

CHAPTER 261.

PLACE OF TRIAL OF CIVIL ACTIONS.

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261.01 Place of trial. Except as provided in section 220.12 and subject to the provisions for change of venue the proper place of trial of civil actions is as follows:

(1) **WHERE SUBJECT OF ACTION SITUATED.** Of an action within one of the four classes next following, the county in which the subject of the action or some part thereof is situated, viz.: (a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such estate or interest, or for an injury to real property. (b) For the partition of property. (c) For the foreclosure, redemption or other satisfaction of a mortgage of real property. (d) For the recovery of distrained personal property.

(2) **WHERE CAUSE OF ACTION ARISES.** Of an action within either of the two classes next following the county where the cause or some part thereof arose, viz.: (a) Except as provided in subsection (9), against a public officer or person appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, shall do anything touching the duties of such officer. (b) For the recovery of a penalty or forfeiture imposed by statute; and when the cause arose where two or more counties have a common jurisdiction, under sections 2.03 and 2.04, the action may be brought in either county.

(3) **ACTION AFFECTING MARRIAGE.** Of an action for the annulment or affirmance of a marriage or for a divorce, the county in which either party resides.

(4) **ACTION AGAINST RAILROADS.** Of an action against any railroad corporation as defined by subsection (42) of section 370.01, or against any corporation owning or operating any interurban railroad, (except in condemnation proceedings), either in the county in which the cause of action arose or in that in which the plaintiff resides, if the road of such corporation extends into either county; if such road does not extend into either county, in any county into which its road does extend.

(5) **AGAINST INSURANCE COMPANIES.** Of an action against an insurance company, to recover on a policy of insurance, the county in which the defendant has its principal office or in which the plaintiff resides or, if brought by a person in a representative capacity by appointment of a court in the county in which such appointment was had, provided, however, that in the event an insurance company is sued or made a party to an action growing out of the negligent operation of a motor vehicle, the proper place of trial shall be in the county where the cause of action arose or where the person or persons, covered by an insurance policy by reason of which such insurance company is sued or made a party to said action, resides.

(6) **AGAINST OTHER CORPORATIONS.** Of an action against any other corporation the county in which it has its principal office or in which the cause of action or some part thereof arose.

(8) **ACTIONS BY STATE.** Of an action by the state against any county or county officer in any county; and actions brought to recover damages for trespass upon public lands, when the amount in controversy exceeds two hundred dollars in any county.

(9) **ACTIONS AGAINST THE STATE.** Of an action brought against the state or any state board or commission or any state officer in his official capacity, the county of Dane.

(10) **ACTIONS ON OFFICIAL BONDS.** Of an action for a breach of any official bond, in the county in which such bond is filed.

(11) **AUTO ACCIDENT ACTIONS.** Of an action growing out of the negligent operation

of a motor vehicle, the county in which the cause of action arose or where the defendant resides.

(12) OTHER ACTIONS. Of any other action, the county in which any defendant resides at the commencement of the action; or if no defendant resides in this state, any county which the plaintiff designates in his complaint. [1935 c. 541 s. 14; 1943 c. 394]

Revisor's Note, 1935: It is desirable that all provisions as to the place of trial be in this chapter. 220.12 is special. It governs venue in actions to enjoin the banking commissioner. The exception in (2) (a) is to harmonize it with (9). Ninth is the latest enactment. *First* (2) is made general to cover personality. *Fifth*, "existing under the laws of this state" includes a licensed foreign company. State ex rel Wis. D. M. Co. v. Circuit Court, 176 W 198, 204. *Sixth*. The amendment makes the statute express clearly the meaning given to it in State ex rel. Wis. D. M. Co. v. Circuit Court, 176 W 198, 204. *Eighth*. 261.01 deals with the place of trial. Change of venue is covered by other provisions (261.08) and so is "calling in a judge". (Bill No. 50 S, s. 14)

Bringing an action for divorce in the county where either spouse resides, designates the proper county and the proper place of trial. Whether the venue shall be changed for convenience of witnesses rests in the sound discretion of the trial court. State ex rel. Jefson v. Mahoney, 204 W 440, 235 NW 926.

A contract of sale of lumber being silent as to place of payment, such place is at the seller's residence, which was in the county of the forum, at which on nonpayment some part of the cause of action arose within the meaning of subdivision sixth. Likewise, some part of the cause of action arose within such county on the refusal of the buyer to order out lumber at the place therein where it was to be delivered. So also some part of the cause of action arose where the contract was made, which was within such county. State ex rel. Flambeau River L. Co. v. Reid, 206 W 478, 240 NW 149.

Under subdivision sixth an action by a member of a co-operative association against the association for the purchase price of products delivered to it was properly brought in the county wherein the products were delivered, that concededly being the county in which the cause of action arose, instead of the county where the association had its principal office, notwithstanding (9) of 185.08, prescribing the proper place of trial of actions by or against such an association under the provisions of that section, the instant action not falling within the classes of actions therein specified. State ex rel. National C. P. Federation v. Foley, 209 W 471, 245 NW 107.

A judgment of a county court foreclosing a mortgage on realty in another county

was void for a total lack of jurisdiction; but the judgment as subsequently amended for damages in the amount due on the notes secured by the mortgage, though the defendants had not appeared or answered in the action, while irregular under 270.57 was not void and could not be collaterally attacked, because the court had jurisdiction of the parties and general jurisdiction to render judgments for damages in proper cases, such as on promissory notes. State ex rel. Hammer v. Williams, 209 W 541, 245 NW 663.

Where defendants make no proper demand for change of venue, action may be tried within the circuit, notwithstanding circuit judge is a party. Belden v. Field, 211 W 485, 248 NW 417.

In action originally instituted against officers for false arrest, venue held properly laid in county where first steps leading to imprisonment of plaintiff were taken. Jordan v. Koerth, 212 W 109, 248 NW 918.

The proper place for the trial of an action on a mortgage bond against the principal obligor and the guarantor, where both defendants are corporations, is the county in which the defendants are situated or have their principal office or place of business, or in which the cause of action or some part thereof arose. As regards venue, a breach of contract to pay arises at the place where payment is to be made and default occurs. State ex rel. Connor L. & L. Co. v. Circuit Court, 213 W 141, 250 NW 753.

Subsection (6) is broad enough to include a principal office in this state of a foreign corporation whose general headquarters are without the state. State ex rel. Johnson v. Aarons, 231 W 524, 286 NW 27.

In an action growing out of the negligent operation of a motor vehicle, both the alleged tortfeasor and his liability insurer are proper defendants, liable to the plaintiff directly if negligence and damages are proved; and the defendant insurer is a "defendant" within the meaning of (11) governing the venue of such an action. State ex rel. Boyd v. Aarons, 239 W 643, 2 NW (2d) 221.

Where a wife left her husband's residence in County M and went to live with her parents in County S, intending to make their home her home until she went to school or got a job, she had a separate residence in County S sufficient to make that county a proper place of trial of her action for divorce. State ex rel. Ferebee v. Dillett, 240 W 465, 3 NW (2d) 699.

261.02 Place of trial, general rule. The county designated in the complaint shall be the place of trial, unless the same be changed as provided in this chapter, except that every action named in subsection (1) of section 261.01 can be commenced only in the county in which the property or some part thereof is situated. [1935 c. 541 s. 16]

Note: A maker agreeing that judgment on a note might be entered in any state or county waived the right to change of venue

in an action thereon after opening of a judgment upon cognovit. State ex rel. Bobroff v. Braun, 209 W 483, 245 NW 176.

261.03 Change of venue to proper county. When the county designated in the complaint is not the proper place of trial, except as to actions named in subsection (1) of section 261.01, the defendant may, within twenty days after the service of the complaint, serve upon the plaintiff a demand in writing that the trial be had within a proper county, specifying the county or counties, and the reason therefor. Within five days after service of such demand the plaintiff may serve a written consent that the place of trial be changed, and specify to what county, if he have the option to name one and such consent shall change the place of trial accordingly. If the plaintiff's consent be not so served the defendant may, within twenty days after the service of his demand, move to change the place of trial, and the court or the presiding judge shall order the place changed with costs of motion. The right to obtain a change of the place of trial shall not be affected by any other proceedings in the action. [1935 c. 541 s. 17]

Revisor's Note, 1935: The complaint determines the county in which the action is laid. State ex rel. Schauer v. Risjord, 183

W 553. The addition of "county or counties" is to indicate the proper demand as held in State ex rel. Shawano County v. Werner, 181

W 275. The matter of service on a party is covered elsewhere (269.37). The addition for making an order is from 261.04. (Bill No. 50 S, s. 17)

This section, providing the procedure for a change of venue, since it sets up no machinery applicable to the situation presented upon the opening of a judgment by cognovit is not applicable to judgments of that sort, and creates no absolute right to a change of venue in such a situation. State ex rel. Bobroff v. Braun, 209 W 483, 245 NW 176.

Venue of action commenced in civil court of Milwaukee county cannot be changed until appeal is taken to circuit court. Same procedure applies in circuit court for obtaining change of venue of actions, whether appealed from justice court or from civil court of Milwaukee county. State ex rel. Trost v. Schinz, 217 W 576, 259 NW 601.

A person not properly a party to an action is not entitled to a change of the place of trial although he is, on the record as it stands, a nominal party. A change of venue is granted only to give the defendant moving for it a right to a trial in the proper county. By not proceeding for a change of venue within the time and in the manner provided by the statute the right to a change is lost. State ex rel. Jackson v. Leicht, 231 W 178, 285 NW 335.

Where both the alleged tortfeasor and his liability insurer are made defendants in

an action growing out of the negligent operation of a motor vehicle 261.01 (11) applies so as to permit the venue to be laid either in the county where the accident occurred or in a county which is the residence either of the alleged tortfeasor or of the liability insurer, so that the alleged tortfeasor is not entitled to a change of venue to a different county where the venue is laid in the county of the residence of the insurer. State ex rel. Boyd v. Aarons, 239 W 643, 2 NW (2d) 221.

In an action for divorce commenced in a county which was not the residence of either party, a change of venue to the county of the residence of the parties was properly denied on the ground that the defendant's motion therefor was not made within the time required by 261.03, where an alleged stipulation between counsel for an extension of the time, if made, was not binding because not made in open court or in writing, as required by 269.46 (2). State ex rel. Sprinkman v. Huiras, 240 W 154, 2 NW (2d) 721.

It is only where the county designated in the complaint is not the proper place of trial that a demand for and consent to a change of venue operate to change the place of trial to another county without an order of the court. State ex rel. Birnamwood Oil Co. v. Shaughnessy, 243 W 306, 10 NW (2d) 292.

261.04 Change of venue, grounds for. The court or the presiding judge thereof may change the place of trial in the following cases:

(1) When there is reason to believe that an impartial trial cannot be had in the designated county and when so changed it shall be to a county in which the cause complained of does not exist.

(2) When the convenience of witnesses and the ends of justice would be promoted.

(3) When the parties or their attorneys shall stipulate in writing to change the place of trial; and, in this case, the order may be made by a judge.

(4) On the motion of any party at any time before trial in an action for damages growing out of the negligent operation of a motor vehicle, to any proper county where any other action is pending for damages for the negligent operation of a motor vehicle involving the same accident. [1935 c. 541 s. 18; Supreme Court Order, effective July 1, 1942]

Comment of Advisory Committee: 261.04 (4) was promulgated Feb. 13, 1942, effective July 1, 1942. All causes of actions growing out of an automobile accident may be included in one action and all persons in interest may be joined as parties or interpleaded (260.11) and separate actions "pending in the same court" may be consolidated (269.05). To nullify the rules for consolidation, actions have been started in as many different courts and counties as possible. The new rule is to facilitate consolidation of actions and to checkmate that move. See 269.59, created by 1939 c. 100.

Revisor's Note, 1935: Old (1) is covered by amendment to 261.03. The addition to old (2) is from 261.09. (5) was a paraphrase of (2). (Bill No. 50 S, s. 18)

As to proper county in divorce actions, and change of venue for convenience, see note to 261.01, citing State ex rel. Jefson v. Mahoney, 204 W 440, 235 NW 926.

A stipulation of the parties consenting to a change of venue to a court which had jurisdiction of the subject matter was binding, notwithstanding noncompliance with requirements of 261.10, as to transmission of record, etc., within twenty days from the

making of the order. Necedah M. Corp. v. Juneau County, 206 W 316, 237 NW 277, 240 NW 405.

A sales contract which provides that actions to enforce the contract may be brought in any county selected by the seller is a valid provision. State ex rel. Kuhn v. Luchsinger, 231 W 533, 286 NW 72.

The refusal of the trial court to grant a change of venue in a prosecution for arson, sought on the ground that public sentiment in the county was such that a fair trial could not be had, was not error, where no sufficient showing of excitement or prejudice that would interfere with the defendant's rights was made, and where no difficulty was encountered in securing a fair and unbiased jury. State v. Zuehike, 239 W 111, 300 NW 746.

The denial of the plaintiff's motion for a change of venue, sought on the ground that prejudice of the people would prevent obtaining a fair jury in the county wherein the case was pending, was not prejudicial where the case did not go to the jury but was ultimately decided by granting the defendant's motion for a directed verdict. Kalb v. Luce, 239 W 256, 1 NW (2d) 176.

261.05 Change of venue between municipal and circuit courts. When the parties or their attorneys shall so stipulate in writing, the place of trial of any civil action, over which the circuit and municipal courts have concurrent jurisdiction shall be changed from the circuit court to the municipal court or from the municipal court to the circuit court; and filing such stipulation shall change the place of trial accordingly. [1935 c. 541 s. 19]

Revisor's Note, 1935: 261.05 was created by chapter 453, Laws 1909. The language is changed to make the procedure conform to the procedure in 261.03 where change is

by consent. There is no reason for a technical requirement for an order. Swan v. Porter, 96 W 34, which was a glaring miscarriage of justice. (Bill No. 50 S, s. 19)

261.055 [Renumbered section 261.12 by 1935 c. 541 s. 20]

261.06 Change of venue if judge disqualified by interest. When the judge is a party or interested in any action in his court or is related to or has been of counsel for either party, the court or the presiding judge thereof shall, upon application of either party, and may without such application, change the place of trial or call in another judge as provided in section 261.08. The fact that the judge is a taxpayer does not disqualify him. [1935 c. 541 s. 21]

Note: Where the plaintiff, in automobile collision case, was circuit judge, denying defendant's application for change of venue to adjoining circuit, which was referred to county court for decision, held abuse of discretion. *Belden v. Field*, 211 W 435, 248 NW 417.

261.07 Justice and municipal court appeals; change of venue. The appellate court shall change the place of trial of any action commenced before a justice of the peace or municipal court upon application of the defendant in like manner and for like causes as in actions originally brought in the circuit court. The demand for consent to such change shall be made within ten days after the defendant has notice of the appeal. [*Supreme Court Order, effective Jan. 1, 1934*]

261.08 Venue changed for judge's prejudice; calling other judge. (1) The court shall change the place of trial to an adjoining circuit upon the application of any party, who shall file his affidavit, that he has good reason to, and does believe, that he cannot have a fair trial on account of the prejudice of the judge, naming him, or the court may retain the action until the end of the current term; and in the meantime shall request the chairman of the board of circuit judges to call some other circuit judge to attend and hold court during the current or next term for the purpose of exercising jurisdiction in all actions and proceedings in which applications for change of the place of trial have been made for such reason. And while so in attendance, said judge may make all orders and hear all applications and motions that may be brought on for hearing. If no other judge can hold court for such purpose, at either of such terms, an order changing the place of trial shall be entered on the first day of the next term.

(2) If such application is made after a continuance obtained by the party filing such affidavit, it shall be granted only upon payment of costs, but no costs for the attendance of witnesses shall be included if notice of the application, with a copy of such affidavit, was served upon the opposite party at least ten days before the commencement of the term. But one change of the place of trial shall be granted to the same side under this section.

(3) When the judge named in the affidavit is the presiding judge of the circuit, such affidavit must be filed and motion thereon made on or before the first day of the term, at which the case is triable, or within ten days after the case is noticed for trial; and when the judge so named is the judge of some other circuit, the affidavit must be filed and motion thereon made on the first day such judge holds court and before any proceeding is had in the case in which such affidavit is filed. When such affidavit names a judge of a circuit court consisting of branches, it must be filed and motion thereon made before the case is called for trial. The filing of such affidavit shall not deprive the presiding judge of the circuit, or of the branch of a circuit court in which the case is pending, of jurisdiction to determine pending motions made by the party filing such affidavit. No such affidavit shall name more than one circuit judge, except that in a circuit court consisting of more than two branches such affidavit may name two judges of said circuit court.

(4) Unless a called judge shall attend and begin the trial of such action or proceeding as early as the opening of court on the second day after the action is reached for trial in its regular order, the action shall not be called for trial (without consent of the parties) until such judge has given to the clerk of the court five days' notice of the time when he will attend, and the clerk shall give to the attorneys of record of all the parties immediate notice of the said time. [1935 c. 541 s. 22]

Note: In an action to enforce a materialman's lien, wherein the contractor and the city for whom the improvement had been made were the defendants, and the defendant contractor alone applied for a change of venue for prejudice of the judge, the court properly denied the application on the ground that it was not joined in by all the

defendants on the same side where the contractor and the city were interested on the same side, and also on the ground that the affidavit was not filed within ten days after the case was noticed for trial. *Morris v. P. & D. General Contractors, Inc.* 236 W 513, 295 NW 720.

261.09 Time for motion to change venue. The place of trial shall not be changed, except under the provisions of section 261.08 after one continuance had on the motion of the party applying for a change unless it shall appear to the court that the cause therefor was discovered or developed after such continuance. [1935 c. 541 s. 23]

Revisor's Note, 1935: The place to which trial may be changed is covered by 261.04 and 261.08. (Bill No. 50 S, s. 23)

261.10 Proceedings after order for change of venue. When the place of trial is changed all process, pleadings and other papers, and copies of all entries and minutes of the clerk in such action shall be certified and transmitted by him to the clerk of the court

to which the trial is changed, with a statement of his fees. Such fees shall be paid before transmission by the party procuring such change, except in the case mentioned in section 261.03, in which case the plaintiff shall pay such fees and the change shall be complete on the making of the order. The change, in other cases, shall be complete on filing the papers transmitted. If such transmission and filing be not made within twenty days from the making of the order to change the place of trial, unless such time be extended, the moving party shall lose his right to the change except in the case mentioned in section 261.03, and no order for a change for the same cause shall thereafter be made and the moving party shall pay the costs of the application within ten days after the expiration of said twenty days; but the other party, may, within forty days from the time of making of the order granting the change, pay the clerk fees and have the papers certified and transmitted to the court mentioned in such order. [1935 c. 541 s. 24]

Revisor's Note, 1935: 261.08 (3) says A stipulation of parties consenting to a court of origin may decide pending motions. change of venue to the court which had jurisdiction of the subject matter is binding. 261.03 says plaintiff shall pay costs if action is brought in wrong county. (Bill No. Necedah M. Corp. v. Juneau County, 206 W 50 S, s. 24) 316, 237 NW 277.

261.11 Conclusiveness of change of venue; second motion. After trial had in the court to which the action has been changed, the proceedings for such change shall be conclusive unless a motion to remand was made before such trial was entered upon. If after the transmission of the papers an order changing the place of trial shall be reversed or set aside the effect shall be to change the place of trial back. After the transmission of the papers back to the original court on such reversal or setting aside of the order the party who filed his affidavit of prejudice may renew his application for a change of venue on such affidavit at the first term of court after the return of the papers; and such renewed application shall be treated as the original application. [1935 c. 541 s. 25]

261.12 Change of venue to civil court of Milwaukee county. Whenever the circuit court of Milwaukee county shall determine that due to congestion there is delay in the trial of actions and proceedings pending in said court, or for any other reason it shall appear that the prompt and efficient administration of justice will be promoted by the transfer of certain cases pending in said court, said court shall, unless by reason of consolidation of trials it will be in the interest of justice to retain the cause in said circuit court, by proper order upon its own motion or upon the application by any party, transfer to the civil court of Milwaukee county any action or proceeding pending in said circuit court within the classification of actions or proceedings enumerated in section 300.05 and subsections (2) and (4) of section 300.06, in which action or proceeding the amount claimed or involved does not exceed the sum of five thousand dollars. Actions and proceedings so transferred shall be entitled to the same place for trial on the civil court calendar as if originally commenced there; and shall be heard, tried and determined in said civil court in the same manner and upon the same conditions, except as to appeal, as if said actions have been held for trial in the circuit court. Costs in actions transferred to the civil court hereunder shall be taxed therein in accordance with the practice in that court, except that the prevailing party may include disbursements incurred before the transfer of the cause taxable in his favor under the circuit court practice. [1933 c. 419 s. 2; 1935 c. 541 s. 20; 1939 c. 297]

261.13 [Renumbered section 227.25 by 1943 c. 375 s. 2]