The Effect of Improper Venue Upon Jurisdiction of the Person and Jurisdiction of the Subject Matter

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There is much apparent confusion between the conceptions of jurisdiction and venue. This confusion is unnecessary and could be avoided by careful analysis.

So far as definitions of the two terms are concerned, there is no difficulty. For our purpose, jurisdiction may be defined as the power to hear and determine. Venue, on the other hand, may be defined as the "locality of a law suit—the place where judicial authority may be exercised."[1] The distinction between jurisdiction and venue has been stated clearly by the Ohio Supreme Court:

> Jurisdiction must not be confounded with venue. Jurisdiction is the right to hear and determine a cause, but the term is used in the sense of power rather than in the sense of selection. There is no doubt that courts of common pleas in Ohio have the right to hear cases of injuries to person and property and of wrongful death by railroad companies, but it does not follow that Ohio courts must, and at all events, hear all cases which may be tendered. In some of the former decisions of this court the language concerning the word 'jurisdiction' has not been carefully selected, thereby leading to some misapprehension. Jurisdiction may exist to hear and determine causes of a certain class, and yet that jurisdiction may not be permitted to attach to certain cases by reasons of limitations of venue. Venue signifies the geographic division where a cause shall be tried. Both jurisdiction and venue depend upon constitutional and statutory provisions. While certain provisions may give the courts power to hear certain causes, other provisions may limit the rights of certain parties to avail themselves of that jurisdiction.[2]

So far there seems to be no difficulty, and no reason why there should be any confusion between these two conceptions.

At this point, it should be noted that there are two kinds of jurisdiction.

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[1] Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U. S. 177, 179, (1928).

[2] Loftus v. Pennsylvania Rd. Co., 107 Ohio St. 352, 356, 140 N.E. 94, *petition for writ of error dismissed*, 266 U. S. 639 (1924). Other definitions may be found in Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930), and Note, *The Venue of Actions as Affecting the Jurisdiction of Courts*, 11 MINN. L. REV. 260 (1927).

JURISDICTION OF THE SUBJECT MATTER AND JURISDICTION OF THE PERSON

The first is jurisdiction of the subject matter. Perhaps the meaning of this phrase may be best approached from a negative viewpoint. If a court does *not* have jurisdiction of the subject matter, it cannot render a valid judgment. For example, in most actions, the minimum pecuniary jurisdictional limitation of the common pleas courts in Ohio is $100.01. Therefore, if a suit for $100.00 is filed in a common pleas court, it would be correct to say that the court does not have jurisdiction of the subject matter of that particular action. Likewise, if a patent infringement suit were filed in common pleas court, it would be correct to say that the court does not have jurisdiction of the subject matter of that particular action. Subject to qualifications not here material, the parties can not waive the objection of lack of jurisdiction of the subject matter. As it is often put, "the parties cannot confer jurisdiction of the subject matter."

Now as to the second kind of jurisdiction—jurisdiction of the person. If a court does not have jurisdiction of the person of the defendant, it cannot render a valid in personam judgment against the defendant, even though it has jurisdiction of the subject matter of the particular action. But, unlike jurisdiction of the subject matter, a party may waive the objection of lack of jurisdiction of his person. Thus , even if a court at first lacks jurisdiction of the person of the defendant, the defendant may enter a general appearance and thereby confer upon the court jurisdiction of his person. With these elementary but fundamental[3] principles in mind, let us consider the judicial reaction to venue problems.

There is no difficulty if venue is proper. That is, if a statute requires that an action be brought in the county where the defendant may be served, and if the action is brought in A County, and summons is served on the defendant in A County, there is no problem. The court has jurisdiction, and venue is proper. However, if the action is brought in A County, summons is issued to the sheriff of B County and he serves the defendant in B County, it is clear that the place or venue of the action does not comply with the statute. In other words, the venue is improper. However, this statement, *of itself,* does not solve practical problems.

THE TWO PROBLEMS

The most frequent of these problems may be stated as follows:

PROBLEM A.

> Plaintiff sues defendant in the wrong county or district. Defendant does not appear, and the court renders a default judgment against him. Is the judgment valid?

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[3] Frequently courts refer to a statute providing for place of trial as being a "jurisdictional statute." Such a term is patently ambiguous. Either jurisdiction of the person or jurisdiction of the subject matter may be meant.

PROBLEM B.

Plaintiff sues defendant in the wrong county or district. Defendant appears generally, without raising the objection that the action was brought in the wrong county or district. May defendant thereafter, in the trial court, or in an appellate court, successfully contend that the court has no jurisdiction?[4]

These are problems which are frequently faced by the courts, and in dealing with them the courts have talked in confusing fashion about jurisdiction and venue. Why should this be, in view of the ease with which we may distinguish the two concepts, on the definition level? Why should this be, when there seems to be no connection between the two concepts, considered abstractly? Why should lawyers be unable to predict successfully the outcome of venue issues on the basis of apparently definite previous decisions?

THREE JUDICIAL POSITIONS WITH RESPECT TO VENUE STATUTES

In construing a "venue" statute, a court may take one of at least three possible positions:

Position 1. The statute relates solely to venue, and has no jurisdictional significance whatever. That is, even though the action is brought in the wrong county or district, this fact does not impair the jurisdiction of the court to any extent whatever.

Position 2. If the action is brought in the wrong county or district, the court does not acquire jurisdiction of the person of the defendant by the service of summons.

Position 3. If the action is brought in the wrong county or district, the court lacks jurisdiction of the subject matter of the action.

Let us now consider some illustrative cases. [5]

In *Commercial Casualty Insurance Company v. The Consolidated Stone Company*,[6] plaintiff, an Indiana corporation, brought a transitory action against defendant, a New Jersey corporation, in the District Court of the United States for the Northern District of Ohio. The defendant was doing business in Ohio, and summons was served within the district upon defendant's statutory agent. Defendant neither appeared nor answered within the required time, and default judgment was entered in favor of

[4] If the defendant makes a timely special appearance and properly raises the venue objection, it will be sustained, whether the court regards the question as "jurisdictional" or not. Therefore, opinions dealing with this third problem will not be discussed, although the language of such opinions may exhibit the same contrariety of approach as those dealing with the first two problems.

[5] Only a few selected United States Supreme Court and Ohio cases are referred to in this paper. No attempt has been made to examine cases from other jurisdictions, or even to examine all the United States Supreme Court and Ohio venue cases. It is quite possible that judicial opinions may be found which analyze the present problems satisfactorily.

[6] 278 U.S. 177 (1928), *supra* note 1.

plaintiff. Later in the same term defendant moved that the judgment be vacated and the action dismissed because the action was brought in a district in which neither party resided. The motion was denied and defendant sued out a writ of error from the circuit court of appeals. That court certified to the supreme court the question as to whether it was open to the defendant, after permitting the case to proceed to judgment by default, to object that the action was not brought in the district of the residence of either party. The supreme court answered the question in the negative. Although the venue was unquestionably improper, as the jurisdiction of the court was founded solely on diversity, and the Northern District of Ohio was not the residence of either the plaintiff or the defendant,[7] the court held that the objection was "a waivable matter of venue only," that the defendant waived the objection by not asserting it "seasonably," and therefore (necessarily) that the motion to vacate was properly denied. The court contrasted the jurisdiction[8] and venue[9] statutes:

> These provisions often have been examined and construed by this Court. Summarized, the decisions are directly to the effect that the first provision invests each of the district courts with general jurisdiction of all civil suits between citizens of different States, where the matter in controversy is of the requisite pecuniary value; and that the other provision does not detract from that general jurisdiction, but merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.

The court thus *attributed no jurisdictional significance whatever* to improper venue. In terms of our formulation, the court took Position 1. If it had held that by reason of improper venue the District Court did not acquire jurisdiction of the person of the defendant by the service of summons (Position 2), it would have held, necessarily, that the judgment was void and should be vacated, as there had been no appearance whatever by the defendant. If the court had held that by reason of improper venue the District Court lacked jurisdiction of the subject matter (Position 3), it would have held, necessar-

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[7] In this situation, venue would now be proper, under 28 U. S. C., Sec. 1391 (c), as defendant was a corporation.

[8] Former U. S. C. Sec. 41, providing that district courts shall have "original jurisdiction" of certain classes of civil suits, including suits between citizens of different states. Where the value of the matter is controversy, exclusive of interest and costs, exceeds $3,000. The corresponding provision of the Judicial Code of 1948 is 28 U. S. C. Sec. 1332.

[9] Former U. S. C. Sec. 112, providing that ". . . where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The corresponding provision of the Judicial Code of 1948 is 28 U. S. C. Sec. 1391 (a).

ily, that the default judgment was void and should be vacated. The *Boston Consolidated Mining Co.*, [10] another diversity case in which court did not mention *Western Loan and Savings Co. v. Butte and* venue was improper. [11] In the *Western Loan* case the defendant had entered a general appearance, and the supreme court held that:

> The defendant had waived objection to jurisdiction over its person, and, by filing the demurrer on the ground stated, submitted to the jurisdiction of the Circuit Court.

The court's position in the *Western Loan* case is basically different from its position in the *Commercial Casualty* case. The language of the *Western Loan* opinion would seem to indicate that the court, in construing the diversity venue statute, was taking Position 2. Before the *Commercial Casualty* case was decided, a defendant sued in the wrong district might well have assumed that under the *Western Loan* decision, he would be safe in not appearing. If the court in the *Commercial Casualty* case had applied, literally, its opinion in the *Western Loan* case, it would have held the other way, and its opinion presumably would have said in substance:

> As the defendant made no appearance, it did not waive the objection of lack of jurisdiction of its person, and did not submit to the jurisdiction of the District Court. Therefore, the judgment was void, and should have been vacated.

As the facts were different in the two cases, the supreme court did not necessarily violate the principle of stare decisis in the *Commercial Casualty* case by holding as it did. However, it might have have clarified the law by referring to the *Western Loan* case, pointing out that the language of that opinion was too broad, and that the problem presented by the fact situation in the *Commerical Casualty* case required that the applicable principles be restated. In terms of our formulation, the facts in the *Western Loan* case presented Problem B, whereas the facts in the *Commercial Casualty* case presented Problem A. A court faced with Problem B (as in the *Western Loan* case) is not forced to choose between Position 1 and Position 2, as the same result will be reached if either of the first two positions is taken. However, a court faced with Problem A (as in the *Commercial Casualty* case), is forced to choose between Position 1, and Position 2, as the two positions give different solutions to Problem A.[12] The language which had been used in the *Western Loan* case

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[10] 210 U. S. 368 (1908).

[11] Venue was improper for the same reason as in the Commercial Casualty case. Plaintiff was a citizen of Utah; defendant was a citizen of New York; the action was brought in the Circuit Court for the District of Montana. Jurisdiction was based solely on diversity of citizenship.

[12] In Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 168 (1939), the court, in discussing waiver of the objection to improper venue, said: "Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an ex-

to solve Problem B would have given the "wrong" answer to Problem A in the *Commercial Casualty* case.

In Ohio, the general venue statute, Ohio General Code Section 11277, provides:

> *General rule as to other actions.* Every other action must be brought in the county in which a defendant resides or may be summoned. . . .

Ohio General Code Section 11282 provides:

> *When summons may issue to another county.* When the action is rightly brought in any county, according to the provisions of the next preceding chapter, a summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request....

In *Snyder v. Clough*,[13] plaintiff commenced an action in the Common Pleas Court of Stark County against four defendants, all of whom resided in Ohio counties other than Stark. The prayer of the petition was for damages for pollution of a stream, and for an injunction against further pollution. Summonses were issued to the respective counties where defendants resided, and served upon them in those counties. None of the defendants appeared, and a default judgment was entered against them for money damages, and they were enjoined from further polluting the stream. Twenty-seven months after the entry of judgment, defendant Clough filed a motion to quash the service of summons and to vacate the judgment. This presented to the trial court the same problem that was presented to the United States Supreme Court in the *Commercial Casualty* case. In terms of our formulation, the trial court was presented with Problem A. The court overruled the motion, and Clough appealed to the court of appeals. That court stated the principal question as follows:

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pression of literary preference." The statement is true in context. However, it will be seen that when a court is faced with what we have called Problem A, it is not merely a matter of literary preference whether the court thinks that a defendant waives the objection by failure to raise it (Position 1), or whether it thinks that the court has no jurisdiction over the person of the defendant unless and until the defendant positively consents to be sued by entering a general appearance (Position 2). The distinction between the two conceptions is blurred in General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., 260 U.S. 261, 273 (1922), wherein the court, in discussing the objection of improper venue, said, "And the inability of the court to proceed with the cause in the presence of such an objection would not have resulted from any want of power to entertain and determine such a suit between such parties, if they were before it, but only because the company declined to yield the necessary jurisdiction of its person." Although the quotation refers explicitly to jurisdiction of the person, the use of the phrase "declined to yield" leaves open the question of the effect of a "failure to decline to yield" (Problem A). That question is answered six years later in the Commercial Casualty decision.

[13] 71 Ohio App. 440, 50 N. E. 2d 384 (1942).

> Did the trial court erroneously exercise jurisdiction over the person of the defendants? In other words, was the action properly commenced in Stark County, and service of summons rightly made?

It held that the action was not properly brought in Stark County, as the defendants could only be sued and the action properly commenced in a county in which one of the defendants resided or service could be made on him. It therefore reversed the order of the trial court, and ordered the default judgment vacated.

As we have said, the Ohio Court of Appeals was faced with the same problem which faced the United States Supreme Court in the *Commercial Casualty* case. In this situation, the United States Supreme Court took Position 1, while the Ohio Court of Appeals took Position 2. It ignored the possibility of Position 1, just as completely as the United States Supreme Court ignored the possibility of Position 2. The court's opinion in *Snyder v. Clough* gives no indication that it is aware that it is attributing jurisdictional significance to venue, *i.e.*, that it is holding a "venue" statute to be "jurisdictional." It is this lack of awareness which leads to lack of explicitness in venue opinions, and results in bewildering law students and misleading lawyers.

This is not by any means to say that the Stark County Court of Appeals was wrong in the *result* reached, or even that it was wrong in taking Position 2. It was entirely correct, and in accord with previous Ohio decisions. Many Ohio decisions, in interpreting various Ohio venue statutes, have talked in terms of Position 2, *i.e.*, that if an action is not brought in the proper county, the court therefore does not, by the service of summons, acquire jurisdiction of the person of the defendant. Thus, in *Southern Ohio Rd. Co. v. Morey*,[14] the court stated:

> Section 5027 provides that: 'An action against.....a railroad company, may be brought in any county through or into which such road....passes.' This section, like the other sections of chapter five of the code of civil procedure, that merely prescribe the county in which a defendant may be sued, relate only to the *jurisdiction over the person.* Neither a railroad company nor other corporation, nor even a natural person, *is bound to appear* in an action in obedience to a summons served out of the prescribed county. It is a privilege, however, that is personal, and may be waived; and this court has uniformly held, that a defendant by appearing in court, and, without objecting to its *jurisdiction over his person,* invoking any action in the cause, waives this privilege, and submits his *person* to the jurisdiction of the court. Harrington v. Heath, 15 Ohio 483, 487-8; Gilliland v. Sellers, 2 Ohio St. 223; Wood v. O'Ferrall, 19 Ohio St. 427; Thomas v. Penrich, 28 Ohio St. 55; Fitzgerald v. Cross,

[14] 47 Ohio St. 207, 24 N.E. 269 (1890).

> 30 Ohio St. 450; O'Neal v. Blessing, 34 Ohio St. 33; Handy v. Insurance Co., 37 Ohio St. 366; Elliott v. Lawhead, 43 Ohio St. 171. The plaintiff in error not only appeared without objecting to the jurisdiction of the court of common pleas over its *person*, but moved to strike from the petition certain averments.....It thus, in the most ample manner, *submitted its person to the jurisdiction* of the court. (Italics added).

Language of similar import may be found in other Ohio cases.[15] And one writer, discussing the Ohio venue statutes and decisions, states:

> The (Ohio) General Code makes specific provision for the place of trial of certain classes of action, both in rem and in personam. As in Nebraska, this is a jurisdictional[16] requirement, and is not simply a provision for venue or place of trial of these actions. The general provision for actions in personam is... (Quoting Ohio General Code Section 11277, *supra* text preceding note 13). The word 'must' as used in the statute, is again interpreted as limiting the jurisdiction of the court even in purely personal actions between residents of the state. The common pleas court of Ohio is therefore not a court of statewide jurisdiction in actions in rem, in personal actions in which the place of trial is specifically designated, or in transitory actions generally.[17]

However, in *Industrial Commission v. Murphy,* [18] the court construed Ohio General Code Section 1465-90, which provided for the filing of an appeal from an award of the Industrial Commission "in the common pleas court of the county wherein the injury was inflicted." The court of appeals stated:

> This court is of the view that the phrase in question prescribes the venue of the case, and not the jurisdiction of the court. All courts of common pleas have jurisdiction to review on appeal the awards of the Industrial Commission. The venue of a particular appeal is the county in which the injury occurred, if it occurred in Ohio at all. The dis-

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[15] *E.g.*, Long v. Newhouse, 57 Ohio St. 348, 49 N.E. 79 (1897), City of Fostoria v. Fox, 60 Ohio St. 340, 54 N. E. 370 (1899), Gorey v. Black, 100 Ohio St. 73, 125 N. E. 126 (1919), Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N. E. 565 (1927). It may be that the phraseology of OHIO GEN. CODE § 11232, *supra* text preceding note 13, has been a factor in the frequent adoption of Position 2 by the Ohio courts. That section provides that when the action is "rightly brought" in one county, summons may be issued to other counties. If the action is not "rightly brought" in the county, it is understandable that the courts would assume that if summons is nevertheless issued to other counties, such summons is unauthorized by the statute and absolutely void, and that service of such summons gives the court no jurisdiction of the person of the defendant.

[16] As to the ambiguity of the term "jurisdictional" in this connection, see note 3, *supra.*

[17] Coffman, *Jurisdiction or Venue?* 20 MINN. L. REV. 617, 622 (1936).

[18] 41 Ohio App. 206, 180 N.E. 731 (1931), *motion to certify record overruled,* Jan. 20, 1932.

> tinction between jurisdiction and venue is pointed out in *Loftus v. Pennsylvania Rd. Co.*, 107 Ohio St. 352, 140 N. E. 94. The venue of an action can be waived. 27 Ruling Case Law, 783; *Southern Ohio Rd. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269; *Klein v. Lust*, 110 Ohio St. 197, 143 N. E. 527. The Industrial Commission made no timely objection to the trial of the case in the County of Athens, rather than in Hocking County, and, by pleading to the merits of the case, waived its right to subsequently raise that question.

This language is much closer to the analysis of the United States Supreme Court in the *Commercial Casualty* case than to that of the Ohio Supreme Court in *Southern Ohio Rd. Co. v. Morey.*[19] In terms of our formulation, the court of appeals is apparently taking Position 1 rather than Position 2. The court takes no notice whatever of the inconsistency of its opinion with previous Ohio opinions.[20] However, the difference in approach makes no difference in the result of the *Industrial Commission* case, because in that case the problem presented is Problem B, and, as we have seen, either Position 1 or Position 2 gives the same answer to Problem B.[21]

In *B. & O. Rd. Co. v. Hollenberger*,[22] plaintiff sued the defendant in the Common Pleas Court of Seneca County, Ohio to recover a penalty for an overcharge under the provisions of Sections 3374 and 3376 of the Revised Statutes. The overcharge complained of did not take place in Seneca County, and therefore venue was improper, under Section 5022, Revised Statutes.[23] There was no demurrer attacking the jurisdiction of the court, nor was the want of jurisdiction set up in defendant's answer. The question of jurisdiction was first raised on defendant's petition in error in the circuit court, one assignment of error apparently being that the common pleas court had no jurisdiction of the subject of the action. Upon affirmance by the circuit court, the defendant filed a petition in error in the Supreme Court of Ohio. The supreme court held that

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[19] *Supra* note 14.

[20] *E.g.*, Southern Ohio Rd. Co. v. Morey, *supra* note 14, and cases cited *supra* note 15.

[21] Likewise, in Loftus v. Pennsylvania Rd. Co., *supra* note 2, the language of the opinion points toward Position 1. However, in the Loftus case, the defendant raised the venue question seasonably, by a motion to quash. Thus the case had not gone far enough to present even Problem A. In this situation, if venue is improper, all three positions give the same result: the motion must be sustained. See note 4, *supra*. Thus it was unnecessary for the court to make a choice between positions.

[22] 76 Ohio St. 177, 81 N.E. 184 (1907).

[23] Now Ohio Gen. Code § 11271, which provides in part as follows: "Actions for the following causes must be brought in the county where the cause of action or part thereof arose:

1. For the recovery of a fine, forfeiture, or penalty imposed by a statute. . ."

the Common Pleas Court of Seneca County lacked jurisdiction of the subject matter of the action, stating:

> it has nevertheless long been a universal rule that an objection to the jurisdiction of the 'subject-matter' can not be waived; because, while parties may voluntarily submit their person to the jurisdiction of a court which has jurisdiction over the cause, they cannot confer power on the court as to the subject-matter, for the reason that the court can derive its general jurisdiction only from the power which created it, the sovereignty.

The opinion concluded:

> The defendant in error (plaintiff below) rests his case on the theory that the plaintiff in error (defendant below) has waived the objection to the jurisdiction. For the reasons stated we are of the opinion that the objection to the jurisdiction was such that the defendant below could not and therefore did not, waive it. 'Where the court has no authority to take cognizance of the *subject-matter* of the suit, the proceedings may be dismissed at any stage of the case, when that fact is made to appear.' *Thompson v. Steamboat,* 2 Ohio St., 28; *Steamboat v. Long,* 18 Ohio St., 521, 526, 533; *Hamilton v. Merrill,* 37 Ohio St. 682, 684, 685. The judgments of the circuit court and the court of common pleas are reversed, and the original petition is dismissed.

The supreme court was faced with Problem B. It ignored completely previous decisions [24] taking Position 2, and most emphatically took Position 3. As Problem B was presented, either Position 1 or Position 2 would have led to an opposite result.

The Source of the Confusion

We now have before us a sufficient number of venue decisions to attempt an analysis of the cause of such apparently erratic and unpredictable decisions. The difficulty is not one of "distinguishing between jurisdiction and venue." The courts do not often "confuse jurisdiction and venue." The statements of the distinction which have been referred to previously [25] are crystal clear. It is not that the courts fail to follow these or similar definitions; actually they apply them with logic which is usually entirely satisfactory.

It is submitted that much of the confusion results from the fact that when a court is faced with what we have called Problem A or Problem B, it usually fails to perceive that two separate and distinct questions of law are presented.

The first question is solely one of statutory interpretation; it is whether the legislature intended to attribute any jurisdictional significance at all to the venue statute, and if so, whether jurisdiction of the person or jurisdiction of the subject matter is intend-

[24] *E.g.,* Southern Ohio Rd. Co. v. Morey, *supra* note 14, Long v. Newhouse, *supra* note 15, and City of Fostoria v. Fox, *supra* note 15.

[25] *Supra* notes 1 and 2 and accompanying text.

ed. In terms of our formulation, the question is whether the court should, with respect to the venue statute, take the first, second, or third position. To repeat, this is simply a matter of statutory interpretation. The arrangement and phraseology of venue statutes vary considerably, and it is therefore to be expected that some venue statutes will be interpreted by the courts as requiring Position 1, while others will be interpreted as requiring Position 2 or Position 3. There is nothing inherently "right" or "wrong" about any one of the three positions. Unfortunately the language of the statutes is usually not sufficiently clear to indicate unmistakably the intent of the legislature. Therefore, the task of the courts is not easy.[26] However, that is all the more reason for facing squarely the problem of statutory interpretation. It does not help at all to ignore it.

Once a court has determined (or simply assumed) the answer to the first question of law, by taking Position 1, 2, or 3, the second question of law is usually easy. The second question is simply this: "Assuming Position 1 (or 2 or 3), what are the practical consequences in this particular fact situation?" For example, in the *Commercial Casualty* case, once the United States Supreme Court assumed that the problem of statutory interpretation should be answered by taking Position 1, it followed inevitably that the default judgment was valid. And when, in *Snyder v. Clough, supra,* in a similar fact situation the Court of Appeals for Stark County, Ohio, assumed that the problem of statutory interpretation should be answered by taking Position 2, it followed inevitably that the default judgment was invalid. Nevertheless, it is this relatively simple second question of law which occupies the attention of most courts almost to the exclusion of the first question, although the second quesiton is dependent upon the answer to the first. A court usually assumes that one of the three positions is correct, and then devotes its opinion to a discussion of why a certain result must logically follow. Once the court assumes one of the three positions, it is a case of "downhill the rest of the way". As a result of this unintentional avoidance of what is the only question of any real difficulty, an opinion in a venue case usually has little value to the bench and bar

[26] Usually the clues to legislative intent are faint. It may be significant that the statute uses the word "jurisdiction" rather than "venue" or "place of trial", or that it says the action "may" instead of "must" be brought in a certain county, or that the action "must be brought *only*" in a certain county. The arrangement of the statutes may be relevent: if the venue and jurisdiction statutes are segregated, this may evince a legislative intent that no jurisdictional significance should be attributed to improper venue, but if the venue and jurisdictional provisions are intermingled, it is more likely that the legislature intended that improper venue should deprive the court of jurisdiction of the person of the defendant or jurisdiction of the subject matter.

except when the identical fact pattern recurs. In future cases involving different fact patterns, the opinion may well prove to be a snare and a delusion, as the court will probably in a later case again ignore the first step of the analysis and may make a *different* assumption as to the proper position to be taken.

Thus, in *Western Loan and Savings Co. v. Butte and Consolidated Mining Co.*,[27] the United States Supreme Court devotes almost no discussion to the first step of the analysis, (*i.e.*, the question of statutory interpretation), stating simply:

> The circuit court for the district of Montana was without jurisdiction of the action, because neither of the parties to it was a resident of that district. . . But. . .the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits....We are of opinion that the defendant had waived objection to jurisdiction over its person....

Thus the court assumed without discussion that Congress intended that if neither party is a resident of the district of suit, the trial court necessarily does not have jurisdiction of the person of the defendant merely by service of summons. It thus attributed a particular kind of jurisdictional significance to improper venue (*i.e.*, it took Position 2), without evincing any awareness of the fact that it might have taken either of two other alternatives: it might have held that Congress did not intend to attribute any jurisdictional significance at all to improper venue (*i.e.*, it might have taken Position 1), or it might have held that Congress intended that if neither party is a resident of the district of suit, the trial court would therefore lack jurisdiction of the subject matter of the action (*ie.*, it might have taken Position 3).

When the United States Supreme Court was faced with Problem A in the *Commercial Casualty* case, it did recognize that the first question for it to decide was whether the venue statute detracts from the "general jurisdiction" of the district court, or whether, on the other hand, it merely "accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election." Thus the court did not skip the first question entirely, as is so often done. However, its treatment of the first question is not satisfactory, as it reaches its conclusion by merely summarizing the previous decisions. By thus contenting itself with a mere summarization, the court failed to explain the inconsistency between its opinion and such previous opinions as the *Western Loan* opinion.[28] The Court of Appeals for

[27] *Supra* note 10.

[28] In Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., *supra* note 12, the United States Supreme Court, in discussing the distinction between jurisdiction and venue, refers to "a period of confusing deviation," during which the distinction was not observed. No cases are cited.

Stark County, Ohio, in *Snyder v. Clough, supra,* showed even less concern with the first question. Without so much as purporting to "summarize" previous decisions, it assumed without any discussion whatever that if venue was improper, the court necessarily lacked jurisdiction of the person of the defendant.[29] As previously indicated, the court of appeals would have been able to justify its position on the basis of previous opinions of the Ohio Supreme Court, but again it is regrettable that it did not explicitly recognize in its opinion that it was making a choice between two possible alternatives. But probably the most striking Ohio case is *B. & O. Rd. Co. v. Hollenberger, supra.* In spite of the fact that many previous Ohio cases had assumed that wrong venue merely deprived the court of jurisdiction of the person of the defendant (Position 2), the court assumed, without any discussion and without any reference to the previous venue cases, that improper venue deprived the court of jurisdiction of the subject matter of the action (Position 3). Thus the supreme court has construed one venue statute (now Ohio General Code Section 11271) one way, and another venue statute (now Ohio General Code Section 11277) another way, without the slightest explanation for its inconsistency. No Ohio case has been found which discusses or even mentions the inconsistency between *B. & O. Rd. Co. v. Hollenberger* and the other Ohio venue decisions. The failure to recognize the existence of the two distinct questions of law is to blame for this situation.

Summary

Although it is frequently said that jurisdiction and venue are confused by courts and lawyers, it is submitted that the two concepts are so far apart that it is almost impossible to confuse them. The confusion, which certainly exists, results from a failure to recognize that every venue statute presents a problem of statutory interpretation, in that a court may be called upon to determine whether a statute providing for the place of trial (1) relates solely to venue, and has no effect on the jurisdiction of the court, or (2) deprives the court of jurisdiction of the person of the defendant, if venue is improper, or (3) deprives the court of jurisdiction of the subject matter of the action, if venue is improper. However, this problem of statutory interpretation is seldom recognized, or at least is seldom discussed. Instead, the answer to the problem of statutory interpretation is assumed, and the opinions are devoted to a discussion of (1) the effect of improper venue, when jurisdiction is unimpaired, or (2) the effect of lack of jurisdiction of the person, or (3) the effect of lack of jurisdiction of the subject matter. This failure to focus attention and discussion on

[29] See the quoted language in the text, *supra* following note 13.

the real problem — the problem of statutory interpretation — results in inconsistent opinions by the same court. The statutes are often not clear, but if the opinions of the courts called attention to the ambiguities in the statutes, it is not unreasonable to expect that the legislatures would attempt to clarify the statutes. While the law remains in its present state of confusion, lawyers should not rely on venue decisions unless they are on "all fours."