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Civil Procedure- Venue-Effect of Contract Provision Fixing Venue as to Future Litigation

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RECENT DECISIONS

CIVIL PROCEDURE—VENUE—EFFECT OF CONTRACT PROVISION FIXING VENUE AS TO FUTURE LITIGATION—Defendants, residents of Harris County, Texas, executed in Harris County a conditional sale contract to purchase a food freezer from plaintiff's assignor. One of the contract provisions was that any suit on the contract was to be tried in Travis County, Texas.[1] Plaintiff subsequently brought an action on the contract in Travis County, and defendants, contrary to their agreement, requested the trial court to transfer the action to a court of proper jurisdiction in Harris County, which was the proper county for suit under the applicable venue statute.[2] In response, plaintiff argued that, since the contract created an obligation performable in Travis County, the contract came within a statutory exception to the general venue rule and Travis County was the proper county in which to bring the suit.[3] The trial court denied defendants' motion and upheld the contract provision. On appeal, *held*, reversed.[4] The contract provision specifying that any action brought on the contract is to be brought in Travis County is contrary to public policy and consequently void.[5] *Tilley v. Capital Nat'l Bank*, 367 S.W.2d 359 (Tex. Civ. App. 1963).

The holding of the court in the principal case adheres to the general rule followed by the majority of American courts regarding contracts which attempt to fix venue before the cause of action has accrued.[6] However, the

1 The provision in relevant part stated: "Any suit brought on the Contract of Sale shall be brought in Travis County, Texas." Principal case at 361. Apparently the seller, who was located in Houston, Harris County, Texas, regularly assigned its conditional sale contracts to plaintiff, the Capital National Bank, in Austin, Travis County, Texas. *Ibid.*

2 "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except . . . if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile." TEX. REV. CIV. STAT. ANN. art. 1995(5) (1950).

3 *Ibid.* However, the court held that the obligation involved was the obligation to pay, which was not, under the contract, performable in Travis County. Principal case at 362; *cf.* McCurdy v. King, 359 S.W.2d 255 (Tex. Civ. App. 1962); Atkins v. Wheeler, 307 S.W.2d 294 (Tex. Civ. App. 1957); General Motors Acceptance Corp. v. Hunsaker, 50 S.W.2d 367 (Tex. Civ. App. 1932).

4 The court remanded the case to the trial court with instructions to transfer the action to a court of proper jurisdiction in Harris County. Principal case at 362.

5 Furthermore, the court held that the contract provision did not come within the statutory exception. *Id.* at 362.

6 See, *e.g.*, General Motors Acceptance Corp. v. Codiga, 62 Cal. App. 117, 216 Pac. 383 (1923); Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856); Gardner & North Roofing & Siding Corp. v. Deaton, 1 Misc. 2d 90, 146 N.Y.S.2d 577 (Sup. Ct.), *aff'd*, 286 App. Div. 992, 144 N.Y.S.2d 744 (1955); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921); Annot., 56 A.L.R.2d 300 (1955). The present discussion does not include contracts attempting to fix venue *after* the cause of action has accrued. For a case illustrating the distinction, see Clark v. Lowden, 48 F. Supp. 261 (D. Minn.), *appeal dismissed*, 135 F.2d 740 (8th Cir. 1942).

reasons for the rule are rooted in a past which seems to evidence ignorance of the historical nature and purpose of venue. The rule developed partially as a result of certain courts' confusion between venue and jurisdiction. Jurisdiction refers to the power of the court to try an action;[7] jurisdiction over the subject-matter is expressly conferred by constitution, statute, or treaty, and it may not be conferred by the consent of the parties.[8] On the other hand, venue refers to the locality in which a law suit is tried, and the venue statutes, being based on considerations of general convenience and expediency,[9] are intended for the benefit of the parties as well as for that of the courts.[10] However, since contract provisions attempting to limit jurisdiction are void,[11] the courts held that contract provisions attempting to fix venue in a particular county, to the exclusion of courts in another county where venue would be properly laid, were likewise void as attempts to oust courts of their jurisdiction.[12] However, the courts of the latter county would no more be ousted of their jurisdiction by a contractual venue provision than they would be if the action were brought in an improper county and the defendant, by engaging in litigation, waived his right to object to improper venue.[13]

Presumably, although the court did not discuss this fact, the defendants in the principal case were actually aware of the venue-fixing provision at the time the contract was concluded.[14] If this was true, then the principal case would seem to be distinguishable from the cases on which the general rule is based, for only one of those cases involved an agreement in which

7 Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939); Paige v. Sinclair, 237 Mass. 482, 130 N.E. 177 (1921).

8 Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 313 (1944); Neirbo Co. v. Bethlehem Shipbuilding Corp., *supra* note 7, at 167; Electrical Prods. Consol. v. Bodell, 132 Mont. 243, 316 P.2d 788 (1957). For a compilation of state jurisdictional statutes, see Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 317 nn.40 & 41 (1951).

9 Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856).

10 Venue relates to the convenience of litigants and consequently is a personal privilege which may be waived. Brown v. Alabama Chem. Co., 207 Ala. 215, 92 So. 260 (1922); Electrical Prods. Consol. v. Bodell, 132 Mont. 243, 316 P.2d 788 (1957); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939) (dictum). *But see* Nute v. Hamilton Mut. Ins. Co., *supra* note 9 (emphasis on convenience of the courts).

11 See, *e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874); Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508 (6th Cir. 1897); Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 111 N.E. 678 (1916); Kent v. Universal Film Mfg. Corp., 200 App. Div. 539, 193 N.Y. Supp. 838 (1922).

12 Ziegelmeyer v. Pelphery, 133 Tex. 73, 125 S.W.2d 1083 (1939); International Travelers' Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630 (1919); Eaton v. International Travelers' Ass'n, 136 S.W. 817 (Tex. Civ. App. 1911). However, it is not clear what the courts mean by the term "void." Generally it is taken to mean that the provision may not be specifically enforced; however, the voidness does not necessarily preclude an action for damages for breach of the contractual agreement. Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856) (dictum).

13 Murdock Acceptance Corp. v. Speer, 225 Ark. 948, 286 S.W.2d 485 (1956); Lieffring v. Birt, 154 S.W.2d 597 (Mo. App. 1941); Dossey v. Oehler, 359 S.W.2d 624 (Tex. Civ. App. 1962).

14 Principal case at 360; see note 19 *infra*.

there was actual consent to the venue provision.[15] Furthermore, one-half of those cases involved contracts which actually sought to oust certain courts of their jurisdiction, and all the cases were based on venue provisions in insurance contracts.[16] While the courts, in applying the general rule, seem to make no distinction with reference to the nature of the contract,[17] it would seem that provisions in insurance contracts should be subjected to policy considerations different from those which govern conditional sale contracts. Such factors as the relative bargaining strength of the parties, the length of time the venue provision would be effective, and the actual convenience to both parties might weigh heavily against allowing such a provision in an insurance contract, while the same reasoning might not apply to a conditional sale contract. For example, the factor of convenience should be given special consideration since, presumably, an insurance company will be interested in discouraging litigation against itself, while the seller in a conditional sale contract will usually be the party instigating the litigation. Consequently, if the venue statutes are primarily based on convenience[18]—an element that can be waived—there should be no reason to prevent a party from waiving that convenience at the time the contract is concluded, provided the party waiving his venue privilege actually consents.[19]

A smaller number of courts which follow the general rule do so on the ground that contract provisions fixing venue before the cause of action has

15 International Travelers' Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630 (1919) (contract based on actual consent), the leading authority in Texas, based its holding on the following cases: Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874) (agreement induced by invalid state statute); Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508 (6th Cir. 1897) (actual consent, but contract ousted certain courts of jurisdiction); Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856) (due to peculiarities in policy, defendant did not know of provision); Eaton v. International Travelers' Ass'n, 136 S.W. 817 (Tex. Civ. App. 1911) (contract subject to insurance company by-laws which were changed after the contract was entered into).

16 Home Ins. Co. v. Morse, *supra* note 15 (insurance contract—excluded federal courts); Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, *supra* note 15 (insurance contract—jurisdiction limited to federal courts); Nute v. Hamilton Mut. Ins. Co., *supra* note 15 (insurance contract—jurisdiction limited to specified county); Eaton v. International Travelers' Ass'n, *supra* note 15 (insurance contract—jurisdiction limited to specified county). In International Travelers' Ass'n v. Branum, *supra* note 15, the agreement ousted no court of its jurisdiction, since it limited jurisdiction only to the courts of a certain county (see text accompanying note 13 *supra*) and the general trial courts of the state are exactly the same, regardless of where they are located throughout the state. Benson v. Eastern Bldg. & Loan Ass'n, 174 N.Y. 83, 66 N.E. 627 (1903).

17 See Detwiler v. Lowden, 198 Minn. 185, 269 N.W. 367 (1936).

18 See note 10 *supra*.

19 In Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), the Court held that an agreement with a state designating an agent for service of process within the state constituted consent to be sued in the federal courts in that state and thereby waived objection to the venue. However, in Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953), the Court clarified its holding in *Neirbo* and held that driving on the highways of a state having a nonresident motorist statute, while sufficient to vest jurisdiction in the state courts (because jurisdiction in such cases does not rest on consent), did not vest jurisdiction in the federal courts in the same state, since "the defendant did not in fact consent" to be sued in the federal courts so as to waive his federal venue rights.

accrued are violative of applicable venue statutes.[20] These courts conclude that to allow parties to substitute their will for the will of the legislature would tend to negative the statutory venue plan.[21] For example, the party inserting the venue provision might try to choose counties which, for one reason or another, would be most favorable to any litigation he might bring on the contract.[22] Moreover, even though a defendant may waive his objection to venue at trial, the courts will not let him "bind himself in advance by an agreement which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."[23] Presumably, the courts are trying to protect a party who is unaware of the venue-fixing provision, or who is in an unequal bargaining position vis-à-vis the party imposing the provision, from being deprived of his rights.[24] On the other hand, it would appear desirable to allow parties a certain amount of latitude and discretion in forming their contracts.[25] In balancing these competing interests, it seems reasonable to allow the parties this flexibility in contract formation, yet at the same time to subject them to the discretion of the court to transfer or dismiss the action on motion if the court concludes that the contractual waiver of venue was not a valid consensual agreement arrived at between parties bargaining as equals.[26] However, the court in the principal case did not discuss these considerations, contenting itself instead with reliance on "precedent" which perhaps clouds the real issues involved.

While a minority of courts have reached the opposite result and have enforced contracts fixing venue before the cause of action has accrued, these courts have done so only with the aid of statutes which provide that the parties may seek a change of venue by written stipulation or by mutual consent in open court after the cause of action has accrued.[27] These

20 Gardner & North Roofing & Siding Corp. v. Deaton, 1 Misc. 2d 90, 146 N.Y.S.2d 577 (Sup. Ct.), *aff'd*, 286 App. Div. 992, 114 N.Y.S.2d 744 (1955); Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921).

21 Cases cited note 20 *supra*.

22 "Such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social or political standing of parties in one or another county." Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184 (1856).

23 Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874). The Texas court quoted this in International Travelers' Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630, 632 (1919).

24 *Ibid.*

25 "[C]ourts are less and less disposed to interfere with parties making such [venue-fixing] contracts as they choose, so long as they interfere with no one's welfare but their own." Daley v. People's Bldg., Loan & Sav. Ass'n, 178 Mass. 13, 59 N.E. 452 (1901); see 6 UTAH L. REV. 128 (1958). *But see* 19 MONT. L. REV. 165 (1958).

26 See State *ex rel.* Kuhn v. Luchsinger, 231 Wis. 533, 286 N.W. 72 (1939); *cf.* Gardner & North Roofing & Siding Corp. v. Deaton, 1 Misc. 2d 90, 146 N.Y.S.2d 577 (Sup. Ct.), *aff'd*, 286 App. Div. 992, 144 N.Y.S.2d 744 (1955).

27 Electrical Prods. Consol. v. Bodell, 132 Mont. 243, 316 P.2d 788 (1957); State *ex rel.* Schwabacher Bros. & Co. v. Superior Court, 61 Wash. 681, 112 Pac. 927 (1911); State *ex. rel.* Kuhn v. Luchsinger, *supra* note 26. See also ARIZ. REV. STAT. ANN. § 12-405 (1956); KY. REV. STAT. § 452.010 (1962); S.C. CODE ANN. § 10-305 (1962); UTAH CODE ANN. § 78-13-9(4) (1953).

statutes do not in themselves authorize formation of contracts with provisions fixing venue before the cause of action has accrued, but the courts have declared that such statutes evidence an intention on the part of the legislature to sanction stipulations as to venue.[28] These courts conclude that, if the parties may agree after the action is begun that the place of trial shall be in any county in the state, it seems only logical to allow them to do so before the action is begun.[29]

It would seem that the foregoing result is the more sound, and that it should be reached whether or not the particular state has a statute which permits the parties to agree on a different venue after commencement of the action. It recognizes that venue is intended largely for the benefit of the defendant, and also that the parties themselves can determine where it will be most convenient to bring an action on the contract. If the contract provisions are, at the same time, subject to the discretion of the court to transfer the action (in effect denying specific performance of the contract provision),[30] then the convenience of the parties and the courts will be best served.

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28 Cases cited note 27 *supra.*
29 *Ibid.*
30 See generally 5 CORBIN, CONTRACTS §§ 1162-71 (1951).