Venue Problems in Wisconsin

Shirley M. Sortor

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Shirley M. Sortor, Venue Problems in Wisconsin, 56 Marq. L. Rev. 87 (1972).
Available at: http://scholarship.law.marquette.edu/mulr/vol56/iss1/6

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrians@marquette.edu.
COMMENTS

VENUE PROBLEMS IN WISCONSIN

In 1856, only eight years after Wisconsin achieved statehood, the Legislature adopted the Field Code of Civil Procedure. The venue provisions of the Code have remained substantially unchanged since that time. The basic venues available to a plaintiff commencing an action remain the same as those in the original Code: (1) where the subject of action is situated; (2) where the cause of action arises; or (3) where the defendant resides (or is doing business). In this period of time, one would expect that any problems in the application of the venue statute would have been resolved long ago; nevertheless, such problems still arise.

A survey of the historical background of venue in England and the United States, followed by a review of some Wisconsin cases in which plaintiffs experienced difficulty in laying proper venue, may cast light on the present law in Wisconsin and on the reasons why this area of the law is not always clear.

I. ENGLISH BACKGROUND

The original meaning of “venue” in the English law was the neighborhood from which the jurors were required to be drawn because their personal knowledge of the facts and the parties formed the bases for decision, regardless of whether the case involved title to land, trespass, fraud, debt, detinue, or any other action at law. This use of a jury of 12 local men, or “recognitors”, had been thoroughly established by 1200 A.D., in the courts of assize which travelled on a circuit and were primarily concerned with questions of seisin. When the three branches of the law courts settled at Westminster about 1200 A.D., in order to avoid the inconvenience of travelling and transporting records and equipment, the convenience then considered was that of the courts, rather than that of parties or witnesses. However, the fact that the courts were established at Westminster did not necessarily mean that a case would be tried there. In fact, after the Statute of Westminster in 1285 authorized the courts of Nisi Prius to try cases of

---

1. See generally 92 C.J.S. Venue §§ 2, 3; and Blume, Place of Trial of Civil Cases, 48 Mich. L. Rev. 1 (1949) [hereinafter cited as Blume].
trespass "and other pleas pleaded in either of the benches," there were two possible places of trial. Under this procedure, actions were commenced, for instance, in King's Bench at Westminster and there pleaded to issue; then a writ would issue commanding the sheriff of the county where the land lay or the cause of action arose to summon jurors from that locality to Westminster to try the case on their own knowledge. Such was the procedure "unless before" then the circuit court of assize arrived in the locality, whereupon the case could be tried without the necessity of the jurors going to Westminster. After trial by the circuit court in the neighborhood, the verdict of the jury would be returned to Westminster where judgment would be rendered by the court in which the action had been commenced. This was an obviously superior method, serving the convenience of the jurors, the parties, and the courts.

The necessity of using jurors from the neighborhood in which the claim arose gradually decreased over the years, as proof by witnesses superseded proof by jurors. As late as 1470, however, the plaintiff had to "lay" his action in the county where the claim arose, even if the action were one that would now be called transitory. If an allegation of breach of contract was made, for example, and the defendant denied the breach, the jurors had to be drawn from the locality where the breach allegedly occurred; if new matter in the nature of confession and avoidance were raised by the defendant, the jurors had to be drawn from the locality of the new matter raised. Yet, by 1705, the requirement of local jurors was dropped in most personal actions at law, and even earlier, in 1664-1665, statutes provided that no judgment was void for improper venue if timely objection were not made.

Despite the changing role of the jury, the requirement that venue in the real actions and in certain personal actions be laid in the place where the land was situated or the cause of action arose

---

2. Blume at 7.
3. The name of these circuit courts, "Nisi Prius", was derived from the language of the writ, which may be translated "unless before".
4. Actions were divided into two categories. "Local" actions were those so closely connected with the place in which they arose that it was held that they could only have arisen there. Included in this group were real actions, ejectment, trespass to land, and replevin. The "transitory" actions were those not identified with any particular locus, that is, those which could arise anywhere, such as actions on contracts, debts, and most torts. See 92 C.J.S. Venue §§ 3, 4, 7-9, 26 and 27.
5. Blume at 18.
continued because the practice worked well. In the real actions, the court had jurisdiction over the land; summons could be served by the sheriff of that county on the land; and judgment could be executed there. Equally, in ejectment or replevin actions, all the necessary steps could be taken within the county where the property, real or personal, was located. In all these cases, witnesses were also likely to be found nearby.

In personal actions at law, the object of service of process was to force the defendant to appear so that he would be subject to the jurisdiction of the court, since default judgments were not permissible prior to 1725. The summons was issued and property belonging to the defendant was attached simultaneously. If the defendant did not appear, successive attachments of the defendant’s property within the county followed, until he was forced to appear. If attachments did not achieve this goal, writs of capias could issue to the sheriffs of any county in which the defendant was thought to be, followed by outlawry as a last resort, so that the defendant would be likely to appear and defend the action, rather than to forfeit all his possessions within the realm.

As the distinction between local and transitory actions developed, the personal actions of debt, account, case and covenant were no longer tied to the locality where the cause of action arose. Instead, these actions could follow the person of the defendant. This meant that venue could be laid where the defendant was found or where he had chattels out of which a judgment could be satisfied. For such purposes, the so-called “venue of the margin” was used. This legal fiction allowed the plaintiff to claim that the cause of action arose in a county where a judgment could be satisfied and the courts held that this fiction could not be denied in actions which could have arisen in any county. The fictional margin-venue could still be denied in actions tied to a locality, such as ejectment, trespass quare clausum fregit, replevin, and, in general, actions substantially in rem against real estate. However, when writs of capias and outlawry became available against an absent defen-

---

6. Originally, outlawry was limited to those fleeing from criminal charges; the outlaw was considered beyond the King’s peace and protection, forfeited all his property, and could be slain by anyone who came upon him. 3 HOLDsworth’s HISTORY OF ENGLISH LAW at 605. Courts later adopted this practice, in milder form, to deal with absconding defendants. The defendant was summoned by proclamation to five successive county courts; if he failed to appear, all his goods and chattels were declared forfeited. Sec 24 C.J.S. Criminal Law § 1620, n. 30 at 932.
The plaintiff was once again required to lay venue where the cause of action arose, apparently on the basis of fairness to the defendant. In actions involving real property, the land was already under the court's jurisdiction, so the service of summons as a means of giving notice to the defendant was a mere formality. Valid service was effected if the summons was left on the land, even if there was little or no likelihood of the defendant being there or being informed of the summons.

Thus, it appears that, in actions at law, determination of the proper venue was affected by a number of factors, including convenience, reach of process, the nature of the action (local or transitory), and the type of jurisdiction needed (in personam or in rem) in order for a judgment to be enforceable.

Courts of equity developed a number of different rules, due primarily to the different basis of authority and mode of operation peculiar to such Chancery courts. Chancery was originally a sort of public board or office which issued writs; subsequently, about 1238, it developed into a separate court, and soon thereafter was settled at Westminster. Its essentially religious nature was apparent: its judicial officers were clergy; its decrees were to act on the conscience of the person; decisions were based on information given by witnesses on oath; and equity would not aid a plaintiff unless the Chancellor decided that, ex aequo et bono, the plaintiff was free of guilt and deserved the court's assistance against the defendant-wrongdoer. Since no jury was employed, there was no need to lay venue in any particular place for purposes of juror selection. Chancery sat only at Westminster; yet, since its process, the subpoena, ran throughout the realm, difficulty was rarely experienced in acquiring personal jurisdiction over a defendant regardless of where he might be found. Before 1732, if a defendant was abroad or in hiding and therefore could not be served with subpoena, no decree could issue. At this time, however, a form of service by publication was developed, requiring posted notices in the parish church of the defendant's usual abode and a showing that he had been in England within the past two years. Then the bill would be taken as confessed and a personal judgment against the absent defendant would be given, which the plaintiff was al-

---

7. Capias and outlawry were first used in about 1250 in an action for trespass; they became available in the other forms of action over a period of nearly 300 years. The process was complete by about 1531. Blume at 12.
Allowed to satisfy from any real or personal property of the defendant within the country.

Backed by the authority of the Church and the acquisition of personal jurisdiction over the defendant, the usual mode of operation of courts of equity was through a decree which operated in personam, compelling the party to act or to refrain from acting. In cases requiring delivery of possession of land, the court would issue a writ to the sheriff of the county in which the land was located, directing him to assist the plaintiff in taking possession. It is therefore apparent that venue, in the modern sense of the word, was not a consideration in suits in equity.

In summary, the following were bases for laying venue: (1) where the cause of action arose, originally because of the need for personal knowledge of the facts by the jurors, and retained because of the likelihood that parties, witnesses, and any property involved would be located there; (2) where the land was situated, in actions involving real property, in order for a judgment in rem to be enforceable; or (3) where the defendant resided or could be found, either in order to subject him to the court's jurisdiction through service of process or to increase the probability of his having property within that jurisdiction out of which a judgment might be satisfied. The defendant could obtain a change of venue in “transitory actions”, such as covenant or debt, as a matter of course only if he could show that the cause of action arose wholly in a county other than that in which venue had been laid. In 1803, Lord Ellenborough stated that, in balancing inconveniences (primarily to witnesses), the court should interfere with the plaintiff's choice only if “all the convenience and justice of the case preponderates in favour of the application”. In local actions, of course, there was no possibility of change of venue once it had been properly laid. If a “local action” was brought in the wrong county, timely objection could cause its removal to the proper county; without objection, an enforceable personal judgment might still be obtained since the defendant's appearance gave the court personal jurisdiction, even though subject-matter jurisdiction over any real property may have been lacking.

II. AMERICAN BACKGROUND

In establishing the federal judicial system in the United States

after the American Revolution, the English system which was familiar to the colonists was retained in large part. However, certain changes were made, due to the fears and prejudices experienced in the colonies as a result of that system. The separation of law and equity was maintained, and the courts of equity were to follow the rules and procedures of those in England. The Federal Judiciary Act of 1789 divided the nation into thirteen districts, each composed of circuits. Courts were established in each circuit which were to sit at specified times and places. The office of United States Marshall for each district was created, with duties similar to those of the Sheriff in each county in England. Process ran only within the district in civil actions. Therefore, only if a defendant was a resident of that district or could be found within the district at the time of service could he be served with process issued within such district. Insofar as procedure was concerned, the law courts in a district were to be governed by the practices obtaining in the state courts of that district. Although the federal courts were given the power to change procedures so that they did not conform with state practice, this authority was rarely exercised. Civil actions at law were totally confined to the district in which the action was brought; service of process, pleadings, trial to judgment and execution of that judgment had to be within the district, and all parties, witnesses, and jurors had to be summoned therein.

One major change, in both the new federal and state systems, was to emphasize the protection of the defendant's interests in laying venue. The colonists were acutely aware of the unfairness which could result to a defendant if venue were laid in a distant place; the size of the country and the difficulties and dangers attending travel were all too apparent. Accordingly, the primary basis for venue was the residence of the defendant; other possible venues were, generally speaking, exceptions to this rule. The same considerations of fairness and convenience to defendants were also fundamental reasons for the establishment of the circuit courts within the districts. Indeed, the people of what is now Kentucky threatened to leave the Union unless provided with a court in their area. The distinction between local and transitory actions was

12. Warren at 72.
13. Blume at 36.
14. See note 4 supra.
maintained, however, and thus modified the primary venue (the defendant’s residence) for those actions traditionally held to be local—replevin, trespass to land, and those actions involving title or possession of real property.

The judicial systems of the individual states varied widely. Most included separate courts of law and equity, although Pennsylvania, greatly influenced by the people’s hatred for the courts of equity which had been instruments of the King and administered by royal appointees during colonial times, established no equity system at all and instead allowed its law courts more latitude in hearing and granting relief in cases which would have been considered of equitable cognizance. The northern states, in particular, emphasized the importance of juries, due to their basic distrust of judges which carried over from pre-Revolutionary days.

Some modifications of the original provisions regarding the Federal Court system have been made over the years, in attempts to improve its efficacy and efficiency as certain problems became apparent. For instance, the strict confinement of civil actions at law to the territorial limits of a district has been somewhat relaxed in that service of process may now be made in any district within a state having more than one district. A statute enacted in 1875 allowed extra-district service of process in order to give notice to non-resident property-owners of actions in rem or quasi in rem within the district which might result in a judgment to be satisfied by execution on that property. Other statutes have made exceptions to the territorial limitations on service of process in certain types of actions, such as stockholders’ derivative suits and bills of interpleader. Nevertheless, the situation in the well-known case of Livingston v. Jefferson would still hold true today, that is, a personal judgment could not be recovered against a non-resident defendant in a local action unless the defendant “could be served” within the district or state where the land involved is located. Local actions, thus, may still be laid only where the property is located.

15. FED. R. CIV. P. 4(f) (1938). Previously, minor exceptions had been made, allowing extra-district writs of execution in cases where the United States sought to satisfy a judgment it had obtained (Act of March 3, 1797, ch. 20, § 6, 1 Stat. 515); in 1826, this was extended so that any plaintiff could get execution in another district, but only if both districts were within a single state (Act of May 20, 1826, ch. 124, 4 Stat. 184).


18. 15 F. Cas. 660 (No. 8,411) (C.C.D. Va. 1811).

19. See note 4 supra.
In federal practice, venue in transitory actions is affected by the reach of process and by the basis for federal jurisdiction. Thus, in diversity cases, venue is proper only in a district in which all defendants or all plaintiffs reside or in which the claim arose; whereas, in non-diversity cases, the possible venues available are the district in which all defendants reside or in which the claim arose.

The American Law Institute has proposed that revisions be made to these venue statutes, in order to remedy certain defects. The changes with regard to venue in diversity cases are aimed primarily at inhibiting “forum-shopping”; by forbidding a plaintiff to bring a diversity action in a federal court located in his home state. He is thus encouraged to resort to the state court system of his domicile, rather than to seek a federal forum. The Reporters have indicated that this provision is to be made a matter of jurisdiction rather than of venue, in order that a defect may not be waivable. In accord with this line of reasoning, the “residence” of a corporate defendant is limited to (1) the district in which it has its principal place of business, or (2) the districts within any state in which it is incorporated, if its principal office is located in a different state. This change is needed, in view of the denial of access to federal courts in the plaintiff's home state, in order to prevent the further forum-shopping which might result from retention of the “doing-business” standard as a test of a corporation's residence.

On the other hand, the possibility of laying venue “where the claim arose” is broadened under the proposed section 1303 to include districts wherein “... a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property which is the subject of the action is situated; ...”

Similar changes have been proposed for the statute governing federal question venue, in that the “residence” of corporate defendants is modified in the same manner, and the phrase “where the claim arose” is expanded to include any “substantial part”. The residence of a defendant is still considered proper venue, but if

21. It is estimated that 45.3% of all original diversity actions would be excluded from the federal courts by the new provision, proposed § 1302(a). American Law Institute Study of the Division of Jurisdiction Between State and Federal Courts, Proposed Final Draft No. 1, 1965, Commentary to § 1302, 69, n. 12 (hereinafter cited as A.L.I. STUDY).
22. Id. at 69.
23. Id.
24. A.L.I. STUDY, proposed § 1303(a)(1) at 14 (emphasis added).
there are multiple defendants, all must reside in the same state (rather than the same district, as is presently the case). The most striking change is the addition in the most recent tentative draft of subsection (c); this subsection provides that service of process upon any defendant in civil actions may be made in any district, when a federal question is involved. The Reporters stated the reason for these alterations:

Existing rules as to venue and service of process in federal question cases often prevent a suit from being heard in the most convenient forum, and on occasion may bar access to a federal court altogether. Changes are proposed to meet these difficulties.\(^6\)

Although these changes in the federal venue statutes are mere proposals not yet enacted into law, they indicate awareness of the need to reduce forum-shopping, while simultaneously maintaining access to the federal courts in those cases properly entitled to such access.

The adoption of the Federal Rules of Civil Procedure in 1938 and their subsequent modifications have been aimed at simplifying procedure and eliminating inequities which could result from the old rules. Law and equity were merged in Federal practice at last;\(^27\) specific provision was made for the transfer of cases laid in improper venues;\(^28\) and the doctrine of forum non conveniens\(^29\) was expressly recognized.

The development of interstate commerce, the emerging importance of corporations in the lives of state citizens, improvements in methods of transportation, and the dominance of automobiles made adaptations in the state court systems necessary also. As the isolated and rural character of the nation changed, the states found that the interests of their citizens were more frequently affected by individuals and corporations outside the jurisdiction of the individual states. In order to give the citizens of a particular state the protection of its courts, "long arm" statutes were enacted; these laws are designed to subject non-residents and foreign corporations to the jurisdiction of the courts within the state enacting such a statute. Special licensing and regulating statutes for foreign corporations, such as insurance companies and railroads, were passed;

\(^{26}\) Id. at 2, n. 25.
\(^{29}\) 28 U.S.C. § 1404(a) (1948).
and the concepts of "presence", "consent", and "doing business" developed as authority for subjecting non-resident individuals and foreign corporations to the jurisdiction of state courts. Frequently, special venue provisions were enacted to be applied in such cases, which often further complicated the original venue provisions.

This, then, is the composition of venue provisions today—a mixture of the traditional English venue rules, the American adaptations with their emphasis on the protection of defendants, and the special provisions and exceptions made necessary by time and circumstances. As defined in a recent law review article, "(T)he major purpose of venue is to provide a fair and convenient geographical location for trial within the borders of a jurisdiction, usually a State, in which jurisdiction over the defendant or his property has been acquired. While convenience to defendant rather than plaintiff is usually emphasized, and while the location of witnesses—the place where the cause of action arises—may also be an important factor, there are few limitations on the locations which a legislature may establish as proper venues."  

III. VENUE IN WISCONSIN

Interest in legal reform reached a peak during the middle of the nineteenth century. In England, this was reflected in the Hilary rules of 1834; the rigidity of these rules was subsequently modified by the Judicature Act of 1870 and the Law Reform Act of 1873. In the United States, the major work of reform was undertaken by David Dudley Field, an attorney in New York. Field had long been interested in codifying the law on a national level, but was unable to arouse sufficient support. When New York began to take an interest in such a project, Field was a willing worker. New York was in need of reform because its first Constitution, adopted in 1777, declared the law of the State to consist of the common law of England as it was in force in New York in 1775, together with the acts of the Colonial legislature and the new state of New York


31. Proper venue may be affected also by the character of the action, problems of party-joinder and claim-joinder, the reach of process, and jurisdiction of persons and subject-matter.

then in force. Subsequent modifications and adaptations had only complicated the system's inherent defects. Field's work produced the five Field Codes, the best known of which was the Code of Civil Procedure.

Similar experiences in other states made many of them receptive to New York's lead in adopting the Code of Civil Procedure in 1848; ultimately thirty jurisdictions adopted this Code, with Wisconsin among the first to do so. A comparison of sections 616, 617 and 618 of the Field Code with section 261.01 of the Wisconsin Statutes shows a substantial identity of provisions, with the exception of later additions, such as those governing venue in motor vehicle accident cases.

That the fundamental venue in Wisconsin is the residence of the

---

33. N.Y. CONST. art. XXXV (1777).
34. ALISON REPPY, The Field Codification Concept, in DAVID DUDLEY FIELD CENTENARY ESSAYS 18, 24-25 (1949).
35. The Interpretative Commentary in the Wis. STAT. ANNOT. § 261.01 (1969) states: This section came initially from sections 616, 617, and 618 of the Field Code, although R.S. 1858, c. 123 §§ 1-5 covered more situations than those mentioned in §§ 616, 617 and 618, viz. actions against a county and against corporations. R.S. 1878, § 2619 shows the addition of specific subsections for marriage actions and railroad actions.
36. Wis. STAT. § 261.01 (1969) reads in part as follows:

PLACE OF TRIAL. Except as provided in section 220.12 and subject to the provisions for change of venue the proper place of trial of civil action is as follows:

(1) WHERE SUBJECT OF ACTION SITUATED. Of an action within one of the four classes next following, the county in which the subject of the action or some part thereof is situated, viz.: (a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such estate or interest, or for an injury to real property. (b) For the partition of property. (c) For the foreclosure, redemption or other satisfaction of a mortgage of real property. (d) For the recovery of distrained personal property ....
(2) WHERE CAUSE OF ACTION ARISES ....
(4) ACTION AGAINST RAILROADS ....
(5) AGAINST INSURANCE COMPANIES ....
(6) AGAINST OTHER CORPORATIONS. Of an action against any other corporation the county in which it has its principal office or in which the cause of action or some part thereof arose.
(8) ACTIONS BY STATE ....
(9) ACTIONS AGAINST THE STATE ....
(10) ACTIONS ON OFFICIAL BONDS ....
(11) AUTO ACCIDENT ACTIONS. Of an action growing out of the negligent operation of a motor vehicle, the county in which the cause of action arose or where the defendant resides.
(11b) ASSAULT AND BATTERY ACTIONS ....
(12) OTHER ACTIONS. Of any other action, the county in which any defendant resides at the commencement of the action; or if no defendant resides in this state, any county which the plaintiff designates in his complaint.
defendant, or the principal office within the state in the case of a 
corporate defendant, is apparent from section 261.01(12). All 
other provisions are exceptions, in whole or in part, to this general 
rule. Hence, the defendant's residence or principal office is either 
the only proper place of trial, or a possible alternate venue in seven 
of the eleven subsections. In addition, subsection (4) which applies 
to actions against railroads allows the action to be brought where 
the cause of action arose or the plaintiff resides, but only if the 
railroad line extends into such county; otherwise, the action must 
bring a in county into which the track does extend. Thus the 
place of defendant's residence or principal office is proper venue, 
with the limited specific exceptions of the various subsections for: 
"local actions"; actions against public officers or to recover statutory penalties or forfeitures; actions by the State; and actions on official bonds. Of these exceptions, the subsection providing for 
venue only in the county where the "subject of the action" is situ-
ated has proved to be the most difficult to interpret. It is not always easy to determine which actions are "local" and therefore 
must be laid "where the subject of the action" is situated. The 
correct resolution of this problem is all the more important since 
a judgment in a local action obtained in the wrong county is void for lack of jurisdiction of the subject-matter.

Venue provisions based on "where the cause of action or some part thereof arose" have led to litigation due to the difficulty in defining "cause of action" and "part thereof"; this occurs most frequently when a defendant attempts to change venue to his resi-
dence or place of business, after the plaintiff has commenced the action in another county on the grounds that the cause of action or some part of it arose there. The general rule is well-settled that, when alternative places of trial are available, the plaintiff's choice will not be disturbed unless the defendant is able to show that the county selected is improper. Only in the occasional case where the

37. Id.
38. For a detailed analysis of all the statutes governing venue in Wisconsin, see Comment, Venue in Civil Actions in Wisconsin, 1960 Wis. L. Rev. 663.
40. See State ex rel. Hammer v. Williams, 209 Wis. 541, 245 N.W. 663 (1932), which held that a court without jurisdiction of the subject-matter is without the power to give a judgment.
41. The phrase appears in six of the eleven subsections of Wis. Stat. § 261.01.
42. Woodward v. Hanchett, 52 Wis. 482, 9 N.W. 468 (1881); Dells Paper & Pulp Co. v. Willow River Lumber Co., 170 Wis. 19, 173 N.W. 317 (1919); State ex rel. Flambeau River Lumber Co. v. Reid, 206 Wis. 478, 240 N.W. 149 (1933).
court, in its discretion, consents to apply section 261.04(2) and order a change of venue to promote the convenience of witnesses and the ends of justice will a proper place of trial chosen by the plaintiff be changed.\footnote{43}

IV. "LOCAL ACTIONS" IN WISCONSIN

Early in Wisconsin's history, just before adoption of the Code, proper venue for actions involving real estate was called into question in \textit{Burrall v. Eames}.\footnote{46} The plaintiff brought a bill for specific performance of a contract for the sale of land in Rock County. The defendant was served in Brown County where he resided. Relying on a statutory provision that "no person shall be sued . . . in any other county than the one in which he resides, or in which he may be found", the defendant asserted that the Rock County court had not acquired personal jurisdiction over him, a plea which the lower court sustained.

On appeal, the Wisconsin Supreme Court stated that process in equity ran throughout the realm in England, and that in New York a bill was filed with the chancellor or the clerk of a circuit without reference to the defendant's residence.\footnote{46} The court proceeded to hold that the statute relied on was applicable only to personal actions at law, and was not pertinent to equitable actions. It therefore reversed the order of the trial court, and ruled that valid personal jurisdiction had been acquired, in accordance with the common usage of the courts of chancery. In discussing the nature of a suit for specific performance of a contract to convey land, the court said:

\begin{quote}
\textit{(A)} suit for specific performance, like that of foreclosure, is of a two-fold character, partly \textit{in personam} and partly \textit{in rem}. The Court may enforce the contract, either by operating upon the person to compel a conveyance, or may pass the title of the land by decree. . . . \textit{(A)}s the \textit{sole object of the suit} to subject the specific property to the jurisdiction of the court, the county in which it is situated is \textit{the} proper county in which to commence the suit, although the defendant may reside in another county in the state.\footnote{47}
\end{quote}

\footnote{43. This is the Wisconsin statutory recognition of the doctrine of \textit{forum non conveniens}.  
44. See the review of cases in \textit{State ex rel. Meyer v. Park}, 174 Wis. 452, 183 N.W. 165 (1921).  
45. \textit{Burrall v. Eames}, 5 Wis. 260 (1856).  
46. \textit{Id.} at 262.  
47. \textit{Id.} at 263 (emphasis added).}
The court thus ruled that the "sole object of the suit" (jurisdiction over the subject-matter) required laying venue in the county where the land was located. Despite the equitable nature of the remedy sought and the acquisition of personal jurisdiction over the defendant—the type of jurisdiction equity traditionally requires—the action was held to be local.\(^4\)

Shortly after *Burrall v. Eames*, the Code provisions were enacted, in words nearly identical to those of the present statute, section 261.01(1), making venue mandatory in the county where the subject of the action is located.

In 1875, a related problem arose in *Hackett v. Carter*,\(^4\) when the plaintiff sought cancellation of a deed to property in Jackson County, and an order compelling the defendant to reconvey the land. In the same action, an order was also sought to compel the defendant to reconvey other land in Eau Claire County, on the ground of alleged fraudulent misrepresentations by the defendant. The defendant's demurrer based upon improper joinder of causes of action was sustained, because the location of the two parcels of land would require different places of trial. The court said:

> (T)hat these causes of action are local and properly triable in the county where the different tracts are situated, does not admit of doubt . . . it is clear the circuit court of Eau Claire County has no right to try the first cause of action . . . .\(^5\)

The issue involved in the court's holding was, of course, whether the causes of action could be properly joined; however, it is apparent that again the *situs* of the different tracts was of paramount importance in rejecting such joinder even though equity could traditionally compel a defendant, over whom personal jurisdiction had been acquired, to affect the title of land not within the jurisdiction of the court.\(^6\) This holding is therefore contrary to the general

---

48. See also 92 C.J.S., *Venue* § 26 at 724, which states:
   "... [I]f title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action will be held local.

Note may be taken of Wisconsin Revised Statutes of 1849, ch. 59, § 30, which defined "conveyance" as
   every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and *executory contracts for the sale or purchase of lands.* (emphasis added).

49. 38 Wis. 394 (1875).

50. Id. at 398 f.

51. 49 AM. JUR. *Specific Performance* § 140 (1943).
rule that actions seeking cancellation or rescission of contracts to convey land are transitory and in personam.\footnote{52}

In \textit{McArthur v. Moffet,}\footnote{53} a question of misjoinder of two causes of action elicited further comments by the court in an effort to clarify the phrase “subject of action” which has appeared in the Wisconsin Statutes since the adoption of the Code.\footnote{54} The defendant demurred to the joinder of a legal cause of action for damages for trespass and cutting timber with an equitable “quiet-title” action. Though both actions fall within the provisions of section 261.01(1)(a) and are therefore “local” in nature, it was necessary to determine whether they arose out of “transactions connected with the same subject of action.”\footnote{55} In an extensive and detailed opinion, the meaning of “subject of action” as it applies to the foundation for proper venue was discussed. The court concluded that

\ldots in possessory and proprietary actions (that is, actions involving rights of possession and ownership), whether involving real or personal property, the subject of action is composed of the plaintiff’s primary right together with the specific property itself.\footnote{56}

This statement allows room for speculation as to whether local actions which must be brought “where the subject of action \textit{or some part thereof} is situated,”\footnote{57} could be brought in a county other than that in which the land is located if the plaintiff resides in that other county, since his personal rights or claims could be said to follow him—a concept which would seem to eliminate all local actions except those in which an \textit{in rem} judgment is sought.

More recently, an action seeking specific performance of an option contract to convey real estate was brought by the State in the county of the defendants’ residence, rather than in the county in which the real estate was located.\footnote{58} It was held that such an action was a contract action, rather than a “local action” governed by section 261.01(1) in which the subject-matter was land. The statutory provision was construed to include only actions for the

\begin{footnotes}
\item[52] See Annot., 77 A.L.R. 2d 1014 (1959).
\item[53] 143 Wis. 564, 128 N.W. 445 (1910).
\item[55] Wis. Stat. § 2647 §§ 1 (1898).
\item[56] 143 Wis. at 588, 128 N.W. at 454.
\item[57] Wis. Stat. § 261.01(1) (1969) (emphasis added).
\item[58] State v. Conway, 26 Wis. 2d 410, 132 N.W.2d 539 (1965).
\end{footnotes}
“recovery of real property”, not those in which the plaintiff sought to acquire title. Thus, “recovery” is the key word. The court stated that the action was to enforce the contract rather than to try title, and that no previous decisions in this state require that an action to enforce an underlying contract must be commenced under section 261.01(1). In addition, the fact that the judgment would operate in personam, rather than directly upon the land, was given as a reason for holding that the action was properly brought within the county of the defendants’ residence, pursuant to section 261.01(12).

It is difficult to reconcile this ruling with that in Burrall v. Eames,69 and other previous actions.60 The point on which the court apparently relied most heavily was its interpretation that an essential element of local actions under section 261.01(1)(a) is the existence of some prior title or interest which is sought to be recovered. In “quiet-title” actions, such as McArthur v. Moffet,61 the plaintiff alleges the existence of his title or interest and seeks to exclude the defendant’s assertion of title. In ejectment actions, a present possessory interest or title is a necessary allegation in the Complaint; therefore, this is also an action in which the plaintiff asserts the existence of his title and seeks to recover the possession of real property to which he has a claim. Even cases such as Hackett v. Carter62 are local because founded upon recovery of title previously held by the plaintiff but allegedly passed because of fraudulent misrepresentations. The court’s ruling in Conway may be explained on the basis that an option contract to sell land does not create any present interest in land so as to require venue within the county where the land is located. This is quite different from a valid executory contract to convey land, as in Burrell v. Eames, which did create a present interest in property. Hence, an action founded upon the latter can be brought only as a “local action” to protect that previously existing interest. Since Burrall v. Eames was decided before the enactment of the Code provision construed here, and therefore was not based precisely upon this wording, it is possible that the court felt it was unnecessary to consider that decision, even though it has never been expressly overruled.

59. 5 Wis. 260 (1856).
60. Hacket v. Carter, 38 Wis. 394 (1875); McArthur v. Moffett, 143 Wis. 564, 128 N.W. 445 (1910).
61. 143 Wis. 564, 128 N.W. 445 (1910).
62. 38 Wis. 394 (1875).
In a vigorous dissent from the part of the majority opinion in *Conway* which held the action transitory,\(^6\) Justice Beilfuss based his arguments primarily on the relief sought by the plaintiff, which he noted was very like that sought in an ejectment action,—that is, possession of the land; this would necessarily require a change in title as its real purpose.

The Wisconsin provision governing local actions was taken directly from the New York Code, as amended in 1852, and New York has recently construed the section to include similar cases. It should be noted, however, that the New York provision was amended after 1852,\(^6\) and that it now reads:

> The place of trial of an action in which the judgment demand would affect the title to, or the possession, use or enjoyment of real property shall be in the county in which any part of the subject of the action is situated.\(^6\)

It may also be noted that an Annotation\(^6\) declares:

> Since an action to compel specific performance of a contract pertaining to real property is generally classified as *in personam* and transitory, except to the extent that it is sought to recover a judgment or decree operating directly on the property, the venue thereof, in the absence of any constitutional or statutory provision to the contrary, is generally held to be in the county in which the defendant resides.

Apparently, the rule of *Livingston v. Jefferson*\(^6\) continues, requiring that actions to recover personal judgments for damages to real property be brought in the county where the property is located. Yet personal judgments for damages of any other nature—in tort or contract, for example—clearly are transitory.

In 1967, a similar problem to that in *Conway* arose in *Fond du Lac Plaza, Inc. v. H.C. Prange Co.*,\(^6\) although the fact situation varied slightly from that in *Conway*. Plaza was the holder, as assignee, of an option to lease certain land in Fond du Lac County from the defendant-owners, Reid. Before the expiration of the option, the Reids conveyed part of the tract to the defendant, Prange.

---

\(^{63}\) 26 Wis. 2d at 417-21, 132 N.W. 2d at 543-45.

\(^{64}\) Wisconsin's statute was modelled on the New York provision as it existed in 1852.

\(^{65}\) N.Y. CIVIL PRACTICE LAW § 507 (McKinney 1963).

\(^{66}\) Annot., 63 A.L.R.2d 456, 479 (1956).

\(^{67}\) See note 18 *supra* and accompanying text.

\(^{68}\) 47 Wis. 2d 593, 178 N.W.2d 67 (1967).
Plaza then brought suit in Rock County, the county of the Reids' residence.

The plaintiff sought four specific forms of relief, three of which were equitable in nature: (1) that the conveyances be set aside and declared null and void, though subsequently this request was withdrawn informally by a letter to the trial court; (2) that Prange and its assignee, Budget, be restrained from exercising any form of control over the land; (3) that specific performance of the option contract by the Reids be ordered, and that plaintiff's rights be declared superior to any purported rights of Prange and Budget; and (4) money damages for losses due to defendants' refusal to permit the exercise of the option at the agreed time.

Prange's demurrer, on the grounds that Fond du Lac County was the only proper county for what it believed to be a local action, was overruled. On appeal, Prange argued that the action was local, under section 261.01(1)(a), and that a valid judgment could therefore be given only by the Circuit Court of Fond du Lac County. Prange also stated its concern that a trial and judgment in Rock County could subsequently be attacked as void for lack of subject-matter jurisdiction. Such an attack might necessitate a second trial in Fond du Lac County, causing further expense and inconvenience to the defendants. It further refused to recognize the plaintiff's informal withdrawal of paragraph 1 of the Complaint, stating that paragraphs 1 and 3 were in essence "quiet-title" actions, and that the relief sought in paragraph 2 was similar to an action in ejectment—both types of relief being traditionally local actions for the recovery of an interest in land. It was noted that the plaintiff had filed a *lis pendens* in Fond du Lac County as required by section 281.03 of the Statutes when a plaintiff "seeks relief in respect to the title (of land)". Prange sought to distinguish this case from *Conway* by emphasizing that here there were third parties involved (Prange and Budget) who were not privy to the option contract between the plaintiff and the Reids. These third parties would have no contract defenses available to them, such as the defendants in *Conway* had.

The plaintiff insisted that *Conway* did apply, and argued that, after its withdrawal of paragraph 1 of the Complaint, the only relief sought was contract relief. Its arguments were based on the idea that, as in *Conway*, the action was not for recovery of an existing interest in land, but to acquire one, and that the judgment would operate only *in personam* against the Reids. As against Prange, the plaintiff contended that only ancillary relief was sought, in order
to make specific performance by the Reids possible by setting aside the conveyance to Prange. The plaintiff argued that Prange bought with knowledge of the existing option, and that therefore a constructive trust should be imposed in favor of Plaza. Furthermore, Plaza relied upon *State ex rel. Klabacka v. Charles* for the proposition that protecting defendants from the hardship and inconvenience of defending in a distant county is the real interest with which the legislature was concerned when it enacted section 261.03 to allow change of venue to a proper county. Since the Reids’ residence was in the county where the action was brought by the plaintiff, it could not be an inconvenient county for them, and venue should not be changed.

The Supreme Court sustained the trial court’s decision, and ruled that section 261.01(1)(a) was intended to apply only when an *in rem* judgment is sought, stating:

... a suit although involving or concerned with real property indirectly is not subject to the section when the main object and nature of the suit is not to directly affect title to land by force of the decree of the court.\(^\text{70}\)

The court recognized that occasionally a suit for specific performance may be *in rem* when the defendant is outside the territorial jurisdiction of the court, or when both the property and the defendant are subject to its jurisdiction, as in *Burrall v. Eames,*\(^\text{71}\) but the relief sought is to affect the land directly. According to the court’s opinion in *Plaza,* the *Burrall* suit could have been commenced in either county, but since the relief sought was *in rem,* the venue was fixed by the location of the land and the defendant could not obtain a change to the county of his residence.

Once the premise is accepted that “local actions” do not include options to purchase land which may be “recovered”, the court’s rulings follow recognized authorities. It is settled law that a constructive trust may be imposed on co-defendants who are not privy to a contract if they purchased with notice of the existence of that contract;\(^\text{72}\) also that the form of decree, when a vendor has conveyed to a third party and the vendee seeks specific performance, should direct the third party to convey the property to the vendee, rather than order cancellation of the deed and specific

---

69. 36 Wis. 2d 122, 152 N.W.2d 857 (1967).
70. 47 Wis. 2d at 596, 178 N.W.2d at 69.
71. Burrall v. Eames, 5 Wis. 260 (1856).
72. 49 AM. JUR. § 148, at 171 f.
performance by the vendor. A recent case involving a similar fact situation in another jurisdiction held that when the relief sought was specific performance of the option contract by one defendant and cancellation of the deed conveying the land to the second defendant, venue was proper in the county of the second defendant's residence. Other jurisdictions have tended to limit local actions in recent years, although the change most often made has been to release trespass to land from the local classification, probably because the remedy sought is a personal judgment against the defendant for money damages.

Apparently, then, in Wisconsin an action involving real property must be for the recovery of an existing interest in land in order to come within the local action category. If a contract is involved, the wording of the prayer for relief will determine whether the action is transitory or local, even though both personal jurisdiction of the defendant and jurisdiction of the subject-matter can be readily obtained in the county where the land is situated. In Plaza, it is also interesting to reflect on the fact that all defendants wanted the venue changed to the county where the land was located, and the plaintiff could have obtained a judgment there which would unquestionably have been res judicata. It would appear that the protection of the defendants' interests had to yield before the plaintiff's choice of remedy, once the cause of action was established by the court as transitory. Yet, historically, it was in transitory actions that the defendant's interest was most protected. There appears, thus, to be a paradoxical situation when a defendant, in the protection of his interests, asserts that a suit must be "local", and a plaintiff, in an effort to buy land on which it had taken an option, states that the action is not local, but transitory.

V. "CAUSE OF ACTION OR SOME PART THEREOF" IN LAYING VENUE IN WISCONSIN

It has already been noted that the basic venue is the defendant's residence, unless altered or varied by specific statutory provisions.

73. 49 Am. Jur. § 176.
75. It may be noted, however, that there is a general rule that an action based on privity of estate is local, and one based on privity of contract is transitory. 92 C.J.S., Venue § 8, at 679.
"Where the cause of action arose" is one such specific statutory modification. This phrase occurs in four of the eleven subsections of the venue statute, and the phrase "cause of action or some part thereof" appears in two others. As a result, a clear understanding of the phrases is of importance in determining proper venue, but such a definition has proved elusive. The problem is made more difficult by the fact that venue provisions are purely statutory and must therefore be strictly followed. 77

Early in Wisconsin's history under the Code, the court held that a defendant who made a timely and proper statutory demand to change venue to a proper county, when that originally named in the complaint was improper, was entitled to the change as a matter of right, rather than merely at the discretion of the court. 78 It has also been held that the place of trial will be that named in the Complaint, unless the defendant moves for a change of venue,—i.e., the court is not deprived of the power to render a valid judgment merely because it is not a "proper" court if the defendant does not object. 79 The sole exception is, of course, in local actions in which venue becomes jurisdictional in the sense that the court must have subject-matter jurisdiction to render a valid in rem judgment affecting realty. In transitory actions, however, the defendant's failure to raise the question constitutes a waiver. The power of a defendant to change the place of trial, when that place is originally proper, is very limited. 80 A review of a few cases may illustrate the difficulties which have arisen because of the need to define "cause of action" and to determine whether the defendant's right to change venue is absolute or discretionary.

*Hosley v. Wisconsin Odd Fellows' Mutual Life Insurance Co.* 81 was an action to recover proceeds due on a life insurance policy. The plaintiff-beneficiaries resided in La Crosse and commenced the suit there; the defendant attempted to change the place of trial to Milwaukee where it maintained its principal office. According

77. State *ex rel.* Trost *v.* Schinz, 217 Wis. 576, 259 N.W. 601 (1935); State *ex rel.* Bobroff *v.* Braun, 209 Wis. 483, 245 N.W. 176 (1932); State *ex rel.* Schauer *v.* Risjord, 183 Wis. 553, 198 N.W. 273 (1924).

78. Foster *v.* Bacon, 9 Wis. 345 (1859); Rines *v.* Boyd, 7 Wis. 155 (1859).


80. Generally, such a change can be based upon a showing that: (1) a change would serve the convenience of witnesses and the ends of justice; (2) that he cannot receive an impartial trial in that county; (3) that the parties have agreed to the change; or (4) that another case is pending with which this one may be consolidated. Wis. *STAT.* § 261.04 (1969).

81. 86 Wis. 463, 57 N.W. 48 (1893).
to the statute, proper venue included both the county of defendant’s office and the county or counties in which the cause of action or a part thereof had arisen.\textsuperscript{82} Obviously, Milwaukee was a proper place of venue, but the court restated the general rule that, if the county chosen by the plaintiff was also a proper place, the defendant had no absolute right to the change. Necessarily a determination of the propriety of La Crosse involved a determination of the constituent parts of the cause of action. The court initially recognized that the cause of action includes “. . . the act or omission without which there would be no cause of action or right of recovery.”\textsuperscript{83} Because the failure to pay the proceeds to the beneficiaries within 90 days was the omission complained of, and since such payment was to have been made at the residence of the beneficiaries, this omission made La Crosse a proper place of trial and the defendant’s motion was consequently denied.

\textit{Anderson v. Arpin Hardwood Lumber Co.}\textsuperscript{84} affirmed several aspects of the law governing change of venue. The defendant-corporation sought to remove the action from Eau Claire to Wood County, but failed to state clearly in its demand that the original county named was improper and also failed to specify all the proper counties to which the action might be removed. The court reiterated its position that removal is not mandatory if the original venue is proper. When the original venue is improper, the court held that “. . . the prime essential to a compulsory change of the place of trial (is) . . . a statutory demand.”\textsuperscript{85} Without a properly worded demand which would give the plaintiff and the court all the necessary information as to all proper counties, the plaintiff need not respond and no legitimate basis for a motion to the court for removal has been laid.

Further clarification of the rule that the place of trial is that in which the plaintiff lays the action in his Complaint, absent a demand for change by the defendant, appeared in \textit{State ex rel. Meyer v. Park}.\textsuperscript{86} The plaintiff, Bean, had brought an action in Wood County seeking to recover on two promissory notes; the defendant served a statutory demand for removal to Barron County, his residence. He also answered and counter-claimed, requesting a set-off, without denying the debts alleged in the Complaint. The trial court

\textsuperscript{82.} \textit{Wis. Stat.} § 261.01(5) (1969).
\textsuperscript{83.} 86 Wis. at 466, 57 N.W. at 49.
\textsuperscript{84.} 131 Wis. 34, 110 N.W. 788 (1907).
\textsuperscript{85.} 131 Wis. at 39, 110 N.W. at 791.
\textsuperscript{86.} 174 Wis. 452, 183 N.W. 165 (1921).
denied the defendant's demand, reasoning that since the only facts in issue were the allegations of the counter-claim, the defendant had thereby become the plaintiff and the plaintiff the defendant as to the issues for trial; therefore Wood County, the residence of the party transformed into the defendant by the counterclaim, was proper. The Supreme Court made quite clear its view that the counterclaim was not a new action but merely a pleading in the original action, even though a complete cause of action was stated in the counterclaim. Since the only proper venue was the county in which the original defendant resided, his statutory demand made his right to change of venue absolute. The rule in Stahl v. Broekert was quoted with approval by the court:

The statute prescribes the proper place of trial. When an action is commenced in an improper county it is in defiance of statutory provisions. The plaintiff has no right to have the action tried therein unless the right to have it tried in some proper county is waived by defendants through failure timely to take the necessary steps to have the place of trial changed. If any of the defendants demand that the action be tried in the proper county the plaintiff is in no position to object. He should have brought the action in the proper county in the first instance. He should not be permitted to profit by his disregard of statutory requirements and force a trial of the action in an improper county against the demand of any of the defendants that the action be had in the proper county. In other words, the statute fixes the proper place of trial, and any defendant has a right to have the action tried in some proper county, even though such right be not insisted upon or, for that matter, desired by all of the defendants.

A subsequent case necessitated a definition of the constituent parts of a cause of action for breach of contract. In State ex rel. Webster v. Risjord, the plaintiff brought its action in Price County where its branch office was located and where it accepted the defendant's orders. In addition, the lumber was shipped from Price County. The plaintiff also contended that payment was due there, although the contract itself was silent as to the place of payment. The plaintiff's principal office was in Wood County. The

88. The question of forum non conveniens was also raised by the plaintiff, Bean; however, the court, in dismissing this contention, stated that proper venue was a prerequisite to any consideration of convenience.
89. 167 Wis. 113, 117, 166 N.W. 653, 654 (1918).
90. 201 Wis. 26, 229 N.W. 61 (1930).
defendant moved to change venue to Douglas County, the site of its principal office; the defendant also contended that a prior course of dealing made Douglas County the place of payment. The court reaffirmed the rule that the place of payment is the residence or principal office of the seller, when the contract itself does not name the place of payment; however, whether the place of payment was to be Wood or Douglas County was held to be unimportant, since Price County would still be a proper place if a part of the cause of action arose there. Citing McArthur v. Moffet,91 the cause of action was held to consist of two basic parts—the plaintiff's rights and the defendant's violation of those rights. Since the contract was made in Price County, the plaintiff's rights arose there, and Price was therefore held to be a proper county. Thus, the defendant had no absolute right to change. The court stated:92

. . . (W)e hold that such rights (i.e., the rights of the plaintiff under the contract) constitute a part of the cause of action, within the meaning of the statute fixing the place of trial of the action.

The court ruled similarly93 in a fact-situation very like that in Webster, on the basis that the plaintiff's rights under the contract, the place of payment, and the place of performance all were in Lincoln County, so venue could not be changed by the defendant as a matter of right. The defendant asserted that the contract was made at its own principal office since final modifications of the contract were made there;94 however, the court stated that this, even if true, would not affect the fact that some parts of the cause of action arose in Lincoln County and venue was therefore proper. The "place of payment" rule received another twist in State ex rel. Connor Lumber & Land Co. v. Circuit Court for Milwaukee County.95 The plaintiff sought to recover on a mortgage bond, naming both the mortgagor and the guarantor as defendants, both of which were corporations having their principal offices in Wood County. In this case, the bond itself gave the holder the option of demanding payment in either Milwaukee or Chicago; payment had been demanded in Chicago and refused, before the action was

92. 201 Wis. at 29, 229 N.W. at 62.
93. State ex rel. Flambeau River Lumber Co. v. Reid, 206 Wis. 478, 240 N.W. 149 (1932).
94. 92 C.J.S., Venue § 10, at 683, states that the general rule is that the contract is made where the primary agreement is made and is not affected by subsequent modifications.
95. 213 Wis. 141, 250 N.W. 753 (1933).
brought. The defendants argued that the plaintiff had made an election by seeking payment in Chicago and that consequently Milwaukee was no longer a possible place of payment, thereby making Milwaukee improper as a place for trial. The court did not agree that, by unsuccessfully seeking payment in Chicago, the plaintiff had lost its right to payment in Milwaukee; thus, part of the cause of action, the plaintiff's right to payment, still existed in Milwaukee and made venue in that county proper.

An interesting case, from several points of view, arose from an automobile accident in which the plaintiffs received personal injuries. The plaintiffs brought the action against the insurance company, as permitted under Wisconsin's "direct action" statute, in Oneida County, where they resided. The accident had occurred in Vilas County, where the driver, Jackson, resided; however, the plaintiffs did not name Jackson as a defendant and sought no judgment against him since he was a minor without means. The defendant-insurance company failed to make timely demand for removal to a proper county as required. Apparently realizing its error, it obtained permission from the court in Oneida County to implead Jackson, who then had an opportunity to demand removal to Vilas County. In an excellent opinion, the court stated:

The purpose and object of the instant statutes plainly are to provide that a defendant whose interests will be affected by the trial of a case shall be given the right to have it tried in a county designated by the statutes as a 'proper' place of trial. The statutes are aimed at protection of pecuniary, property, and proprietary interests. It would be absurd and unreasonable to assume that the legislature intended that a person who had no interest that could be affected by the event of an action should be given the right to control its place of trial.

The Supreme Court was obviously annoyed at the attempt of the insurance company to circumvent the statute by impleading Jackson, particularly in view of the assurances given the Oneida Court to the effect that joining Jackson would not delay trial. Dismissing the defendant's argument that the right to change the place of trial is not affected by any other proceedings in the action, the court commented that

99. 231 Wis. at 185, 285 N.W. at 338.
what has deprived the insurance company of right to change of venue is not any proceeding, but want of a proceeding by it under the statute that confers the right within the time allowed thereby for asserting the right.\(^{101}\)

Another automobile accident case further delineated the venue rights of co-defendants. *State ex rel. Boyd v. Aarons*\(^{102}\) established the principle that, if venue is well-founded as to one defendant, in a case involving multiple defendants, the other defendants are not entitled to demand a change of venue. The action was brought in Milwaukee County, where the defendant-insurance company had its principal office; the court ruled that the defendant-driver had no absolute right to demand a change of venue to Washington County where he resided and where the accident had occurred.

Recently, the court allowed a change of venue, in an apparent relaxation of the rule laid down in *Anderson*,\(^{103}\) which required strict compliance with statutory requirements in a demand for change of venue; however, the court stated:

\[
\text{(W)e do not consider this holding a departure from previous mandates of this court which have emphasized that the essential prerequisite for a change of venue be that the plaintiff have knowledge of the controlling facts.}\(^{104}\)
\]

That is, the defendant must state that venue is improper and specify the proper counties. Perhaps the court was influenced by its statement of the general purpose of the statutes:

The purpose of secs. 261.03 and 261.01(12), *Stats.*, is to prevent the hardship and inconvenience to which a defendant may be subjected by having to defend himself in a county in which he is not a resident.\(^{105}\)

In 1969, an action on a contract, *State ex rel. Hartwig's Poultry Farm, Inc. v. Bunde*,\(^{106}\) raised some question as to how well-settled the rules governing venue in contract actions actually are. In the underlying action, a poultry farmer, Victor Heeg, sought damages of $36,000 and an accounting from the processor, Hartwig, based on an oral contract by the terms of which Heeg's

\(^{101}\) 231 Wis. at 183, 285 N.W. at 337.
\(^{102}\) 239 Wis. 643, 2 N.W.2d 221 (1942).
\(^{103}\) Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 34, 110 N.W. 788 (1907).
\(^{104}\) State *ex rel.* Klabacka v. Charles, 36 Wis. 2d 122, 130, 152 N.W.2d 857, 859 (1967).
\(^{105}\) 36 Wis. 2d at 129, 152 N.W.2d at 859.
\(^{106}\) 44 Wis. 2d 229, 170 N.W.2d 734 (1969).
turkeys were to be processed and sold by Hartwig. A provision was also included that, in the event Hartwig could not find a third party buyer, Hartwig would purchase the turkeys at a specified amount below the market price. The suit, based on Hartwig’s alleged failure to sell all the turkeys or find another buyer promptly, and to give Heeg all the proceeds due, was brought in Wood County where Heeg resided. Hartwig then made a demand for change of venue to Jefferson County, its principal place of business. This demand the trial court denied, apparently on the basis that part of the required performance (picking up the turkeys) was in Wood County, thereby making it a “proper” county under section 261.01(6), Wisconsin Statutes.

On appeal, Hartwig argued that the only possible breaches alleged must have taken place at its principal place of business since they amounted to a failure of performance, rather than non-payment. The defendant also urged that the non-payment cases which state that part of the cause of action arises where the contract is made, where it is breached, or where payment is to be made, apply only to contracts for the sale of goods, not to contracts for the performance of services.

In his affidavit in opposition to Hartwig’s motion for change of venue, Heeg had alleged the contract without detail, except to state that the payments were to be made in Wood County and not all payments were made. In his appellate brief, it was argued that Wood County was a proper county because the cause of action or a part thereof arose there, since that was where the contract was made, the payment was to be made, and part of the contract was to be performed. Anderson was cited as authority for the rule that, when the cause of action does not wholly arise in the defendant’s county, change of venue is not an absolute right; and

---

107. The Complaint set out five causes of action:

1. Hartwig failed to follow instructions and sell all the turkeys at once on the New York market;
2. Hartwig retained money received for some turkeys sold;
3. Hartwig rendered inaccurate accounts;
4. Hartwig was represented by its authorized agent, C. Hartwig, and was estopped to deny his authority; and
5. Hartwig negligently failed to use due diligence in finding a third party buyer, causing loss to the plaintiff.

108. In addition, Hartwig stated that any delay in disposing of all the turkeys was due to Heeg’s failure to give timely instruction, and that, subsequently, all had been sold and the money paid to Heeg.

Flambeau was also cited for the proposition that the place of payment alone justifies laying venue in that county.

The majority held that the breach alleged was a failure to perform, and that this failure could only have taken place at the defendant's place of business, in Jefferson County. The court stated that, since non-payment was not alleged, and no breach of performance of the acts to be performed in Wood County was complained of, the only breach was failure to perform duties in Jefferson County; the majority therefore held that the plaintiff's cause of action could arise only in Jefferson County, so that the defendant's motion for change of venue should have been granted.

In a spirited dissent, Justice Hansen stated that venue could properly be laid, according to prior holdings of the court, where (1) the contract is made; (2) the contract is breached; or (3) payment is to be made. He reasoned that the allegations of the second cause of action, i.e., that the defendant had sold some turkeys and kept the proceeds without making proper remittance to the plaintiff, was a clear non-payment allegation which constituted "some part" of the cause of action arising in Wood County and justified making Wood the place of trial.

This case is puzzling in several respects. First, the holdings of the court in a number of previous cases, notably Webster and Flambeau, specifically stated that "the rights of a plaintiff arising from a contract" are part of any cause of action for breach of that contract. Yet, here, the majority stated:

We think the second factor (where the acceptance of the contract takes place) has no significance in this case since there is no

110. State ex rel. Flambeau River Lumber Co. v. Reid, 206 Wis. 478, 240 N.W. 149 (1932).
111. It may be noted, also, that the defendant had attempted at the trial court level to obtain the desired change of venue through § 261.04(2) which allows changes when the convenience of witnesses and the ends of justice would be promoted. Evidently, he discontinued this effort on appeal because of the highly discretionary nature of the provision. The Supreme Court's ruling does not mention this, however, and the relative infrequency with which the courts grant such motions makes it unlikely that many defendants will be able to obtain a change of forum through the use of this remedy. See the discussion in State ex rel Meyer v. Park, 174 Wis. 452, 455-56, 183 N.W. 165, 167-68 (1921).
112. 44 Wis. 2d at 237-39, 170 N.W.2d at 738 f (1969).
113. State ex rel. Webster v. Risjord, 201 Wis. 26, 229 N.W. 61 (1930).
114. State ex rel. Flambeau River Lumber Co. v. Reid, 206 Wis. 478, 240 N.W. 149 (1932).
dispute about the making of the contract, and it, therefore, does not matter where the contract was made.\textsuperscript{115}

Evidently, the two parties disputed which one had accepted the offer made by the other; however, if Heeg accepted, the contract was made in Wood County, and his rights under the contract arose there. It would appear essential to determine whether or not the contract was made in Wood County, before it could be determined that no part of Heeg's cause of action for breach of that contract arose in Wood County.

Secondly, the contract provided for alternative performances by Hartwig as to the purchase of the birds; it was to find a third party buyer, or to buy them itself. The court stated\textsuperscript{116} that, since failure to find a third party buyer must have preceded the failure to purchase, only the first failure was charged. This formed the basis for the rationale that non-payment was not involved. However, since Hartwig could perform its part of the bargain by doing either of these, it would seem that failure to buy and pay for the birds is the ultimate breach of the contract terms, since the failure to find another purchaser could be readily cured by the alternative performance.

It had appeared from previous cases that the trend of the holdings had been to increase possible venues by splitting up a cause of action into "parts thereof", thereby decreasing the extent to which defendants might be protected from hardship and inconvenience by the venue statutes. Such protection was held to be the purpose of the statutes; yet the effect of the court's rulings, whether intentional or not, was often to decrease that protection. However, in Hartwig, the defendant was granted the sought-after change of venue, through a process of confining the cause of action on the contract to the narrow limits of the precise portions of performance alleged to have been breached, and then considering only the default, rather than the rights of the plaintiff violated thereby. It is possible that the majority's ruling resulted from a failure to allege non-payment with sufficient clarity in the complaint, although the dissent disagreed sharply on this point. Alternatively, the holding in this case may signal a changing emphasis on the respective venue rights of defendants and plaintiffs.

\textsuperscript{115} 44 Wis. 2d 229, 233 f., 170 N.W.2d 734, 736 (1969).
\textsuperscript{116} Id. at 236, 170 N.W.2d at 738.
CONCLUSION

Obviously, much of the difficulty with venue statutes today is a legacy from the past. Early limitations of locality, scope of process, jurisdiction and other more pragmatic considerations survive, long after the reasons for this existence have largely, if not wholly, vanished. The basic venue statutes derived from English and early American law have been overlaid with additions designed to deal with certain types of parties or particular situations, so that proper venue may depend on who the parties are, as well as where they are, and what they are alleged to have done. As a result, venue statutes today are a "crazy quilt," designed to be fair to everyone and often ending by pleasing no one.

Originally evolved to serve in situations involving only one plaintiff, one defendant and a single issue, the venue statutes breed confusion when applied to modern multiple-party litigation. Certainly, a defendant’s residence should be a convenient and fair place of trial as to that defendant; however, if other defendants are included in the action, convenience may dictate a different place of trial for each of them. Alternatively, the theory on which the plaintiff bases his claim may result in a particular venue being either proper or improper, as the preceding contract cases amply demonstrate.

Venue in the place where a claim arises may be subject to similar objections, when one considers that the basic function of venue statutes is to set a fair and convenient location for trial. The process of splintering a cause of action into its component parts does offer more opportunities to find a proper venue which is also a convenient one. Simultaneously, it gives rise to problems in defining those components. This is further complicated when it is charged that an act has been omitted rather than performed. Venue might then be proper in any jurisdiction, since an omission "occurs", if it can be said to "occur" at all, everywhere. Such a solution as a means of determining where trial should be had is not helpful, to say the least.

It is suggested that the main purpose in having any venue statute at all is to promote convenience. The paramount importance of convenience to witnesses was recognized as long ago as 1803;\textsuperscript{117} yet the venue statutes today give the barest recognition to this purpose. The proliferation of possible venues is apt to result in a

\textsuperscript{117} See note 8 \textit{supra}.
venue which is convenient for one party, and inconvenient for another, with forum-shopping as an inevitable result. It seems anomalous to require strict observance of formalities before venue can be changed to promote convenience, when a change of forum should be obtainable all the more readily when it is truly inconvenient.

A proper place of trial should not be confused with jurisdictional requirements, as has often happened in the past. Although a court lacking jurisdiction of a person or of the subject-matter cannot render a binding judgment, this is a separate consideration from that of the fairness and the convenience of that forum for all those involved in the litigation.

It is further submitted that the ends of justice would be better promoted by giving the courts a free rein to balance the relative conveniences of all concerned in a lawsuit; then, if the result of such a balancing test so indicates, those courts should be encouraged to apply the doctrine of *forum non conveniens* with increased liberality. Obviously, such flexibility precludes the use of the old, rigid approach to venue. However, the reasons for and the feasibility of such an approach have been superseded by the complex face often presented by litigation today. A frank recognition of the real justification for venue statutes requires such a flexible approach, rather than the superimposition of more patchwork on the existing crazy quilt.

Shirley M. Sortor