STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Retention of Venue for Convenience of Witnesses

February 1, 1957

LETTER OF TRANSMITTAL

To His Excellency Goodwin J. Knight
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether, when a defendant moves to change the place of trial of an action, the plaintiff should in all cases be permitted to oppose the motion on the ground of convenience of witnesses. The commission submits herewith its recommendation relating to this subject and the research study prepared by its staff.

Thomas E. Stanton, Jr., *Chairman*
John D. Babbage, *Vice Chairman*
Jess R. Dorsey, *Member of the Senate*
Clark L. Bradley, *Member of the Assembly*
Joseph A. Ball
Bert W. Levit
Stanford C. Shaw
John Harold Swan
Samuel D. Thurman
Ralph N. Kleps, *Legislative Counsel, ex officio*

John R. McDonough, Jr.
Executive Secretary
February 1, 1957

TABLE OF CONTENTS

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Retention of Venue for Convenience of Witnesses

Section 396b of the Code of Civil Procedure provides that when a plaintiff files an action in a court other than a "proper" court, *i.e.*, other than a court designated by Code of Civil Procedure Sections 392 to 395.1, and the defendant moves to transfer the case to a proper court, a counter motion to retain the case where filed for the convenience of witnesses may be considered "if an answer be filed." A defendant will, therefore, ordinarily move to change venue before answering, with the result that the action is transferred to the "proper" court. The plaintiff may then, in an appropriate case, have the case transferred back to the original court for convenience of witnesses on a motion made pursuant to Code of Civil Procedure Section 397(3) after the defendant has answered.

The commission believes that this cumbersome transfer-retransfer procedure should be eliminated. To that end, it recommends that the words "if an answer be filed" be eliminated from Section 396b of the Code of Civil Procedure. The commission does not believe that it is necessary to have an answer on file to decide whether the case should be retained where filed for the convenience of witnesses. The court can obtain sufficient information concerning the issues in the case and the witnesses who will be called to enable it to decide the motion from affidavits of the parties and interrogation of counsel at the hearing on the motion.

The commission's recommendation would be effectuated by the enactment of the following measure: *

An act to amend Section 396b of the Code of Civil Procedure, relating to retention of venue for the convenience of witnesses or the ends of justice.

The people of the State of California do enact as follows:

SECTION 1. Section 396b of the Code of Civil Procedure is amended to read:

396b. Except as otherwise provided in Section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title, the action

* Matter in "strikeout" type would be omitted from the present law.

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

A STUDY OF THE CALIFORNIA LAW RELATING TO RETENTION OF VENUE FOR CONVENIENCE OF WITNESSES *

INTRODUCTION

The purpose of this study is to discuss whether, when the defendant moves to change the place of trial of a civil action to the proper court,[1] the plaintiff should in all cases be permitted to oppose the motion on the ground of the convenience of witnesses.

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 395.1, 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, however, the action must be transferred to the proper court without consideration of a counter motion

* This study was made by the staff of the Law Revision Commission.

[1] "Proper court" means a court, or a court in the place, designated by Code of Civil Procedure Sections 392 to 395.1. A case may be tried in a different or "improper" court in certain situations. See CAL. CODE CIV. PROC. §§ 396b, 397.

to retain venue for the convenience of witnesses.[2] The hearing on defendant's motion cannot be postponed until defendant has answered.[3] 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.[4]

The present 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 defendant's motion to change venue to the proper court must be heard before any further proceedings may be had in the action. Although both of these rules were originally developed by the courts,[5] they were codified in 1933 by the addition of the last clause of Code of Civil Procedure Section 396b.[6] In order fully to understand the reasons for these rules, this study will examine their development by the courts prior to 1933. However, it

[2] CAL. CODE CIV. PROC. § 396b. See also Gordon v. Perkins, 203 Cal. 183, 263 Pac. 231 (1928); Sheffield v. Pickwick Stages, 191 Cal. 9, 214 Pac. 852 (1923); Cook v. Pendergast, 61 Cal. 72 (1882).

[3] Heald v. Hendy, 65 Cal. 321, 4 Pac. 27 (1884).

[4] Gordon v. Perkins, 203 Cal. 183, 263 Pac. 231 (1928); Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815 (1910); and Borba v. Toste, 52 Cal. App.2d 591, 126 P.2d 655 (1942), approved the transfer-retransfer procedure by affirming the action of the proper court, to which the case had been transferred, in retransferring the case back to the original court for convenience of witnesses.

[5] See pp. L-12, L-21 *infra*.

[6] Cal. Stat. 1933, c. 744, § 8a, p. 1842. It could perhaps be argued that the second rule was not codified in 1933. See p. L-21 *infra*.

should be kept in mind that the enactment of the statute in 1933 codified the rules developed by the courts and there is no longer any possibility of modification of them by the courts.

CALIFORNIA VENUE PROVISIONS

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 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 the 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 in part:

> §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. * * *[7]

[7] The California Practice Act and the Code of Civil Procedure of 1872 had provisions substantially similar in content and arrangement to present Code of Civil Procedure Sections 392, 393 and 394. The earliest counterpart of Section 395 provided:
"§ 20. In all other cases, the action shall be tried in the county in which the *parties*, or some of them, reside at the commencement of the action; or if none of the parties reside in the State, the same may be tried in any county which the plaintiff may designate in his complaint; subject, however, to the power of the court to change the place of trial, as provided in this act." [Emphasis added.] CAL. PRAC. ACT (1851). In 1858 the first clause of Section 20 was amended to read:
"§ 20. In all other cases, the action shall be tried in the county in which the *defendants* or any one of them may reside at the commencement of the action; * * *" [Emphasis added.]
CAL. PRAC. ACT (1858).

The view which the courts have traditionally taken of these provisions is not immediately apparent from the face of the statute. However, it has been a significant factor in the historical development of the transfer-retransfer procedure considered by this study and should therefore be noted at the outset. The courts have 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 particular actions 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. *Times-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."[8] 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 the 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.[9]

Under this interpretation of the venue statutes 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 of the venue statutes developed. One court has said that "The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute * * *."[10] However, it is interesting to note that 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.[11] 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.[12] 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 view that a lawsuit should be tried where the

[8] 106 Cal. 56, 58, 39 Pac. 209, 210 (1895).
[9] 75 Cal. App.2d 44, 47, 170 P.2d 104, 107 (1946).
[10] Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 521, 274 Pac. 977, 979 (1929).
[11] *Venue*, 67 C.J. 12 (1934); Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1 (1949).
[12] *Venue*, 67 C.J. 15 (1934); Blume, *supra* note 11, at 28.

underlying transaction happened. Perhaps one factor leading to this view was the belief that in many or most cases this would lay venue in the county most convenient to court, parties and witnesses. Thus, before the function of the jury changed, the convenience of the court and the jury was preferred over the convenience of the parties. And 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.[13]

Whatever the origin of the California rule, however, it appears to be firmly established and has had an important influence on the development of almost every aspect of the California venue law, including the rules which necessitate the transfer-retransfer 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.

THE REQUIREMENT THAT ANSWER BE FILED

The present requirement that an answer be filed before the plaintiff may make a counter motion to retain venue in the improper court for convenience of witnesses is necessitated by the provision of Code or 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 demurs 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.[14] 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

[13] Blume, *supra* note 11, at 37.
[14] Gilman v. Nordin, 112 Cal. App.2d 788, 247 P.2d 394 (1952); Stutsman v. Stutsman, 79 Cal. App.2d 81, 178 P.2d 769 (1947); Wood v. Silvers, 35 Cal. App.2d 604, 96 P.2d 366 (1939).

added, the procedure had been firmly established by a long line of case authority.[15]

Historical Development of the Rule

The earliest cases seem to have regarded the question of whether an answer has been filed as completely immaterial. None of them mention such a requirement, [16] and in only two of them do the opinions indicate whether or not answer had in fact been filed. In *Loehr* v. *Latham* [17] 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.*[18] 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 should 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

[15] See p. L-13 *infra.* The making of a counter motion to retain venue in an improper court on the ground of the convenience of witnesses was recognized as proper practice long before 1933. The earliest cases to approve the 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. CAL. PRAC. ACT § 21(3) (1851). However, the courts consistently stated that a counter motion to retain venue for convenience of witnesses was proper. Loehr v. Latham, 15 Cal. 418 (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. Hanchett v. Finch, 47 Cal. 192 (1873); Jenkins v. California Stage Co., 22 Cal 537 (1863); Pierson v. McCahill, 22 Cal. 128 (1863). The only reference to the Practice Act is found in the last case decided under its provisions, Edwards v. Southern Pacific R.R. Co., 48 Cal. 460 (1874). 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." *Id.* at 461.

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 Hall v. Central Pacific R.R. Co., 49 Cal. 454 (1875), 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 witnesses], and the rule has been so long established that we do not feel at liberty to depart from it." *Ibid.* The rule was codified in 1933 with the enactment of the last clause of Code of Civil Procedure Section 396b.

[16] See Reavis v. Cowell, 56 Cal. 588 (1880); Hall v. Central Pacific R.R. Co., 49 Cal. 454 (1875); Edwards v. Southern Pacific R.R. Co., 48 Cal. 460 (1874); Hanchett v. Finch, 47 Cal. 192 (1873); Jenkins v. California Stage Co., 22 Cal. 537 (1863); Loehr v. Latham, 15 Cal. 418 (1860).

[17] 15 Cal. 418 (1860).

[18] 22 Cal. 537 (1863).

govern and control the Court in determining the question whether the application for the change should be granted or not.[19]

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 whether or not answer had been filed was immaterial were repudiated in 1882 by the landmark case of *Cook* v. *Pendergast*.[20] 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.[21] As to the *Jenkins* case, the court concluded that the court in that case had "overlooked the point made by counsel that the cross-motion was made prior to an answer by defendant."[22] 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* [emphasis by court] 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.[23]

[19] *Id.* at 538.
[20] 61 Cal. 72 (1882).
[21] *Id.* at 77.
[22] *Id.* at 78.
[23] *Id.* at 79-80.

Since *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.[24] Although affidavits must be filed containing the names and addresses of prospective witnesses and the testimony which they are expected to give,[25] the courts nevertheless require that the case be at issue so that the materiality of the testimony may be ascertained.[26] It would appear from the opinions of the Supreme Court, however, that the rule of *Cook* v. *Pendergast* has never been re-examined in the light of the awkward procedure of transfer and retransfer which it produces. In *Sheffield* v. *Pickwick Stages*[27] the court reviewed the development of the counter motion and the requirement that answer be filed, but did not consider the practical consequences of the requirement. It simply stated:

> [U]nless answer has been filed at the time the demand for change of venue is made, a counter-motion to retain the case on the ground of the convenience of witnesses will not lie. [Citing *Cook* v. *Pendergast* and later cases.] This is for the obvious reason that until the issues are settled the court cannot determine what testimony will be material thereto.[28]

This statement has been repeated with slight variations in almost every case since *Sheffield* v. *Pickwick Stages* involving the question.[29] It expresses the only rationale ever offered for the rule.

The Experience of the Federal Courts

Since the California courts have consistently followed the rule that, until answer has been filed, a motion to change or retain venue for convenience of witnesses will not lie, it is impossible to determine from the California cases whether such a motion cannot, as a practical matter, be decided prior to answer. Although the federal courts have had no experience in the area of retaining venue for convenience of witnesses, they have, since the enactment of Section 1404(a) of the United States Code in 1948, had considerable experience with changing venue for

[24] Gordon v. Perkins, 203 Cal 183, 263 Pac. 231 (1928); Sheffield v. Pickwick Stages, 191 Cal. 9, 214 Pac. 852 (1923); McSherry v. Pennsylvania C. G. M. Co., 97 Cal. 637, 32 Pac. 711 (1893); Armstrong v. Superior Court, 63 Cal. 410 (1883); Gilman v. Nordin, 112 Cal. App.2d 788, 247 P.2d 394 (1952); Wood v. Silvers, 35 Cal. App.2d 604, 96 P.2d 366 (1939); Rowland v. Bruton, 125 Cal. App. 697, 14 P.2d 116 (1932); Jansing v. Bowen, 117 Cal. App. 31, 3 P.2d 327 (1931); Woods v. Berry, 105 Cal. App. 90, 286 Pac. 1073 (1930); San Jose Hospital v. Etherton, 84 Cal. App. 516, 258 Pac. 611 (1927); Dawson v. Dawson, 83 Cal. App. 119, 256 Pac. 491 (1927); Wong Fung Hing v. San Francisco etc. Funds, 15 Cal. App. 537, 115 Pac. 331 (1911).

[25] See Pascoe v. Baker, 158 Cal. 232, 234-35, 110 Pac. 815, 816 (1910); Cook v. Pendergast, 61 Cal. 72, 77 (1882); Reavis v. Cowell, 56 Cal. 588, 591 (1880); Loehr v. Latham, 15 Cal. 418, 419 (1860); Woods v. Berry, 105 Cal. App. 90, 92, 286 Pac. 1073, 1074 (1930); San Jose Hospital v. Etherton, 84 Cal. App. 516, 518, 258 Pac. 611, 612 (1927).

[26] See note 24 *supra*. The convenience of witnesses testifying to immaterial points may not be considered. Lancel v. Benwell, 81 Cal. App. 447, 253 Pac. 963 (1927); Wong Fung Hing v. San Francisco etc. Funds, 15 Cal. App. 537, 115 Pac. 331 (1911). See also note 24 *supra*.

[27] 191 Cal. 9, 214 Pac. 852 (1923).

[28] *Id.* at 11, 214 Pac. at 852-53.

[29] For almost identical language see Gordon v. Perkins, 203 Cal. 183, 185, 263 Pac. 231 (1928); Gilman v. Nordin, 112 Cal. App.2d 788, 793, 247 P.2d 394, 397-98 (1952); Rowland v. Bruton, 125 Cal. App. 697, 701, 14 P.2d 116, 117 (1932); Jansing v. Bowen, 117 Cal. App. 31, 3 P.2d 327, 328 (1931); Woods v. Berry, 105 Cal. App. 90, 92, 286 Pac. 1073, 1074 (1930).

convenience of witnesses.[30] This experience is valuable in determining the practical necessity for the California rule.

Under the federal procedure there is no requirement that the case be at issue before the motion to change venue on the ground of convenience of witnesses will be heard.[31] When an 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.[32] Apparently in such a case the affidavit of the

[30] 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."

When venue is improperly laid, defendant may either object or waive the defect. If defendant objects, Section 1406(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 provision 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. CAL. CODE CIV. PROC. § 398.

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. *E.g.* C-O-Two Fire Equipment Co. v. Barnes, 194 F.2d 410 (7th Cir.), *aff'd per curiam sub nom.* Cardox Corp. v. C-O-Two Fire Equipment Co., 344 U.S. 861 (1952); Schiller v. Mit-Clip Co., 180 F.2d 654 (2d Cir. 1950). 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.

[31] See note 43 *infra.*

[32] See Tankel v. Seiberling Rubber Co., 95 F. Supp. 987 (N.D. Cal. 1951); United States v. E. I. DuPont de Nemours & Co., 87 F. Supp. 962 (N.D. Ill. 1950); and cases cited in note 43 *infra.*

moving party—usually the defendant [33]—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." [34] 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,[35] and plaintiff's proper

[33] It appears to be somewhat unsettled whether plaintiff can ever have a case transferred under Section 1404(a). In Barnhart v. John B. Rogers Producing Co., 86 F. Supp. 595 (N.D. Ohio 1949), the court said:

"It appears to the Court that the motivating reason for the enactment of Section 1404(a) was to afford relief to a defendant by placing him on a footing of equality with a plaintiff in the selection of a forum for the trial of the case. * * * It appears to this Court that Section 1404(a) is not available to plaintiffs who voluntarily choose their own forum."

Id. at 599. The court in Bolten v. General Motors Corp., 81 F. Supp. 851 (N.D. Ill. 1949) said:

"Furthermore, it should be remembered that the selection of the forum was plaintiff's, and he should not now be permitted to transfer the action indiscriminately."

Ibid. However, in both these cases, as in most of the cases in which plaintiff has sought a transfer under Section 1404(a), plaintiff had some reason other than convenience for seeking the transfer. In the *Barnhart* case plaintiff could not have served process on defendant in the proposed transferee district. He was attempting to avoid this problem by commencing the action in a district where he could get service on defendant and then transferring it to a forum where he could not, for all practical purposes, have maintained the action originally. The court refused to sanction this procedure, saying:

"If this Court were to permit a plaintiff to utilize the statute in the manner here proposed, it would, in effect, nullify and set aside existing provisions for service upon a defendant in a manner that the Court believes was not intended by the Congress upon the enactment of the statute." Barnhart v. John B. Rogers Producing Co., *supra* at 599. The same result was reached in Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950), and is now apparently settled law. Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950); General Felt Products Co. v. Allen Industries, 120 F. Supp. 491 (D. Del. 1954); Berk v. Willys-Overland Motors, 107 F. Supp. 643 (D. Del. 1952); Rogers v. Halford, 107 F. Supp. 295 (E.D. Wis. 1952); McDaniel v. Drotman, 103 F. Supp. 643 (W.D. Ky. 1952); Herzog v. Central Steel Tube Co., 98 F. Supp. 607 (S.D. Iowa 1951).

In Bolton v. General Motors Corp., *supra*, plaintiff had brought the action in a forum where the statute of limitations had run and then sought to transfer it to a forum where the statute had not run. The court refused to allow this procedure and instead granted defendant's motion for summary judgment. For a discussion of the statute of limitations problem see Currie, *Change of Venue and the Conflict of Laws*, 22 U. OF CHI. L. REV. 405 (1955).

These cases apparently leave the question open whether plaintiff may have an action transferred to a proper court in which he could get service over defendant. However, as a practical matter it would seem that the question would rarely arise. If there are two forums which are proper and in which plaintiff could get service over defendant, plaintiff will certainly initiate the action in the forum which is most convenient for him.

[34] Webster-Chicago Corp. v. Minneapolis-Honeywell Reg. Co., 99 F. Supp. 503, 505 (D. Del. 1951).

[35] This question has apparently never arisen in a federal case. Statements in First-Trust Joint S.L. Bk. v. Meredith, 16 Cal. App.2d 504, 510, 60 P.2d 1023, 1026 (1936) indicate that, in California, statements in affidavits supporting a motion to change venue would not limit a party at the trial.

remedy would presumably be a motion to retransfer in light of changed circumstances [36] if he did so.

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 difficult at least in some cases to determine the convenience of witnesses when the issues are not settled. In *Webster-Chicago Corp.* v. *Minneapolis-Honeywell Reg. Co.*[37] 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 proceedings.[38]

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

Brown v. *Insurograph* [39] also indicates some difficulty in deciding a motion to change venue for convenience of witnesses before the answer was 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

[36] It is still an open question whether plaintiff's motion for retransfer would be successful. See note 33 *supra*. In Atlantic Coast Line R.R. Co. v. Davis, 185 F.2d 766 (5th Cir. 1950), plaintiff sought and was granted a retransfer in the interests of justice. The Court of Appeals granted a writ of mandamus prohibiting the retransfer because the grounds asserted by plaintiff were completely inadequate. The court discussed, but did not decide, the propriety of a retransfer:
"Considering section 1404(a), supra, in the light of its purpose and its relation to the doctrine of *forum non conveniens*, but authorizing transfer rather than dismissal of the suit, it could be reasonably argued that the statute envisions and authorizes, after the plaintiff has made the permissible choice of venue, only one determination thereafter of the venue for trial which will best serve 'the convenience of parties and witnesses, in the interest of justice' and that this determination settles the matter. This application of the statute would remove any possibility of shuttling of the cause or of conflict between the several district courts * * *."
Id. at 769-70.

[37] 99 F. Supp. 503 (D. Del. 1951).

[38] *Id.* at 506.

[39] 85 F. Supp. 328 (D. Del. 1949).

> 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.[40]

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 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 Ins. Co.*[41] The court there 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.[42]

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 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 would be

[40] *Id.* at 330.
[41] 109 F. Supp. 800 (S.D.N.Y. 1953).
[42] *Id.* at 803, 804.

or what testimony would be material.[43] 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.

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.[44] Moreover, in those states which do allow venue to be *changed* to an improper court for convenience of witnesses, the general rule is that an action may not be *retained* in an improper court for any reason.[45]

Although there are several states which have statutory provisions substantially similar to California's provisions before 1933,[46] 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.[47] That state—Montana—has also adopted the requirement that answer must be filed before the counter motion can be heard. [48] 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

[43] *E.g.*, Nachtman v. Jones & Laughlin Steel Corp., 90 F. Supp. 739 (D.D.C. 1950); Walsh v. Pullman Co., 89 F. Supp. 762 (S.D.N.Y. 1949); Richer v. Chicago, R.I. & P.R.R. Co., 80 F. Supp. 971 (E.D. Mo. 1948).

[44] For the provisions for change of venue in those states which do not recognize convenience of witnesses as a proper ground for change, see ALA. CODE tit. 7, § 65 (1940); ARK. STAT. ANN. tit. 27, § 27-704 (1947); DEL. CONST. Art. 1, § 9; FLA. STAT. §§ 53.03, 53.05 (1953); GA. CODE § 3-207 (1933); IOWA RULES CIV. PROC. rule 167 (1954); KAN. GEN. STAT. ANN. § 60-511 (1949); KY. REV. STAT. § 452.010 (1953); LA. REV. STAT. tit. 13, § 3273 (1950); MD. ANN. CODE art. 75, § 109 (1951); MASS. ANN. LAWS c. 223, § 13 (1955); MISS. CODE ANN. § 1443 (1942); MO. REV. STAT. § 508.090 (1949); NEB. REV. STAT. § 25-410 (1943); N.J. RULES 4:3-4 (1953); N.M. STAT. ANN. § 21-5-3 (1953); OHIO REV. CODE ANN. § 2311.38 (Page, 1953); OKLA. STAT. tit. 12, § 140 (1951); PA. STAT. ANN. tit. 12, §§ 111, 113 (Purdon, 1953); R.I. GEN. LAWS ANN. c. 496, § 21 (1938); TENN. CODE ANN. §§ 20-503, 20-508 (1956); TEX. STAT. vol. 1, Rules Civ. Proc. rule 257 (Vernon, 1948); VT. STAT. § 1606 (1947); VA. CODE ANN. § 8-157 (1950).

[45] Rooks v. Marks, 59 Ariz. 348, 129 P.2d 303 (1942); MINN. STAT. § 542.10 (1953); Stocks v. Stocks, 183 P.2d 617 (Nev., 1947); Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Clark v. Cleveland, 60 N.D. 460, 235 N.W. 342 (1931); Ivanusch v. Great Northern Ry. Co., 26 S.D. 158, 128 N.W. 333 (1910); State *ex rel.* DeLape v. Superior Court, 156 Wash. 302, 286 Pac. 851 (1930); Meiners v. Loeb, 64 Wis. 343, 25 N.W. 216 (1885).

[46] MONT. REV. CODE ANN. §§ 93-2905, 93-2906 (1947); NEV. COMP. LAWS § 8572 (Hillyer, 1929); N.C. GEN. STAT. § 1-83 (1953); N.D. REV. CODE vol. 3, §§ 28-0406, 28-0407 (1943); S.D. CODE §§ 33.0305, 33.0306 (1939); UTAH CODE ANN. §§ 78-13-8, 78-13-9 (1953).

[47] McNeill v. McNeill, 205 P.2d 510 (Mont., 1949).

[48] *Ibid.* See also Enos v. American Surety Co., 95 Mont. 588, 28 P.2d 197 (1933); Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933); McKinney v. Mires, 95 Mont. 191, 26 P.2d 169 (1933); Dawson v. Dawson, 92 Mont. 46, 10 P.2d 381 (1932); Wallace v. Owsley, 11 Mont. 219, 27 Pac. 790 (1891).

convenience of witnesses is New York.[49] The New York law seems to be somewhat uncertain with regard to whether an answer must be filed before a motion based on convenience of witnesses can be determined. In two early cases the courts said that a defendant could not move to change the place of trial for convenience of witnesses unless the case were at issue.[50] It was once held that a counter motion made before answer could not be determined.[51] 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' affiidavits 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 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.[52]

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.[53] 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.[54]

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

Thus, there is apparently 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

[49] Such procedure has been authorized by the New York courts since 1911 when their Code of Civil Procedure was amended to provide that, when one party makes any type of motion, "the adverse party * * * may serve upon the attorney for the moving party a notice * * * specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action, whether the relief so asked for be responsive or not to the relief asked for by the moving party."
See N.Y. CIV. PRAC. ACT § 117. On the basis of this provision the New York courts abandoned the earlier rule that defendant had an absolute right to have the place of trial changed and adopted the rule that an action could be retained in an improper county on the ground of convenience of witnesses. McDaniels v. Doubleday, 241 App. Div. 51, 270 N.Y. Supp. 306 (1934); Behrman v. Pioneer Pearl Button Co., 190 App. Div. 843, 181 N.Y. Supp. 59 (1920); Brady v. Rockland Coaches, 55 N.Y.S.2d 588 (1945).

[50] Mixer v. Kuhn, 4 How. Pr. 409 (N.Y. Sup. Ct. 1850); Lynch v. Mosher, 4 How. Pr. 86 (N.Y. Sup. Ct. 1849).

[51] MacArthur Bros. Co. v. New York, 182 App. Div. 640, 169 N.Y. Supp. 767 (1918).

[52] *Id.* at 641, 169 N.Y. Supp. at 768.

[53] McDaniels v. Doubleday, 241 App. Div. 51, 270 N.Y. Supp. 306 (1934); Behrman v. Pioneer Pearl Button Co., 190 App. Div. 843, 181 N.Y. Supp. 59 (1920); Brady v. Rockland Coaches, 55 N.Y.S. 2d 588 (1945); Reynders v. Paterno, 149 Misc. 819, 268 N.Y. Supp. 263 (Sup. Ct. 1933); Waterworth v. Franz, 146 Misc. 668, 262 N.Y. Supp. 660 (Sup. Ct. 1933).

[54] Reynders v. Paterno, 149 Misc. 819, 820, 268 N.Y. Supp. 263, 264 (Sup. Ct. 1933).

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, the counter motion will be considered before answer has been filed. If the affidavits are not sufficiently explicit, defendant's motion will be granted.

THE RULE THAT DEFENDANT'S MOTION TO CHANGE VENUE TO THE PROPER COURT MUST BE HEARD BEFORE ANY FURTHER PROCEEDINGS MAY BE HAD IN THE ACTION

The requirement of *Cook* v. *Pendergast* that an answer must be on file before a counter motion to retain venue for convenience of witnesses will be considered 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. Prior to 1933, that procedure could have been avoided by postponing action on both defendant's motion and plaintiff's counter motion until after the answer had been filed in the court in which the action was commenced. However, for many years before 1933 the courts had refused to allow such a postponement of the motions and had consistently adhered to the rule that defendant's motion to change venue to the proper court must be heard before any further proceedings may be had in the action.[55] That rule 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 an 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 entire practice relating to counter motions to retain venue as it existed in 1933.

Historical Development of the Rule

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.][56]

However, even before *Cook* v. *Pendergast* the Supreme Court, in *Buell* v. *Dodge,*[57] 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 non-

[55] See discussion *infra.*
[56] 61 Cal. 72, 80 (1882).
[57] 57 Cal. 645 (1881).

resident 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.][58]

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.[59] However, the rule has never been applied to motions under Code of Civil Procedure Section 397(3) to *change* 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.[60] 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*[61] 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 * * *."[62] 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 effectually deprived him of his right to have his demurrer heard in San Francisco. (*Cook* v. *Pendergast,* 61 Cal. 72.)"[63]

Whether the court considered *Heald* v. *Hendy* to be merely an application of the holding 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

---

[58] *Ibid.*
[59] Remington Sewing Machine Co. v. Cole, 62 Cal. 311 (1882); Ferguson v. Koerber, 69 Cal. App. 47, 230 Pac. 476 (1924).
[60] Gordon v. Perkins, 203 Cal. 183, 263 Pac. 231 (1928); Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815 (1910); Borba v. Toste, 52 Cal. App. 2d 591, 126 P.2d 655 (1942).
[61] 65 Cal. 321, 4 Pac. 27 (1884).
[62] *Id.* at 322, 4 Pac. at 27.
[63] *Ibid.*

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, on the ground that in such a situation the later development which defeats defendant's right to a trial in the proper court is the perfection of the statutory right of plaintiff to trial in the most convenient court. 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 the principle 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 matter in the case other than the motion itself until the motion has been decided.

The rule of *Heald* v. *Hendy* 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 has indeed been strengthened by the decision in *Hennessy* v. *Nicol* [64] and three later cases [65] that any further proceedings had in the improper court will be nullified. In the *Hennessy* case 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 Supreme Court issued the writ and vacated the support order:

> The action was one which, under section 395 of the 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.[66]

Walsh v. *Superior Court* [67] 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 authorizes 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.

[64] 105 Cal. 138, 38 Pac. 649 (1894).
[65] Nolan v. McDuffie, 125 Cal. 334, 58 Pac. 4 (1899); Stutsman v. Stutsman, 79 Cal. App.2d 81, 178 P.2d 769 (1947); Pickwick Stages System v. Superior Court, 138 Cal. App. 448, 32 P.2d 433 (1934).
[66] Hennessy v. Nicol, 105 Cal. 138, 141, 38 Pac. 649 (1894).
[67] 44 Cal. App. 31, 185 Pac. 998 (1919).

In three other cases the defendant demurred and moved to change the place of trial to the county of his residence.[68] Plaintiff had made no motion in any of the cases. The trial court acted on the demurrer before hearing the motion. In each of these cases the ruling on the demurrer was nullified by the appellate court, on appeal from the order denying change of venue, on the ground that after the motion to transfer was made the court had no authority to consider any other matter than the motion.

Apparent Rationale of the Rule

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 courts.

1. The courts 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[69] and is suggested by the language in several of the California cases discussed. In *Nolan* v. *McDuffie,*[70] 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 Supreme 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.[71]

In two other cases involving similar facts the District Court of Appeal 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 omitted] and that any order made prior to the determination of the motion for a change of place of trial is a nullity * * *.[72]

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.[73]

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

[68] See note 65 *supra.*
[69] See Stevens, *Venue Statutes: Diagnosis and Proposed Cure,* 49 MICH. L. REV. 307, 316 (1951).
[70] 125 Cal. 334, 58 Pac. 4 (1899).
[71] *Id.* at 336-37, 58 Pac. at 5.
[72] Beard v. Superior Court, 39 Cal. App.2d 284, 286, 102 P.2d 1087 (1940).
[73] Stutsman v. Stutsman, 79 Cal. App.2d 81, 85, 178 P.2d 769, 771 (1947).

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.[74] 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.[75] 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. The statements quoted are more likely somewhat inaccurate expressions of the effect of the rule rather than attempts to explain it.

2. Another possible explanation of the rule 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.[76] 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 have apparently 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 defendant answers, defendant has the right to have all proceedings take place in the county of his residence until such time as plaintiff *is* in a position to show that the case falls within an exception. Defendant's right is apparently regarded as sufficiently important to justify the greatest possible protection: namely, the nullification of any proceedings had in the improper court after the right is asserted.

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.*[77] and seems to be the most logical explanation for the decisions in these cases. In the *Brady* 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

[74] CAL. CODE CIV. PROC. § 396b.
[75] Watts v. White, 13 Cal. 321 (1859); Pearkes v. Freer, 9 Cal. 642 (1858); Reyes v. Sanford, 5 Cal. 117 (1855); Tooms v. Randall, 3 Cal. 438 (1853).
[76] See p. L-9 *supra*.
[77] 106 Cal. 56, 39 Pac. 209 (1895).

> 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. * * * 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.[78]

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."

ANALYSIS OF POLICY QUESTIONS PRESENTED

The California transfer-retransfer procedure can only 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 were codified by the amendment of Code of Civil Procedure Section 396b in 1933. This portion of the study presents and discusses several questions relating to the revision of Section 396b to eliminate the transfer-retransfer procedure.

Should the Law Be Left As It Is?

It is arguable that no change in the present law is warranted 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 or at least minimize the necessity of 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 desirable that he should also be able 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 convenient 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 ability to sue.

[78] *Id.* at 60-61, 39 Pac. at 211.

Should the Requirement That An Answer Be on File Be Abolished?

The California courts have always said that a motion to retain (or change) venue for convenience of witnesses cannot be intelligently decided until an answer has been filed and the issues are known. They have assumed that the motion can never be decided until an answer is filed and that it is necessarily ripe for decision as soon as that has been done. Both assumptions are questionable.

It can certainly be argued, on one hand, that in many cases both the court and the parties will have a rather clear idea of what the issues in the case will be even before defendant answers. Although the language in several federal cases indicates that defendant's answer is sometimes necessary for the determination of a motion to change venue for convenience of witnesses, the fact that defendant's motion has been granted in many federal cases when no answer had been filed suggests that it is not crucial in all cases. In some cases the court could doubtless determine with reasonable certainty from affidavits before defendant has answered whether the testimony to be given by the alleged witnesses will be material.

On the other hand, an answer does not necessarily eliminate all uncertainty as to what the issues in a case will be. Many answers consist of little more than denials in general terms and generally-stated affirmative defenses and give little indication of the specific issues which will be developed at the trial. In such cases the court may not be in a position to determine who the witnesses will be even after defendant has answered—although the technical materiality of the testimony of every alleged witness could perhaps be decided—and it would be preferable to be able to withhold ruling on the motion until the issues have been narrowed or clarified by pretrial proceedings subsequent to answer.

A distinction should be noted, however, between a case involving a motion to change venue made by defendant and one involving a motion by plaintiff to change or retain venue. In the former case the defendant will obviously be much more inclined than in the latter to inform the court in his affidavits of what issues he expects to raise in his answer. Moreover, plaintiff would not be able to inform the court with certainty what the defenses will be. Therefore, if the requirement that answer be filed before the court may consider a motion by plaintiff to change or retain venue for convenience of witnesses were simply abolished, the court might in some cases be in doubt as to whether the testimony of certain witnesses would be material. But this difficulty could probably be overcome by providing either (1) that the court in which the action was commenced may require the defendant to indicate what issues he anticipates raising and in the absence of such a showing may assume for purposes of deciding the motion that the issues will be as stated in plaintiff's affidavits, or (2) that the court in which the action was commenced may retain the case until defendant has answered or such other time as it can determine the materiality of the testimony to be given by the various witnesses.

Should the Rule That the Motions May Not Be Continued 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 a right to have his

case tried in a proper court and that this right logically includes the right to have every part of it, including all pretrial motions and proceedings, heard there. The courts have said that defendant's motion to transfer to the proper court may not be continued until answer because this would require a ruling on defendant's demurrer in the improper court, which would abrogate defendant's right to have his demurrer heard by the proper court.

Although this rule that defendant's motion may not be continued represents a strictly logical application of the general principle that the defendant has a right to be sued at home, it is open to question on practical grounds even though the validity of the underlying principle is assumed. There would seem to be no good reason for insisting that *every* aspect of the case take place in the proper court if a more flexible approach would avoid the wasteful transfer-retransfer procedure which the present rule involves and would at the same time preserve the defendant's right to have the trial itself in the proper court if the motion to retain venue fails. Indeed, Code of Civil Procedure Section 396b has already been amended once by the Legislature to provide that the improper court may make an order for temporary alimony, counsel fees, etc. in a divorce or separate maintenance action before transferring the case to the proper court, thus superseding a line of decisions to the contrary which also stemmed from a rigid application of the "defendant's right" theory. A second statutory exception to achieve another practical accommodation of the interests of all concerned would seem to be equally justifiable.

POSSIBLE METHODS OF CHANGING THE LAW

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

1. The transfer-retransfer procedure could be eliminated by providing that the defendant's motion to change venue can only be made at the time of answer. There would appear to be at least two possible 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, it does not provide for cases in which it is necessary or desirable to delay a ruling on the motions until a later point in the trial where it appears that the issues might be narrowed or clarified by pretrial proceedings subsequent to the filing of the answer.

2. The transfer-retransfer procedure could be eliminated by authorizing the court to continue the motions until the answer has been filed. Two possible objections may be made to this proposal. First, it requires that an answer be on file in all cases whereas it may be possible to decide some cases without an answer. Second, it does not provide for cases in which it is necessary or desirable to delay a ruling on the motions until after pretrial proceedings subsequent to the answer have narrowed or clarified the issues in the case.

3. The transfer-retransfer procedure could be eliminated by authorizing the court to consider the counter motion before the answer has

been filed and placing the burden on defendant of indicating in his affidavits the issues he anticipates raising. There appear to be two objections to this proposal. First, it requires defendant to decide and reveal the issues he will raise prior to the time he is required to answer. Second, it does not authorize the court to delay consideration of the motions until a later stage in the case where such procedure appears desirable.

4. The transfer-retransfer procedure could be eliminated by making the procedure flexible as to the time when the motions are to be decided. This could be achieved by eliminating the words "if an answer be filed" from Code of Civil Procedure Section 396b and adding the following sentence at the end thereof:

> When a motion for transfer to the proper court and opposition thereto on the ground of convenience of witnesses comes on for hearing, the court shall either decide the motion if it is able to determine what the issues and who the witnesses at the trial will be or continue the motion until such time prior to trial, whether before, when, or after the answer is filed, as it is able to make such determination, and the court may entertain any proceeding in the cause prior to the determination of the motion.

5. Finally, it would be possible to combine the third and fourth solutions above by placing the burden on defendant of indicating the issues he anticipates raising and also authorizing the court to continue the motions until they are deemed ripe for decision. This could be accomplished by eliminating the words "if an answer be filed" from Code of Civil Procedure Section 396b and adding at the end thereof the following language:

> When a motion for transfer to the proper court and opposition thereto on the ground of convenience of witnesses comes on for hearing, the court shall either decide the motion if it is able to determine what the issues and who the witnesses at the trial will be or continue the motion until such time prior to trial, whether before, when, or after the answer is filed, as it is able to make such determination, and the court may entertain any proceeding in the cause prior to the determination of the motion.
>
> In deciding a motion for transfer to the proper court and opposition thereto on the ground of convenience of witnesses the court may consider affidavits of the parties concerning issues to be pressed at the trial and necessary witnesses, as well as pleadings and other papers on file.

If one of the latter three changes is made in Code of Civil Procedure Section 396b, a parallel change should logically be made in the procedure for change of venue for convenience of witnesses under Code of Civil Procedure Section 397(3), even though this does not fall within the scope of the study authorized by the Legislature.

o

printed in CALIFORNIA STATE PRINTING OFFICE

47972 12-56 2M