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THE CHANGE OF VENUE PROBLEM

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Strictly construed the term "change of venue" means a change of the place of trial from one county or district to another. In an early New Hampshire case the court said, "Whenever or however the practice originated, it became thoroughly engrafted upon the common law, long before the independence of this country, and from that time forth, not only has the practice prevailed in the courts of England, but the power is now exercised by the courts of very many if not all of our states, either by force of express statute or the adoption of the common law into the jurisprudence of the same."[1]

In Indiana the right to a change of venue and the procedure for its exercise are wholly statutory and here the term is also used to denote the transfer of a cause from the regular judge of the court in which it is pending to a special judge of the same court whose jurisdiction is limited to the disposition of such cause only. The reasons that prompted the legislature to provide for a change of venue from the judge in civil and criminal actions are fundamental; the causes for his disqualification, as specified by statute, are sound and the right must be recognized as essential to the procurement of fair trials in those instances where statutory grounds exist for the exercise of the right.

In providing machinery for the exercise of this right, the legislature has not been so wise. There are now in effect

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1. Cochecho Railroad v. Farrington (1853), 26 N.H. 428, 436.

12 statutes, if we include those of the criminal code, applicable to various situations and providing many methods of selecting a special judge to try a cause in which the regular or presiding judge has been disqualified.[2] Out of this prolixity of methods, all designed to insure a litigant in his right to have his case heard by a fair and impartial judge, has grown a multitude of abuses that have brought no credit to the bar and have subjected the courts of the state to lay criticism for long and unreasonable delay in the disposition of business.

The Civil Practice Code of 1881 recognized a litigant's basic right to have a change of venue from the judge who, in regular course, would hear his case. It specified grounds upon which the right could be exercised and set up the machinery whereby a special judge was selected and appointed. The act contained five sections all but one of which still stand, substantially as enacted, and constitute a part of our present civil code.[3] The first of these sections, provides four grounds for a change of venue from the judge: (1) That he was engaged as counsel in the cause prior to his election or appointment or is otherwise interested in the action; (2) that he is of kin to either party; (6) that he is a material witness; and (7) that he is biased and prejudiced.[4] The existence of any of these grounds, in a particular case, must be shown by affidavit and statistics reveal that bias and prejudice is most commonly alleged. The right to a change of venue in a civil action, granted by this statute, has been extended, either by judicial construction of the word "civil" or by express legislative enactment,[5] to almost every character of proceeding adversary.

Section 257 of the Civil Practice Code of 1881 provided that: "When a change of venue is granted (from the judge) the Court or Judge shall call a Judge of any Circuit, Superior or other Court of general jurisdiction, or any Judge of the

2. Ind. Acts 1881 (Spec. Sess.), ch. 38, §255-251; Ind Acts 1903, ch. 195; Ind Acts 1905, ch. 96, as amended; Ind. Acts 1907, ch. 1; Ind. Acts 1905, ch. 169; Ind Acts 1907, ch. 59; Ind. Acts 1911, ch. 159, as amended by Acts 1919, ch. 17; Ind. Acts 1913, ch. 122, as amended by Acts 1929, ch. 6; Ind. Acts 1913, ch. 139, as amended by Acts 1935, ch. 71; Ind. Acts 1937, ch. 103; Ind. Acts 1937, ch. 221; Ind. Acts 1937, ch. 7; Ind. Acts 1937, ch. 290.
3. §§225 to 259, §257 repealed by Acts 1905, ch. 96, §1.
4. Burns' Ind. Ann. Stat. (1933) §2-1401
5. Id. §§2-1402 and 2-1403.

Supreme Court to preside in such case, and try the same; or, if it shall be difficult, in the opinion of the Court, for any cause, to procure the attendance of such Judge, the Court, in order to prevent delay may appoint any competent and disinterested attorney of this State, in good standing, to act as Judge in such cause,".[6] This procedure was deemed adequate until 1905 when, possibly to prevent arbitrary choice of a successor by a judge willing to favor one of the litigants, §2-1409, Burns' 1933, was enacted.[7] This section as amended in 1907, requires the judge from whom the change is taken, if the parties fail to agree on a special judge, "to nominate three (3) competent and disinterested persons, each of whom shall be an available judge or member of the bar of this state, to be submitted to the parties," each of whom shall strike one name and the person whose name remains becomes the special judge. If either party fails to exercise his right to strike within the time limited the regular judge chooses from the remaining names.

It is difficult to conceive of a situation in which the machinery provided by this statue for the selection and appointment of a special judge would not be adequate to insure litigants a fair trial. It is obvious, except where the change is taken for the purpose of delay, that counsel, by conscientious effort, could agree on a special judge and the fact that they do not do so, in many instances, indicates that the underlying reason for the change is not within the purview of the statute that gives them the right to take it.

Notwithstanding the adequacy of existing law, in 1937 the legislature passed two acts pertaining to the selection of special judges, each of which unfolds an elaborate and novel scheme to accomplish the purpose.[8] The first of these acts[9] it would seem, is the source of most of the abuse of the basic right to a change of venue from the judge that has become so prevalent in recent years. It was so carelessly written that construction by the Supreme Court approaching judicial legislation was required to give it application to civil actions.[10] Under this statute an applicant, by objecting to the

6. Ind. Acts 1881 (Spec. Sess.), ch. 38, §257, p. 286.
7. Ind. Acts 1905, ch. 96, §1, p. 164, amended by Acts 1907, ch. 81, §1, p. 108.
8. Ind. Acts 1937, ch. 85, p. 443; Ind. Acts 1937, ch. 103, p. 481.
9. Burns' Ind. Ann. Stat. (1942 Supp) §2-1430.
10. State ex rel. 1625 E. Wash. R. Co. v. Markey, Judge 212 Ind. 59, 7 N. E. (2d) 989 (1937).

submission of a list of prospects by the regular or presiding judge, may require the clerk of the Supreme Court to list three names from which, by striking, a special judge is to be selected. In making up this list the clerk is limited to the names of judges of circuit courts of "adjoining counties," or to members of the bar of the county where the action is pending, and "adjacent counties." It will be noted that superior, criminal, or probate court judges may not be named and whether the words "adjoining" and "adjacent" are used synonymously is not clear. In its practical application the clerk of the Supreme Court has frequently been unable to find available lawyers in some of the smaller counties, and, with the approval of the Supreme Court, has construed "adjacent" to include the second tier of counties on either side of that in which the action is pending.

Since January 1, 1944, the clerk of the Supreme Court has kept a separate record book in which complete data on lists submitted by him is recorded. This record discloses that from January 1, to November 1, 1944, he has certified to trial courts the appalling number of 536 lists of which the following is a partial breakdown: In 34 counties no list was requested and in 19 counties only one. Counties requesting as many as 5 and less than 10 were Decatur, Delaware, Gibson, Hancock, Jay, Jefferson, Knox, Lawrence, Owen, Posey and Warrick. Counties requesting 10 or more were Allen, Hamilton, Hendricks, Lake, Marion, Marshall, Porter, Spencer, Vanderburgh and Vigo. All other counties asked less than 5. In Allen County with 3 courts there were only 10 lists requested while Hendricks and Marshall, each with only a circuit court, requested 10 lists each. The worst offenders among the smaller counties were Hamilton, 26; Porter, 21; and Spencer, 12. The figures for Vanderburgh are 27; for Vigo, 26; for Lake, 91; and for Marion, 150. All this, of course, does not include instances where special judges were selected by agreement of the parties or from lists submittd by the regular judges from whom changes of venue were taken.

The clerk of the Supreme Court has furnished data in five instances which illustrate the frequent and typical results of the practical application of this statute. In each of these cases there was, perhaps, some unnecessary delay preceding certification to the clerk of the filing of the affi-

davit for a change of venue and, later, in striking names from the list submitted and getting the selected judge qualified and ready to hear the case, but in the main part the unreasonable delay, shown in each case, can be attributed to infirmaties in the statute.

In a case pending in Decatur County the first list was certified by the clerk on March 26, 1942. The special judge selected from this list qualified and acted as such until January 14, 1944, when a change of venue was taken from him. The clerk's second list was certified on January 15, 1944, and the judge selected refused to serve. A third list was certified on February 4, 1944, with the same result and on June 8, 1944, a list was finally submitted from which it was possible to procure a special judge. The various lists included the names of all the circuit judges of adjoining counties and none of them was satisfactory to both parties except the first one selected and he was subsequently unseated by the second bias and prejudice affidavit.

Seven months elapsed in the process of selecting a special judge in a case pending in the Lake Superior Court in Gary. Three lists were necessary to effect the purpose.

The ineffectiveness of the statute is strikingly illustrated by a deplorable situation in a Spencer County case. Eight months have elapsed since the services of a special judge were required and as far as the record in the office of the clerk of the Supreme Court discloses, none has yet been selected. Six lists have been certified. The first was recalled because one of the attorneys named was related to an attorney of record in the case. To insure against such occurrences it would be necessary for the clerk to investigate each individual whose name is submitted as a prospective special judge. His relationship to lawyers employed in the case and to all of the parties, and the possibility of his previous employment in the litigation or of his being a witness at the trial thereof are all matters that would have to be determined. When we realize that in the ten months from January 1, to November 1, 1944, the clerk was required to certify 536 lists of three names each, requiring 1608 separate investigations, if the possibility of submitting the name of a disqualified person was to be avoided, the impossibilty of complying with the statutory injunction that "competent" and "disinterested" persons shall be selected, becomes apparent.

The second list in the Spencer County case was recalled because one of the judges named lived in Vanderburgh County which does not adjoin. The judge from the third list refused to serve. The one selected from the fourth list qualified but later resigned. The fifth selection refused to qualify and there is no record in the clerk's office as to what occurred in connection with the sixth list.

A period of six months was required to get a special judge to try a case in the Marion Superior Court, Room 1. Five lists were submitted and each of the lawyers selected from the first four lists declined to serve.

In a case pending in the Vanderburgh Circuit Court each party took a change of venue from the judge. The first list certified May 28, 1943, contained the names of three circuit court judges, one of whom was selected. He qualified and acted until January 18, 1944, when the second change of venue was taken. It required the submission of three more lists before a lawyer was selected who would agree to serve. Eight months elapsed between the submission of the first and last lists.

The process of selecting and qualifying a special judge to try a case in which the regular judge has been disqualified should not be difficult or prolonged. Under the provisions of §257 of the Civil Practice Act of 1881 it seldom took more than a few days. The regular judge knew his neighboring colleagues on the bench and members of the bar. He knew their relationships to the parties and counsel engaged in the litigation and could learn very quickly as to the willingness of any of them to serve. The sole objection to the law, as it then stood, rested in the arbitrary power it vested in a judge who had been disqualified, usually for bias and prejudice, to select his successor. Perhaps the objection was more fancied than real because it presupposes that a biased and prejudiced judge could and would find another who was also biased and prejudiced. However that may be, it cannot be denied that we now have on our statute books a clumsy, carelessly written and ineffective law pertaining to the selection of special judges which, by reason of its very ineffectiveness, appeals to many litigants and lawyers as an apt and appropriate instrument to procure long and unreasonable delay in litigation of which they are not anxious to dispose.

There is no disposition on the part of anyone concerned with the problem to deny to litigants the privilege of a change of judge to the end that they will be assured a fair trial but the situation, as it presently exists, demands a remedy. The Judicial Council, during the past year, has given the problem serious consideration, and is of the opinion that either of two remedies should be adopted: (1) The entire matter should be taken over by the Supreme Court and handled under its rule making power, or (2) all procedural statutes should be repealed and one comprehensive and workable act passed in their stead. There is much to be said for the first plan. The Supreme Court is fully aware of the difficulties its clerk has had and the onerous duties and responsibilities cast upon him concerning a matter which logically has no connection with his office. The court, by knowledge and training, is in position to formulate rules that will preserve to litigants the basic right to a change of venue and at the same time set up an efficient and speedy method of obtaining special judges which will eliminate any abuse of the right that now exists or may develop.

The power of the Supreme Court to deal with changes of venue under its rule making authority may be doubted by some. Article 4, § 22, of the Constitution of Indiana provides as follows: "The General Assembly shall not pass local or special laws, in any of the following cases, that is to say: * * * (4) Providing for changing the venue in civil and criminal cases:" It has been argued that the constitution, by expressly prohibiting the enactment of special or local laws concerning changes of venue, recognizes the inherent and exclusive power of the legislature to deal with the subject in all other respects. In 1937 the legislature passed the following act. "All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The Supreme Court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect." [11]

It would seem that this language is sufficiently broad to embrace the procedural aspects of the appointment of

11. Acts 1937, ch. 91, p. 459.

special judges but the Supreme Court might be reluctant to take such a position in view of the fact that the act relates to its own powers. To put the matter beyond controversy a simple statute could be enacted providing in substance that special judges may be appointed in all instances now authorized by law in accordance with such reasonable procedural rules pertaining to the steps necessary to obtain the appointment of such judges and the method of their selection as the Supreme Court may, from time to time, adopt.

If it should be considered that the power to provide a procedure to effectuate changes of venue is vested by the constitution exclusively in the legislature and cannot be delegated to the judiciary, the second remedy, suggested above, should be pursued. With that in mind the Judicial Council prepared and sponsored, in the 1945 session of the General Assembly, a bill for an act which is set out in full as an appendix hereto. This bill was lost in the volume of proposed legislation and was not presented to the legislature for passage but it is the belief of those who have given the matter study that, if enacted, it would go a long way in the solution of the problem, and it is offered here for the consideration of the bar and all persons interested. Its salient features are: (1) An opportunity for counsel to agree on a special judge; (2) the right of the Supreme Court to appoint the regular judge of any court in the state, except justices of peace and magistrates, to serve as a special judge anywhere in the state; (3) an appointment by the Supreme Court constitutes a mandate to serve; and (4) fairly adequate compensation for the services of such special judge together with traveling expenses at the same rate per diem.

The great majority of our trial judges receive no compensation in addition to their base salary paid by the state. It is believed that from these judges a list of those available and willing to serve will soon develop through the practical operation of the law. It is reasonable to expect that such judges will be scattered geographically throughout the state and thus a stranger to the subject matter, parties, and counsel, in any given case, will be available without delay to act as a special judge in the event of a change of venue therein. The opportunity afforded judges in the smaller counties, receiving base pay only, to add materially to their salaries should make the mandate of the Supreme Court welcome.

APPENDIX

A BILL FOR AN ACT TO AMEND SECTION I OF AN ACT ENTITLED "AN ACT TO AMEND SECTION I OF AN ACT ENTITLED 'AN ACT PROVIDING FOR THE APPOINTMENT OF SPECIAL JUDGES IN CHANGE OF VENUE AND CERTAIN OTHER CASES AND DECLARING AN EMERGENCY', APPROVED MARCH 4, 1911; REPEALING ALL LAWS IN CONFLICT HEREWITH AND DECLARING AN EMERGENCY", (BEING CHAPTER 70, ACTS 1919).

SECTION I. Be it enacted by the General Assembly of the State of Indiana,—That Section 1 of the above entitled act, being Chapter 70, Acts 1919, be amended to read as follows:

SECTION 1. Hereafter, whenever a change of venue is taken from the presiding judge in any circuit, superior, criminal, probate, juvenile, municipal or city court in this state, or in any case where the presiding judge, whether he be the regular, special or pro tem judge of said court, is disqualified from any cause to try such action, if the parties in such action shall agree in writing or in open court, to the transfer of the action to another court in this state to try such action, it shall be the duty of the court wherein said action is pending, to transfer to the court, or to appoint as special judge such judge or attorney, so agreed upon. In the absence of such agreement, it shall be the duty of the court, within two days from the date such change of venue is granted or such disqualification become effective, to certify, under seal of said court, to the Supreme Court of Indiana, that such presiding judge is disqualified to try said action and specify therein the reasons for such disqualification and that the parties litigant have failed to agree upon a transfer or a special judge to try said action. The Supreme Court, within a reasonable time thereafter, shall appoint the regular judge of any court in the State, except magistrates or justices of the peace, as a special judge to try said action. Any such judge so appointed by the Supreme Court, shall by reason of such appointment, be obligated to act as such special judge and shall forthwith file his appointment and oath with the clerk of the court wherein said action is pending, which appointment and oath shall be entered by the clerk upon the orderbook of said court and such judge shall thereupon have power to hear

and determine said action, until the same is finally disposed of, or a change of venue thereof is taken in proper cases. Any court to which an action is transferred under this Act shall have jurisdiction of the action. Said special judge, whether appointed by the trial court upon agreement of the parties, or by the Supreme Court, shall be allowed and paid five cents for each mile necessarily traveled in the performance of his duties as special judge and shall be paid as compensation for his services the sum of twenty-five dollars ($25.00) per day and, in computing the time for which he is entitled to compensation, the time necessarily required for travel from his home to the place of holding court and return shall be included within the time of actual services on the bench. Said compensation and travel expense shall be paid as follows: On presentation of an order made by the court for the allowance, specifying the time of service, supported by an affidavit of the special judge that he actually served such time and traveled the mileage claimed, and an affidavit of the regular judge, if any, stating the reason for the service of such special judge, the same shall be paid out of the county treasury for which the county shall have credit on settlement of the treasurer with the State. A special judge, appointed by virtue of this Act, shall have jurisdiction to hear and determine any action, or matter connected therewith, in which he is appointed in vacation or term time. As used in this Act "action" includes all civil and criminal actions and other judicial proceedings.

SECTION 2. All laws or parts of laws pertaining to the method, manner or procedure by which a special judge is to be selected and appointed in any action wherein the presiding judge has been disqualified for any reason, in the courts specified in Section 1, are hereby repealed, provided however, that nothing in this Act shall deprive a special judge heretofore appointed, qualified and acting by virtue of any law hereby repealed, of jurisdiction to hear to completion and decision any action pending before him upon the date this Act become effective, and PROVIDED FURTHER that nothing in this Act shall in any way abridge, change or modify the right of any party litigant to a change of venue from a presiding judge as now provided by law.

SECTION 3. The Supreme Court is authorized by rule or order to regulate the administration of and the procedure for carrying into effect the provisions of this Act.