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Venue Reform in Kentucky — A Proposal

By George Neff Stevens*

The Honorable Watson Clay in a recent article in the Kentucky State Bar Journal indicated that an overall study of venue in Kentucky was now in progress.1 Because of my ties to Kentucky and my interest in the subject of venue, I accepted this opportunity to make some suggestions.

Trouble spots in the venue picture usually appear at the following points:

1. Jurisdiction and Venue;
2. Joinder of Causes of Action and Venue;
3. Service of Process, Jurisdiction over the Person and Venue;
4. Joinder of Parties, Service of Process and Venue; and
5. Grounds of Venue

If these sore points can be soothed, much needless confusion, costly delay and wasteful litigation can be eliminated.

Jurisdiction and Venue

The distinction between jurisdiction and venue is fundamental. Jurisdiction, in the sense of jurisdiction over the subject matter, means the power of a court to hear and determine the general abstract question involved, to inquire into facts, to apply the law, to make decision and to declare judgment. In every state in the United States there is a constitutional or statutory provision conferring general original jurisdiction on some court, either generally,2 or in the county in which the court is sitting.3

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Kentucky provides by K.R.S. Section 23.010 that the circuit court shall have original jurisdiction of all matters, both in law and equity, unless delegated exclusively to some other tribunal.

Venue on the other hand has nothing to do with the power of the court to hear and determine a controversy. Venue means the place of trial, the particular county or territorial area, within the state or district in which the cause is properly brought or tried. It has to do with geographical subdivisions, relates to practice or procedure, and may be waived. So also, every state in the United States has constitutional or statutory provisions controlling the venue of civil cases. Judge Hobson in Gillen v Illinois Central R. Co. said of the Kentucky venue provisions:

"The purpose of sections 62-77 of the Code is not to regulate the jurisdiction of courts. The Code of Practice does not treat of the jurisdiction of courts or attempt to regulate it. It simply regulates the procedure in civil actions. The purpose of these sections of the Code, as shown in the title, is to regulate the county in which the action may be brought; or, in other words, the venue of actions. If an action under any of these sections for the recovery of money within the jurisdiction of the court is not brought in the proper county, it may be dismissed if the objection is properly taken; but, if the defendant does not object to the venue, the matter is waived."


Page v. Sinclair, 237 Mass. 482, 130 N.E. 177 (1921); but see Shadoin v. Sellars, 223 Ky. 751, 4 S.W. 2d, 717 (1923).

For a collection and study of these statutes see Stevens, Venue Statutes; Diagnos is and Proposed Cases, 49 Mich. L. Rev. 307 (1951), 137 Ky. 375, 125 S.W. 1047 (1910).
Unfortunately, the Court of Appeals has not seen fit to follow this sound lead. The annotations to practically every venue provision in the Kentucky Code list cases wherein venue is spoken of and treated as a limitation on the jurisdiction of the court over the subject matter of the particular action. Once this possibility of jurisdictional limitation through venue is recognized, the lawyer who fails to object to improper venue in a timely manner will raise the objection that the court has no jurisdiction. This seems to be the case in Kentucky.

The confusion in the Kentucky cases as in other states stems from a misapplication of the common law concept of local actions, triable only at the place where the land lies. For example, in *Livingston v Jefferson*, Chief Justice Marshall held that trespass to land was a local action and could be brought only in the courts of the state where the land lies. This type of decision is an example of a geographical limitation on jurisdiction. Here the land upon which the trespass was committed was in another state. This rule does not apply, and should not be applied, to land located within the state. There is no question but that the people of the Commonwealth of Kentucky have the right and the power to give their courts jurisdiction over all the land anywhere in Kentucky. Thus they did in K.R.S. Section 23.010. Kentucky Code Section 62, which reads, in part, that actions for injury to real property must be brought in the county in which the subject of action, or some part thereof, is situated is simply a venue provision. It designates the county in which the action should be brought for purposes of trial convenience. Here there is no question of power, or of control. There is only a question of convenience and of distribution of the work of the Circuit Court.

There is little doubt but that the use of the word "must" was and is in part responsible for the position the Court of Appeals

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8 See for example, Black v. Bishop, 307 Ky 40, 209 S.W 2d. 482 (1948).

9 1 Brock. 203 (Fed. 1811).
has so frequently taken.\textsuperscript{10} The legislative intent was, probably, that these words were not intended to be jurisdictional limitations, but were used only to make it clear that failure to comply subjects the pleader to attack on the ground that the venue is improperly laid. But, since the Kentucky provision is not unambiguous, and since a law suit may be won by having the action dismissed for lack of jurisdiction, litigation becomes a certainty.

Another factor in the Kentucky picture is that there is no provision in the Code dealing expressly with the problem of how and when to attack venue improperly laid.\textsuperscript{11} Consequently, it is not surprising to find lawyers attacking improper venue by motion to quash or demurrer on the ground that the court has no jurisdiction.

All these difficulties can be eliminated by carefully planned and worded legislation. A suggestion as to how to deal with these problems is included in the proposed Code set forth at the end of this paper.

\textit{Joinder of Causes of Action and Venue}

Joinder of causes of action becomes a venue problem when the plaintiff's attorney wants to join in a single law suit two or more claims against the same defendant, which claims, if brought separately, would have to be brought in different counties. Kentucky is one of the twenty-three states which have statutes dealing with the problem.\textsuperscript{12} Section 83 of the Kentucky Code limits joinder of causes of action, otherwise joinable, by providing for joinder only if each may be brought in the same county. Section 86 provides for waiver of objection to misjoinder unless taken in a timely manner under Section 85. The Court of Appeals has not, so far as can be ascertained, construed the venue aspect of these particular provisions. If the present review of the Civil Code indicates a need for broader joinder of causes of action in the interest of settling claims between the same parties in a single law suit, then care must be taken to review the limiting effect of the present provision with respect to venue.

\textsuperscript{10} See cases cited, supra fn. 7. Also, see detailed study of this and similar confusing language in Stevens, \textit{Venue Statutes: Diagnosis and Proposed Cure}, 49 Mich. L. Rev. 307 at 320 (1951).

\textsuperscript{11} Kentucky is not alone. Only twenty-one states have statutes dealing with this problem. See 49 Mich. L. Rev. 307 at 321-323.

\textsuperscript{12} Supra fn. 8.

\textsuperscript{13} See, Stevens, 49 Mich. L. Rev. 307 at 324-325.
If the present rule is retained, the statute should provide, not for dismissal of the improperly joined causes of action, but for dividing the suit into as many actions as necessary and transferring them to a proper county for further proceedings. This change would do much to cut costs and speed up decisions on the merits. A specific suggestion will be found in the proposed act later to be discussed.

Service of Process, Jurisdiction over the Person and Venue

Service of process becomes a complicating factor in the venue picture whenever a statute or statutes tie service requirements to venue provisions. The importance of proper service needs no citation of authority. The difficulty of obtaining service in many instances is also well known to the practicing lawyer. Any statute that needlessly adds to the difficulty or complicates the obtaining of a proper service should be eliminated. Unfortunately, Kentucky is one of the twenty states in which service of process and venue are tied together. If Section 41 of the Kentucky Code, providing that a summons shall be issued at any time, to any county, against any defendant, at the plaintiff's request, were the sole service provision, Kentucky would join the twenty-eight states which provide that service may be had in any and all civil actions anywhere in the state. However, Section 41 is limited by Sections 70 (Upon return of “no property found”) and 78 (Transitory actions) when venue is laid at the place where the defendant is summoned. When this ground is the theory of venue, service, for proper venue, can be had only in the county where action is brought. The problem presented by this type of venue provision should be eliminated by abolishing venue based upon service of summons. This matter will be more fully discussed under “Grounds of Venue.”

Sec. 41 is also, and far more seriously, limited by Sec. 78 whether venue be based on service of summons or on residence of the defendant by virtue of Sec. 79. This latter section provides, in effect, that where venue is based on summons, the service of process does not give jurisdiction over the person of defendant unless service was made in the county where venue is laid. Like-

wise, the statute says that where venue is based on defendant's residence, service is invalid, although otherwise properly had, unless defendant resides in the county where the action is brought. Thus, Sec. 79 turns a simple problem of improper venue into a serious question of jurisdiction over the person.

This method of raising the issue of improper venue is confusing, time consuming, and a hindrance to the speedy administration of justice. It gives no protection to a defendant that cannot be given as expeditiously by motion attack for improper venue. It complicates the problem of service on the defendant, and it results in unnecessary delay in reaching a binding decision on the merits. Consequently, it is recommended that Sec. 79 of the Kentucky Civil Code be repealed. In the proposed Venue Code the suggested method of treatment will show that there is also no need for Sections 81 and 82 of the present Code.

**Joinder of Parties, Service of Process and Venue**

Joinder of parties becomes a venue problem when the venue of plaintiff's action is based upon the county where one of several defendants resides or is summoned and the other defendant or defendants do not reside in, or cannot be served in, the same county. Kentucky is one of the forty-one states which have venue statutes by virtue of which venue may be laid in the county where any one of several defendants resides or is summoned.\(^{15}\) Civil Code Sec. 73, concerning actions against common carriers, and Sec. 78, covering transitory actions, so provide.

Service of process, however, is a complicating factor in Kentucky because Sec. 41 of the Code is limited by Sec. 80. Here again the statute has changed the simple problem of improper venue into the serious question of jurisdiction over the person. It does even more. It makes the question of proper venue, and of proper service turn not only on whether the defendants are properly joined\(^{16}\) but also and far more important on what the outcome of the case against the resident or served defendant may be.\(^{17}\)

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\(^{15}\) See, Stevens, 49 Mich. L. Rev. 307 at 327-331.

\(^{16}\) Ky. Code Sec. 78 — "who may be properly joined as such in the action"

\(^{17}\) Ky. Code Sec. 80 — Several defendants; judgment; bankrupt. "In an action brought pursuant to section 78, against several defendants, no judgment shall be rendered against any of them, upon the service of a summons out of the county
There is a reason for such legislation at this point. Venue based on residence or service on one of several defendants has been abused by the device of adding a party defendant for the sole purpose of controlling venue. Kentucky is one of six states\textsuperscript{18} which have attempted to deal with the problem by legislation.

From the point of view of the honest plaintiff who with probable cause and in good faith joined the defendant upon whose residence or service venue is based the statute can be very unfair. Sec. 80 recognizes this in part by providing for waiver where the defendant summoned outside the county makes defense without objecting to the jurisdiction of the court. As a practical matter, however, this effort at amelioration fails, for lawyers for such defendants will make objection on this point in every such case as a matter of course.\textsuperscript{19}

Admitting that the Kentucky experiment is a great improvement over the common law situation, still a valid criticism lies in the wastefulness of a procedure which allows a full hearing on the merits resulting in a verdict for the plaintiff against one or more of the defendants, only to be set aside because the defendant upon whose residence or service venue was based escapes liability \textsuperscript{20} The issue should be one of good faith in laying the venue. The time to raise and decide this issue should be at the outset of the action, not at its conclusion. A suggestion along these lines is included in the proposed Code set forth at the end of this paper.

**Grounds of Venue**

In a recent study of Venue on a national basis\textsuperscript{21} I discovered that contemporary venue provisions are predicated on some thirteen different fact situations. These grounds of Venue are (1)

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\textsuperscript{18} Ark., Ill., Iowa, Ky., Minn. and S. Dak.

\textsuperscript{19} The problem as to what constitutes a proper objection under Sec. 80 may yet prove very troublesome. The Ohio Supreme Court held in Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N.E. 565 (1927), that a general denial raised the objection.

\textsuperscript{20} See for example, University of Louisville v. Metcalf, 216 Ky. 339, 287 S.W 945 (1926). For a collection of such cases, see 98 A.L.R. 949 (1934).

Where the subject of action or part thereof is situated, (2) Where the cause of action, or part thereof, arose or accrued, (3) Where some fact is present or happened, (4) Where the defendant resides, (5) Where the defendant is doing business, (6) Where the defendant has an office or place of business, or an agent, or representative, or where an agent or officer of defendant resides, (7) Where the plaintiff resides, (8) Where the plaintiff is doing business, (9) Where the defendant may be found, (10) Where the defendant may be summoned or served, (11) In the county designated in the plaintiff's complaint, (12) In any county, and (13) Where the seat of government is located.

Venue statutes should have some sound basis for their adoption. Each provision should be based on convenience of the court, of the defendant, of the plaintiff, or of the witnesses. Tested by such a requirement only five of the above grounds measure up to standard. These five sound grounds are (1) Where the subject of action or part thereof is situated, (2) Where the cause of action, or part thereof, arose or accrued, (3) Where the defendant resides, (4) Where the plaintiff resides, and (5) Where the seat of government is located.

Venue based upon (1) Where the defendant is doing business and (2) Where the defendant has an office, etc., qualify in part but might better be absorbed, by careful legislative draftsmanship, into one of the five sound grounds.

Six of the thirteen grounds fail to qualify in any respect. These are (1) Where some fact is present or happened, (2) Where the plaintiff is doing business, (3) Where the defendant may be found, (4) Where the defendant may be summoned or served, (5) In the county designated in the plaintiff's complaint and (6) In any county Venue based on these six grounds should be abolished. They add needless confusion, create unnecessary problems, and do not contribute to the speedy and impartial administration of justice.22

Present Kentucky venue provisions employ eight of the thirteen grounds above listed. These include the five sound grounds,23 one of the grounds that could be absorbed in the five

22 For a detailed discussion, see Stevens, fn. 21 supra.
23 (1) Where the subject of action or part thereof is situated: Ky. Code §§: 62, 70, and 75; (2) Where the cause of action, or part thereof, arose or accrued: Ky. Code §§: 63, 71, 72, 73, 74, and 77. (3) Where the defendant resides: Ky.
sound grounds\textsuperscript{24} and two of the grounds which should be abolished.\textsuperscript{25}

It is quite obvious that the present Kentucky Civil Code with respect to Venue was developed with an eye to particular types of cases, as for example, Sec. 62 covering real property; Sec. 63, fines and forfeitures; Sec. 64, wills; on through to Sec. 78, which covers transitory actions, and, to particular parties, such as, prisoners, Sec. 69; banks and insurance companies, Sec. 71, corporations, Sec. 72; and common carriers, Sec. 73.

Such an approach leads to a multitude of venue provisions, complicates the job of the lawyer in choosing the proper venue and increases the possibility of delaying tactics because of the increased possibility of improper or questionable venue.

It is suggested that Kentucky's new Venue Code be broad and general in approach and coverage, rather than narrow and restricted. Detailed regulation of specific parties or types of action should be avoided as far as possible. And the number of grounds of venue should be reduced to a minimum, thus eliminating unnecessary distinctions which all too frequently give rise to confusion and litigation.

With all the above factors in mind, the following Code is suggested as one of many possible solutions.

\textit{Proposed Venue Code for Kentucky}

\textbf{Chapter 1. Venue — Place of Trial}

\textbf{Section 1. Venue — Place of Trial:} The following provisions relate to venue — the place of trial — of civil actions within the state. They are not, and are not to be construed to be, jurisdictional provisions or limitations under any circumstances whatsoever.

\textit{Comment:} It is suggested that this provision will clarify the legislative intent and render obsolete all Kentucky cases where venue is spoken of as a jurisdictional limitation in any respect.

\texttt{Code \$§\$: 69, 70, 73, 74, 75, and 78. (4) Where the plaintiff resides: \texttt{Ky. Code \$§\$: 73 and 74.} (5) Where the seat of government is located: \texttt{Ky. Code Sec. 69.} \textsuperscript{24}Where the defendant has an office or place of business, or an agent, or representative, or where an agent or officer of defendant resides: \texttt{Ky. Code Sec. 71 and 72.} \textsuperscript{25}(1) Where some fact is present or happened: \texttt{Ky. Code \$§\$: 64, 65, 66, 67, 70, 73, 75, and 76. (2) Where the defendant may be summoned or served: \texttt{Ky. Code \$§\$: 70, and 78.}
(1) The county in which the subject of action, or part thereof, is situated is the proper county for the trial of the following actions:

(a) For the recovery of real property, or of an estate or interests therein, or for the determination in any form of such right or interest;
(b) For the partition or sale of real property;
(c) For the foreclosure of all liens and mortgages on real property; and
(d) For the recovery of specific personal property

Comment: This provision reenacts Sec. 62 (1), (2) and (3). It adds a provision, not presently found in Kentucky, covering replevin actions. It is suggested that this group be included because of expediency in seizure of a chattel at the outset of the suit by the sheriff of the county in which the action is brought. Note that later provisions give the plaintiff an option to lay the venue elsewhere in this type of case if the facts fit. Sec. 62 (4) covering injury to real property has not been included. Trespass to land actions should not be treated specifically, but should be covered by general provisions. See comments under later sections.

(2) The county in which the act complained of, or part thereof, occurred, or in which the act, or part thereof, which was omitted, should have been performed, or in which the loss resulted from such omission, is a proper county for trial, except for actions listed under subsection (1) (a), (b) and (c)

Comment: It is suggested that this type of provision be used rather than the terminology "where the cause of action or part thereof arose or accrued." There is still considerable difficulty with the term "cause of action." Add to this the "or part thereof" provision and the difference between "arose" and "accrued" and a difficult problem of interpretation is presented. It is suggested that the above provision would provide a venue at the place where witnesses are most likely to be available and where a view if helpful, could be had, without encountering the difficulties of interpreting venue based upon "where the cause of action or part thereof arose or accrued." This provision provides the same coverage in a broader and more general form that is now found in Sec. 63 (fine or forfeiture to recover; officer against), Sec. 71 (bank or insurance company), Sec. 72 (cor-

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26 See for example, State ex rel. Northwestern Mutual Life Insurance Co. v. The Circuit Court, 165 Wis. 387, 162 N.W 436 (1917).
porations generally upon a contract or for a tort), Sec. 73 (common carrier; upon a contract to carry property or for a tort), Sec. 74 (person or character, injury to), and Sec. 77 (contractor for public work). One provision, made applicable to all, replaces six provisions each aimed at separate groups or causes! Note that trespass to land would fall into this category, and, under it, a proper venue, among others, would be the county in which the land was located — thus, Sec. 62 (4) is reenacted, but as a general, rather than specific, provision.

(3) The county in which the defendant, or defendants, or any one of them reside at the commencement of the action is a proper county for trial except for actions listed under subsection (1) (a), (b) and (c) For purposes of this subdivision.

(a) Persons — residence as used in this section means a dwelling place or dwelling places within the state. It does not include transient or temporary lodging. A prisoner in this State, or a person confined in an asylum for persons of unsound mind in this State is to be considered a resident of the county in which he resided or claimed residence when confined if known, and if not known, of the county where he is confined.

(b) Corporations — both domestic and foreign corporations shall be deemed to be residents of any county in which the corporation (1) has an office, (2) has a place of business, or (3) is actually doing business;

(c) Nonresidents doing business in the state — partnerships composed of residents, nonresidents, or both doing business in the state, unincorporated associations composed of residents, non-residents or both, doing business in the state, and non-residents doing business in the state through agents in the state, shall be deemed to be residents of the county in which they are actually doing business.

Comment: By the use of the article "a" rather than "the" in subsections (2) and (3), it is intended to make it clear that the plaintiff has an option as to the place of venue where his facts fit either provision. This terminology is employed throughout this Code. The purpose of subsection (3) (a) is to define residence. It makes it clear that a person may possibly have two
The provision with respect to prisoners and persons confined to asylums reenacts Sec. 69 of the Code as a part of this general provision. Subsection (3) (b) eliminates the need for venue based upon "where defendant has an office, etc." This provision incorporates into a general defendant's residence venue provision the specific provisions of Sec. 71 (banks and insurance companies) and Sec. 72 (corporations generally upon a contract or for a tort). It would eliminate the problem as to the proper venue of an action against a common carrier which was also a corporation (Sec. 72 or Sec. 73), as well as the question as to what is the residence of a common carrier raised in *James v Nashville, C. & St. L. Ry.* This provision changes and broadens the rule therein laid down with respect to residence of a corporation. Subsection (3) (c) eliminates the need for venue based upon "where the defendant is doing business, etc." and yet provides a place of trial for cases involving parties of this description. Do not confuse this provision which relates to venue with the more difficult problem of how to acquire jurisdiction over the person of such parties. The object of subsection (3) (c) is simply to provide a place of trial in those cases where jurisdiction over the person can be successfully obtained by some proper service or where the case may be transformed into a *quasi in rem* proceeding by attachment and some form of constructive service. Note that trespass to land cases fall within this provision where the facts fit. Subsection 3 reenacts in a broader form Sec. 70 (Upon return of "no property found"), Sec. 73 (Common carrier), Sec. 74 (Person or character), Sec. 75 (Constructive service) and Sec. 78 (Transitory actions).

(4) The county in which the plaintiff or plaintiffs, or any of them reside at the commencement of the action is a proper county for trial when all of the defendants are nonresidents except for actions listed under subsection (1) (a), (b) and (c) For purposes of this subdivision:

(a) Persons — residence as used in this section means a dwelling place or dwelling places within the state. It does not include transient or temporary lodging;

(b) Corporations — both domestic and foreign corporations shall be deemed to be residents of any county in

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27 This provision is in line with the position taken as to what constitutes residence for venue purposes in Southeastern Greyhound Lines v. Conklin, 303 Ky. 87 196 S.W 2d. 961 (1946).

28 310 Ky. 616, 221 S.W 2d. 449 (1949).
which the corporation (1) has an office, (2) has a place of
business, or (3) is actually doing business;
(c) Nonresidents doing business in the state — partner-
ships composed of residents, nonresidents, or both doing
business in the state, unincorporated associations com-
posed of residents, nonresidents, or both doing business in
the state, and nonresidents doing business in the state
through agents in the state shall be deemed to be residents
of the county in which they are actually doing business.

Comment: In many states the plaintiff may elect to bring his
action in the county where either a defendant or a plaintiff
resides. Since the plaintiff controls the bringing of a lawsuit,
it is suggested that this provision, which is highly favorable to
the plaintiff, be limited, as it is, to situations not covered by sub-
sections (1) and (3) above. It will give a plaintiff an election
as to venue if the facts fit subsection (2) above. Its main pur-
pose is to provide a place of trial within the state, based on
convenience of the plaintiff, where a foreign cause of action is
involved. This provision does not cover the possibility of venue
at plaintiff's residence presently permitted by Sec. 73 (action
against a common carrier, in county in which plaintiff resides,
if he resides in a county into which the carrier passes) or by
Sec. 74 (actions for libel, in the county in which the plaintiff
resides). It is hoped that these parts of Sections 73 and 74 will
be repealed. They are not necessary today regardless of the
situation at the time of their enactment.

Note that Subsection 4 covers an action for trespass to land
where the facts fit. For example, land in one county in Ken-
tucky plaintiff a resident of another county in Kentucky, the
trespasser, a nonresident of Kentucky. Here, plaintiff would
have an election to lay venue in the county where the trespass
took place under Subsection 2 (and, of course, but incidentally,
where the land lies) or in the county where he, the plaintiff,
resides under this subsection.

Do not confuse this possibility re venue with the problem of
how to get service on the nonresident defendant. This provision
covers a proper place for trial. It is not concerned with how to
get a proper service. The two are separate. Keep them so!

(5) The county in which the seat of government is located
is the proper county for the trial of the following actions:
(a) Where all of the parties to the action are nonresidents
and the venue cannot be laid under subsection (1) (a)
(b), (c), (d), or (2) hereof;
(b) Where the action is against the state or any agency thereof;
(c) Where the action is against a county, city or other political subdivision.

For the purposes of this subdivision: In an action under subsections (a) or (b), seat of government means the county in which the state government is located; in an action under (c), seat of government means the defendant county or the county in which the appropriate political subdivision is located.

Comment: The question whether or not states must open their courts to actions by nonresidents against nonresidents on foreign causes of action is not within the scope of this study. It is the purpose of this subdivision to provide a venue in the states which allow such actions and to do so in a county where, with a minimum of effort, some check can be made on the number and types of suits of this nature which are being litigated. This provision broadens and includes the coverage of Sec. 68 ( sinking Fund Commissioners or Board of Education.)

(6) For the purposes of Section 1.
(a) The words "is a proper county" means that plaintiff has an election to use such provision if his facts fit and there is no exception.
(b) The words "is the proper county" means that plaintiff has no election unless his facts fit into one of the other provisions and there is no exception.

Comment: For example, the plaintiff may have an election in a replevin action to lay his venue under subsection (1) (d), or (2), or (3) or (4). The trespass to land possibilities have already been noted.

Section 2. Venue improperly laid, objection, waiver — An action brought in the wrong county may nevertheless be tried therein, unless a defendant before the time for answer has expired, or at the time he makes his general appearance in the case by answer, demurrer or otherwise, whichever comes first, moves for its change to a proper county. If such a motion is made in a timely manner, the court shall order the change at plaintiff's cost, which may include reasonable compensation for defendant's trouble and expense, including attorney's fees, in attending in the wrong county, and shall direct the clerk to forward all papers to
the clerk of the court in the proper county for further proceedings. If such a motion is not made within this time limit, the venue irregularity shall be deemed to have been waived.

Comment: The purpose of this provision is to implement the suggestions previously made.

Section 3. Change of venue by stipulation or consent.—All the parties to an action, after it is commenced in any county may agree by stipulation or by consent in open court, entered on the record, that the place of trial may be changed to any other county in the state. Thereupon, the court must order the change as agreed upon.

Comment: K.R.S. Sec. 452.010 (1), as interpreted by the Court of Appeals, allows such a change only when the venue is properly laid in the first instance. Such a limitation, based on a confusion of jurisdiction and venue, should be eliminated. The above proposal broadens the old statute and makes clear the legislative intent.

Section 4. Change of venue by contract, effect of—All contracts, agreements or stipulations, made before an action is commenced, whereby the venue herein prescribed is altered, changed, waived or otherwise affected, are valid, subject however to the power of the court, on motion made under Section 2 above to order the cause removed to a proper county if the court is of the opinion that convenience of witnesses and the ends of justice would be promoted by the change. Where an action is brought in a proper county under this Code, despite a contract, agreement or stipulation providing for venue in a different county, the defendant may by motion under Section 2 above request the court to order the cause removed to the county agreed upon. If the court is of the opinion that convenience of witnesses and the ends of justice would be promoted by the change, the judge should order the case removed to the county agreed upon, otherwise not. The decision of the court on either type of motion shall not be subject to review.

Comment: Section 4 is a liberalization of choice of venue granted to contracting parties. The danger to be guarded against in such agreements as to venue is economic duress or

fraud. Do not confuse contracts limiting or changing venue with contractual attempts to limit the jurisdiction of courts over subject matter which are void for reasons of public policy.

Section 5. Joinder of causes of action, proper venue.—Where causes of action requiring different places of trial are joined whether properly or not, the venue may be laid in any county in which either cause of action, if sued upon separately, could have been brought. Where the trial of these actions together would be inexpedient, the defendant, before the time for answer has expired, or at the time he makes his general appearance in the case by answer, demurrer or otherwise, whichever comes first, may move the court to separate the causes of action so joined and to remove the cause or causes of action joined to a proper county for further proceedings. If the causes of action so joined were improperly joined, and require different places of trial, the court must, on timely motion, order the cause or causes of action so joined removed to a proper county for further proceedings, at plaintiff's cost. If the causes of action were properly joined, but require different places of trial, the court may in its discretion order the separation requested. If such a motion is not made within the above time limit, any objection on any of these grounds shall be deemed to be waived. If none of the causes of action so joined could be brought in the county where the venue was laid, the provisions of Section 2 shall control.

Comment: This provision implements the suggestions made under the heading “Joinder of Causes of Action and Venue.”

Section 6. Joinder of parties, proper venue.—When two or more defendants are joined and venue is laid at the residence of one of them, the other or any of the other defendants, before the time for answer has expired, or at the time he makes his general appearance in the case by answer, demurrer or otherwise, whichever comes first, may make a motion for change of venue to a proper county on the ground that the joinder of the resident defendant was not made in good faith, but was made solely to control the venue of the action. Affidavits in support of the motion setting forth the facts upon which the moving party relies must be submitted when the motion is made. Plaintiff may submit affidavits in answer thereto within three days after notice of motion is served upon him or his attorney. If the objection is
properly taken in a timely manner and if the court is of the opinion, on the basis of the affidavits submitted and after argument, that the resident defendant was joined merely to control venue, the court must order the case removed at plaintiff's cost, which may include reasonable compensation for defendant's trouble and expense, including attorney's fees, in attending in the wrong county, to a proper county for further proceedings. If the court is of the opinion that the plaintiff joined the resident defendant in good faith, the motion should be denied. The decision of the court on a motion on this ground shall not be subject to review unless there is a flagrant violation of discretion. Unless the defendant objects on this ground in the manner hereinafter provided and within the time limit set forth, he will be deemed to have waived the objection.

Comment: This provision is in line with and implements the suggestions made under the heading "Joinder of Parties, Service of Process and Venue". It is submitted that this provision gives a defendant all the protection he needs and at the same time protects the plaintiff who has joined defendants in good faith against an adverse decision on the merits against some but not all of such defendants. This provision would supersede Sec. 80 of the present Code.

Comment: This provision covers, in a broader form, the provision of K.R.S. Sec. 452.010 (2).

Section 7. Change of venue properly laid.—The venue of any civil action may be changed by order of the court on motion by the party aggrieved when an impartial trial cannot be had in the county wherein the action is pending. The right to make such a motion shall be deemed to be waived if not taken before trial.

Section 8. Number of changes of venue restricted.—Neither party is entitled to more than one change of venue for any reason.

Comment: The purpose of this provision is to prevent abuse of motions for change of venue by either plaintiff or defendant. A tendency to use this device for purposes of delay is appearing. It should be squelched.

Section 9. Transfer of judgments in actions affecting real property.—When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to a
court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, and record the judgment in the records of the court, briefly designating it as a judgment transferred from ....... court (naming the proper court)

Section 10. Appeals.—An appeal may be taken from an order granting or refusing to grant a motion to change the place of trial of an action or proceeding unless the right to appeal is specifically denied. Where the decision to grant a motion lies within the discretion of the court, an appeal may be taken only when there has been a flagrant abuse of this discretion. Notice of appeal in either instance must be filed within two days after the order granting or refusing to grant the motion is entered. Unless so filed, any objection to such ruling is forever waived. If a notice of appeal is properly filed, further proceedings in the case shall be stayed pending decision on the appeal.

Comment: The purpose of this provision is to provide for an immediate appeal on venue technicalities. This section must be implemented, if it is to be effective, by a provision under which the appellate court will hear such cases within ten days. It is felt that the present practice under which objections to venue go to appeal, after a decision of the case on the merits, is extremely wasteful and must be eliminated.

Section 11. Improper venue, not jurisdictional.—No order, judgment or decree shall be deemed void or voidable for want of jurisdiction because rendered in the wrong venue.

Comment: The object of this section is to implement the material discussed in Part II hereof under the heading "Jurisdiction and Venue"

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Some Final Suggestions

This proposed Code will not be effective, and in fact will give considerable trouble, unless Kentucky Civil Code Sections 79, 80,
81 and 82, limiting service of process under Section 41, are repealed, for the reasons discussed under "Service of Process, Jurisdiction over the Person, and Venue." It might be wise to strengthen the language of Section 41 to read as follows:

"A summons shall be issued at any time to any county against any defendant, at the plaintiff's request, regardless of the kind of action or the propriety of venue."

The following provisions of the Kentucky Civil Code should be repealed. Sections 62 through and including 82. It should be noted that no special provision has been made in this proposal for venue in actions concerning Wills, Sec. 64 of the present Code; deceased persons or assigned estates, Sec. 65; distribution, partition and sale of decedent's estate, Sec. 66; ward against guardian, Sec. 67, upon return of "no property found", Sec. 70; persons constructively summoned, Sec. 75; and alimony or divorce, Sec. 76. The Wills provision, Sec. 64, does not tell the lawyer where to lay venue. He must find out where the will should be recorded before he knows. If Sec. 64 were repealed, under the proposed Code Sec. 1 (2) would provide a proper venue based on the omission to probate or the act of probating in the county where, by law, the will should be probated, or was probated. Sections 65, 66, and 67 provide a venue based upon where the personal representative qualified. If repealed, as it is suggested they should be, the proper venue of similar actions would be much broader, allowing a greater choice, based upon trial convenience, rather than the fact of the place of appointment. Frequently, the venue would be the same county as under the present provision, but for firmer reasons. The same is true of Sec. 70, upon return of "no property found" and Sec. 75, persons constructively served. With respect to divorce, Sec. 76, it is felt that no special provision is required. The matter should be controlled by general provisions.

The following provisions of the K.R.S. should be repealed: K.R.S. Sec. 452.010 thru and including Sec. 452.100 (covering change of Venue), and K.R.S. Sec. 23.020 (Franklin Circuit Court venue in revenue and fiscal cases) The provisions of the latter statute are embodied in the present Code. Consequently, this special provision is unnecessary.
Also, all other provisions whether in the Statutes or the Civil Code bearing on Venue in the Circuit Court should be repealed.

Venue can be simplified and the uncertainties of venue irregularities can be eliminated. It is hoped that these suggestions will be of some assistance in accomplishing these ends in Kentucky.