

Memorandum No. 3

Subject: Venue Study

As I have reported to you, the Southern Committee considered the staff report on the Venue study at its meeting on October 22 and recommended its acceptance by the Commission. The Committee also recommended that the Commission recommend the fourth proposed revision of Code of Civil Procedure Section 396b (pp. 34-35 of the staff report) to the Legislature and that it recommend a parallel revision of Code of Civil Procedure Section 397(3) which governs change of venue for convenience of witnesses.

We have prepared a draft of a Report and Recommendation by the Commission to the Legislature, a copy of which is attached. Several questions are presented:

1. We have bracketed some material because we are in doubt as to whether it should be included. Some of these doubts we referred to below; others will be explained at the meeting.

2. Is the general form of the report - Findings, Recommendations, Proposed Revisions - acceptable? In lieu of the first of these we could use a different title, omit the numbers, and cast some of the paragraphs in the form "The Commission believes ..." (see, e.g., paragraphs 4, 5 and 6).

3. You will note that the proposed revision covers both Section 396b and Section 397(3) of the code and that it combines the revisions of Section 396b proposed in both the third and fourth revisions suggested in the staff report. Bringing in the third proposed revision departs from the Committee's recommendation. Our thought is that a method should be devised to enable the court to put pressure on the defendant to make a disclosure of the issues he intends to raise before his answer is filed. The "unless

Memorandum No. 3

Page 2.

clause" in brackets is included to make it clear that the plaintiff's affidavits shall not control the pleadings and other documents in the case as to what the issues are; it is bracketed because (a) it may not be necessary because no court would think that the affidavit would control and (b) it may be desirable to permit the affidavit to control, (this assumes, contrary to (a) that it would) so that for the purpose of the motion, the issues shall be determined by the parties' affidavits only rather than by the pleadings and other documents which may formally frame issues that the parties do not seriously intend to contest.

A couple of other matters:

First, the Chairman wishes the Commission to consider whether the staff study and the Commission's Recommendation and Report should, if adopted by the Commission at the November meeting, be immediately sent to the State Bar and other interested groups for their comment and criticism.

Second, at the Committee meeting Mr. Babbage called attention to the fact that witnesses are sometimes called on matters arising at the outset of the trial, such as restraining orders, injunctions, and writs and suggested that this might be adverted to in the study as an additional justification for abolishing the requirement that the answer be filed before a counter motion to retain venue for the convenience of witnesses can be heard because the convenience of such witnesses ought to be considered but this aspect of the case will be moot by the time the answer is filed. The Committee suggested that consideration be given to including this thought in the staff report.

Memorandum No. 3

Page 3.

There are no California cases which suggest that a court should consider the convenience of any witnesses other than those at the trial. This is probably due to the fact that because of the strict rule that a motion based on convenience of witnesses cannot be considered before answer, the question of convenience of witnesses at preliminary proceedings is usually moot by the time the motion comes on for hearing. However, even in the Federal cases which we have read, where the motion was decided prior to preliminary proceedings, there is no indication that the convenience of witnesses at those proceedings was considered. Moreover, in all of the considerable amount of material which was studied in preparing the staff report discussion was tacitly on the footing that the controlling factor is the convenience of the witnesses at the trial. If the convenience of witnesses at preliminary proceedings were to be considered, difficult questions would arise, such as whether the action should be held in or transferred to one court for pretrial matters and then transferred to another for trial if the respective witnesses and their residences are different. We think that getting into this matter would considerably complicate the study and suggest that it may be better to leave it alone. Thus, the proposed revision of sections 396b and 397(3) refersto witnesses "at the trial" but this language is bracketed to indicate that it should be omitted if the Commission decides that the convenience of other witnesses should also be considered.

Respectfully submitted,

John R. McDonough, Jr.  
Executive Secretary

NOV 7 1955

REPORT AND RECOMMENDATION OF THE LAW  
REVISION COMMISSION TO THE LEGISLATURE  
RELATING TO RETENTION OF VENUE IN AN  
IMPROPER COURT FOR CONVENIENCE OF  
WITNESSES

Resolution Chapter 207 adopted by the 1955 Session of the Legislature authorized and directed the Law Revision Commission to make a study to determine whether, when the defendant moves to change the place of trial of an action, the plaintiff should in all cases be permitted to oppose the motion on the ground of convenience of witnesses. The Commission has made this study. Its findings and recommendations, which are based on its consideration of a staff report set forth at pages 00-00 of this report, are as follows:

FINDINGS OF THE COMMISSION

1. The present law is that when a plaintiff files an action in a court other than a "proper" court - i.e., other than a court designated by Code of Civil Procedure Sections 392 to 395.1 - and the defendant moves to transfer the case to a proper court, a counter motion to retain the case where filed for the convenience of witnesses may be considered only if the defendant has answered.

2. The general practice of defendants is, therefore, to file motions to change venue before answering with the result that the action must be transferred to the proper court and then, in an appropriate case, retransferred back to the original court for convenience of witnesses on a motion made in the proper court pursuant to Code of Civil Procedure Section 397(3) after the defendant has answered.

3. This cumbersome practice is based on two rules adopted by the California courts in the last century: (1) that a motion to retain or change

venue for convenience of witnesses cannot be determined prior to answer because the court cannot know what the issues will be and whose testimony will, therefore, be required; and (2) that a motion to change venue to the proper court and a counter motion to retain venue for convenience of witnesses cannot be continued for hearing and decision until the answer is filed because the defendant has a right to have all further proceedings in the action take place in the proper court and, if his motion to transfer to the proper court were postponed until answer, it would be necessary for the improper court to entertain further proceedings, such as hearing defendant's demurrer. These two rules were codified by an amendment of Code of Civil Procedure Section 396b in 1933.

4. It is not necessary in every case to have an answer on file in order to decide a motion to retain venue for the convenience of witnesses. Under a proper procedure (see Finding No. 7 below), it would be possible in at least some cases to obtain sufficient information to enable the court to decide the motion from affidavits and through interrogation of counsel by the court at the hearing on the motion.

5. In some cases, on the other hand, a motion to retain venue for the convenience of witnesses cannot be properly decided even though an answer is on file because the issues which will be tried are still obscure. It is desirable, therefore, to make the procedure sufficiently flexible to permit the motion to be continued in such cases until the issues have been clarified by pretrial proceedings subsequent to answer.

6. There is no particular merit in the rule that when a motion to change venue is filed the court cannot entertain any other matter in the cause

until the motion has been determined. [The rule appears to have been developed by carrying to a logical extreme the general attitude of the courts that the defendant has an "ancient and valuable right" to trial at the place of his residence - an attitude which is itself open to much doubt today.] It is desirable to permit the court to continue a motion to change venue when a counter motion to retain venue for convenience of witnesses has also been filed until both motions are ripe for decision (whether by the filing of the answer or other pretrial developments in the cause) and to permit the court where the action is filed to entertain and decide other matters in the cause until such time.

7. In order to facilitate the early decision of motions to retain venue for the convenience of witnesses, the courts should be authorized to accept the plaintiff's affidavit as to what the issues in the case will be unless [the pleadings and other papers on file indicate that the plaintiff's statement is erroneous or] the defendant files a conflicting affidavit as to what issues he intends to raise. [The courts should also be authorized to interrogate counsel on this matter.]

8. If Section 396b, which governs motions to retain venue for the convenience of witnesses is revised, parallel revisions should logically be made in the procedure on motions to change venue for the convenience of witnesses made pursuant to Code of Civil Procedure Section 397(3) although such changes are outside the scope of the study which the Legislature authorized and directed the Commission to make.

## RECOMMENDATIONS OF THE COMMISSION

The Code of Civil Procedure should be revised to provide a more flexible procedure on motions to retain and to change venue for the convenience of witnesses by:

(a) Abolishing the requirement that the answer be on file before such motions can be decided;

(b) Authorizing the courts to decide such motions when they are filed or to continue them until such other time, before, when, or after the answer is filed, as they become ripe for decision;

(c) Authorizing the courts to entertain and decide other matters in the cause while a motion to change venue and a counter motion to retain venue for the convenience of witnesses are pending; and

(d) Authorizing the courts to accept the plaintiff's affidavit as to what the issues in the case will be unless [the pleadings or other papers on file indicate that the plaintiff's statement is erroneous or] the defendant files a conflicting affidavit as to what issues he intends to raise.

## PROPOSED REVISION OF THE CODE OF CIVIL PROCEDURE

The commission has drafted proposed revisions of Code of Civil Procedure Sections 396b and 397, the enactment of which will achieve the several changes of substance which it recommends. The following shows the changes from the present law which the enactment of these proposed revisions would involve:

§ 396b. Except as otherwise provided in Section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk, or with the judge if there be no clerk, an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, upon the adverse party, of a copy of such papers. Upon the hearing of such motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the same transferred to the proper court; provided, however, that the court in an action for divorce or separate maintenance, may, prior to the determination of such motion, consider and determine motions for allowance of temporary alimony, support of children, counsel fees and costs, and make all necessary and proper orders in connection therewith; provided further, that in any case, ~~if an answer be filed~~, the court may consider opposition to the motion, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted.

If, when the motion for transfer to the proper court and opposition thereto on the ground of convenience of witnesses comes on for hearing, there is no answer on file or the court is unable to determine what the issues will be or who the witnesses [at the trial] will be, the court may do either of the following:

(a) Decide the motion on the basis of the statements in plaintiff's affidavit as to what he believes the issues will be, [unless the court determines from the pleadings and other papers on file that the plaintiff's statements are erroneous or] unless the defendant files a conflicting affidavit as to the issues which he intends to raise;

(b) Continue the motion until after the answer is filed or other proceedings are had which will enable it to determine what the issues will be and who the witnesses [at the trial] will be. The court may entertain all proceedings in the cause until the motion has been heard and determined.

§ 397. The court may, on motion, change the place of trial in the following cases:

1. When the court designated in the complaint is not the proper court;
2. When there is reason to believe that an impartial trial can not be had therein;
3. When the convenience of witnesses and the ends of justice would be promoted by the change; . If, when a motion to change the place of trial made under this subsection comes on for hearing, there is no answer on file or the court is unable to determine what the issues will be or who the witnesses [at the trial] will be, the court may do either of the following:



(a) Decide the motion on the basis of the statements in the affidavit of the moving party as to what he believes the issues will be, [unless the court determines from the pleadings and other papers on file that such statements are erroneous or] unless the opposing party files a conflicting affidavit as to the issues which will be raised;

(b) Continue the motion until after the answer is filed or other proceedings are had which will enable it to determine what the issues will be or who the witnesses [at the trial] will be.

4. When from any cause there is no judge of the court qualified to act;

5. When an action for divorce has been filed in the county in which the plaintiff has been a resident for three months next preceding the commencement of the action, and the defendant at the time of the commencement of the action is a resident of another county in this State, to the county of the defendant's residence, when the ends of justice would be promoted by the change. If a motion to change the place of trial shall be made under this subsection, the court may, prior to the determination of such motion, consider and determine motions for allowance of temporary alimony, support of children, temporary restraining orders, counsel fees and costs, and make all necessary and proper orders in connection therewith.