1936

Jurisdiction or Venue

L.Dale Coffman

JURISDICTION OR VENUE?

By L. DALE COFFMAN*

SHOULD a state court of first instance, in actions between residents of the state, be a court of state-wide jurisdiction, and the place where the action may be tried resolve itself into a question of venue; or should the power to try such actions be subject to definite territorial limitations within the state? In actions between residents of the state where some court of first instance may certainly acquire jurisdiction over the person of the defendant, should the problem of place of trial be one of venue or one of jurisdiction—of where the action ought to be tried, or of the power of the court selected to try the action? In answering this question, is there any real basis for making a distinction between transitory actions and actions in rem? These questions are directed only to state courts of general original jurisdiction, and considerations as to the jurisdiction and powers of local inferior tribunals, such as municipal courts, county courts, police courts, surrogate courts, and justices of the peace are eliminated.

Nebraska and Ohio have treated this problem as one of jurisdiction, both as to actions in personam and in rem. Because serious questions might be raised concerning some of the results reached by virtue of this doctrine, it might be well to see how the problem has been dealt with in other jurisdictions. Iowa and Minnesota are Nebraska neighbors, presumably faced with problems similar to those of Ohio and Nebraska as far as a workable procedure and practice is concerned; and it would seem that a procedure that would work satisfactorily in one state should not meet insurmountable difficulties in any of the other three. Because New York was a pioneer among the code states, it seems logical to look briefly at its manner of dealing with the problem. This problem, therefore, will be considered briefly as to each of the five states named.

I. NEBRASKA

The Nebraska Code of Civil Procedure makes specific provision for the place of trial of certain classes of actions, both in rem and in personam.[1] These actions must be tried in the

*Professor of Law, University of Nebraska.

[1]See Nebraska, Compiled Statutes 1929, sec. 20-401 to sec. 20-403, relative to actions involving the title to real estate; sec. 20-404, actions

locality specified, unless the venue is changed because it is "made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or otherwise disqualified to sit."[2] But if the proper county is not selected, if the action is originally brought in some county other than the place named in the statute, the court may not direct the action to be transferred to the proper county. The court does not have jurisdiction; it does not have the power to do anything with the case other than to dismiss it for want of jurisdiction.[3]

The district court of Nebraska is not a court of state-wide jurisdiction. Even in regard to purely personal actions between residents of the state, the jurisdiction of the court is subjected to the definite territorial limits of the county in which it sits. The general provision relative to transitory actions is: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned."[4] The word "must," as used here, is given a strict interpretation; strict, in the sense that if the action is brought in violation of the provisions of the statute, the court does not acquire jurisdiction. It is submitted, in passing, that simply because the statute provides "must be brought," this alone should not limit the jurisdiction of the court. "Must" might just as well refer to venue.[5]

The results of this strict interpretation placed upon the statute seem to be unfortunate. Let us assume that P, a resident of A county, has a personal claim against D, a resident of B county. If P brings suit in the District Court of A county, and causes personal service to be made on D in B county, the court fails to acquire jurisdiction. The action has not been brought in the county

for the recovery of a fine or penalty, or actions against public officers or their bondsmen; sec. 20-405, actions against corporations; sec. 20-406, actions against common carriers; sec. 20-407, actions against turnpike companies; sec. 20-408, actions against non-residents and foreign insurance companies. See also Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull. 341.

[2]Nebraska, Compiled Statutes 1929, sec. 20-410; see also sections 20-411 and 20-412 for provisions as to the procedure for change of venue, and procedure in those actions affecting the title to real estate.

[3]See Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull. 341, and Nebraska cases there collected.

[4]Nebraska, Compiled Statutes 1929, sec. 20-409.

[5]See the discussion beginning at part III of the text relative to the Iowa, Minnesota and New York provisions.

where the defendant "resides or may be summoned."[6] The court does not acquire jurisdiction with the power to change the venue to the proper county upon demand; it simply has no power to deal with the case, and the plaintiff is in the same position as if he had never started an action. If the statute of limitations has run on his claim before he can bring a new action, the defendant may successfully plead it as a bar.

P may bring his action in B county. If D chooses to stay in B county, that is the only place where the plaintiff may institute the action. The argument is made that if the plaintiff were allowed to select his forum in some part of the state remote from the county of the residence of the defendant, and prosecute the action there, then such possibility would serve as a potent instrument of abuse. It would put a sword into the hands of the plaintiff to compel settlement of small contested claims, because the cost of defense would be greater than the cost of settlement. That argument, it is submitted, is inappropriate. To accomplish the result suggested, it is not necessary to conclude that the state court of original jurisdiction is without the power to change the venue to the proper county. It is not necessary to place territorial limitations upon the jurisdiction of the court. The argument is directed to the proper venue, not to the power of the court.

In fact, the statute itself defeats the very object of the suggestion. The statute provides that the action must be brought in the county in which the defendant, or some one of the defendants, resides *or may be summoned.* Thus, if D, residing in B county, comes to A county, the residence of P, P may cause D to be served in A county and the action may be tried in A county, because the defendant was summoned in A county. Likewise, if D happens to be in some remote corner of the state, P may bring the action wherever he may happen to find D and cause service of summons to be made upon him. Of course, no matter what the inconvenience to D in being forced to defend where he may happen to be served, he cannot change the venue to the county of his residence because of such inconvenience.[7] Therefore, the terms of the statute and the decisions thereunder, defeat the very argument made in favor of the limited jurisdiction of the trial tribunal.

The court, recognizing the possibility that the plaintiff might

[6]See Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull, 341.

[7]The grounds for change of venue have been set out in the text at footnote 2.

select the forum in some remote part of the state and there lie in wait for the chance coming of the defendant within the jurisdiction, has placed certain limitations upon this power of the plaintiff. If a petition is filed and summons issued on a date when personal service within the jurisdiction is impossible because of the absence of a nonresident of the county, the fact that the nonresident does later come within the jurisdiction and is personally served before the return day named in the summons, does not give the court jurisdiction, and such service is void. The petition must be filed and summons issued thereon at a time when personal service is presently possible, not simply prospectively possible. It is said that the rule prevents the filing of petitions in several counties, the issuance of summonses with no possibility of service, followed by service when the nonresident does come within the jurisdiction, with the result that a defendant will be compelled to defend at a place distant from his home, where it might be inconvenient for him and his witnesses.[8] But it is submitted that this limitation is solely upon the means, and not the result. The result remains that the plaintiff, in a transitory action, may sue the defendant in any county of the state in which he may be found, and the defendant may be forced to defend there regardless of the inconvenience or regardless of the residence of the parties within the state.

Starting then with the proposition that the action must be brought in the county of the defendant's residence or where he may be summoned, and that this is a jurisdictional and not a venue requirement, some provision must be made for the case in which there are several defendants residing in, or served in different counties. The statute provides that "when the action is rightly brought in any county, according to the provisions of this code a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request."[9] The unsatisfactory result seems to have been reached, that the case must first be heard on the merits in order to determine whether the plaintiff can successfully prosecute his claim against the resident defendant, before the court can determine whether it has jurisdiction to try the case against the out-of-county defendants. This

[8]Coffman v. Brandhoeffer, (1891) 33 Neb. 279, 50 N. W. 6; Hoagland v. Wilcox, (1894) 42 Neb. 138, 60 N. W. 376; Mosher v. Huwaldt, (1910) 86 Neb. 686, 125 N. W. 143; Lamb v. Perkins, (1910) 87 Neb. 565, 127 N. W. 903; Davis v. Ballard, (1894) 38 Neb. 830, 57 N. W. 527.

[9]Nebraska, Compiled Statutes 1929, sec. 20-504.

conclusion is reached because the term "rightly brought" has been interpreted to mean "successfully prosecuted."[10]

There is an earlier line of cases, supported by dicta in later cases, to the effect that if the plaintiff states a cause of action against the resident defendant and introduces sufficient evidence to make out a prima facie case against the resident, and by such evidence shows his good faith in joining the resident as a party defendant, then the action has been "rightly brought;" and the jurisdiction of the court over the nonresident does not depend upon the success or failure of the plaintiff in prosecuting his claim against the resident.[11] This, it is submitted, is a more practicable and reasonable interpretation of the statute. Under a similar statutory provision Kansas has reached this result. Of course, the plaintiff should not be permitted to choose the forum by the simple device of joining a local nominal defendant who has no interest in the controversy.

"But this rule cannot be applied to a plaintiff who sued in good faith in an honest belief that he had a cause of action against the resident as well as the nonresident, and the mere fact that he fails to recover against the former will not of itself defeat a judgment against the latter. . . . The controlling element in such a case is the good faith in the joinder."[12]

The results of an interpretation of "rightly brought" to mean "successfully prosecuted," it is submitted, are eminently unsatisfactory. The plaintiff is required to choose the place of trial at his peril. It is impossible in all cases to determine, before the trial, the power of the court to decide the controversy. A trial on the merits is necessary in order to determine the power of the court to try the case on the merits. If such results do not necessarily inhere in the organization of state trial tribunals, it is time means were developed to eliminate them. The parties should be able to ask for no more than one fair trial on the merits, and a

[10]See Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull. 341, and cases there collected.

[11]Pearson v. Kansas Mfg. Co., (1883) 14 Neb. 211, 15 N. W. 346; Dunn v. Haines, (1895) 17 Neb. 560, 6 N. W. 397; Bailey v. Chilton, (1921) 106 Neb. 795, 184 N. W. 939; see Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull. 341 for a complete collection of the Nebraska authorities. The later Nebraska authorities clearly interpret "rightly brought" to mean "successfully prosecuted:" Morearty v. Strunk, (1929) 118 Neb. 718, 226 N. W. 329; Peters v. Pothast, (1930) 120 Neb. 208, 231 N. W. 805.

[12]Johnston, C. J., in Van Buren v. Pratt, (1927) 123 Kan. 581, 583, 256 P. 1006; see discussion on this point in Maloney v. Callahan, (1933) 127 Ohio St. 387, 188 N. E. 656.

procedure should be devised whereby the place of trial might be determined before the trial on the merits.[13]

II. Ohio

The common pleas court of Ohio is the court of general original jurisdiction. The General Code makes specific provision for the place of trial of certain classes of action, both in rem and in personam.[14] As in Nebraska, this is a jurisdictional requirement, and is not simply a provision for venue or place of trial of these actions.[15] The general provision for actions in personam is:

"Every other action must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian, or trustee, which may be brought in the county wherein he was appointed or resides, in which cases summons may issue to any county."[16]

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.[17] 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. The illustrations given above as to the effect of this rule in Nebraska apply with equal force in Ohio.

If, in transitory actions, the jurisdiction of the court is limited to the "county in which a defendant resides or may be summoned," some provision must be made for the situation where there are several necessary or proper parties defendant, residing in or summoned in different counties. The General Code provides:

[13]See discussion in Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull. 341.

[14]Ohio, General Code sec. 11268, When to be brought where property situated; sec. 11269, When may be brought where part of property situated; sec. 11270, In actions for specific performance; sec. 11271, Where the cause of action arose; sec. 11272, Other actions against corporations; sec. 11273, Actions against railroad company, inter-urban, suburban or street railroad, and stage companies, where brought; sec. 11276, Further provisions as to non-residents; sec. 6308, in motor vehicle accident cases, the venue may be laid in the county where the injured persons reside.

[15]See 32 Ohio Jurisprudence 407: "The validity of service of process depends upon the correctness of the venue of the actions as brought, for no defendant is obliged to appear in answer to a summons issued out of the wrong county."

[16]Ohio, General Code sec. 11277.

[17]Dunn v. Hazlett, 4 Ohio St. 435 (1854); City of Fostoria v. Fox, (1899) 60 Ohio St. 340, 54 N. E. 370; 32 Ohio Jurisprudence 407, and cases there collected.

"When the action is rightly brought in any county, according to the provisions of the next chapter, a summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request."[18] The similarity between this and the Nebraska provision is at once apparent; and upon examination of the cases, the similarity in the interpretation of the provision becomes apparent.

To require a nonresident to defend in a county other than the county of his residence or where he may be served, there must be a proper joinder of defendants and causes of action; the statute has no application where there is a misjoinder of causes of action or parties defendant.[19] This would seem to be a necessary result if the statute is to mean anything. Even if the court were a court of state-wide jurisdiction and this statute were a provision for venue merely, any other interpretation would permit the plaintiff to lay the venue of any action in any county whatsoever in which resided a person against whom he had some claim.[20]

But assuming that the nonresident and resident defendants are either necessary or proper parties defendant, and that there has been no misjoinder of causes of action, when can it be said that the action has been "rightly brought?" There are several possible interpretations:

(1) A statement of a cause of action against both the resident and nonresident. It might be said that if the plaintiff states in his petition a good cause of action against each, and there is no showing of misjoinder of parties or causes of action, then the action may be said to have been rightfully brought. The difficulty with this interpretation is that the statute would be meaningless if it were adopted. It would permit the joinder of nominal or fictitious defendants solely for the purpose of laying the venue wherever the plaintiff might choose. This, it is submitted, is just what the statute is designed to prohibit. Nebraska and Ohio are both clear in their decisions that the plaintiff must do more than simply state a cause of action against both defendants in his petition before the action can be said to have been "rightly brought." A nonresident defendant cannot be compelled to defend in some county other than the county of his residence, or where he may be

[18]Ohio, General Code sec. 11282.

[19]Smith v. Johnson, (1898) 57 Ohio St. 486, 49 N. E. 693; Bigger v. Insurance Co., (1909) 8 N. P. (N.S.) 27, 19 D. 704.

[20]See discussion in part I of text, as to Nebraska rule.

summoned, by joining, as a resident defendant, a mere nominal party or one who has no substantial interest in the controversy.[21]

(2) The action might be said to have been "rightly brought" if the plaintiff introduces any evidence as to the liability of the resident defendant:

(A) Even though a verdict is directed in favor of the resident at the close of the plaintiff's case;

(B) Even though a verdict is directed in favor of the resident at the close of all of the evidence;

(C) Even though a jury question is made out on all of the evidence, and the jury returns a verdict in favor of the resident.

(3) The action might be said to have been "rightly brought" if the plaintiff introduces sufficient evidence in support of his alleged cause of action against the resident, to show that the resident is not merely a nominal defendant, and to show good faith on the part of the plaintiff in joining the resident as a party defendant. Under this test, the action would have been rightfully brought regardless of the outcome of the case against the resident, whether (A), (B), or (C) noted under (2).

(4) The action cannot be said to have been rightfully brought unless the plaintiff proves his case against the resident: unless the plaintiff is able to prosecute successfully his claim against the resident defendant.

Under the second or the third test suggested, the final disposition of the case between the plaintiff and the resident would make no difference; nor would it matter in what manner that disposition was made.[22] It is submitted that the second test would

[21]See Coffman, Counties to Which Summons May Issue in Nebraska, (1934) 12 Neb. L. Bull. 341, for the Nebraska cases on this point; probably the leading case in Ohio, and the case cited many times in Nebraska as well as Ohio, is Allen v. Miller, (1860) 11 Ohio St. 374; the following language has been quoted many times in both jurisdictions (at p. 378): "It seems to us, that the words 'defendant' and 'defendants,' as employed in those sections of the code to which reference has been made, in so far as they affect the question of jurisdiction, must be held to mean not nominal defendants merely, but parties who have a real and substantial interest adverse to the plaintiff and against whom substantial relief is sought; and that to hold otherwise, would open wide a door to all sorts of colorable devices, to defeat the policy of the law in respect to jurisdiction,—devices difficult to detect, but oppressive and wrongful in their practical application." See also Thompson v. Massie, (1884) 41 Ohio St. 307; Gorey v. Black, (1919) 100 Ohio St. 73, 125 N. E. 126; Drea v. Carrington, (1877) 32 Ohio St. 595.

[22]To say that the action is or is not rightly brought depending upon either (A), (B) or (C) would be arbitrary and unreasonable. Either the plaintiff has introduced sufficient evidence for some purpose, or he has not. If there is no purpose, suggestion (2) would be applicable.

be impracticable. Unquestionably the resident defendant must be more than a mere nominal defendant joined solely for the purpose of compelling the nonresident to defend in a county other than that of his residence or where he may be summoned. Could the plaintiff introduce "any evidence" against such a defendant? He probably could. Then what is the purpose of the requirement that the plaintiff introduce some evidence in support of the alleged liability of the resident? It would seem that the plaintiff might reasonably be required to show that the resident is not a mere nominal defendant; the purpose would seem to be to show that the plaintiff did have reasonable cause to join the resident as a party defendant; that the plaintiff did have probable cause in believing that he could support his claim against the resident, and to show good faith in so joining the resident. One line of authority in Nebraska seems to adopt this test.[23] And this seems to be the test adopted in Kansas.[24] Of course, when we speak of "good faith," "bona-fides," "probable cause," or "reasonable grounds," we are speaking of a standard; and standards are always more difficult of application than rules. Reasonable minds may differ as to whether the facts come within the standard. A definite rule may be capable of almost automatic application, and all may readily ascertain whether the facts come within the statement of the rule.

If we say that the plaintiff must recover from the local defendant before the action can be said to have been rightfully brought as to the nonresidents, it is not difficult to determine whether the conditions of the rule have been met; either the plaintiff does or does not recover from the local defendant. That consideration might have had some weight in determining the construction to be placed upon this statute, but the fact remains that Ohio has definitely adopted the fourth suggestion mentioned above. It was held at an early date that

"where a resident and a nonresident of the county are sued as joint contractors, and service is made on the latter in his own county, and on the trial it turns out that the resident defendant is not liable, judgment can not be rendered against the nonresident, because the jurisdiction of the court over his person depended on his being rightly joined with the resident defendant, and as the verdict found he was not liable, there was no authority to summon

The writer suggests a purpose in suggestion (3) which, it is submitted, is a reasonable test.

[23]See footnote 11.

[24]Van Buren v. Pratt, (1927) 123 Kan. 581, 256 P. 1006.

the nonresident to answer out of the county where he was served."[25]

Thus, "rightly brought" means "successfully prosecuted." There must be a trial on the merits in order to determine whether the court has the power to try the case on the merits. If a verdict is returned in favor of the resident, and against the nonresident, the nonresident, although he has had a fair trial on the merits, is not bound by the verdict or judgment rendered thereon, because the court has no power to enter judgment against him. The plaintiff must begin over, and if the statute of limitations has run on his claim in the meantime, his claim is barred. But suppose that the jury returns a general verdict in favor of all the defendants. May the plaintiff then bring another action against the nonresident in the county of his residence? The court has followed this doctrine to its logical conclusion, and has said:

"The court had jurisdiction of the subject matter, and the plaintiff having invoked it against the defendant, cannot object to an affirmance of the judgment on the ground that the court had no jurisdiction of the person of the defendant. It is an advantage a defendant in such a case has: He may avail himself of a judgment in his favor on the merits, or set it aside for want of jurisdiction, where it is against him."[26]

---

[25]Drea v. Carrington, (1877) 32 Ohio St. 595, at p. 603. In Gorey v. Black, (1919) 100 Ohio St. 73, 125 N. E. 126, the action was properly brought in Licking County against Clark, but Black, a non-resident, was joined as a party defendant, the plaintiff alleging that the two were joint tort-feasors. It was said, at p. 80: "And if in the case in Licking County he can on the other hand demonstrate that the defendant Clark had no part in the committing of the wrong, that would oust the jurisdiction against him even if the proof showed that he had wrongfully injured the plaintiff, because the essential basis of the right to proceed against Black in Licking County is that a joint tort-feasor has been joined in that case and properly served there. A plaintiff cannot compel persons residing out of the county where suit is brought to defend there by simply joining them with another person or persons against whom there is no joint right of action." In Adams v. Trepanier Lumber Co., (1927) 117 Ohio St. 298, 158 N. E. 541, 55 A. L. R. 1118, it is said, at p. 302: "It has been held in this state that, where no judgment is rendered against the only party defendant who resides in the county where suit is brought, the court has no jurisdiction to render a judgment against the defendant who resides in another county, service upon whom was secured by reason of the service upon the defendant resident in the county where the action was brought." See also Allen v. Miller, (1860) 11 Ohio St. 374; City of Fostoria v. Fox, (1899) 60 Ohio St. 340, 54 N. E. 370. In Bucurenciu v. Ramba, (1927) 117 Ohio St. 546, 159 N. E. 565, it is brought out clearly that this jurisdictional question is one to be determined by a trial on the merits, and cannot be decided until the verdict of the jury is returned.

[26]City of Fostoria v. Fox, (1899) 60 Ohio St. 340, 54 N. E. 370, at p. 352. One way to avoid this result may be to serve, if possible, the non-resident in the county in which the action is brought, as well

This result is absurd. The nonresident may demand a trial on the merits in order to determine the jurisdiction of the court over him. If the verdict of the jury is in favor of all defendants—resident and nonresident—the nonresident may successfully plead res adjudicata if the plaintiff brings another action against him. If the verdict is in favor of the resident, but in favor of the plaintiff as against the nonresident, he may successfully assert the lack of jurisdiction of the court. It is said, however, that this result is the fault of the plaintiff; he may require the jury to determine the jurisdictional question first, and if that is determined in favor of the nonresident, then there is no verdict on the merits in favor of the nonresident.[27]

But this takes care of only a portion of the difficulty. True,

as in the county of his residence, as was done in Paragon Refining Co. v. Higbea, (1925) 22 Ohio App. 440, 153 N. E. 860, 3 Ohio L. Abs. 703. There summons was issued and served upon the Rank Market Company in Williams County, Ohio, and at the same time summons was issued to Lucas County for the Paragon Refining Company, and served upon that company in Lucas County. Thereafter, and without quashing the service upon the Paragon Refining Company in Lucas County, a summons was issued for that company to the sheriff of Williams County, and service made in that county. The court said (at p. 444): "The claim is made that, as the verdicts were in favor of the defendant the Rank Market Company, the service upon the Paragon Refining Company in a foreign county was invalid, and that service on the same defendant in Williams County was invalid also, for the reason that an alias summons cannot be issued during the life of the original summons. Therefore it is claimed that there was no valid service whatsoever. We think the correct rule in Ohio is, that, where the service of an original summons is not valid, the party seeking service is not required to wait until the first service is quashed before issuing an alias summons . . . There was a valid service of summons upon the defendant the Paragon Refining Company, for, if the service in Lucas County was invalid, the service in Williams County was valid." Thus, even though the service of the second summons would be invalid if the first summons were valid, and the validity of the first summons could not be determined until after the service of the second summons, and after a trial on the merits, the court concluded that one of these summonses must be valid.

[27]Speaking through Robinson, J. in Bucurenciu v. Ramba, (1927) 117 Ohio St. 546, 159 N. E. 565, at pp. 552-553, the court has recognized this objection, and this means of partially relieving the difficulty, when it is said: "In all cases of this character, either counsel or the court, and usually both, bring forward the argument that it is unjust, a waste of the time of the court and of the substance and energy of the litigants, and generally impracticable, to permit a defendant to participate throughout a trial, and, upon a verdict being rendered against him, to then avail himself of the want of jurisdiction of the court over his person, and, in the event of the verdict being in his favor, to insist upon judgment, and thus be in a position to plead res adjudicata to an action brought in a district where jurisdiction over his person could properly be obtained. To all such argument the answer may well be made that if such a situation results it is the fault either of counsel or the court; that it is within the power of counsel to require the court, where the question of jurisdiction over the person is one of fact, to direct the jury to determine that issue

if the plaintiff's attorney asks that the jury determine the jurisdictional question first, then the judgment goes only to that problem, and the nonresident may not plead res adjudicata when another action is brought. But if the judgment is in favor of the nonresident, the plaintiff must start all over again, and even though he has once proved his case against the nonresident, and the nonresident has had one fair trial on the merits, he may demand another. And we are still met with the problem of the statute of limitations. All the objections to the result in Nebraska are equally applicable to the Ohio decisions.[28]

Since the jurisdiction of the court depends upon the result of the trial on the merits, the nonresident may attack the jurisdiction by filing a general denial.[29] If it appeared upon the face of

first and to further direct it that, if it find that the resident defendant was not a joint tort-feasor with the non-resident defendant, it find the issue of jurisdiction over the person of the non-resident defendant in favor of such non-resident defendant, and that it so state in its verdict, and that as to him it will consider the case no further. The judgment upon such verdict will then go to that subject alone. If, then, it is within the power of counsel and the court to prevent an unfair advantage inuring to the non-resident defendant by reason of his having at the same time denied the jurisdiction and participated in the trial, the force of the argument necessarily fails."

[28]See also Maloney v. Callahan, (1933) 127 Ohio St. 387, 188 N. E. 656. There, the action against the resident was dismissed, and the case allowed to proceed against the non-resident. The basis of the decision seems to be that the dismissal, alone, is no determination of the nonliability of the resident; he might have settled out of court. It is said, pp. 392-393: "True, the trial court dismissed the actions against Isaacs at his costs, constituting a valid judgment for cost against him, but the reason for the dismissal is not disclosed, and we are left to conjecture. It may be that Isaacs made settlement, and was dismissed on that account. If it were apparent from the records that there was no joint liability on the part of Isaacs, the resident defendant, and his dismissal was for that reason, we would be required to hold that the trial court was without jurisdiction to render valid judgments against Maloney, the non-resident defendant . . . However, the bare fact that Isaacs was dismissed from the action does not of itself justify us in saying that the trial court thereby lost jurisdiction over the non-resident defendant; the records failing to show that Isaacs could not have been legally included in the judgments. In other words, the fact of his dismissal standing alone does not establish his non-liability." This is contrary to the holding of the Nebraska court on this question: see Cobbey v. Wright, (1890) 23 Neb. 250, 36 N. W. 505; 29 Neb. 274, 45 N. W. 460. It is interesting to note that the Ohio court quotes from Ramirez v. Chicago, B. & Q. R. Co., (1928) 116 Neb. 740, 219 N. W. 1, which is a case dealing with the time of commencement of the action, and the language relative to the meaning of "rightly brought" is dictum and incorrect in Nebraska.

[29]Dunn v. Hazlett, (1854) 4 Ohio St. 435; Coverson v. Carpenta, (1928) 29 Ohio App. 482, 163 N. E. 718; Drea v. Carrington, (1877) 32 Ohio St. 595; Long v. Newhouse, (1897) 57 Ohio St. 348; Dzema v. P. & L. E. Rd. Co., (1928) 31 Ohio App. 288, 165 N. E. 376, 28 Ohio L. Rep. 33, 7 Ohio L. Abs. 397.

the petition that the plaintiff had no right to send summons to another county, a motion to quash such summons might be entertained and determined by the court, because that would be a question of law.[30] But if the lack of jurisdiction does not appear upon the face of the record, the nonresident, by denying the jurisdiction in his answer to the merits, is raising the jurisdictional question at this first opportunity.

"It seems clear that if upon the face of the petition a case is made in which all the defendants are rightfully joined, and service is made on one or more in the county where the suit is brought, and on the others in another county, the question of jurisdiction of the court over the persons of the defendants served in such other county must be raised by answer, and becomes one of the issues in the case. The trial court is without authority to pass upon the question of jurisdiction until such answer is filed and the evidence introduced upon all pertinent issues, including the question of jurisdiction."[31]

The nonresident cannot successfully raise the jurisdictional question in the answer, if, before answering, he does anything that amounts to a general appearance.[32] Of course, the objection to the jurisdiction may be specifically urged in the answer; but a general denial filed by the nonresident also accomplishes this purpose. This rule arose first in a situation where the resident and nonresident were sued as joint obligors; either both were liable for the full amount, or neither was liable at all. It was there determined that a general denial filed by the nonresident successfully raised an objection to the jurisdiction of the court.[33] This same rule has been applied where the defendants are only proper parties defendant, and not necessary parties defendant.[34] However, in a situation where the resident and the nonresident are not necessary parties defendant, but are simply proper parties defendant (such as alleged joint-tort-feasors) it is difficult to see why

[30]Drea v. Carrington, (1877) 32 Ohio St. 595.

[31]Coverson v. Carpenta, (1928) 29 Ohio App. 482, 163 N. E. 718, at p. 485.

[32]Long v. Newhouse, (1897) 57 Ohio St. 348. The court recognizes that the defendant may set up this defense in his answer, but if he moves to strike or to separately state and number, or makes any other such motion first, he has entered a general appearance; he has not raised the jurisdictional question at his first opportunity.

[33]Dunn v. Hazlett, (1854) 4 Ohio St. 435.

[34]Drea v. Carrington, (1877) 32 Ohio St. 595; Coverson v. Carpenta, (1928) 29 Ohio App. 482, 163 N. E. 718; Dzema v. Pittsburgh & L. E. R. R., (1928) 31 Ohio App. 288, 165 N. E. 376, 28 Ohio L. Rep. 33, 7 Ohio L. Abs. 397; Bucurenciu v. Ramba, (1927) 117 Ohio St. 546, 159 N. E. 565.

a general denial filed by the nonresident puts the jurisdiction of the court in issue.[35]

III. Iowa

In Iowa, the general statutory requirement for the venue of personal actions is as follows:

"Personal actions, except as otherwise provided, must be brought in a county in which some of the defendants actually reside, but if neither of them have a residence in the state, they may be sued in any county in which either of them may be found."[36]

An action on a written contract which specifies a particular place of performance, may be brought in the county where the contract was to be performed, regardless of the defendant's residence; this rule, however, is permissive and not mandatory.[37] But even in

[35]This distinction is brought out by Justice Vickery's concurring opinion in Dzema v. Pittsburgh & L. E. R. R., (1928) 31 Ohio App. 288, at pp. 299-300, 165 N. E. 376, 28 Ohio L. Rep. 33, 7 Ohio L. Abs. 397, but under the authority of Bucurenciu v. Ramba, (1927) 177 Ohio St. 546, 159 N. E. 565, he concludes that the court is left no choice: "Now it must be remembered that a suit on a joint contract, like that in 4 Ohio State, (Dunn v. Hazlett, (1854) 4 Ohio St. 435) and a suit against joint tort-feasors are not parallel. A suit may be brought against joint tort-feasors and a recovery had against each or any of them, but that is not so in a joint contract; the judgment must be against all or none. Now the court, it seems to me, begs the question when it says, that the general denial is a plea to the jurisdiction. The authorities all seem to hold that the question of jurisdiction may be raised either by a motion or by an answer, and, where it cannot be raised by a motion, and it is conceded by both parties it could not be in the instant case, it seems to the writer of this opinion that an answer should have been filed setting up the fact that this was not a joint liability, that they were not joint tort-feasors, and that the defendant in question was a non-resident of Cuyahoga County, and that there had been no service made upon it in Cuyahoga County, and request made that it go hence for the want of jurisdiction."

[36]Iowa, Code 1931, sec. 11049.

[37]Iowa, Code 1931, sec. 11040: "When, by its terms, a written contract is to be performed in any particular place, action for a breach thereof may, except as otherwise provided, be brought in the county wherein such place is situated;" The Troy Portable Grain Mill Co. v. Bowen & Co., (1859) 7 Iowa 464; Oliver v. Bass, (1870) 30 Iowa 90; Haugen & Co. v. McCarthey, (1872) 34 Iowa 415. The indorser in blank of a promissory note, when sued *alone* on his indorsement in the county in which the note requires the maker to make payment, is entitled to a change of venue to the county of his residence when said first county is not the county of his residence in the state, because the legal obligation placed upon an unqualified indorser does not embrace an obligation to pay in the county in which the note requires the maker to pay. Dougherty v. Shankland, (1933) 217 Iowa 911, 251 N. W. 73. A mere implication arising from a writing that payments maturing under the writing will be made at a certain place in a certain county, furnishes no legal basis for bringing action in said county when defendant is an actual resident of some other county. Basis for such action in a county other than that of defendant's residence must be found in the express terms of the writing. Bechtel v. District Court, (1932) 215 Iowa 295, 245 N. W. 299.

such cases, a change of venue to the county of the defendant's residence may be allowed if fraud in the inception of the contract is alleged.[38] If, after the commencement of an action in the county of the defendant's residence, he removes therefrom, the service of notice upon him in another county has the same effect as if it had been made in the county from which he removed.[39]

In transitory actions, the district courts of Iowa are courts of state-wide jurisdiction sitting in and for the respective counties. Even though the statute[40] provides that such actions "*must* be brought in a county in which some of the defendants actually reside," if the action is brought in a county in which none of the defendants reside, that fact alone does not deprive the court of jurisdiction.[41]

"If an action is brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county, in which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county."[42]

Thus, where there is a single defendant who has been properly served with summons in a transitory action, the question of the proper place of trial is a problem of venue, and not one of jurisdiction. Even though the wrong county is designated, and regardless of where in the state the defendant has been served, if the defendant does not move for a change of venue, the court does acquire jurisdiction and may proceed to judgment.[43] The motion must be made before answer,[44] and one who makes no objection to a failure to rule on a motion for a change of venue and goes to trial on the merits, is treated as having abandoned the

[38]Iowa, Code 1931, sec. 11411: "In an action brought on a written contract in the county where the contract by its express terms is to be performed, in which a defendant to said action, residing in a different county in the state, has filed a sworn answer alleging fraud in the inception of the contract constituting a complete defense thereto, such defendant, upon application and the filing of a sufficient bond, may have such action transferred to the district court of the county of his residence."

[39]Iowa, Code 1931, sec. 11052.

[40]Iowa, Code 1931, sec. 11049.

[41]Lyon v. Cloud, (1858) 7 Iowa 1; Knott v. Dubuque & S. C. Ry., (1892) 84 Iowa 462, 51 N. W. 57.

[42]Iowa, Code 1931, sec. 11053. This is a compensatory, and not a penal statute. Everett v. Board of Supervisors, (1895) 93 Iowa 721, 61 N. W. 1062.

[43]Lyon v. Cloud, (1858) 7 Iowa 1; Knott v. Dubuque & S. C. Ry., (1892) 84 Iowa 462, 51 N. W. 57; Iowa, Code 1931, sec. 11053.

[44]Iowa, Code 1931, sec. 11053.

motion.[45] It is submitted that this is a salutary, sensible and workable rule of procedure, which obviates many of the difficulties discussed with reference to the Ohio and Nebraska procedure. County lines within the state are at most political lines, deemed convenient for the efficient working of certain parts of the state governmental machinery.[46] It would seem that in a purely personal action between residents of the state, where the defendant has been properly served with process, the place of trial should be a matter to be settled before the trial on the merits, and should not be a question of the jurisdiction of the court.

But Iowa goes only a part of the way in making the district court a court of state-wide jurisdiction. In the first place, statutes determining the place of trial of actions in rem are provisions defining the jurisdiction of the court. Such statutes, it is said, confer upon the court the jurisdiction over the subject-matter of the action, and if suit is brought in the wrong county, the court of that county does not have jurisdiction of the subject-matter. The statute quoted above,[47] providing for the change of venue when the action is brought in the "wrong county," has no application where the court does not have jurisdiction of the subject-matter of the action; the court does not have the power to change the venue; all it can do is to dismiss the action.[48]

Iowa starts from the fundamental position that the district court is a court of state-wide jurisdiction in transitory actions; Nebraska and Ohio start from the fundamental position that the trial court of first instance is a court of limited territorial juris-

[45]Knott v. Dubuque & S. C. Ry., (1892) 84 Iowa 462, 51 N. W. 57.

[46]And today, there is much talk of consolidation of many county functions, whose reason for existence seems to be primarily historical rather than in the interests of efficiency.

[47]Iowa, Code 1931, sec. 11053.

[48]Post v. Brownell & Co., (1873) 36 Iowa 497; Beck, J., speaking for the court in Orcutt v. Hanson, (1887) 71 Iowa 514, 32 N. W. 482, said at p. 518: "To authorize a court to act in an action in rem it must have jurisdiction of the subject matter of the suit, and, in an action in personam, it must have jurisdiction of the person of the defendant. In personal actions, the section just quoted, [Iowa, Code 1931, sec. 11053] and those preceding it, give to the court of the 'wrong county' jurisdiction of the person of the defendants who were served with notice; but, in actions in rem, the court of the 'wrong county' acquires no jurisdiction of the subject matter, under the statutes and the decisions of this court. Now, what order may a court make in an action in rem wherein it has no jurisdiction of the subject matter thereof? None whatever, except to dismiss it, or strike it from the docket. As the court lacks jurisdiction of the subject matter, it can make no order whatever affecting the right to the rem. These views are based upon the most familiar elementary principles, which demand no authorities in their support in order to assure the assent of the legal mind."

diction. Where there is but a single defendant, the Iowa rule turns what are jurisdictional problems in Nebraska and Ohio into problems of venue. But when there are several defendants, residing in different counties, Iowa has adopted a compromise position. Where two defendants are sued jointly, the action may be brought in the county of the residence of either.[49] Where one of the parties sued is made a defendant by a cross-petition of his co-defendant in the original action, he must submit to trial in the original county, and has no right to a change of venue to the county of his residence.[50] These provisions may not be employed by a plaintiff to permit the bringing of a suit in a county other than the county of residence of the "real" defendant; the plaintiff, by the device of joining a purely nominal party as a resident defendant, cannot force the nonresident to defend in a county other than the county of his residence.[51]

Thus in Iowa, the court is faced with the same problem considered with reference to Ohio and Nebraska. When is the resident defendant one who has "an actual, real and positive interest in the cause,"[52] and when is he a nominal or fictitious party, joined as a defendant for the purpose of forcing the nonresident to defend in some county other than that of his residence? The various possible interpretations of "rightly brought" discussed with reference to the Ohio and Nebraska statutes might well be considered here. It would seem that as the district court is a court of state-wide jurisdiction, this is a problem that might well be settled before a trial on the merits. If, after a trial on the merits, it turns out that the plaintiff really did not have any claim against the resident, nevertheless, the nonresident has had one fair trial on the merits, and that, it would seem, should be all that he is entitled to. But where the action is against several defendants, some resident and some nonresident of the county in which the action is brought,

[49]Iowa, Code 1931, sec. 11049, Staut v. Noteman, (1870) 30 Iowa 414.

[50]Mahaska City State Bank v. Crist, (1893) 87 Iowa 415, 54 N. W. 450.

[51]It is said in The Troy Portable Grain Mill Co. v. Bowen & Co., (1859) 7 Iowa 464, at p. 467: "When defendants are mentioned, those are meant who had an actual, real and positive interest in the cause, and not those who consent to be made use of to defraud the real parties, and compel them to attend at the wrong county, at great expense and trouble. To permit this, would leave the law, in many instances, inoperative and meaningless."

[52]The Troy Portable Grain Mill Co. v. Bowen & Co., (1859) 7 Iowa 464.

"and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such nonresidents may, upon motion, have said cause dismissed, with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them."[53]

This is a compromise position, because it does not automatically defeat the jurisdiction of the court where the defendant has raised the jurisdictional question in his answer, and the plaintiff fails to recover judgment against the resident; but it does give the nonresident the power to force another trial on the merits.[54] The nonresident is entitled to a dismissal only when the action against the resident has been dismissed, or judgment entered in favor of the resident; a verdict of the jury in favor of the resident is not a dismissal or judgment in his favor, and a motion made after verdict but before judgment or dismissal is premature. The verdict does not "terminate the jurisdiction of the court over the parties or the subject matter. It might be set aside and a new trial ordered or in some cases judgment entered notwithstanding the verdict."[55] The nonresident may obtain a dismissal only upon motion; averment in the answer that the action has been brought in the wrong county is not sufficient.[56] Thus, the court, in the absence of motion by the nonresident defendant, has jurisdiction and may render a valid judgment against the nonresident even though the local defendant is a purely nominal defendant. But the nonresident, having had one fair trial upon the merits, if the result is against him, may demand another trial; if the result is in his favor, of course he will not move to dismiss. In transitory actions where there are resident and nonresident defendants, Iowa has apparently reached a compromise position between its original proposition that the district court is a court of state-wide jurisdiction, and the territorially limited jurisdiction theory of Ohio and

[53]Iowa, Code 1931, sec. 11051.

[54]McAlister v. Safley, (1885) 65 Iowa 719, 23 N. W. 139; Woodling v. Mitchell, (1905) 127 Iowa 262, 103 N. W. 115; Korf v. Howerton, (1920) 188 Iowa 120, 174 N. W. 350. Where an action is against several defendants, some of whom are non-residents of the county, and the action is dismissed as to the resident defendants, such non-residents may have the cause dismissed as to them; but before they are entitled to a dismissal, they must establish the fact of non-residence. Constantine v. Grupe Co., (1910) 147 Iowa 142, 124 N. W. 189; Porter v. Dalhoff, (1882) 59 Iowa 459, 13 N. W. 420; Bruce v. State S. & S. Co., (1920) 190 Iowa 343, 177 N. W. 457; Hoyt v. Eckles, (1923) 196 Iowa 385, 193 N. W. 578.

[55]Lyon v. Barnes, (1907) 133 Iowa 717, 720, 111 N. W. 9.

[56]Brown v. Legion of Honor, (1899) 107 Iowa 439, 78 N. W. 73.

Nebraska. And the compromise is given in the form of an option to the nonresident defendant.

In Ohio and Nebraska one of the difficulties discussed dealt with the application of the statute of limitations. If, after a trial on the merits, the plaintiff fails to recover against the local defendant, and if the nonresidents have raised the objections to the jurisdiction properly, even though the nonresident has had a fair trial on the merits, the whole proceedings go for naught because the court did not have jurisdiction. If the statute of limitations has run on the plaintiff's claim in the meantime, his right to commence a new action against the nonresidents is an empty privilege. But in Iowa, even though the nonresident may obtain a dismissal of the cause, and force the plaintiff to bring a new action in the proper county, the plaintiff cannot be met with the bar of the statute:

"If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purpose herein contemplated, be held a continuation of the first."[57]

A distinction is made between the county of residence and the county of suability. A railroad company may be sued in any county through which its tracks run.[58] It is said that the general rule as to nonresidents[59] does not apply as conveniently to this situation. A railroad company can defend more conveniently in a county through which it operates its road than in some remote corner of the state where one of its officers may be served. But because it may be sued in such a county, it does not follow that the corporation is a resident of that county; it may be a resident of another state and suable in Iowa in any county through which its tracks run. When the company is joined as a defendant with a person who is a resident of the state, and the action is brought in the county in which the corporation has tracks, but not in the county of the residence of the other defendant, the defendant

[57]Iowa, Code 1931, sec. 11017.

[58]Iowa, Code 1931, sec. 11041: "An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, steamboat and other river crafts, telegraph and telephone companies, or the owner of any line for the transmission of electric current for lighting, power or heating purposes, and the lessees, companies, or persons operating the same, in any county through which such road or line passes or is operated."

[59]Iowa, Code 1931, sec. 11049, providing for suit in any county where they may be found.

resident in the state may secure a change of venue to the county of his residence. The action must be brought in a "county in which some of the defendants actually reside,"[60] and as a railroad company does not reside in every county in which it may have tracks, the action must be brought in the county of the residence of one of the defendants. If the railroad company were the sole defendant, the county of suability would determine the venue.[61]

IV. New York

The New York supreme court is a court of statewide jurisdiction. "As the jurisdiction of the supreme court is co-extensive with the boundaries of the state, personal service of a supreme court summons may be made anywhere within the state."[62] The Civil Practice Act makes relatively simple provisions for the place of trial. Generally speaking, actions affecting the title to real estate must be tried in the county where the real estate, or some part thereof is situated.[63] Actions to recover a penalty or forfei-

[60]Iowa, Code 1931, sec. 11049.

[61]Hinchcliff v. District Court, (1927) 204 Iowa 470, 472, 215 N. W. 605: "The place of suability and actual residence must be differentiated in construing venue statutes." This case is noted in (1928) 13 Iowa L. Rev. 212, and the Iowa cases are there collected.

[62]2 Carmody, New York Practice 1122.

[63]Civil Practice Act, sec. 183: "Each of the following actions in the supreme court must be tried in the county in which the subject of the action or some part thereof is situated:

1. An action of ejectment;
2. For the partition of real property;
3. For dower;
4. To foreclose a mortgage upon real property, or upon a chattel real;
5. To compel the determination of a claim to real property.
6. For waste;
7. For a nuisance;
8. To procure a judgment directing a conveyance of real property;
9. Every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real."

[64]Civil Practice Act, sec. 184: "An action in the supreme court for any of the following causes must be tried in the county where the cause of action or some part thereof arose:

1. To recover a penalty or forfeiture imposed by the statute, except that where the offence for which it was imposed was committed on a lake, river or other stream of water situated in two or more counties, the action may be tried in any county bordering on the lake, river, or stream and opposite the place where the offence was committed; but in an action where the people of the state are a party to recover a penalty for trespass upon the lands of the forest preserve, the action may be tried in a county adjoining the county where the cause of action arose;

2. Against a public officer or a person specially appointed to execute his duties for an act done by virtue of his office or for an omission to perform a duty incident to his office; or against a person who, by the

ture imposed by statute, or against a public officer for his public acts or omissions, or to recover a chattel distrained, or damages therefor, must be tried in the county where the cause of action or some part thereof arose.[64] All other actions must be tried in the county in which one of the parties resided at the commencement thereof.[65]

If the action is not brought in the proper county, the court having state-wide jurisdiction, may proceed with the trial and render a valid judgment.

"In an action in the supreme court, notwithstanding that the county designated in the complaint as the place of trial is not the proper county, the action may be tried therein unless the place of trial is changed to the proper county upon the demand of the defendant, followed by the consent of the plaintiff or the order of the court."[66]

The provision for the place of trial of in rem actions is not intended to define the jurisdiction of the court, but simply to determine the place of trial of actions of which it has jurisdiction.[67]

Personal actions generally "must be tried in the county in which one of the parties resided at the commencement of the action."[68] The word "resided" as used in the statute, refers to residence and not domicile.

"Residence implies an established, as distinguished from a temporary abode, however, one fixed permanently for a time, for business or other purposes, although there may be an intent in the future at some time or other to return to the original domicile.

---

command or in the aid of a public officer, has done anything touching his duties;

3. To recover a chattel distrained, or damages for distraining a chattel."

[65]Civil Practice Act, sec. 182: "An action in the supreme court not specified in the two following sections must be tried in the county in which one of the parties resided at the commencement thereof. An executor or administrator shall be deemed a resident of the county of his appointment, as well as the county in which he actually resides. If neither of the parties then resided in the state it may be tried in any county which the plaintiff designates for that purpose in the title of the complaint. A party having or maintaining a residence in more than one county shall be deemed a resident of either county."

[66]Civil Practice Act, sec. 186.

[67]8 Carmody, New York Practice 724: "If the action is brought in the supreme court, the proper venue is the county in which the real property, or some part thereof, is situated. Notwithstanding that the county designated is not the proper county, the action may nevertheless proceed in such county unless removed to the proper county." In Cragin v. Lovell, (1882) 88 N. Y. 258, at p. 263, it is said: "That section (referring to what is now sec. 183, quoted above) was not intended to define the jurisdiction of the Supreme Court, but simply to determine the place of trial of actions of which it had jurisdiction."

[68]Civil Practice Act, sec. 182.

Casual or temporary sojourning of a person in a county, whether for business or for pleasure, does not make him a resident of said county; still, on the other hand, it is not essential that a person should come into the county with the intention to remain there permanently, to constitute him a resident."[69]

If a party has several residences in different counties, the venue may be laid properly in any of such counties; this is true with respect to parties plaintiff or defendant.[70] In contrast with the distinction between suability and residence brought out by the Iowa decisions, in New York a railroad company is deemed to have a residence in each county through which it operates its road.[71]

Section 187 of the New York Civil Practice Act sets forth the grounds for a change of place of trial:

"The court, by order, may change the place of trial of an action in the supreme court in either of the following cases:
1. Where the county designated for that purpose in the complaint is not the proper county;
2. Where there is reason to believe that an impartial trial cannot be had in the proper county; or
3. Where the convenience of material witnesses and the ends of justice will be promoted by the change."

The privilege of changing the place of trial may be waived,[72] and if so waived the court may not refuse to try the action, or

[69]4 Carmody, New York Practice 2616, and cases there collected. A domestic corporation having its principal office and place of business in a county, is a "resident" of the county within the statutes defining the place of trial. Finch School v. Finch, (1911) 144 App. Div. 687, 129 N. Y. S. 1.

[70]In Shepard v. Squire, (1894) 76 Hun 598, 28 N. Y. S. 218, it is said, at p. 219: "Nor are the words 'one of the parties,' in section 984, [Civil Practice Act, sec. 182] entitled to such construction as to necessarily embrace all the plaintiffs or all the defendants, when they, respectively, consist of more than one person. In that case each one of the persons is a party plaintiff or defendant, and the import of the language used is, in view of its purpose, the same as if it read that 'an action must be tried in the county in which one of the persons who is a party resided.'" In Bischoff v. Bischoff, (1903) 88 App. Div. 126, 85 N. Y. S. 81, it is said, at p. 81: "A person may have one or more residences, as distinguished from a domicile; and if the plaintiff at the time of commencement of this action had either an actual residence or a domicile in Westchester county, the action is properly brought in that county, although the plaintiff may also have had a residence elsewhere." Carmody suggests that the present statutory provision was designed to incorporate the rule of the Bischoff case. See 4 Carmody, New York Practice 2618, footnote 54, for historical sketch and collection of cases.

[71]Levey v. Payne, (1922) 200 App. Div. 30, 192 N. Y. S. 346; Poland v. United Traction Co., 88 App. Div. 281, 85 N. Y. S. 1, aff'd. on opinion below, (1903) 177 N. Y. 557, 69 N. E. 1129; See 4 Carmody, New York Practice 2617-2618.

[72]Failure to object is a waiver. Civil Practice Act, sec. 186.

may not on its own motion change the place of trial.[73] But if the plaintiff brings the action in a county in which none of the parties reside, the defendant has an absolute right, upon following the proper procedure, to a change of the place of trial to the proper county.[74] Where the plaintiff brings the action in a county where neither party resides, he will not be permitted to change it to the county where he resides upon the defendant's motion to change the venue to the county of the defendant's residence.[75] If the plaintiff, in an action against nonresidents of the state, lays the venue in a county other than that of his residence, the nonresidents may take advantage of the statute and demand a change of venue to the county of plaintiff's residence.[76] Where the action is brought

[73]Phillips v. Teitjen, (1905) 108 App. Div. 9, 95 N. Y. S. 469; Schober v. Fifth Avenue Coach Co., (1905) 110 App. Div. 921, 96 N. Y. S. 1145. "The supreme court is a court of general jurisdiction, extending over the whole state. In transitory actions parties have a right to lay the venue in any county and there have the issues disposed of, if they so desire. The privilege of removal, which is given to the defendant, may be waived, and if so waived the court of its own motion may not refuse to try the action." Anderson v. Nassau Electric Ry. (1910) 138 App. Div. 816, 123 N. Y. S. 384, at p. 385.

[74]Finch School v. Finch, (1911) 144 App. Div. 687, 129 N. Y. S. 1; Levey v. Payne, (1922) 200 App. Div. 30, 192 N. Y. S. 346; Shepard v. Squire, (1894) 76 Hun 598, 28 N. Y. S. 218; Ferrin v. Huxley, (1904) 94 App. Div. 211, 87 N. Y. S. 1005; Lageza v. Chelsea Fibre Mills, (1909) 135 App. Div. 731, 119 N. Y. S. 906. The "proper procedure" involves a demand by defendant, and consent by plaintiff within five days after service of demand; or if no consent within the time, then motion within fifteen days after service of demand and ten days after expiration of time for plaintiff to consent. See Civil Practice Act, sec. 186; Rules of Civil Practice, 145, 146 and 147.

[75]In Loretz v. Metropolitan St. Ry. Co., (1898) 34 App. Div. 1, 53 N. Y. S. 1059, at p. 1059, it is said: "At the outset, the plaintiff had his choice as between the two proper counties in which to bring his action. These were Kings county, where he resided, and New York county, of which the defendant corporation was constructively a resident. The plaintiff chose to lay the venue in Queens county, where it did not belong. The defendant then exercised the statutory right of demanding and moving that the place of trial be changed to New York, as the proper county. The plaintiff should not be allowed to defeat this application by now consenting to try the case in the county where he lives. He elected not to try it there when he designated Queens county as the place of trial, and he should be held bound by that election, after the defendant has taken steps to have the venue changed to one of the two proper counties prescribed by the statute." Ferrin v. Huxley, (1904) 94 App. Div. 211, 87 N. Y. S. 1005.

[76]In Shepard v. Squire, (1894) 76 Hun 598, 28 N. Y. S. 218, at p. 219, it is said: "The defendants were at the time of the commencement of the action, and are, residents of the state of Washington. The subject of the action is land situated in that state. The plaintiff King is, and has for several years been a resident of the state of Minnesota. The place of residence of the other plaintiffs is Ilion, in the county of Herkimer, N. Y. This action comes within those to which is applicable the statute which provides that an action 'must be tried in the county in which one

in the "wrong county" against several parties defendant, one defendant alone may move for a change of venue, even against the opposition of a co-defendant.[77]

In considering the practice in Nebraska, Ohio and Iowa, it was discovered that considerable difficulty might arise in the joinder of several parties defendant, each residing in different counties. In all three states it is settled that the plaintiff may not, by the means of joining a purely nominal party as a local defendant, compel the out-of-county defendant to defend away from his home. In order to secure this principle, Ohio and Nebraska permit the out-of-county defendant to raise the question in his answer, try the case on the merits, and if the plaintiff fails to recover a judgment against the resident defendant, the objections to the jurisdiction of the court originally raised in the answer of the non-resident are sustained. The result is that the plaintiff must commence a new action. In Iowa, although the district court is a court of state-wide jurisdiction, this principle is realized by giving the out-of-county defendant the option to require a dismissal. If the action is dismissed after one fair trial on the merits, the plaintiff must start all over again in the proper county. Again, the defendant may require two trials on the merits.

In New York, the action may be brought "in the county in which one of the parties resided at the commencement of the action."[78] What about this matter of joinder of purely nominal defendants that has caused so much trouble and litigation in the three other states considered—particularly in Nebraska and Ohio? In New York, this problem is settled prior to a trial on the merits.

---

of the parties resided at the time of the commencement thereof.' Code Civ. Pro. sec. 984. And because none of the parties resided in the county of Monroe, and two of the plaintiffs then resided in the county of Herkimer, the demand for the change to the latter, as the proper county, was made. The defendants' attorney, not being served with written consent thereto, gave, within due time, notice of motion, founded upon his third demand, for change of the place of trial. The fact that the defendants were non-residents of the state does not deny to them the benefit of the statute referred to, for the purpose of proceeding in the manner so provided for changing the place of trial to the proper county. Nor are the words 'one of the parties,' in section 984, entitled to such construction as to necessarily embrace all the plaintiffs or all the defendants, when they, respectively, consist of more than one person. In that case each one of the persons is a party plaintiff or defendant, and the import of the language used is, in view of its purpose, the same as if it read that 'an action must be tried in the county in which one of the persons who is a party resided.'"

[77]North Shore Industrial Co. v. Randall, (1905) 108 App. Div. 232, 95 N. Y. S. 758.

[78]Civil Practice Act, sec. 182.

If it is shown that the venue has been laid in some remote corner of the state where one of the parties resides, but it is highly inconvenient for all the other parties and their witnesses to try the case at that place, a change of venue may be granted even to a county in which none of the parties reside for "convenience of witnesses."[79] The convenience of expert witnesses usually will not be considered, because it is presumed that they will receive compensation for their services.[80] The same is true with regard to witnesses who are the party's employees.[81] The place of trial is not ordinarily changed from a rural to a metropolitan county, "the convenience of witnesses is ordinarily best subserved by a trial in the rural county, even though they are residing in the city in which the trial is sought to be had, for the condition of the calendar is just as important to a witness as the accessibility of the court house."[82]

The county in which the cause of action arose, in many cases is the most convenient place of trial, even though none of the parties reside there.[83]

It is beyond the scope of this paper to treat in detail the application of the statute permitting change of place of trial for the convenience of witnesses, but suffice it to say that this may be a practicable and sensible method of meeting the objections to joinder of nominal defendants which have caused so much unnecessary difficulty in Nebraska and Ohio, and to some extent, in Iowa. This is a means by which the proper venue may be determined before trial; and the parties may have one, and only one fair trial on the merits.

V. Minnesota

In transitory actions the district court of Minnesota is a court of state-wide jurisdiction.[84] The venue of the ordinary personal

[79]Civil Practice Act, sec. 187.

[80]Solberg v. Ft. Orange Const. Co., (Sup. Ct. Spec. Term 1913) 142 N. Y. S. 228.

[81]Sparks v. United Traction Co., (1901) 66 App. Div. 204, 73 N. Y. S. 108.

[82]4 Carmody, New York Practice 2627, and cases there collected.

[83]Solberg v. Ft. Orange Const. Co., (Sup. Ct. Spec. Term 1913) 142 N. Y. S. 288; See 4 Carmody, New York Practice 2628.

[84]Mason's 1927 Minn. Stat. sec. 9206: "Except as provided in section 9207, every civil action shall be tried in the county in which it was begun, unless the place of trial be changed as hereinafter prescribed; and, when so changed, all subsequent papers in the action shall be entitled and filed in the county to which such transfer has been made." Sec. 9214: "All actions not enumerated in paragraphs 9207-9213 shall be tried in a county in which one or more of the defendants reside when the action was

action is laid in the county in which "one or more of the defendants reside when the action was begun," and except as to actions purely local in character, "every civil action shall be tried in the county in which it was begun, unless the place of trial be changed" as provided by statute.

The venue is specifically fixed by statute for certain classes of actions.[85]

"Actions for the recovery of real estate, the foreclosure of a mortgage or other lien thereon, the partition thereof, the determination in any form of an estate or interest therein, and for injuries to lands within this state, shall be tried in the county where such real estate or some part thereof is situated, subject to the power of the court to change the place of trial in the cases specified in section 9216 subds. 1, 3, 4. If the county designated in the complaint is not the proper county, the court therein shall have no jurisdiction of the action."[86]

This provision purports to limit the power of the court; it defines the jurisdiction. As in Iowa, and unlike New York, the statute purports to define the jurisdiction of the court over the subject-matter of the action. But the effect of the statute has been largely whittled away by judicial construction; the classification of local

begun. If none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the action may be begun and tried in any county which the plaintiff shall designate. A domestic corporation other than railroad companies, street railway companies, and street railroad companies whether the motive power is steam, electricity, or other power used by said corporations or companies, also telephone companies, telegraph companies and all other public service corporations, shall be considered as residing in any county wherein it has an office, resident agent or business place. The above enumerated public service corporations shall be considered as residing in any county wherein the cause of action shall arise and wherein any part of its lines of railway, railroad, street railway, street railroad, without regard to the motive power of said railroad, street railway or street railroad; telegraph or telephone lines or any other public service corporation shall extend, without regard to whether said corporation or company has an office, agent or business place in said county, or not."

[85]Actions for official misconduct, and to recover penalties or forfeitures imposed by statute, are to be tried in the county in which the cause of action arose: Mason's Minnesota Statutes, sec. 9208. Actions and proceedings prosecuted upon forfeited bail bonds or recognizances shall be heard and tried in the county in which the forfeiture was adjudged: sec. 9209. Actions upon cost bonds shall be tried in the county where such bond or security is filed; an action against a non-resident defendant proceeded against by attachment may be brought in any county wherein such defendant has property liable to attachment: sec. 9210. Actions of replevin may be tried in the county where the taking occurred, or where the plaintiff resides, or in the county in which the property is situated: sec. 9211. Civil actions for trespass in which the state is plaintiff may be begun and tried in such county as the attorney general or other attorney authorized to bring the same, shall select: sec. 9212.

[86]Mason's 1927 Minn. Stat., sec. 9207.

actions has been narrowed by holding causes transitory wherever possible.[87]

"It is settled . . . that the requirement that actions shall be tried where the defendant resides is the general rule, and that the requirement that certain actions shall be tried where the subject-matter is situated is an exception to that rule, and that to bring a case within the exception the subject-matter must be wholly local."[88]

There is nothing inherently impossible in the conclusion that a state court of first instance may try the title to real estate wherever situated in the state.[89] Even under the above statute, when the action is admittedly local, the venue may be changed to a county other than that in which the real estate is situated, upon a proper showing.[90] Is it correct to say: "If the county designated in the complaint is not the proper county, the court therein shall have *no jurisdiction* of the action?"[91] Logically, a distinction should be made between lack of jurisdiction, and a statutory rule or judge-made admonition not, under certain circumstances, to exercise jurisdiction. Too often have courts hidden behind an assumption of lack of power, to justify a decision not to exercise that power which they have.[92]

[87]State v. District Court of Swift County, (1925) 164 Minn. 433, 205 N. W. 284, noted in (1926) 10 MINNESOTA LAW REVIEW 608; see also instructive note in (1927) 11 MINNESOTA LAW REVIEW 260.

[88]State v. District Court of Swift County, (1925) 164 Minn. 433, 205 N. W. 284, 285. Taylor, C., enters upon an extended review of the cases in which the actions have been held to be transitory, and concludes: "The prior decisions may not be entirely consistent in all respects, yet they establish these general rules: That, where the subject-matter of an action is land only, and the primary and principal relief sought relates to the land, the action is local and must be tried where the land is situated; that, where the subject-matter is a contract, and the primary and principal relief sought is to enforce it, or to determine the rights and obligations growing out of it, or to have it annulled as invalid, the action is transitory, and must be tried where the defendant resides, although it may also involve the determination of rights in or title to real estate." See also: (1926) 10 MINNESOTA LAW REVIEW 608; (1927) 11 MINNESOTA LAW REVIEW 260; State ex rel. Child v. District Court, (1902) 85 Minn. 283, 88 N. W. 755; State ex rel. Barrett v. District Court, (1905) 94 Minn. 370, 102 N.W. 869.

[89]See discussion as to New York rule in part IV of text.

[90]Mason's 1927 Minn. Stat., sec. 9207; sec. 9216.

[91]Mason's 1927 Minn. Stat., sec. 9207 (italics mine).

[92]This thought is expressed well in (1927) 11 MINNESOTA LAW REVIEW 260, at p. 270: "Jurisdiction should be carefully distinguished from the propriety of its exercise. At bottom, the rule which confines the place of trial of local actions to the forum of the locality where the land lies does not, and logically cannot, limit the jurisdiction of the courts, the numerous expressions in the cases to the contrary notwithstanding. What the rule of venue really does is to teach the courts self-restraint in the exercise of their powers, and rather than admit a discretionary self-renunciation, the courts would conceal their reluctance to act in given cases behind the cloak of judicial incapacity."

There may, therefore, be two distinct classes of venue statutes: (1) those which direct that a certain class of actions shall be tried in certain counties; but if the particular action is not brought in the county specified, the court may proceed and render a valid judgment; (2) those which provide that a certain class of actions are local, and the court of some locality other than the one specified should not exercise jurisdiction; and such rules are usually framed in terms of lack of jurisdiction. Lack of jurisdiction is lack of power to decide; lack of power to decide is not a determination not to exercise the power to decide. Justice Mitchell, in a courageous dictum, expressed this idea, when he said with reference to the statutory provision quoted above, that it

"is not to be construed as meaning that the court has no jurisdiction of the subject matter of the action, in the full sense in which that term is ordinarily used. The district court of the state, which in a proper sense is one court, has jurisdiction of actions for the recovery of real property. We have no doubt that, notwithstanding the statute, the district court for any county in the state would, with the express consent of both parties, have jurisdiction to try any action for the recovery of real property, although no part of the property was situated in that county, which would not be the fact if the court had no jurisdiction of the subject-matter, in the ordinary meaning of that term."[93]

This dictum seems to state the law in Minnesota. The district court is really one court sitting in and for the respective counties. In *State v. District Court of Ramsey County*[94] the plaintiff brought suit in Hennepin county to cancel a mortgage on real estate located in Hennepin county. The defendant resided in Ramsey county and procured a change of venue to that county, where the case was tried and resulted in a judgment for defendant. Upon appeal, the case was reversed and a new trial granted. Plaintiff then applied to the Ramsey county court for an order remanding the case to Hennepin county, on the ground that it was a local action triable only in that county. The court denied the application. The supreme court stated that the action was a local action within the meaning of the statute, but

"by apparently acquiescing in the transfer to Ramsey county and trying the case in that county without objection, plaintiff must be deemed to have waived the right to insist upon a trial in Hennepin county, and to have acceded to the demand that the trial be in Ramsey county."[95]

[93]Smith v. Barr. (1899) 76 Minn. 513, 79 N. W. 507, 508; see also (1927) 11 MINNESOTA LAW REVIEW 260.

[94](1926) 168 Minn. 519, 210 N. W. 405.

[95]State v. District Court of Ramsey County, (1926) 168 Minn. 519, 210 N. W. 405, 406.

If the statute really deprived the district court for Ramsey county of the power to decide this case, no passive acquiescence of the plaintiff could confer upon the court jurisdiction of the subject-matter. In most cases it is unnecessary to make the distinction between lack of jurisdiction and the determination not to exercise jurisdiction; the result is the same under either theory. But in some instances, the distinction should be realized, as in the illustration above, and as in the problem of the power to try an action for damages arising out of the trespass to foreign realty.[96]

The ordinary transitory action should be tried in the county in which one or more of the defendants reside when the action was begun, and if begun in the wrong county, that fact alone does not deprive the court of the power to determine the controversy; in fact, there is the statutory admonition not to refuse to exercise the jurisdiction which is acquired.[97] If the action is brought against a single defendant in a "wrong county," he may demand a change of venue to the proper county as a matter of right.[98]

"If there are several defendants residing in different counties, the trial shall be had in the county in which a majority of them unite in demanding, or, if the numbers be equal, in that whose county seat is nearest."[99]

This provision has been construed to mean that where a majority of the defendants demand a change of venue, and are equally divided as to the county to which they desire the venue changed, the difficulty will be solved by selecting the county whose county seat is nearest to the county in which the action was commenced; but the statute has no application where less than a majority unite in the demand for a change.[100] The demand of the majority removes the cause to the county agreed upon; no order is neces-

[96]This distinction, it is submitted, lies at the basis of the difference between Cardozo, J. and Seabury, J., in Jacobus v. Colgate, (1916) 217 N. Y. 235, 111 N. E. 837; for an illuminating discussion of this problem, see (1927) 11 MINNESOTA LAW REVIEW 260; see also (1920) 5 MINNESOTA LAW REVIEW 63; (1922) 6 MINNESOTA LAW REVIEW 516.

[97]See footnote 86, where sections 9206 and 9214 are set out. The provision that a foreign corporation, though it has complied with the provisions of law as to its right to do business in the state, may be sued in any county which the plaintiff may designate, was held unconstitutional as violating the equal protection clause of the fourteenth amendment to the federal constitution. State v. District Court of Otter Tail County, (1929) 178 Minn. 72, 225 N. W. 915, noted in (1929) 14 MINNESOTA LAW REVIEW 83. See also, (1929) 13 MINNESOTA LAW REVIEW 522.

[98]Mason's 1927 Minn. Stat., sec. 9215.

[99]Mason's 1927 Minn. Stat., sec. 9215.

[100]Scott v. Miller Liquor Co., (1913) 122 Minn. 377, 142 N. W. 817.

sary.[101] In determining whether a majority of the defendants have demanded a change, a nonresident defendant will not be counted.[102] However, a defendant may unite in a demand for a change of venue before he has been summoned.[103] Where there are several defendants residing in different counties, a majority of such defendants may secure the change of venue authorized by the statute by making proper affidavit and serving a joint demand therefor, before the time for answering has expired as to any of them, or by each of them making such affidavit and serving a demand for the same change at any time before his time for answering expires.[104] Even though the action is originally brought in a county in which one of the defendants resides, if a majority of the defendants unite in a demand for a change the change must be made.[105]

"The venue of any civil action may be changed by order of the court in the following cases: (1) Upon written consent of the parties; (2) When it is made to appear, on motion, that any party has been made a defendant for the purpose of preventing a change of venue under section 9215; (3) When an impartial trial cannot be had in the county wherein the action is pending; or (4) When the convenience of witnesses and the ends of justice would be promoted by the change."[106]

The second ground stated above prevents the joinder of mere nominal defendants as a means for the plaintiff to dictate the venue. If the venue is laid in the county of the residence of a nominal defendant, the venue might be changed if a majority of the defendants unite in the demand. If a majority cannot unite in the demand, it may be shown *on motion* for change of venue that the resident is a mere nominal defendant.[107] Or, of course, as in New York, the venue may be changed on the grounds that the "convenience of witnesses and the ends of justice will be promoted by the change."[108]

---

[101]Mason's 1927 Minn. Stat., sec. 9215; State v. District Court of Ramsey County, (1934) 192 Minn. 541, 257 N. W. 277; State v. District Court of Ramsey County, (1922) 152 Minn. 540, 188 N. W. 161.

[102]State v. District Court of Ramsey County, (1922) 152 Minn. 540, 188 N. W. 161.

[103]See footnote 102.

[104]Grimes v. Ericson, (1904) 92 Minn. 164, 99 N. W. 621.

[105]Chadbourne v. Reed, (1901) 83 Minn. 447, 86 N. W. 415; see also Collins v. Bowen, (1891) 45 Minn. 186, 47 N. W. 719.

[106]Mason's 1927 Minn. Stat., sec. 9216.

[107]The court apparently is influenced in its decision of such a motion by the cause of action stated in the petition: W. B. Foshay Co. v. Mercantile Trust Co., (1926) 166 Minn. 442, 208 N. W. 203; see also Roesher v. Union Hay Co., (1915) 131 Minn. 489, 154 N. W. 789; Singer v. Singer,

It is possible therefore, to determine the place of trial before a trial on the merits. The trial court should be granted a wide discretion in its rulings on motions for change of venue. The place where the action should be tried is a matter which may be settled before the trial, and one fair trial on the merits is all any litigant should have the power to demand.[109] And in the face of a rather specific statutory requirement, Minnesota has reached this desirable result as to actions in rem, as well as in personam.

VI. Conclusion

It is submitted that the county in which the trial is to take place is a matter that should be definitely settled before a trial on the merits. A procedure which permits the parties more than one fair trial on the merits in order to determine a question which might be determined before trial results in a sacrifice of time, money and ordinary intelligence upon a worm-eaten altar of formality. County lines within a state are no more than convenient political lines for convenient diversification of governmental functions. To hold that the state court of first instance is limited in its jurisdiction to those lines in purely personal actions, or actions in rem is hardly a recognition of those lines on any basis of convenience.[110] It has even been suggested that state lines today are no more than convenient political lines, and in all

(1927) 173 Minn. 57, 214 N. W. 778, opinion adhered to on rehearing, 173 Minn. 94, 216 N. W. 789.

[108]Fauler v. Chicago, B. & Q. R. R., (1934) 191 Minn. 637, 253 N. W. 884.

[109]In Delasca v. Grimes, (1919) 144 Minn. 67, 174 N. W. 523, 524-525, Lees, C. said: "The practice of obtaining a review of an order relating to the venue of an action by appealing from an order denying a new trial, or from a judgment, is not to be commended. A speedy determination of the action upon the merits will not be reached if the question is reserved until after the case has been tried, for, if a reversal be had on that ground, the parties have been put to the expense of a trial on the merits, which has accomplished nothing." In State v. District Court, (1921) 150 Minn. 498, 185 N. W. 1019, it was said, at p. 1020: "It was early held that the aggrieved party could not appeal from an order denying or granting a motion to change the place of trial, but that such order could be reviewed upon appeal from an order denying a motion for a new trial or from the judgment. . . . The inadequacy of such relief is apparent. The desirability of a speedy and final determination of the proper place of trial, before trial, was commented on in Delasca v. Grimes, (1919) 144 Minn. 67, 174 N. W. 523, where the cases are reviewed. A practice which does not permit a final determination of the proper place of trial, except on appeal, when, if there has been error in determining it, the whole trial, no matter if rightly conducted, goes for naught, is intolerable."

[110]See Pound, Organization of Courts, 6 Am. Jud. Soc. Bulletin.

cases the place of trial should be tested by a rule of convenience.[111]

It is submitted that in all actions between residents of the state, the problem of where the case should be tried is one that should be settled before a trial on the merits; and the question should be determined primarily on the basis of convenience to the parties and witnesses with a view toward a speedy and efficient administration of justice. Some definite rules are necessary to determine the proper county in the vast majority of cases. The county where the res is located is the usual venue provision for local actions. In transitory actions New York says the residence of any of the parties; Iowa says the residence of one of the parties defendant; Minnesota says the county in which one or more of the defendants reside when the action was begun. The New York rule gives the plaintiff a wider selection. But granted that there is some reasonable rule prescribing where such actions should be brought; then, it is submitted, there should be some means for the defendant to raise the question of convenience, and he should be able to demand a change of venue if he can show that the rule (which might designate the most convenient place of trial in the vast majority of cases, and should be framed for that purpose) does designate a very inconvenient place of trial in his particular case. In other words, it would seem advisable to adopt a rule which would designate the most convenient place for the trial in the majority of cases; but as the ultimate test should be convenience and efficiency in the workings of the judicial machinery, certain rules and standards might well be worked out as means to that end, so that the place of trial might be changed if the rule of thumb adopted for the mass of cases does not work well in the particular case. It would seem also that this reasoning is applicable to all actions, in rem or in personam, where the place of trial is the problem to be solved. Of course, this can be done only when the trial court is a court of state-wide jurisdiction.[112]

---

[111]Roger S. Foster, Place of Trial—Interstate Application of Intrastate Methods of Adjustment, (1930) 44 Harv. L. Rev. 41; See also Foster, Place of Trial in Civil Actions, (1930) 43 Harv. L. Rev. 1217.

[112]Sedgwick, J., in Mosher v. Huwaldt, (1910) 86 Neb. 686, 688, 126 N. W. 143, recognized one of the difficulties of the Nebraska principle that the district court is limited in its jurisdiction to the county in which it sits, when he said: "The defendant may still be sued in a county distant from his home. Perhaps a more just practice is furnished by providing for the place of trial instead of limiting the place of beginning the action, as in New York and other states. The matter is, of course, peculiarly within the discretion of the legislature, and the province of the courts is to ascertain the meaning of the legislature."