 (1926).

What course should the nonresident defendants take in case the plaintiff marries the resident defendant or effects a compromise of the case with him? These are matters that arise during the progress of the suit, probably after the time expires within which a plea in abatement can be filed. Two reasonable views might be taken of these situations: (1) the conduct of the plaintiff destroys the right to proceed to trial becase the court has no authority to hear the controversy, or (2) the jurisdiction once acquired will be retained unless the defendants specially plead some new matter defeating it.

If the first view is adopted no special plea is necessary and the fact of the compromise or marriage might be shown under the general issue. If marriage or compromise destroys the very right to try the cause the defect is one of subject matter and not jurisdiction over the person. There is logic in this position but practical considerations might result in its rejection.

The second view is more consistent with the adopted practice in this state in that special defense must be specially pleaded. This requirement narrows the issue to a single inquiry and directs the attention of the court to a fatal defect stripped of all immaterial substance going to the merits of the cause. It is suggested that a plea of *puis darrein* continuance or similar import be employed setting up the specific facts relied upon to bring about an abatement of the suit.[11]

Practically all the cases involving the matters discussed show an overlapping of principles relating to venue and jurisdiction. Primarily the basic question is one of venue often confused with jurisdiction. Why not eliminate any consideration of jurisdiction and treat the whole problem as one of venue? The statute confers certain rights upon a party about to institute a suit and gives him the privilege of convening the defendants in any county where he may serve one of them with process. This privilege is special and against the general rule that a defendant has the right to defend a suit in his own county. Hence the statute should be construed strictly against a plaintiff and favorable to a defendant. When the plaintiff uses this method of convening the defendants in one county he should be compelled to show the facts justifying this course. In other words the burden of showing proper venue should rest at all times upon the plaintiff

[11] HOGG, PLEADING & FORMS (3d ed. 1908) § 246; Hunt v. Wilkinson, 2 Call. 49 (Va. 1799); Garred v. Henry, 6 Rand. 110 (Va. 1828); Virginian Ry. & Power Co. v. Leland, 143 Va. 920, 129 S. E. 700 (1925).

and the facts should appear upon the trial. In criminal cases the state must always show this fact—why require less from a citizen in a civil suit when he acts under a statute conferring special favors? Venue should extend beyond the mere maturing of a suit; it should project itself into the actual trial far enough to require the plaintiff to disclose the facts upon which it is based. If this were the rule the trial would be simplified and very material matter, whether venue or not, could be presented at one hearing and upon a general issue. The result of the suit should be made to depend upon the right to maintain the suit at a particular place and the facts relating thereto could be as easily disclosed upon the one trial as upon a plea in abatement or one of a similar nature. Suppose the suit is instituted under section 2, article 1, chapter 56 and the facts at the trial disclose the cause of action did not arise in the county where suit was brought must the suit be abated there? Strict construction of the statute certainly would bring about that very result.

If the whole situation could be confined to the realm of venue less confusion would reign and speedier determination of judicial controversies ensue.[12]

[12] Since the preparation of the foregoing article the Supreme Court of Appeals of West Virginia has set at rest some of the questions raised and discussed above in the case of Staats v. Co-Operative Transit Co., S. E. (W. Va. 1943), opinion by Judge Rose.