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Joseph G. Dail Jr.

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NOTES AND COMMENT

Civil Procedure—Jurisdiction of Transitory Actions—Effect of Restriction of Venue After Voluntary Nonsuit

Generally speaking, a liberal attitude is taken in the United States towards allowing a plaintiff to take a voluntary nonsuit or to dismiss his action without prejudice.¹ However, there have undoubtedly been many instances in which plaintiffs have taken advantage of this liberality in order to obtain a change of venue when such change would not otherwise be possible.

Attempts to correct this abuse without restricting the plaintiff's right to take a voluntary nonsuit can be found in statutes and court orders which provide that, after such dismissal or nonsuit, a subsequent suit on the same cause of action may be brought only in the court which granted the nonsuit or dismissal. A problem then arises as to whether such a statute or court order precludes the plaintiff's bringing a suit on the same cause of action in the courts of another state, or in the federal courts, if such courts would otherwise have jurisdiction. This problem was considered in two recent cases wherein it was decided that the subsequent action would not be precluded.²

One of these cases arose under a Virginia statute.³ The suit was brought in federal district court in Virginia by a citizen of Ohio against a citizen of Virginia to recover damages for personal injuries. The district court dismissed the action on the ground that a dismissal of

¹" . . . nearly three-fourths of the states give the plaintiff the absolute right to halt proceedings, discontinue his action, and return again at a more convenient time upon the same issues, even though the trial was well commenced, or in fact, nearly over." 37 VA. L. REV. 969, 986 (1951).

North Carolina is one of the most liberal states in this respect. Plaintiff has the right to take a nonsuit any time before the rendition of the verdict. He may then institute a new action within one year from the date of the nonsuit. N. C. GEN. STAT. §§ 1-25, 1-224 (1953). *Briley v. Roberson*, 214 N. C. 295, 199 S. E. 73 (1938).

Taking a voluntary nonsuit in federal court is within the discretion of the district judge unless it is taken before answer or by stipulation of all parties. FED. R. CIV. P. 41(a).

The terms "dismissal" and "nonsuit," unless otherwise indicated, are used synonymously herein, as they generally are. *Wetmore v. Crouch*, 188 Mo. 647, 87 S. W. 954 (1905); 27 C. J. S., *Dismissal and Nonsuit* § 1 (1941).

²As both of these cases appear to be decisions of first impression, the purpose of this note will be to point out the analogous situations and decisions which may be considered precedents for these decisions and to show that they represent extensions of the rules set forth in the analogous decisions.

³VA. CODE § 8-220 (1950), which provides that: ". . . after a non-suit no new proceeding on the same cause of action shall be had in any court other than that in which the non-suit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause be shown for proceeding in another court."

a prior suit on the same cause of action in a Virginia state court precluded plaintiff's suit in the district court by reason of the Virginia statute.⁴ This decision was reversed by the Court of Appeals for the 4th Circuit which held, *per* Parker, Chief Judge, that: "the effect of the statute is merely to limit the venue of any new action on the cause of action nonsuited; and, of course, a state venue statute can have no application to the courts of the United States."⁵

In the other case, an order of a South Carolina trial court which granted the dismissal attempted to restrict any subsequent actions on the same cause of action to that court. However, the Supreme Court of North Carolina held that the plaintiff was not precluded from suing on the same transitory cause of action⁶ in the courts of North Carolina.⁷

For purposes of discussion, the problem raised in these two cases can be considered from two aspects: (A) the *res judicata* effect of a nonsuit or dismissal which is prejudicial to plaintiff's rights to the extent of restricting the venue of a subsequent action on the same cause of action; and (B) the validity of attempts by the courts or legislature of one state to restrict the venue of a cause of action of which the courts of other states or the federal courts are otherwise competent to take jurisdiction.

In both of the principal cases it is obvious that the nonsuits granted were not intended to bar subsequent actions altogether, but were intended merely to restrict the venue of subsequent actions. There seems to be no reason, therefore, why the nonsuits in these cases cannot be brought within the general rule that a judgment of dismissal or non-

⁴ Popp v. Archbell, 108 F. Supp. 571 (E. D. Va. 1952).

⁵ Popp v. Archbell, 203 F. 2d 287, 288 (4th Cir. 1953). The decision also overrules Buchanan v. Norfolk Taxi-Cab Corp., 95 F. Supp. 810 (E. D. Va. 1951), wherein the same construction was given to the statute as in the District Court's opinion in Popp v. Archbell, 108 F. Supp. 571 (E. D. Va. 1952).

⁶ "Transitory" actions are personal actions; the transactions on which they are based might take place anywhere; "local" actions, on the other hand, are based on transactions which could occur only in some particular place. The test as to whether actions are transitory or local is in the nature of the subject of the injury, not in the cause of the injury nor the place at which the cause of action arises. Brady v. Brady, 161 N. C. 325, 326, 77 S. E. 235, 236 (1913); McLeod v. Connecticut & P. R. Co., 58 Vt. 727, 733, 734, 6 Atl. 648, 649, 650 (1886).

⁷ Howle v. Twin States Express, Inc., 237 N. C. 667, 75 S. E. 2d 732 (1953). Plaintiff, a resident of Tennessee, brought an action in North Carolina Superior Court against defendant, a North Carolina corporation, for damages for personal injuries sustained in an automobile accident in South Carolina. Plaintiff had previously brought an action in the South Carolina Court of Common Pleas. That court had granted plaintiff a voluntary nonsuit with limited prejudice, that is, with the right to renew the action in that county only, but without the right to bring the action in another county. The trial judge granted the dismissal in this form because he found that ". . . there is no denial of the defendant's assertion that the underlying purpose of the voluntary nonsuit is to bring the action in another county." (Emphasis supplied.) 237 N. C. 667, 668, 75 S. E. 2d 732, 734 (1953). In the suit in North Carolina, the trial court allowed defendant's plea in abatement based on this order. The North Carolina Supreme Court reversed.

suit in a state court which is not an adjudication of the merits of the controversy will not support a plea of *res judicata* and will not bar a subsequent action on the same cause of action in the courts of another state,⁸ or of the United States.⁹ Conversely, a dismissal which is not on the merits in a federal court will not bar a new action in a state court.¹⁰

A more difficult problem arises when the legislature or the courts of a state attempt to restrict the prosecution of certain actions, or classes of action, either to the courts of that state in general or to specific courts.

An example of this is seen in early cases which arose under a statute of the Territory of New Mexico¹¹ which provided that actions for personal injuries received in the Territory could be maintained only in its courts. The Texas Court of Civil Appeals, however, allowed a recovery for personal injuries sustained in New Mexico.¹² The United

⁸ *Brunswick Tire Corp. v. Credit Tire Stores, Inc.*, 8 Cal. App. 2d 69, 46 P. 2d 804 (1935); *Jones v. Supreme Lodge, K. of H.*, 236 Ill. 113, 86 N. E. 191 (1908); *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 83 N. E. 542 (1907); *Wilson & Co. v. Hartford Fire Ins. Co.*, 300 Mo. 1, 254 S. W. 266 (1923); see *In re Porep*, 60 Nev. 393, 111 P. 2d 533 (1941).

But cf. *Welch v. Kroger Grocery Co.*, 180 Miss. 89, 177 So. 41 (1937) (Plaintiff took a voluntary nonsuit in suit in Tennessee when the court was "in the act of granting" defendant a directed verdict. *Held*: subsequent suit in Mississippi on same state of facts properly dismissed as Tennessee court had, in effect, decided defendant's non-liability.); *Morrow v. Atlanta & C. A. L. Ry. Co.*, 84 S. C. 224, 66 S. E. 186 (1909) (nonsuit in prior action in North Carolina because plaintiff's evidence proved as a matter of law that he was not entitled to recover, *held* to bar subsequent action on same cause in South Carolina).

⁹ *Security Realization Co. v. Henderson*, 120 F. 2d 449 (9th Cir. 1941); *Am-torg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 108 F. Supp. 170 (S. D. N. Y. 1952); *Jacobs v. North La. & Gulf R. Co.*, 69 F. Supp. 5 (W. D. La. 1946).

This decision has been reached in cases in which plaintiff took a voluntary nonsuit after judgment for him in trial court was reversed on appeal, and case was remanded: *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349 (1893); *Southwestern Greyhound Lines, Inc. v. Buchanan*, 126 F. 2d 179 (5th Cir. 1942), *cert. denied*, 317 U. S. 646 (1942), *rehearing denied*, 317 U. S. 707 (1942); *Interstate Realty and Investment Co. v. Bibb County, Georgia*, 293 Fed. 721 (5th Cir. 1923); *Gabrielson v. Waydell*, 67 Fed. 342 (C. C. E. D. N. Y. 1895).

For cases reaching the same result in which the dismissal was for failure of proof, see: *Brooklyn Heights R. Co. v. Ploxin*, 294 Fed. 68 (2d Cir. 1923), *cert. denied*, 263 U. S. 719 (1923); *Glencove Granite Co. v. City Trust, etc. Co.* 118 Fed. 386 (3d Cir. 1902); *Cline v. Southern Ry. Co.*, 231 Fed. 238 (W. D. S. C. 1916).

Cf. *Western Union Tel. Co. v. Ammann*, 296 Fed. 453 (3d Cir. 1924) (involuntary nonsuit); *Bixler v. Pennsylvania R. Co.*, 201 Fed. 553 (M. D. Pa. 1913) (compulsory nonsuit).

¹⁰ *E.g.*, *Swift v. McPherson*, 232 U. S. 51 (1914); *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885 (1908); *Wells v. Western Union Tel. Co.*, 144 Iowa 605, 123 N. W. 370 (1909).

¹¹ N. M. LAWS 1903, c. 33, §§ 1-7.

¹² *Atchison, T. & S. F. Ry. Co. v. Sowers*, 99 S. W. 190 (Tex. Civ. App. 1906), *writ of error denied*, Texas Supreme Court, March 13, 1907, *aff'd.*, 213 U. S. 55 (1909). *But cf.* *Southern Pac. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 106 S. W. 766 (1907) (distinguished *Sowers* case on ground that plaintiff here was resident of New Mexico and could not disregard its laws by suing in other states when the New Mexico statute forbade such practice).

States Supreme Court affirmed,¹³ saying that full faith and credit was given to the statute when its other conditions (concerning making of affidavits and certain time limitations) were complied with,¹⁴ but that the right of action could not be restricted as it was based on common-law principles.¹⁵ This rule was extended in *Tennessee Coal, Iron & R. R. Co. v. George*¹⁶ to include actions brought under statutes which created causes of action not existing at common law.¹⁷ The Supreme Court said that venue was no part of the right created,¹⁸ and that "a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action."¹⁹

¹³ *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, *affirming* 99 S. W. 190 (Tex. Civ. App. 1906).

¹⁴ U. S. Constr. Art. IV, § 1; 28 U. S. C. § 1738 (Supp. 1949). A state is required to give full faith and credit to the public acts, records, and judicial proceedings of every other state; but the jurisdiction of a state's courts must be prescribed by that state's constitution and legislation, and a law attempting to do so to interfere with the jurisdiction of another state's courts does not come within the full faith and credit provision of the Constitution. *Atchison, T. & S. F. Ry. Co. v. Sowers*, 99 S. W. 190 (Tex. Civ. App. 1906).

¹⁵ *Atchison, T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 70 (1909).

The distinction was accordingly made in several cases that where a statute created a right not previously existing, a condition could be attached that suits based on that right be brought only in courts of that jurisdiction. *Coyne v. Southern Pac. Co.*, 155 Fed. 683 (D. Utah 1907); *see Lessenden v. Missouri Pac. Ry. Co.*, 238 Mo. 247, 260, 261, 142 S. W. 332, 335, 336 (1911), *appeal dismissed*, 225 U. S. 696 (1911); *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 Tex. Civ. App. 359, 116 S. W. 852, 854 (1909).

¹⁶ 233 U. S. 354 (1914), *affirming* 11 Ga. App. 221, 75 S. E. 567 (1912).

¹⁷ In the *George* case, *supra* note 16, suit was brought in Georgia to enforce a right created by an Alabama statute. An Alabama venue statute, ALA. CODE § 6115 (1907), attempted to confine the right to bring such actions to the courts of Alabama. This provision has subsequently been stricken from the Code, ALA. CODE, tit. 7 § 63 (1940).

The Georgia Court of Appeals said: "The statute of Alabama is the source of the right on which the jurisdiction acts; but it is not the source of the jurisdiction itself. We look to the act to determine the right; but we refuse to look to the law of Alabama to determine what rights the courts of this state will enforce, or to fix the jurisdiction of its tribunals." *Tennessee Coal, Iron & R. R. Co. v. George*, 11 Ga. App. 221, 75 S. E. 567, 571 (1912).

¹⁸ Compare the language of the North Carolina Supreme Court in *Howle v. Twin States Express, Inc.*, 237 N. C. 667, 672, 75 S. E. 2d 732, 736 (1953): "It [the order of the South Carolina court dismissing the plaintiff's action with limited prejudice] pertains to procedure, rather than to the substance of the cause of action."

¹⁹ *Tennessee Coal, Iron & R. R. Co. v. George*, 233 U. S. 354, 360 (1914). See also, *Slaton v. Hall*, 172 Ga. 675, 158 S. E. 747 (1931); *State ex rel. Bosing v. District Court*, 140 Minn. 494, 168 N. W. 589 (1918); *accord*, *Houston & T. C. R. Co. v. Fife*, 147 S. W. 1181 (Tex. Civ. App. 1912), *writ of error denied*, Texas Supreme Court, June 26, 1912 (plaintiff not precluded from suing Louisiana corporation in Texas although the statute which incorporated defendant provided that actions against it could be brought only at its place of domicile).

The United States Supreme Court, in the *George* case, recognized that cases

The North Carolina Supreme Court, in the *Howle* case, after finding that the North Carolina courts would otherwise be competent to take jurisdiction over this cause of action, discussed the intent of the order of the South Carolina court and decided that the order was intended only to prevent the plaintiff from bringing his action in a neighboring county. The Court felt that the South Carolina court did not intend that its order should extend beyond the territorial limits of the state, and that the order could not have such force and effect.²⁰ Although the Court did not specifically rely on any authority discussed here, the decision would seem to be an extension of the principle that one state cannot oust another state's courts of jurisdiction of a transitory cause of action.

However, where the plaintiff attempts to bring his second action in a federal court, the conclusion reached must be based on different principles.

Generally, the rule of *Erie R. R. Co. v. Tompkins*,²¹ which requires federal courts to follow state substantive law, does not apply to matters of practice or procedure, including matters of venue.²² The federal courts, therefore, cannot be deprived of the jurisdiction granted to them by Congress, and that jurisdiction cannot be restricted, by a state law which regulates venue in state courts,²³ which confers exclusive jurisdiction would arise wherein right and remedy are so united that the right can only be enforced before the tribunal designated by the act. *Tennessee Coal, Iron & R. R. Co. v. George*, 233 U. S. 354, 359 (1914). For examples of such rights, see: *Mosely v. Empire Gas & Fuel Co.*, 313 Mo. 225, 281 S. W. 762 (1926) (workmen's compensation statute); *Davis v. P. E. Harris & Co.*, 25 Wash. 664, 171 P. 2d 1016 (1946) (same).

There are situations not within the scope of this note in which the courts of the state in which the cause of action is sought to be enforced may refuse to entertain jurisdiction, particularly if the cause of action arises under a statute of another state which is penal in character or which is contrary to the public policy of the state in which the right is sought to be enforced. *E.g.*, *Carey v. Schmeltz*, 221 Mo. 132, 119 S. W. 946 (1909).

²⁰*Howle v. Twin States Express, Inc.*, 237 N. C. 667, 672, 673, 75 S. E. 2d 732, 737 (1953).

²¹304 U. S. 64 (1938).

²²*Carby v. Greco*, 31 F. Supp. 251 (W. D. Ky. 1940).

However, the Federal Rules of Civil Procedure will not be applied in diversity cases where such application would permit the contravention of state policy and state law. *Hoosier Cas. Co. of Indianapolis, Ind. v. Fox*, 102 F. Supp. 214 (N. D. Iowa 1952).

²³*Foote v. Kansas City Life Ins. Co.*, 92 F. 2d 744 (5th Cir. 1937) (rule that only court with power to cancel a sheriff's deed of sale in execution of judgment was the court which originally issued the execution order); *Blunda v. Craig*, 74 F. Supp. 9 (E. D. Mo. 1947) (provision in non-resident motorists act that suits under it must be filed in county in which the cause of action accrues); *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608 (C. C. S. D. Ga. 1892) (state statute providing that suits against a corporation must be brought in the county in which its principal office is located); *Davis v. James*, 2 Fed. 618 (C. C. N. D. Ill. 1880) (state statute allowing guardians to mortgage real estate of their wards provided that foreclosures of such mortgages could only be had in the county court which allowed the mortgage); *Cunningham v. County of Ralls*, 1 Fed. 453 (C. C. E. D. Mo. 1880) (state statute providing that actions against a county shall be brought in the circuit court of such county).

diction of certain controversies upon its own courts or upon a particular court,²⁴ or which ". . . prescribes the modes of redress in [its] courts, or which regulates the distribution of [its] judicial power."²⁵ In accordance with these principles, the Court of Appeals, in *Popp v. Archbell*,²⁶ decided that the Virginia statute was a statute regulating practice and procedure in state courts and could have no effect on federal jurisdiction.

Thus, there is apparently no direct precedent for the decisions in the principal cases. Yet, on the basis of the decisions in analogous cases, it would seem that the results reached in these two cases are correct and proper, in that the jurisdiction of a court should not be restricted or eliminated by laws or rules governing procedure in the courts of other jurisdictions.

JOSEPH G. DAIL, JR.

Constitutional Law—Right of Counsel

The North Carolina Supreme Court has recently affirmed the constitutional principle that counsel need not be assigned to defend persons accused of non-capital crimes, absent special circumstances brought to the attention of the court and revealing the necessity for counsel.¹

The English common law denied a person accused of treason or felony the benefit of counsel,² and did not even consider the assignment of counsel,³ while most of the original American colonies at least nominally provided for the right to counsel.⁴ The privilege, which has

²⁴ *Barber Asphalt Pav. Co. v. Morris*, Judge, 132 Fed. 945 (8th Cir. 1904) (city charter allowing claims against the city to be appealed only to a certain state court); *Darby v. L. G. DeFelice & Son, Inc.*, 94 F. Supp. 535 (E. D. Pa. 1950) (statute providing that suits against turnpike commission could be brought only in courts of certain county); *Wunderlich v. National Surety Corp.*, 24 F. Supp. 640 (D. Minn. 1938) (statute authorizing issue of bonds required suit on them to be brought within the state); *Brown v. Return Loads Bureau*, 15 F. Supp. 1073 (S. D. N. Y. 1936) (wrongful death statute providing that actions under it must be prosecuted within the state); *accord*, *Slaton v. Hall*, 172 Ga. 675, 158 S. E. 747 (1931) (*held* that action under same wrongful death statute could be prosecuted in competent court of another state). *Cf.* *Crowley v. Goudy*, 173 Minn. 603, 218 N. W. 121 (1928).

As to effect of state statutes granting exclusive jurisdiction over suits affecting probate or administration of decedents' estates to probate courts, see Annotation, 158 A. L. R. 9 (1945).

²⁵ *Hyde v. Stone*, 20 How. 170, 175 (U. S. 1858); *Lappe v. Wilcox*, 14 F. 2d 861 (N. D. N. Y. 1926).

²⁶ Note 5 *supra*.

¹ *State v. Cruse*, 238 N. C. 53, 76 S. E. 2d 320 (1953).

² Herein, the general constitutional privilege concerning counsel for defense in criminal cases is called "right of counsel," and includes: (1) "benefit of counsel," which means that a person may be represented by a lawyer whom he has employed; and (2) "assignment of counsel," which means that a person is entitled to the assignment of a lawyer to defend him.

³ *Powell v. Alabama*, 287 U. S. 45, 60 (1932).

⁴ *Id.* at 64.