August 30, 1955

Proposed Agenda For Meeting
of
California Law Revision Commission

September 16 - 17, 1955

1. Consideration of Minutes of Meeting of June 25, 1955.
2. Consideration of memorandum of Executive Secretary re personnel for Agenda work (See Memorandum No. 1, enclosed herewith).
3. Consideration of memorandum of Executive Secretary regarding the Agenda and the Reports of the Agenda Committee (See Memorandum No. 2, enclosed herewith).
4. Consideration of Proposed Budget for fiscal year 1956-57 (See Memorandum No. 3, enclosed herewith).
5. Consideration of memorandum of Executive Secretary re items on current Calendar of Topics for Study (See Memorandum No. 4, enclosed herewith).
6. Consideration of memorandum of Executive Secretary re Committee work by Commission members (see Memorandum No. 5, enclosed herewith).
7. Consideration of memorandum of Executive Secretary concerning relationship with the Legislature (See Memorandum No. 6, enclosed herewith).

8. Consideration Report on Change of Venue

MINUTES OF MEETING

OF

SEPTEMBER 16 and 17, 1955

Pursuant to the call of the Chairman, the Law Revision Commission met on September 16 and 17 at San Francisco, California.

PRESENT:

Mr. Thomas E. Stanton, Jr., Chairman

Mr. John D. Babbage, Vice Chairman (Sept. 16)

Honorable Jess R. Dorsey, Senate

Honorable Clark L. Bradley, Assembly (Sept. 17)

Mr. Joseph A. Ball

Mr. Bert W. Levit (Sept. 17)

Mr. Stanford C. Shaw

Mr. John H. Swan

Mr. Ralph N. Kleps, ex officio

ABSENT:

Mr. Samuel D. Thurman

Mr. John R. McDonough, Jr., Executive Secretary of the commission, and Mrs. Virginia B. Nordby, Assistant Executive Secretary of the commission, were present on both days. Mr. Charles W. Johnson, Chief Deputy Legislative Counsel, was present on both days. Mr. Thomas E. Cochran, the commission's Research Consultant on Study No. 10 and Mr. Norris Burke, Chief Research Attorney for the Judicial Council, were present during a part of the meeting on Friday, September 16. During a part of the meeting on Friday, a number

of members of the Bench and Bar were also present at the invitation of the commission to make suggestions concerning its work.

The minutes of the meeting of the commission on June 25, 1955, which had been distributed to the members of the commission prior to the meeting, were unanimously approved.

## 1. AGENDA

A. Action on Pending Suggestions: The commission considered the report of the Agenda Committee recommending action on a number of suggestions and reached the following decisions:

Immediate Study. The commission decided that the following suggestions should be placed on the list of Topics Selected for Immediate Study:

| | |
|---|---|
| 29(3) | 79 |
| 39 | 94 |
| 76(1) | |

Future Study. The commission decided that Suggestion No. 95 should be placed on the list of Topics Intended for Future Study.

Postponed. The commission postponed consideration of the following suggestions:

| | |
|---|---|
| 35 | 87 |
| 80 | |

Consolidate. The commission consolidated the following suggestions with Topic No. 10 [as originally reported to the Legislature], which is a study to determine whether the Small Claims Court Law should be revised:

| | |
|---|---|
| 21(3) | 47(1) |
| 21(4) | 68 |

Not Accept. The commission decided that the following suggestions should not be accepted for study:

| | | |
|---|---|---|
| 21(2) | 60(1) | 75 |
| 21(5) | 60(2) | 82 |
| 22A | 67(1) | 83 |
| 29(2) | 67(2) | 84 |
| 38 | 67(3) | 85(1) |
| 45 | 69(1) | 85(2) |
| 46 | 69(2) | 86 |
| 47(2) | 69(3) | 89 |
| 47(3) | 70 | 90 |
| 47(4) | 72 | 91 |
| 47(5) | 73 | 92 |

In addition the commission decided that the following action should be taken with regard to some of the suggestions which were not accepted:

1. It was decided that Suggestion No. 21(2), relating to appointment of counsel for indigent defendants, and the mimeographed report on that suggestion should be sent to Mr. Garret Elmore of the State Bar, together with a letter explaining the action of the commission.

2. It was decided that Suggestion No. 82, relating to making it a ground for new trial in criminal cases that it is impossible to have the phonographic record of the trial transcribed, should be sent to the Secretary of the State Bar with the suggestion that it may be deemed appropriate for study by the State Bar Committee on Criminal Law and Procedure.

3. It was decided that it should be suggested to the originators of Suggestions No. 22A, 47(2), 47(3), 47(4), 47(5), 69(2), 75 and 86, all of which relate to the Vehicle Code, that they may wish to write to the Assembly Interim Committee on Transportation and Commerce about the problems raised by their suggestions.

4. It was decided that it should be suggested to the originators of Suggestions No. 85(1) and 89, which relate to elections, that they may

wish to write to the Assembly Interim Committee on Elections and Reapportionment about the problems raised by their suggestions.

5. It was decided that the Executive Secretary should consider suggesting to the originators of Suggestions No. 21(5) and 69(1), which relate to justice court matters, that they may wish to present the problems raised by their suggestions to the Justices and Constables Association.

B. Personnel for Agenda Work: The commission considered a memorandum by the Executive Secretary pointing out the large amount of research which must be done in connection with preparing a calendar of topics for study and the difficulties involved in the present arrangement under the contract with Stanford University. Stanford has been using law review men to do this research but this method has not proved satisfactory because the students are so involved in their other work that they cannot devote enough time to it. The possibility of adding a second Junior Counsel to the staff to handle the Agenda work was discussed but rejected because of the shortage of space at the Law School and also because it is not certain that there will be enough Agenda work to keep one person busy full time. It was decided that the commission should discuss with Stanford whether the University can make another arrangement for doing the Agenda research, possibly by having one of the Law School's Teaching Fellows devote a part of his time to this work.

C. Further Solicitation of Suggestions: The Executive Secretary reported that the commission has received almost no suggestions during 1955 from members of the Bench and Bar for the revision of the law. The commission discussed what might be done to stimulate interest in its work and decided that a letter should be sent to the judges, law professors, and bar associations

throughout the State requesting suggestions. It was also decided that the Chairman should try to write an article for the State Bar Journal telling of the work of the commission and requesting suggestions and should attempt to have an announcement of the commission's interest in receiving suggestions published in the State Bar Journal.

D. Suggestions for Law Revision from Members of the Bench and Bar: On the afternoon of Friday, September 16, the commission received members of the Bench and Bar who responded to the commission's general invitation to attend the meeting for the purpose of making suggestions for revision of the law. The persons who attended the meeting of the commission included Mr. Norris Burke, Mr. B. E. Witkin, Mr. Felix Stumpf, Professor Edward Barrett, Mr. Allan Sapiro, Mr. Frank Baker, Judge Raymond Peters, Judge Fred Wood and Mr. John Anderton of San Francisco. The following suggestions were made:

1. Judge Peters suggested that something should be done to allow the expenditure of state money for educating and rehabilitating inmates of the county jails.

2. Mr. Stumpf urged the commission to collect and publish materials relating to the legislative history of enactments which are of concern to lawyers.

3. Professor Barrett suggested that the topics which the commission has selected for study are, generally speaking, too narrow in scope and that the commission should study broader areas of the law. He suggested that, for example, the study of Limitations of Actions in California prepared by Mr. Allan Sapiro of San Francisco for a State Bar panel discussion might be

considered as the basis for a general revision of the law in that area.

4. Judge Wood suggested that the commission study the law relating to illegal searches and seizures and, if necessary, recommend revision of any provisions which may prove to be a hindrance in developing an enlightened set of rules under the newly announced ban on illegally obtained evidence.

5. Mr. Witkin recommended that the commission make a series of studies in several major areas of private law to determine what need for law revision in such fields may exist. He also suggested that the commission recommend over-all revision in such areas to the Legislature rather than continue its present practice of studying isolated, relatively minor problems in unrelated fields.

E. Matters on Current Agenda of Judicial Council: Mr. Norris Burke, Chief Research Attorney for the Judicial Council, discussed with the commission what might be done to avoid any duplication of effort or overlapping of study projects between the Judicial Council and the commission. He outlined the present program of the Judicial Council, which includes studies of the extraordinary writs; Article VI of the Constitution (Courts); pre-trial procedure which may eventually include discovery proceedings, demurrers, motions, etc; and judicial statistics. He said that he would keep the Executive Secretary informed of matters being considered by the Judicial Council and the Chairman of the commission assured him that the commission would advise him of matters placed on the commission's calendar of topics selected for immediate study.

## 2. CURRENT STUDIES

A. Selection of Research Consultants: The Executive Secretary reported that, pursuant to the authority given to the Chairman and the Executive Secretary at the meeting of June 25, they had retained Research Consultants for all of the topics that the commission had decided should be studied by consultants. The consultants and their compensation are as follows:

| Study No. | Subject | Consultant | Compensation |
|---|---|---|---|
| 1. | Restraints on Alienation | Prof. Turrentine - Stanford | $ 1,000 |
| 2. | Proof of Foreign Law | Prof. Hogan - Hastings | 750 |
| 3. | Dead Man Statute | Prof. Chadbourn - UCLA | 750 |
| 4. | Survival tort actions arising elsewhere | Prof. Sumner - UCLA | 500 |
| 5. | Prob. Code § 201.5 | Harold Marsh - Atty. S.F. | 750 |
| 6. | C.C.P. § 660 | Prof. Barrett - Boalt | 500 |
| 10. | Penal Code § 19A | Thomas Cochran - Dept. D.A. - L.A. | 750 |
| 13. | Parties on Cross Actions | Prof. Howell - USC | 750 |
| 14. | Administrator in Quiet Title Action | Prof. Maxwell - UCLA | 500 |

The Executive Secretary reported that in writing to each consultant he had requested that the consultant submit a preliminary report in the near future outlining how he would propose to proceed so that the committee of the commission assigned to his study could use it as the basis of a discussion

with him to determine the general scope of the study. He also reported that he had suggested to the consultants deadlines ranging from December 1, 1955 to April 1, 1956 for the submission of the first drafts of their final reports.

B. Form of Report: The Executive Secretary reported that he had had several inquiries from the Research Consultants as to the general form in which they should submit their reports. He called the attention of the commission to a report on Study No. 7 - Retention of Venue in an Improper Court for Convenience of Witnesses - which had been prepared by the staff and suggested that the commission might wish to approve the form of that report so that it could be sent to the consultants as a general guide. After the commission examined and discussed the general form of the report on Study No. 7, a motion was made by Senator Dorsey, seconded by Mr. Swan, and unanimously passed that the report be approved as an acceptable form.

C. Study No. 10 - Penal Code Section 19A: Mr. Thomas W. Cochran, the Research Consultant on Study No. 10 presented an oral report to the commission on the progress of his work. He stated that he has read and digested all of the cases involving conflicts between Penal Code Section 19a and other statutory provisions in the Penal Code and elsewhere requiring imprisonment in the county jail for more than one year. These cases uniformly hold that Section 19a controls and that imprisonment in the county jail must be limited to one year. Mr. Cochran also reported that he has made a search of the Penal Code and the other codes for misdemeanors which are punishable by imprisonment in the county jail for longer than one year and which therefore conflict with Section 19a.

Mr. Cochran reported that while the major portion of the legal research on his study has been completed, the research sheds little light on the important question of how the conflict between Section 19a and the other statutory provisions should be resolved. Mr. Cochran proposed that the commission ascertain the views of persons familiar with the practical aspects of county jail imprisonment before it decides whether the underlying policy of Section 19a - that no person should be committed to the county jail for longer than a year - is basically sound.

The committee appointed by the Chairman to work with Mr. Cochran on Study No. 10 ( Mr. Ball, Chairman, and Mr. Shaw) recommended that the commission write a letter to all superior and municipal court judges, sheriffs, probation officers, public defenders, parole officers and others who might be familiar with the matter, inviting them to express their views as to whether punishment in the county jail should be for more than one year in the cases now designated by statute or whether, on the other hand, these statutory provisions should be amended to conform with the policy of Section 19a that no persons should be imprisoned in the county jail for more than one year. This recommendation of the committee was unanimously adopted by the commission. It was decided that the office of the Executive Secretary should handle the mimeographing and mailing of the letter after consultation with Mr. Cochran.

D. Study No. 18(L) - Fish and Game Code: The Executive Secretary reported that, pursuant to the authority given to the Chairman at the meeting of June 25, a contract had been made with the Legislative Counsel to make a study of the Fish and Game Code for the commission. The Legislative Counsel will submit a draft of a proposed revision of the Fish and Game Code by February 1, 1956.

The Executive Secretary reported that he had met with Mr. Seth Gordon, Director of the Department of Fish and Game, and Mr. William J. Harp, representing the Fish and Game Commission, to discuss the commission's assignment to revise the Fish and Game Code. He reported that both Mr. Gordon and Mr. Harp offered whatever assistance the commission and the Legislative Counsel might need and that Mr. Gordon in particular appeared to be both enthusiastic and cooperative about the project.

The commission discussed whether it should contact sportsmen's clubs and organizations at this time to notify them of the commission's assignment to revise the Fish and Game Code and to request suggestions. It was decided that such contact should be established as early as possible both through letters and through a notice in the sportsmen's publications. The Executive Secretary was instructed to prepare and mail a letter to all sportsmen's groups requesting suggestions for the revision of the Fish and Game Code and to forward any suggestions received to the Legislative Counsel.

E. Study No. 17(L) - Inheritance and Gift Tax: The Chairman reported that he had discussed the commission's assignment to study the Inheritance and Gift Tax law with Assemblyman McFall, the sponsor of Res. Ch. 205 (A.C.R. 33), but that Assemblyman McFall did not appear to have any specific idea as to how the commission ought to proceed or how broad the scope of the commission's study should be. Apparently Assemblyman McFall originally had in mind only matters of detail, not the broad question of whether California should adopt an estate tax. However, he expressed to the Chairman the view that the commission's study need not be so limited, that the commission could make its study as broad as it thinks necessary, and that as far as he is

concerned the entire matter is within the commission's discretion.

The Executive Secretary reported that he had discussed the commission's assignment with Mr. James W. Hickey, Chief Inheritance Tax Attorney of the Controller's Office, and that Mr. Hickey had expressed the willingness of his office to cooperate with the commission and had sent him a list of thirteen major differences between the federal estate tax and the state inheritance tax.

The Chairman also reported that, pursuant to the commission's instruction, he had notified the Board of Governors of the State Bar about Res. Ch. 205 and had requested the State Bar to give the commission its view with respect to the feasibility and scope of the contemplated study. The Board of Governors has referred the question to the State Bar Committee on Taxation and the chairman of that committee has appointed a subcommittee to consider the matter and has indicated that the subcommittee will make a report of its conclusions and recommendations on or about October 15, 1955.

The Executive Secretary stated that he had discussed Res. Ch. 205 with several members of the Bar and that their general opinion was that the commission should use Res. Ch. 205 as an opportunity to examine the broad question of whether California should change from the inheritance to the estate tax. They indicated that there would be little benefit to anyone from making the inheritance tax law conform to the federal estate tax law in minor respects so long as the basic structure of the inheritance tax law is retained.

The commission discussed at length what the scope and purpose of its study should be. Mr. Levit suggested that the commission should approach this matter as a study project, rather than as an assignment to draft a new

law or several alternative laws. He recommended that the commission make a preliminary study to serve as the basis of a report to the Legislature at the 1956 Session. He said that such a study should point out that if the Legislature is interested in greater conformity between State and Federal law a preliminary choice must be made between studying (a) whether it would be desirable to adopt an estate tax in California and (b) how to achieve conformity in minor details between the basically different estate and inheritance taxes which now exist. It should then point out the basic differences between the federal estate tax and the state inheritance tax, examine in a preliminary way the general consequences of adopting an estate tax in California, and indicate what might be done to make the state inheritance tax law conform to the federal estate tax law as to matters of detail, assuming that the present inheritance tax structure is retained. The study, he said, should be sufficiently detailed and accurate to permit the Legislature to make a decision as to how the commission should proceed, but should not purport to be an exhaustive investigation of all possible legal and economic considerations involved in proceeding along either line. Mr. Levit recommended that if such a study is made the commission consider retaining Mr. James B. Frankel of the San Francisco Bar as Research Consultant.

A motion was made by Mr. Swan, seconded by Mr. Shaw, and unanimously adopted that the Chairman and the Executive Secretary be authorized to employ a Research Consultant for not more than $500 to make a study required to be made under Res. Ch. 205 along the lines suggested by Mr. Levit.

## 3. ADMINISTRATIVE MATTERS.

A. Budget for 1956-57. The Executive Secretary submitted a proposed budget for the 1956-57 fiscal year. After some discussion a motion was made by Mr. Ball, seconded by Mr. Shaw, and unanimously adopted that the proposed budget be approved except that the amount allowed for printing be reduced to $6,000 and the amount allowed for research be increased to $14,000.

The Chairman and the Executive Secretary were authorized to submit estimates of the number and cost of study projects during 1956-57 if such estimates are required by the Department of Finance in support of the amount allowed for research in the proposed budget.

B. Appointment of Committees: The commission decided that there should be two committees - a Northern Committee and a Southern Committee - to work with the Research Consultants and the staff on Current Studies and make recommendations to the commission. The members of the Northern Committee will be Mr. Levit, Mr. Stanton, Mr. Thurman and Mr. Swan. The members of the Southern Committee will be Mr. Babbage, Mr. Ball and Mr. Shaw. It was decided that neither the legislative members nor the Legislative Counsel should serve on committees.

The commission discussed what should be the relationship of the Executive Secretary and the committees, particularly with regard to the ultimate responsibility for the substantive content of the Research Consultant's report. It was decided that the Executive Secretary should keep track of the progress of the consultants' work, make arrangements for committee meetings, and devote as much time as feasible to studying the reports. However, it was

agreed that the ultimate responsibility for checking the substantive content of the consultants' work and for preparing the recommendations of the commission would rest with the members of the committees and not with the Executive Secretary.

C. Relationship with the Legislature: The commission discussed methods of developing effective liaison with the Legislature and its interim committees. It was agreed that steps should be taken to avoid conflict or overlap between commission studies and the work of interim committees and that the members and the Executive Secretary should make as many personal contacts with members of the Legislature as possible in order to familiarize them with the commission and its work.

D. National Association of Legislative Service Agencies: The Chairman reported that both he and the Executive Secretary had received invitations from the Governor of Florida to attend the meeting of the National Association of Legislative Service Agencies being held in Miami the middle of October. He stated that he could not personally attend, but recommended that the Executive Secretary be sent as the commission's representative to observe the functioning of the Association and ascertain what benefit the commission may obtain and what contribution the commission might make from an active participation in the Association. A motion was made by Mr. Shaw, seconded by Mr. Swan, and unanimously adopted that the Executive Secretary be authorized to attend the meeting at State expense.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

# A STUDY OF THE LAW RELATING TO RETENTION OF VENUE IN AN IMPROPER COURT ON THE GROUND OF THE CONVENIENCE OF WITNESSES

The purpose of this study is to determine whether, when the defendant moves to change the place of trial of a civil action to the proper court, the plaintiff should in all cases be permitted to oppose the motion on the ground of the convenience of witnesses. (footnote noting that "proper" court means a court designated by Code of Civil Procedure Section 392 to 395.1 and that a case may be tried in a different or "improper" court in cases covered by Sections 396b and 397)

Under the present law, when a plaintiff commences an action in a court which is not the court designated for the trial of the action by the provisions of Code of Civil Procedure Sections 392 to 395, defendant may move to transfer the action to the proper court. If the defendant has filed an answer, the court may consider a counter motion to retain venue in the improper court on the ground of convenience of witnesses. This procedure is authorized by Code of Civil Procedure Section 396b, which provides:

> §396b. Except as otherwise provided in Section 396a [justice courts], 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 motions, 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. /Emphasis added./

If an answer has not been filed, the action must be transferred to the proper court without consideration of a counter motion to retain venue for the convenience of witnesses. The hearing on defendant's motion cannot be postponed until defendant has answered. After the action has been transferred to the proper court, and defendant has answered, plaintiff may move to return the action to the court in which it was commenced on the ground of convenience of witnesses. This motion is allowed under the provisions of Code of Civil Procedure Section 397:

> §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 cannot be had therein;
> 3. When the convenience of witnesses and the ends of justice would be promoted by the change;
> 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. /Emphasis added/

If the judge of the proper court is persuaded that the convenience of witnesses and the ends of justice will be promoted by a trial of the action in the court in which it was commenced, he must transfer the action back to

that court.

This procedure appears to be both cumbersome and wasteful and to afford the defendant an opportunity to employ purely dilatory tactics. The objective of this study is to determine whether a more expeditious procedure can be devised. The study will examine (1) the present provisions for venue and change of venue in California, (2) the development of two well-settled rules which necessitate the present procedure of transfer to the proper court and retransfer to the most convenient court; (3) the procedure followed by other jurisdictions in analogous situations; and (4) the policy considerations relevant to a determination whether a change in existing law should be made.

## VENUE AND CHANGE OF VENUE IN CALIFORNIA

Title IV of Part 2 of the Code of Civil Procedure (Sections 392 to 401) fixes the place of trial of civil actions. The provisions of this title determine which of several courts having jurisdiction over the subject matter of the action and having potential jurisdiction over the person of the defendant is the proper court for the trial of particular actions. Section 392 designates as the proper place for the trial of real property actions "the county in which real property, which is the subject of the action, or some part thereof, is situated ***." Section 393 requires that actions to recover penalties or forfeitures imposed by statute and actions against public officers shall be tried in the county in which the cause of action arose. Section 394 provides that actions by or against a city, county, or city and county may be tried in the city or county involved, but it also contains a special and very liberal provision for transferring the action to another city or county. Section 395.1 provides that, in actions against an executor, administrator, guardian or trustee, the proper county is the county having jurisdiction of the estate which

the defendant represents. All other cases are covered by Section 395 which provides:

> § 395. (1) In all other cases except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. If the action be for injury to person, or to personal property, or for death from wrongful act, or negligence, either the county where the injury occurs, or where the injury causing death occurs, or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. In an action for divorce, the county in which the plaintiff has been a resident for three months next preceding the commencement of the action is the proper county for the trial of the action. When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary.***

The perspective in which the courts have traditionally viewed these provisions is not immediately apparent from the face of the statute. However, it will be a significant factor in the resolution of the problem considered by this study and should therefore be noted at the outset. The courts have apparently considered the venue statutes to be designed primarily for the defendant's benefit, giving him a general prima facie right to have venue laid in the county of his residence. Statutory provisions that the proper place for trial of an action is somewhere other than the place of defendant's residence have been viewed as exceptions to this general rule. It was stated as early as 1895 in Brady v. Time-Mirror

Co. that "The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception." The same view has recently been stated even more emphatically in Goossen v. Clifton: "The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have an action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can — otherwise, the defendant's right is to have the case tried in the county of his residence." Under this interpretation of the venue statues the first sentence of Section 395 is considered to establish the general right of every defendant to have actions against him tried at his place of residence, and the remaining provisions of Section 395, as well as the provisions of Sections 392, 393, 394, and 395.1, are considered to constitute exceptions to and encroachments upon this general right.

It is difficult to determine exactly how this view that the venue statutes confer a "right" upon the defendant to be sued in the place of his residence developed. One court has said that "The right of a defendant to have an action brought against him in the county in which he has his residence is an ancient and valuable right which has always been safeguarded by statute***", but this statement is not actually supported by either the present Code or its earlier counterparts which lay venue of many actions elsewhere. Moreover, no such right was ever recognized by the English common law. Under the early common law every action was tried in the place

where the cause of action arose. This rule developed as a matter of practical necessity because the jury at that time was required to be personally familiar with the facts of the case. But even after the function of the jury evolved into its modern form, many actions were labelled "local" and required to be tried in the place where the cause of action arose, and "transitory" actions, which could be commenced anywhere, were subject to the right of defendant to have them transferred to the place where the cause of action arose. It would appear that the primary consideration in the development of these English common law venue rules was not the right of defendant to a trial at the place of his residence but was rather the factor of greatest convenience to court, parties and witnesses. Before the function of the jury changed, the convenience of the court and the jury was preferred over the convenience of the parties. The later rules for commencing or transferring actions to the place where the cause of action arose might well have been based, in part at least, on the assumption that this place would be most convenient for both parties and witnesses.

Whatever the origin of the California rule, it would appear today that the provisions of the Code of Civil Procedure have so substantially modified defendant's so-called "right" to a trial in the county of his residence that it may be unrealistic to assert that it still exists. Sections 392 to 395.1 have modified it by providing numerous cases in which trials must be had elsewhere or in which plaintiff has a choice of laying venue elsewhere. It has also been modified by Section 397(3), which allows the court to change the place of trial in any action on motion of either party when the convenience of witnesses and the ends of justice would be

promoted by the change, and by Section 396b, which allows an improper court to retain any action if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted.

But despite these substantial qualifications of defendant's "right" to be sued at home, at least some of which are designed to assure that venue will ultimately be laid in the most convenient court, the rule that defendant has a "right" to trial in the county of his residence is firmly established. The rule sometimes produces unnecessary delay if it does not actually require trial in an inconvenient court. (footnote re burden of proving inconvenience). Moreover, it has had an important influence on the development of almost every aspect of the California venue law, including the rules which necessitate the cumbersome procedure which must be followed to lay venue ultimately in the court where the action was filed in cases in which it is not the proper court but is the most convenient forum for the trial of the action.

## DEVELOPMENT OF THE CALIFORNIA LAW RELATING TO RETAINING VENUE IN AN IMPROPER COURT

Under the present law when defendant moves to change the place of trial to the proper court, the plaintiff is allowed to make a counter motion to retain venue in the improper court in which the action is pending for convenience of witnesses only if the defendant has filed an answer. The requirement that an answer be filed has been explained on the

ground that the court cannot determine who the witnesses in the action will be or what testimony will be material until the issues are framed. The result is that the defendant will normally file his motion to change the place of trial before he answers and the action will be transferred to the proper court. After the defendant files his answer in that court, he may move under Code of Civil Procedure Section 397(3) to have the action transferred back to the original court on the ground that the convenience of witnesses will be promoted by the change. This cumbersome procedure of transferring to the proper court and then transferring back to the convenient court is necessitated by the provision of Code of Civil Procedure Section 396b that:

> . . . if an answer be filed, the court may consider opposition to the motions, 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. [Emphasis added]

The courts have consistently held that when defendant demurrs and moves to change the place of trial to the proper court, a counter motion to retain venue for convenience of witnesses cannot be considered and the action must be transferred to the proper court. This construction of the statute appears to be correct. The language of the statute alone supports it. Moreover, prior to 1933 when the clause quoted above was added, the procedure had been firmly established by a long line of case authority.

Since the purpose of this study is to determine whether a more expeditious procedure can be devised, it is necessary to examine the development of the present procedure by the courts prior to 1933 so that the reasons for the present rule may be clearly understood and an informed decision

as to their validity may be made. However, it should be kept in mind that whatever the weaknesses of the reasons given may be and whatever the opportunities may have been for a judicial change in the present procedure prior to 1933, the enactment of the statute in that year codified the rules developed by the courts and there is no longer any possibility of modification of them by the courts.

The procedure of transferring to the proper court and retransferring to the original court after defendant has answered is necessitated by two factors: (1) the requirement that answer be filed before a motion to retain venue on the ground of convenience of witnesses will be heard, and (2) the rule that once defendant moves to change the place of trial to the proper court he has the right to have all further proceedings in the action take place in that proper court.

1. The requirement that answer be filed before a counter motion to retain venue on the ground of convenience of witnesses will be heard: This requirement has not always been a statutory one. The last proviso of Section 396b authorising the counter motion and setting forth the requirement, was added in 1933. However, prior to 1933 the courts had developed two well-settled decisional rules: (a) that a counter motion to retain venue in an improper court on the ground of the convenience of witnesses could be made and granted under the authority of subsection 3 of Code of Civil Procedure Section 397, and (b) that such a motion could not be entertained unless the case was at issue.

(a) The earliest cases in which a counter motion to retain venue in an improper court on the ground of the convenience of witnesses was recog-

nized as proper practice arose while the California Practice Act was in effect. That Act contained no provision similar to present Code of Civil Procedure Section 396b authorizing the retention of an action in an improper court in certain instances, although it did contain a section identical to present Section 397(3) authorizing a change of venue on the ground of convenience of witnesses. However, the courts consistently stated that a counter motion to retain venue for convenience of witnesses was proper. Loehr v. Latham, decided in 1860, was the earliest case to approve the practice; the court did not consider the Practice Act but simply assumed that the counter motion could be made. Later cases made the same assumption, and the only reference to the Practice Act is found in the last case decided under its provisions, Edwards v. Southern Pacific R. Co. The Court carefully summarized the previous cases which had approved the practice of retaining venue in an improper court and concluded: "This rule has been acquiesced in, and acted upon, for many years,*** and we do not feel justified in giving a new construction to the provisions of the Practice Act, involved in the question."

The Code of Civil Procedure of 1872 continued in effect as Section 397(3) the provision of the Practice Act relating to change of venue on the ground of convenience of witnesses. The Code also contained a new provision which allowed an improper court to retain the action unless the defendant, at the time he appeared and answered or demurred, demanded that the trial be had in the proper county. In the first case to be decided under the Code, the Court said: "The Code of Civil Procedure has made no change in the law, which requires a modification of the rule, [that an action may be retained in an

improper court on the ground of the convenience of witnesses7 and the rule has been so long established that we do not feel at liberty to depart from it." The rule was codified in 1933 with the enactment of the last clause of Code of Civil Procedure Section 396b.

(b) The requirement that the case must be at issue before a counter motion to retain venue on the ground of the convenience of witnesses was also established law long before its codification in 1933. However, early cases seem to have regarded the question of whether an answer has been filed as completely immaterial. None of them mention such a requirement, and in only two of them do the opinions indicate whether or not answer had in fact been filed. In Loehr v. Latham defendant had answered at the time the motion to transfer to the proper county and the counter motion to retain for convenience of witnesses were made but no significance was given to this fact by the opinion of the Court. In Jenkins v. California Stage Co. no answer had been filed in the action. Defendant moved to change venue to the county where it had its principal place of business. Plaintiff opposed the motion on the ground, inter alia, that the case could be retained for the convenience of witnesses. Defendant's motion was denied by the trial court and the Supreme Court affirmed the denial on the ground of convenience of witnesses. The Court said:

> When a defendant applies for a change of the place of trial, on the ground that the action was not brought in the county where he resides, the plaintiff has a right to oppose the motion by showing that the "convenience of witnesses and the ends of justice would be promoted" by refusing the change and such facts should govern and control the Court in determining the question whether the application for the change should be granted or not.

This decision that a counter motion to retain an action in an improper court on the ground of the convenience of the witnesses could be granted before the defendant has answered and also the implications of earlier cases that the question of whether or not answer had been filed was immaterial were repudiated in 1882 by the landmark case of Cook v. Pendergast. In that case the defendant moved for a change of venue to the proper county before he answered. Plaintiff resisted defendant's motion on the ground of the convenience of witnesses. The trial court denied defendant's motion and defendant appealed. The Supreme Court reversed. In the opinion the Court first distinguished all the earlier cases except Jenkins v. California Stage Co. on the ground that they did not state whether or not answers had been filed and hence were not holdings that answer need not be filed. As to the Jenkins case, the Court concluded that it had "overlooked the point made by counsel that the cross-motion was made prior to an answer by defendant." The Court then stated its oft-cited rationale for the rule that the case must be at issue before a motion to change or retain venue on the ground of the convenience of witnesses may be heard or granted.

> The plaintiff can not move to change the place of trial on the ground that he has brought his action in the wrong county. But he may move to change the place of trial on the ground that the convenience of witnesses and the ends of justice will be promoted by the change. The cases which recognized his right to a cross-motion assumed this much.*** But neither plaintiff nor defendant can move for a change of the place of trial because of the convenience of witnesses, *** until the event has occurred which, *** can alone enable the Court to decide what facts are material to be proved by the respective parties, ***. Independent of an express provision of statute, the Superior Court ought not to be called on before issues of fact have been joined to decide that the convenience of witnesses will be promoted by a change of the place of trial *** The Code of Civil Procedure does not require a decision

> which — in the nature of things — must ordinarily be premature. /Emphasis added/
>
> A defendant who demurs to a complaint without answering, must demand a transfer (if he claims it on the ground that the proper county is not designated), before or when he demurs. If his motion to change the place of trial is brought to a hearing before he has answered, the plaintiff can not by cross-motion, demand the retention of the action in the county where it is pending, on the ground of convenience, etc.

Since the decision in Cook v. Pendergast, the courts have consistently held that a motion to retain venue on the ground of the convenience of witnesses cannot be granted unless answer has been filed and the requirement was enacted into Code of Civil Procedure Section 396b in 1933.

2. The rule that defendant's motion to change venue to the proper court must be heard before any further proceedings are had in the action: The requirement of Cook v. Pendergast that an answer must be on file would not, alone, have necessitated the procedure of transferring to the proper court and subsequently retransferring to the court in which the action was commenced. That procedure could have been avoided by postponing action on both defendant's motion and plaintiff's counter motion until after the answer is filed in the court in which the action was commenced. It should be noted that the Court in Cook v. Pendergast did not require that defendant's motion to transfer to the proper court be heard before any further proceedings in the action. It said: "If his motion to change the place of trial is brought to a hearing before he has answered, the plaintiff can not by cross-motion, demand the retention of the action in the county where it is pending, on the ground of convenience, etc." /Emphasis added/

However, even before Cook v. Pendergast the Supreme Court, in Buell v. Dodge, had announced the rule that a motion to change venue to the proper court must be decided on the basis of the condition of the case as it stands when defendant first appears. The facts of Buell v. Dodge did not involve a counter motion to retain venue in an improper court for convenience of witnesses. There were two defendants in that case; one was a nonresident of the county in which the action was commenced and one was a resident. It appeared from the original complaint that the nonresident defendant was the only one against whom a cause of action was stated. While a motion to change venue will be denied if venue is proper as to any defendant, a defendant is ignored in deciding the motion unless a cause of action is stated against him. After the nonresident defendant had made a motion to change venue to the county of his residence, therefore, the plaintiff filed an amended complaint setting forth a good cause of action against the resident defendant. The trial court nevertheless ordered the action transferred to the county where the nonresident defendant lived. On appeal the Supreme Court affirmed this order, stating only:

> Dodge's right to a change of the place of trial is to be determined by the then conditions of the case, and could not be taken away by statements in an amended complaint subsequently filed. [Emphasis added]

The rule of Buell v. Dodge, stated another way, provides that once defendant moves to change venue to the proper court, no later development in the case, such as a later-filed pleading, will be allowed to deprive him of the right to a change if he had such a right when he first appeared. This rule has been broadened by later cases to provide that no later development

may affect defendant's right, either by depriving him of the right or by perfecting a right to a change of venue which did not exist at the time he first appeared. However, the rule has never been applied to motions under Code of Civil Procedure Section 397(3) to change of venue on the ground of convenience of witnesses; in these cases the motion is decided on the basis of the "conditions of the case" when it is heard. Moreover, it was not suggested by Cook v. Pendergast that when plaintiff makes a counter motion to retain the case in an improper court for convenience of witnesses, the court may not consider the case as it stands at that time rather than when the defendant first appeared.

However, two years after the decision of Cook v. Pendergast the Supreme Court held that the trial court may not postpone hearing defendant's motion and plaintiff's counter motion until after defendant has answered. In Heald v. Hendy defendant demurred and moved to change the place of trial to San Francisco, the county of his residence, which was the proper county. Plaintiff filed a counter motion to retain the cause in the county in which it was pending, for the convenience of witnesses. When defendant's motion came on for hearing the trial court ordered "that further hearing of defendant's motion be postponed until defendant files his answer to plaintiff's complaint, and that plaintiff's cross-motion be heard at the time when the further hearing of defendant's motion is heard ***". Defendant appealed from this order and the Supreme Court reversed, saying: "This order, in its legal effect, was an order denying defendant's motion for a change of the place of trial. It effectively deprived him of the right to have his demurrer heard in San Francisco. (Cook v. Pendergast, 61 Cal. 72.)"

Whether the court considered Heald v. Hendy to be merely an application of the rule of Buell v. Dodge that a later filed pleading - in this case, the answer - may not be considered in ruling on a motion to change venue is not entirely clear. Buell v. Dodge was not cited in the Heald case. Moreover, the Court could have distinguished the cases and held that the rule of Buell v. Dodge does not apply when plaintiff has made a counter motion to retain venue. But the strongest ground for doubt that Heald v. Hendy involves an application of the Buell v. Dodge rationale is that what the Court seemed to have primarily in mind in Heald v. Hendy was that to await defendant's answer would require a ruling on his demurrer by the improper court and that such a procedure would abrogate the right of defendant to have the demurrer heard in the proper court. In this aspect of its decision the Court laid down a principal which has been strictly applied ever since: that defendant's right to have the case tried in the proper court includes the right to have every part of it, including all demurrers, motions and other proceedings, tried there and that once a motion to change venue has been made the court can consider no other matter in the case other than the motion itself until the motion has been decided.

However this may be, the rule that no further proceedings can be had once a motion to change venue is made until the motion has been decided has subsequently been affirmed in a series of cases involving a variety of factual situations and must now be regarded as settled law. The following cases are examples of its application:

In Hennessy v. Nicol defendant demurred and moved to change the place of trial to the county of his residence, which was the proper county.

Plaintiff moved for an order for support pendente lite and the court granted the motion. Defendant then sought a writ of mandate from the Supreme Court to have his motion to change venue heard. The Court issued the writ and vacated the support order. "The action was one which, under Section 395, Code of Civil Procedure, the defendant was entitled to have tried in the county of his residence. And, when proper application for the change was made, the court had no discretion to refuse to hear the motion, or to impose terms as a condition precedent to the hearing." Walsh v. Superior Court involved a factual situation similar to that of Hennessy v. Nicol, except that in the Walsh case the trial court refused to hear plaintiff's motion for support pendente lite and the Supreme Court refused plaintiff's petition for a writ of mandate to require such a hearing. This result was specifically changed by the 1939 amendment of Code of Civil Procedure Section 396b which authorized the improper court to "consider and determine motions for allowance of temporary alimony, support of children, counsel fees and costs" prior to determining defendant's motion in actions for divorce or separate maintenance.

Brady v. Times-Mirror Co. was another case which asserted the right of defendant to have all proceedings except the decision of the motion to change venue take place in the proper court. In that case suit was against several defendants. They all demurred and moved to change venue to the county in which some of them resided. Prior to the hearing of the motion the court allowed plaintiff to amend his complaint to drop the nonresident defendants from the suit. Defendant's motion for a change of venue was then heard and denied. On appeal, this action was reversed. The Supreme Court said:

> When the defendants made their motion to change the place of trial, it was the duty of the court to act upon that motion, and either grant or deny it before taking any other judicial action in the case.*** The statute requires the motion to be made "at the time" the defendant appears and answers or demurs. If he does not then make the motion he is not entitled to make it at any subsequent stage of the proceedings, even though the condition of the case may be such that if it could be then made it would be granted. /Citation omitted/ This necessarily implies that the motion must be made and determined by the court before it can hear or determine any other motion in the case. If the defendants are entitled to have their motion granted they are entitled to have every motion or proceeding in the case heard before the superior court of the county of their residence.

In three other cases the defendant demurred and moved to change the place of trial to the county of his residence. Plaintiff had made no motion in any of the cases. The trial court acted on the demurrers before hearing the motion. In all three cases the rulings on the demurrers were held to be nullities on the ground that after the motion to transfer was made the court had no authority to consider any other matter than the motion.

In none of these cases did the Court give a clear explanation for the rule that once defendant has moved to change the place of trial to his residence no further proceedings may be had in the action until the motion is determined. The rule has been asserted as though its reason were completely obvious. One of two basic attitudes may be at the heart of the rule, although neither has been offered specifically as a rationale by the Court.

(a) The Court may have construed the venue provisions as depriving an improper court of jurisdiction to entertain any matter in the case other than the motion to transfer the action to the proper court. This is a construction which the courts of other states have sometimes given to venue

statutes and is suggested by the language in several of the California cases discussed. In Nolan v. McDuffie, one of the three cases in which defendant demurred and moved to change venue to his residence and the trial court ruled on the demurrer before hearing the motion, the Superior Court said:

> It was the duty of the court to hear and determine the motion before it could hear or determine the demurrer***. The court had no power to act upon the demurrer when it did, *** and its order in that regard is a nullity.

In two other cases involving similar facts the District Court of Appeals has said:

> It is the established law of California that the filing of a motion for a change of place of trial suspends the power of the trial court to act upon any other question until the motion has been determined [citations ommitted] and that any order made prior to the determination of the motion for a change of place of trial is a nullity.

and:

> [T]he trial court had no jurisdiction to rule upon defendant's demurrer to the complaint even though plaintiff could not claim prejudicial error in such ruling.

These statements indicate that some confusion exists between action taken by a court which lacks jurisdiction and action taken by a court which is not the proper court under the venue statutes. However, it seems doubtful that the courts making the statements intended to construe the venue statutes as depriving an improper court of jurisdiction. Such a construction is certainly not supported by the Code of Civil Procedure, which specifically provides that objections to improper venue are waived unless promptly raised. Moreover, even without such statutory provisions the Supreme Court very early held that an improper court could proceed with an

action unless defendant made timely objection. In light of such definite assertions that improper venue does not affect jurisdiction, it is doubtful that a confusion of venue and jurisdiction has been the primary factor in the development of the rule that once defendant has moved to change venue to the proper court no further proceedings in the action may be had in the improper court. The statements quoted are more likely somewhat inaccurate expressions of the effect of the rule rather than attempts to explain it.

(b) Another explanation of the rule, and one which is suggested by some of the cases, is that the courts have regarded it as a logical consequence of the fact that defendant has a right to trial at the place of his residence. As has been discussed, the courts have viewed the venue provisions of the Code as giving defendant a definite and substantial right to be sued in the county of his residence. This view has been carried to its logical extreme in the cases under discussion: if the defendant has a right to be sued at home this includes the right to have every part of the proceeding take place there. If plaintiff sues elsewhere he must clearly bring himself within one of the statutory exceptions which designate some other county than that of defendant's residence as the proper county. The California courts may have viewed suit in a county which is more convenient than the county of defendant's residence as one of these exceptions. Since plaintiff cannot show that the county in which he commenced the action is the most convenient county until the time when defendant answers, defendant has the right to have all proceedings take place in the county of his residence. Although this line of reasoning has not been spelled out in any of the cases announcing the rule, it was suggested in Brady v. Times-Mirror Co.

and seems to be the most logical explanation for the decision in these cases.

The rule prohibiting further proceedings after a motion to change venue is made doubtless applies when the defendant moves to change venue to a proper court other than that of his residence. It should be noted, however, that all of the cases in which proceedings taken by the trial court after defendant's motion have been nullified were cases in which the proper county was the county of defendant's residence. There have apparently been no cases where the proper county was someplace other than the county of defendant's residence and proceedings had in the improper court after defendant's motion to transfer were nullified on appeal. However, there seems to be no question that the same result as in Hennessy v. Nicol and the later cases discussed would apply. The right of defendant to have all proceedings take place in the proper court has been jealously guarded, whether or not the place designated by the Code is his place of residence. Once it has been established that the court in which the action is pending is not the proper court, defendant has a right to have the action transferred immediately. This right has been well-recognized in cases where the proper court was not the place of defendant's residence. The greatest protection which can be given defendant is to nullify proceedings had in an improper court after defendant has objected to trial in that court. It seems clear that such protection will be given in all cases.

The rule against entertaining further proceedings after the defendant moves to change venue to a proper court of course precludes the trial court from continuing the action until the answer is filed. This is because the defendant's demurrer must be ruled upon before the defendant can be required to answer and the hearing and decision thereon constitutes a

prohibited "further proceeding." Until the rule is changed, therefore, the present transfer and retransfer procedure in respect of motions to retain venue in an improper court cannot be modified.

While the basis of the rule that a court may not continue both defendant's motion to change and plaintiff's motion to retain venue until the answer is filed is not entirely clear and may be open to criticism as an original matter, the rule is firmly established in California decisional law. Moreover, it was probably codified in 1933 when the Legislature enacted the last clause of Code of Civil Procedure Section 396b. While a technical argument can be made that the words "if answer be filed" codified only the first rule discussed herein, first laid down in Cook v. Pendergast, a more probable interpretation is that the Legislature intended to codify the practice in respect of counter motions to retain venue as it existed in 1933. In any event, there seems to be little likelihood that the courts will reconsider the matter even if they have power to do so. If a change is to be made it must, therefore, be by legislative action.

## PROCEDURE FOR CHANGE OF VENUE IN OTHER JURISDICTIONS

In Cook v. Pendergast the California Supreme Court established the rule that, until answer has been filed, a motion to change or retain venue for convenience of witnesses will not lie. The reason given for the rule was that, until the issues are joined, a court cannot determine what witnesses will be necessary at the trial. Since the California courts have consistently

followed this rule, it is impossible to determine from the California cases whether the rule is justified, as a practical matter, in all or most situations. There are at least two other jurisdictions which allow motions based on convenience of witnesses to be heard before the issues are joined and their experience with this procedure may be helpful in evaluating the California rule.

1. The experience of the Federal courts: Title 28 Chapter 87 (Sections 1391 to 1406) of the United States Code fixes the place of trial of most civil actions in the Federal courts. Section 1391 determines the venue in probably the majority of cases. It provides:

> § 1391. Venue generally.
>
> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
>
> (d) An alien may be sued in any district.

(footnote re other specific Federal venue provisions).

When venue is improperly laid, defendant may either object or waive the defect. If defendant objects, Section 1404(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Section 1404(a) makes the following provision for change of venue from a proper court: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." [Emphasis added] Two important differences between these provisions and the provisions of the California Code of Civil Procedure are immediately apparent. The first is that the Federal Judicial Code contains no statutory provisions similar to Code of Civil Procedure Section 396b authorizing the retention of venue in an improper district on the ground of the convenience of witnesses. The second is that the Judicial Code allows transfers on the ground of the convenience of witnesses only to a district or division which is a proper district or division under the venue statutes. In California, transfers on this ground may be to any court having jurisdiction, whether it is the proper court or not.

Although no case has been found in which the plaintiff in a Federal court sought to retain an action in an improper district on the ground of the convenience of witnesses, it is clear that any attempt to do so would be unsuccessful. The federal courts have uniformly held that when defendant enters an objection to improper venue, the trial court has only two courses of action available: either dismiss the action or transfer it to a proper court. In the light of the requirement of Section 1404(a) that transfers on the ground of convenience of witnesses must be to a proper court, it is very unlikely that the Federal courts would ever allow the retention of an action on that ground in an improper court.

Despite the fact that the precise problem which is being considered by this study cannot arise under

the Federal Judicial Code, the Federal experience is nevertheless helpful in evaluating the California requirement that the case must be at issue before the convenience of witnesses will be considered. Although the California requirement applies not only to changing venue for convenience of witnesses but also to retaining venue for convenience of witnesses, the same reason has been given in explanation of the requirement for both situations: namely, until the case is at issue it is impossible to determine who the material witnesses will be. The Federal courts have had no experience in the area of retaining venue for convenience of witnesses, but since the enactment of Section 1404(a) in 1948 they have had considerable experience in the area of changing venue for convenience of witnesses. This experience is valuable in determining whether it is necessary that the case be at issue when convenience of witnesses is being considered.

Under the Federal procedure defendant may move to change venue on the ground of convenience of witnesses either before or after answer. (footnote re why plaintiff does not and generally cannot make this motion). There is no requirement that the case be at issue before the motion will be heard. When answer has not been filed the court determines the materiality of testimony to be given by prospective witnesses on the basis of the complaint and the affidavits filed by both parties. Apparently in such a case the affidavit of the moving party - usually the defendant - states what he considers will be the issues of the case and specifies the issue to which the testimony of each witness will be pertinent. It was said in one case that "This court is entitled to rely upon the affidavits and statements of reputable counsel and to assume that an issue *** alleged

by the plaintiff and denied by the defendant [in his affidavit] will be presented." It is difficult to ascertain whether such reliance on the statements of reputable counsel has in all cases been justified. Statements in affidavits on a motion to change venue would probably not preclude defendant from pleading a different defense in his answer (footnote re California case to this effect), and plaintiff's proper remedy would presumably be a motion to retransfer in light of changed circumstances.

The key question is whether or not the Federal procedure is workable in cases where defendant has not answered. Statements by several Federal courts suggest that it is at least difficult in some cases to determine the convenience of witnesses when the issues are not settled. In Webster-Chicago Corp. v. Minneapolis-Honeywell Reg. Co. defendant had not answered but in its affidavit it alleged that it would raise the issue of the existence of a justiciable controversy between the parties. The court said:

> Assuming, then, that in this case the existence of a justiciable controversy will be denied by the defendant, then this issue must be first determined, for upon this the jurisdiction depends.
>
> At the present stage of this case, however, it is not clear that the existence of a justiciable controversy may not be raised by motion as suggested by the defendant. For the determination of such motion witnesses may not be essential nor their convenience considered. If the existence of a justiciable controversy becomes a factual issue determinable in some manner by affidavits, deposition or actual witnesses, then the necessity of such witnesses, their number and convenience may be considered in any subsequent proceeding."

Defendant's motion was denied, without prejudice for its renewal after the case was at issue.

Brown v. Insurograph, Inc. also indicates that there is some difficulty in deciding a motion to change venue for convenience of witnesses before

answer has been filed.

> The defendant's main dependence in support of transfer upon the ground of convenience of witnesses arises by suggestion of defenses appearing in certain affidavits. No answer has, as yet, been filed. It is suggested in certain affidavits that the defendants will interpose certain defenses based upon the equitable doctrines of unclean hands and equitable estoppel. It is uncertain just what weight can be given these suggested defenses as a basis of determining the convenience of witnesses who might be expected to sustain them. It is certain that some consideration must be given these defenses because, if actually presented, they do involve witnesses whose convenience will become of moment at the trial. On the other hand, they do not represent any defense authorized at this time by any answer of the defendant. If they do not subsequently appear as actual defenses the witnesses once intended for their support, but not called, would form no basis to test the convenience of witnesses and to overcome witnesses for the primary issues of the trial.

The court finally concluded that it should give at least some consideration to the convenience of the prospective witnesses to be used in the suggested defenses. It decided, however, that their convenience did not overbalance the convenience of the other witnesses and denied the motion.

The necessarily tentative nature of the court's decision in some cases when defendant has not answered is suggested by the following statement of the court in Jerclaydon v. Hosid Products:

> /T/estimony is of consequence on the issue of prior use of the respective trademarks, but that is not the controlling question if the true nature of the controversy is presently understood.

The difficulty of deciding the questions which arise on a motion to transfer for convenience of witnesses when answer has not been filed is further indicated by the opinion in Marks v. Fireman's Fund Insurance Co. The court here said:

> Not having filed its answer, defendant insists that there will be a controversy based upon the "alleged agreement for increase of insurance and coverage." Plaintiffs, for their part, allege that their cause of action in this respect is based solely upon written instruments. This is not denied by defendant and it may well be that the possible "Controversy" may be one solely of construction and interpretation of such instruments.
>
> * * *
>
> "Factors of public interest" remain to be considered. Defendant alleges that the suit may be reached for trial much sooner in Chicago than in the Southern District of New York. *** It might also be said that additional burden of jury service would be imposed upon the citizens of New York. But such objections assume that the controversy will be disposed of by trial of issues of fact rather than by summary judgment - a matter about which one can only speculate at this stage of the proceeding in absence of answer by defendant.
>
> It must be conceded that the substantive law of the State of Illinois would govern the controversy in question regardless of the forum in which it is resolved. *** No doubt a federal forum in Illinois is more at home with the State law that must govern this case than one in New York. But at this stage of the proceeding in absence of answer it cannot be determined whether the matter in controversy is one about which the substantive law of New York and Illinois vary.

It is interesting to note that in all of these cases defendant's motion was denied. Whether the number of motions made before answer that are denied exceeds the number that are granted is a question that is impossible to answer since the courts frequently do not mention what the state of the pleadings was at the time of motion. There have been many cases in which defendant's motion was granted but the opinions do not describe in any detail how the court ascertained what the issues will be or what testimony will be material. It may be assumed, however, that since defendant has made the motion his affidavits will be quite specific as to what issues he intends to raise.

2. The experience of other states: Since, under the Federal procedure, venue may never be retained in an improper court for convenience of witnesses, we must look to the procedure in the other states to determine whether the California requirement that answer must be filed before such a counter motion may be considered is the only practical procedure. There are only a few states whose experience will be helpful because many of the states do not recognize the convenience of witnesses as a determining factor in either changing or retaining venue. Moreover, of those states which do allow venue to be changed to an improper court for convenience of witnesses, there are many which do not allow an action to be retained in an improper court for any reason. In these states the procedure is similar to the present California procedure in cases where answer has not been filed. The case is transferred to the proper court (footnote re states in which the action is dismissed and begun again in the proper court) and is then retransferred to the original court for convenience of witnesses. (footnote re some states which do not allow the second step).

Although there are several states which have statutory provisions substantially similar to California's provisions before 1933, (footnote re no states with provisions the same as the present California ones) only one of those states has been found which construed its provisions as authorizing a counter motion to retain venue in an improper court for convenience of witnesses. That state - Montana - has also adopted the requirement that answer must be filed before the counter motion can be heard. Since the Supreme Court of Montana has relied heavily, and rather uncritically, upon the California cases in this area, the experience of that

state is not particularly helpful in evaluating the California rules. Apparently the only other state besides California and Montana which allows a counter motion to retain venue in an improper court for convenience of witnesses is New York (footnote re development of this procedure in New York) With regard to the requirement that answer must be filed before a motion based on convenience of witnesses can be determined, the status of New York law seems to be somewhat uncertain. The courts have several times announced that defendant cannot move to change the place of trial for convenience of witnesses unless the case is at issue. It was once held that a counter motion made before answer could not be determined. However, the opinion in that case specifically limits the holding to the facts in the case. The court said:

> There is nothing in the affidavits filed by either party showing what the issue is, and it is conceded that no answer has been served. The plaintiffs' affidavits allege that certain witnesses are necessary as to certain subjects. The defendant's counter-affidavits allege that certain witnesses are necessary for it upon those subjects. Neither side shows in particular what the witnesses named will swear to. *** From the entire record we are unable to determine whether or not the convenience of witnesses and the ends of justice require that the trial be had in Ulster county. We are not passing upon the question whether a motion to change the place of trial can be made before answer is served; we are only holding that in this case it does not appear what the issues will be, or the materiality of the testimony of most of the witnesses named.

There have been other New York cases in which counter motions to retain for convenience of witnesses have been granted without any statement as to whether or not answer had been filed. In one case the court remarked:

> Considering the questions presented by the cross-motion, it may be said that the witnesses, stated by the plaintiff to be material, are more than might be necessary, yet it cannot be said that their evidence would be immaterial, and the plaintiff would have the right to have them present at the trial.

Perhaps it could be inferred from this that the case was not at issue.

Apparently there is no strict and rigid rule in New York similar to that in California that a counter motion to retain venue for convenience of witnesses can never be allowed until the case is at issue. It seems that each case is decided on its own facts. If the affidavits are explicit enough to allow the court to determine the materiality of the testimony which certain witnesses are expected to give, then the counter motion will be considered before answer has been filed. If the affidavits are not sufficiently explicit, then defendant's motion will be granted.

## POLICY CONSIDERATIONS

If the California transfer-and-retransfer procedure is to be changed it must be changed by legislation. The rules that an answer must be on file before the court may consider a counter motion to retain venue and that the hearing on defendant's and plaintiff's motions may not be continued until defendant has answered are not only well-settled but have been codified in Code of Civil Procedure Section 396b. Various possible courses of action are discussed in this section of this report.

(a) Should the law be left as it is at present?

It is arguable that no change is necessary because the plaintiff who finds himself involved in a transfer-retransfer procedure could have avoided it by filing his action in the proper court and moving under Code of Civil Procedure Section 397(3) to change venue for the convenience of witnesses. Why, then, should any change be made? The following considerations may be thought to justify a change which would make it possible to file an action in an improper but convenient court and retain it there:

1. Such a procedure would avoid the necessity of any transfers for convenience of witnesses whereas requiring the plaintiff to file in the proper but inconvenient court makes inevitable a number of such transfers each year.

2. In a number of cases there may be a close question whether the court in which the action is filed is not only the most convenient but also the proper court. When, in such a case, the plaintiff opposes defendant's motion to change venue on the ground that the local court is proper, it

would seem to be desireable that he should also be able at that time to show that it is the most convenient for witnesses.

3. In cases involving relatively small amounts of money the difference between being able to file initially in a local court and retain the case there and having to file in a distant county and transfer the case may be decisive to the plaintiff's decision to sue.

Assuming that it is desired to make it possible to file and retain an action in an improper but convenient court, what changes should be made in the law to achieve this purpose?

(b) Should the requirement that an answer be on file before a court can consider a counter motion to retain venue be abolished?

The California courts have always said that a motion to retain (or change) venue for convenience of witnesses simply cannot be intelligently decided until an answer has been filed and the issues are known. The federal experience under 28 United States Code Section 1404(a) shows that federal courts in particular cases have also thought it difficult or impossible to decide a motion to change venue for convenience of witnesses until the case is at issue. It may, therefore, be desireable to retain this requirement in the Code of Civil Procedure. Another possibility, however, would be to leave the matter to the discretion of the trial court, permitting it to decide motions prior to answer where the affidavits and arguments of the parties sufficiently disclose the issues and who the witnesses at the trial will be, to continue the parties' motions until the answer is filed in other cases, and, in still others, to continue the motions to an even later point in the proceedings when it appears that the issues are likely to be further clarified by pre-trial

proceedings subsequent to answer. This approach of letting the matter turn on the particular circumstances of each case appears to be similar to the one taken in New York.

(c) Should the rule that the trial court may not continue the parties' motions until the answer has been filed be abolished?

This rule is derived from the long-held view of the California courts that under our venue statutes the defendant has an "ancient and valuable right" to have his case tried in a proper court and that this right necessarily includes the right to have every part of it, including all pretrial motions and proceedings, heard there. Because continuing the parties' motions until answer will require a ruling on defendant's demurrer (which he must file to file a motion to change venue, Code of Civil Procedure Section 396b) in the proper court, the courts have said that it cannot be done. The rule that a defendant is entitled to have every part of his case heard in the proper court would appear to have been developed not on the basis of reason or sound policy but by the California view that the venue statutes are designed for the defendant's benefit to its logical extreme. There would appear to be no reason why the rule should not yield in any situation where fair and expeditious procedure requires that particular pretrial motions or other proceedings be heard in the court in which the action is filed even though it will or may ultimately be transferred to another court. Indeed, the Legislature has already overruled one line of cases based on this rule, in providing that in any action for divorce or separate maintenance the court may consider and determine motions for allowances of temporary alimony, support of children, counsel fees and costs

before transferring the case to the proper court, Code of Civil Procedure § 396b. (See discussion supra, p. ) No reason appears why another exception should not be created to permit the court to retain the case long enough to pass on plaintiff's counter motion to retain venue for the convenience of witnesses.

(d) Methods of changing the law to avoid the transfer-retransfer procedure.

Assuming that it is decided to recommend abolition of the transfer-retransfer procedure, three possible revisions of the law to that end are suggested for consideration.

The problem could be eliminated by providing that the defendant's motion to change venue must be made at the time of answer. This could be achieved by the following revision of Code of Civil Procedure Section 396b:

> §396b. Except as otherwise provided in Section 396a [justice courts], 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 motions, 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.

There would appear to be at least two objections to this solution of the problem.

First, it would necessitate the filing of an answer in every case of a motion to change venue to a proper court, while a counter motion to retain venue would probably not be made in most cases.

Second, this revision would not permit the court to delay consideration of a motion until a later point in the trial in a case where it appeared that the issues might be further clarified by pretrial proceedings subsequent to the filing of the answer,

Another possibility would be to authorize the court to continue the motion until the answer has been filed, by the following revision of Code of Civil Procedure Section 396b:

§396b. Except as otherwise provided in Section 396a [justice courts], 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 motions, 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 the motion shall be continued until after the answer is filed and the court may entertain all proceedings in the case until the motion has been heard and determined.

Objection may be made to this proposal on two grounds: (1) that it requires that an answer be on file in all cases whereas it may be possible to decide some cases without an answer; and (2) that it does not go far enough because in some cases it may be necessary or desireable to delay a ruling on the motion until after pretrial proceedings subsequent to the answer have further clarified the issues in the case.

A third possibility would be to make the procedure completely flexible, by the following revision of Code of Civil Procedure Section 396b:

§396b. Except as otherwise provided in Section 396a [justice courts], 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 motions, 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, the court is unable to determine who the witnesses at the trial will be, the motion may be continued until after the answer is filed or other proceedings in the case are had which will enable the court to make such determination and the court may entertain all proceedings in the cause until the motion has been heard and determined.