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Fred P. Storke

THE VENUE OF ACTIONS OF TRESPASS TO LAND

By Fred P. Storke.*

There is a curious and unfortunate anomaly in the law of venue which has generally been overlooked in movements to reform procedure. This is the rule that actions for injuries to real property can only be brought in the state where the property is situated. It seems worth while to trace the development of this rule, in order to show that it is merely a historical accident tending to obstruct the administration of justice.

The rule in question depends upon the classification of actions as local or transitory. Originally all actions were local in the sense that they were all tried by a jury of the vicinage. The term *venue* meant the vicinity from which the jury came. As the jury was to decide chiefly on its own knowledge, it must be chosen from the neighborhood of the spot where the issuable fact occurred. By the theory of the common law there was only one fact in issue, and what that fact was could only be determined by the pleadings. Hence in the pleadings it was necessary to allege every fact with its proper venue, so that when a material fact was traversed and issue joined, it could be known from what vicinity the jury were to be summoned to Westminster.

With the rise of the *nisi prius* system, the jury as a rule no longer came to Westminster, but the judges went on circuit. The venue now determined the place of trial as well as the place from which the jury were selected. As the requirements that the jury must come from the very hundred where the facts took place were gradually relaxed, and they were selected to a greater extent from the whole country, the venue came to mean the county where the trial took place.

In many cases, however, the exact county where the issuable facts took place was not material to the cause of action. In most personal actions, the plaintiff could lay the venue in any county

* Auburn, New York.

that he chose, and could prove facts sufficient to entitle him to recover without showing where the transaction actually took place. If, however, he must prove the locality in order to sustain his case, there would be a fatal variance if he had alleged the fact as occurring in some other county than the actual one.

Here we have a distinction growing up between two classes of actions—one where the plaintiff must prove the venue of the fact in issue, the other where he need not do so. The court came to hold that in the second class of cases, while the plaintiff must allege the venue, the defendant would not be allowed to traverse this allegation, and as the plaintiff could prove all the necessary elements of his cause of action without a variance, he could recover. By means of this fictitious non-traversable allegation, actions of this class could now be tried in any county, and came to be called transitory actions. By an extension of this reasoning, such actions could be brought in England and tried in an English county even when the transaction had occurred abroad or on the high seas.[1] The development of the doctrine of transitory actions was assisted by the change in the function of the jury. From actual witnesses, they had become transformed into judges of the evidence, and it became less important that they should come from the vicinage.

The other class of actions consisted of cases where the *situs* of the subject matter was material. As the allegation was a material one, the courts permitted it to be traversed and a variance would result if the plaintiff alleged that the act had occurred in the wrong county. Such actions were called local, and the distinction was made that whenever the facts constituting the cause of action could only occur in one certain place, the action was local; whenever they might have occurred anywhere, the action was transitory.

Since the plaintiff had now practically acquired the power to choose the venue in transitory actions, we come to the modern conception of *action* venue in place of the *fact* venue of the older law. It became customary for the plaintiff to endorse on the margin of the declaration the county which he selected for the trial; and this was the only venue which, from this time on, had any legal effect.

[1] This fiction is cleverly satirized by Sir Frederick Pollock in "Leading Cases Done into English Verse." Mostyn *v.* Fabrigas begins:

"Minorca lies in the Middle Sea,
Within the ward of Cheap to wit."

Nevertheless, the older fact venue continued to leave its mark, and the material facts were still pleaded each with its proper venue. So there existed a dual system of venue—the action venue shown in the margin, and the obsolete fact venue still appearing in the body of the pleadings.[2]

Local actions included actions to recover real property or some interest therein, common law replevin (which lay for a wrongful distress and so was necessarily connected with the *situs* of real property, trespass *quare clausum fregit,* and actions on contracts running with lands, where the right or liability was based only on privity of estate.[3] It might easily have been held in some of these cases that the location of the land was not an essential element of the plaintiff's claim, but the courts never felt they could go so far as to permit the plaintiff to allege that lands lay in one county when they in fact lay in another.

Lord Mansfield attempted to make some alterations in the rule as it now stood. In two cases at *nisi prius,* he held that one who committed a trespass to real estate in the colonies could be sued in England. In *Mostyn* v. *Fabrigas,*[4] where an English governor of Minorca was sued in England for false imprisonment of the plaintiff in Minorca, this judge in sustaining the writ gave it as his opinion that all actions where damages only were sought should be transitory, except perhaps actions of trespass *vi et armis* which must be laid against the king's peace. But the English courts refused to follow this *dictum.* In *Doulson* v. *Matthews*[5] they squarely reaffirm the doctrine that actions of trespass *quare clausum fregit* are local. Actions of trespass *vi et armis* for injuries committed abroad have always been held to lie in England, notwithstanding Lord Mansfield's doubt.[6]

The law in England remained well settled after *Doulson* v. *Matthews* until the Court Rules of 1875. By these rules the distinction between local and transitory actions was abolished, so that

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[2] A full account of the development of the action venue from fact venue, and the rise of the distinction between local and transitory actions, will be found in the note to Mostyn *v.* Fabrigas. 2 SMITHS' LEADING CASES, 9 ed., 916. The matter is also briefly summarized in the article "Venue" in 40 CYC.

[3] Farmer *v.* Dakin, 28 N. D. 452, 149 N. W. 354 (1914); Ackerson *v.* Erie R. Co., 31 N. J. L. 309 (1865); Robinson *v.* Mead, 7 Mass. 353 (1811); Williams *v.* Welch, 5 Wend. 290 (N. Y. 1830); Whisler *v.* Roberts, 19 Ill. 274 (1857); Doulson *v.* Matthews. 4 T. R. 503 (1792); Livingston *v.* Jefferson, 15 Fed. Cas. No. 8411 (1811); Whitaker *v.* Forbes, L. R. 10 C. P. 583 (1875); White *v.* Sanborn, 6 N. H. 220 (1833); Clark *v.* Scudder, 6 Gray 12 (Mass. 1855); Lienow *v.* Ellis, 6 Mass. 331 (1810).

[4] Mostyn *v.* Fabrigas, 1 Cowper 161 (1774).

[5] Doulson *v.* Matthews, *supra.*

[6] See Rafael *v.* Verelst, W. Bl. 1055 (1766).

actions formerly called local could be brought in any county. It was quite generally assumed that this rule would apply to causes of action arising outside of England.[7] But it was subsequently held that the rule was not intended to enlarge the jurisdiction of the court. Since at common law they could not take cognizance of local actions arising outside of the kingdom, this class of actions was unaffected by the rule.[8]

The leading case in America is *Livingston* v. *Jefferson,*[9] decided in the United States Circuit Court for the District of Virginia by Chief Justice Marshall and Judge Tyler. Livingston purchased lands along the Mississippi river, from which he was ejected by United States troops acting under orders of Jefferson, then President. Subsequently, Livingston sued for a large sum in the Federal district of Virginia. A plea to the jurisdiction was entered. Tyler unhesitatingly followed the rules of English law, that such an action was local, and the court sitting in Virginia had no jurisdiction. Marshall, after reviewing the authorities, gave his opinion that the rule was a technical one and not based on sound reasons, but nevertheless concurred in upholding it. It is noteworthy that in this case Marshall was deciding a point that might have meant financial ruin to his political enemy, Jefferson. Obviously he was unwilling to hold that while the existing law gave no warrant to sustaining the jurisdiction, he would change the rule and permit the court, for the first time, to entertain the action. It seems probable that if the great judge had been free to act without regard to ulterior considerations, a different result might have obtained.

The question having been settled by so great an authority, little attempt was made for years to depart from the rule. Again and again the language of Marshall is quoted condemning the decision, but always the courts felt bound by the decided cases. New York adopted the rule in *Watt's Administrators* v. *Kinney,*[10] and followed it in a long line of cases. One distinction that gained a foothold for a time in New York, was that where the gravamen of the action is negligence, an action will lie in New York for injuries to real estate situated outside of the state.[11]

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[7] See remarks of Mitchell, J., in Little *v.* Chicago, *etc.* R. Co., 65 Minn. 48, 67 N. W. 846 (1896). Also remarks of Lord Cairns in Whitaker *v.* Forbes, 1 C. P. D. 51 (1875).

[8] British South Africa Co. *v.* Companhia de Mozambique, [1893] A. C. 602.

[9] 15. Fed. Cas. No. 8411.

[10] 23 Wend. 484 (1840).

[11] Barney *v.* Burstenbinder, 7 Lans. 210 (N. Y. 1872); Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun. 182 (N. Y. 1877).

It was a long time before the Court of Appeals passed on this question. In *Brisbane* v. *The Pennsylvania Railroad Company*[12] the trial court refused to entertain such an action for injuries caused to crops on the plaintiff's land in New Jersey. The Appellate Division overruled this decision, but the Court of Appeals sustained the trial court and held that no action would lie in New York for injuries to real estate abroad, whether caused intentionally or negligently. This case finally settled the common-law rule in New York and incidentally provoked the reaction resulting in the adoption of a different rule by statute.

This change was brought about by Chapter 76, Laws of 1913, which is now Section 882a of the Code of Civil Procedure and reads as follows: "An action may be maintained in the courts of this state to recover damages for injuries to real estate situated without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state."[13]

In only one state where the common law is in force has the doctrine that trespass *quare clausum fregit* is a local action been repudiated. The Minnesota Supreme Court held that actions of this sort, where the only remedy sought is money damages, are transitory. The opinion by Mitchell, J., is a clean-cut bit of practical and sound reasoning, a liberal education on the subject of following precedents which no longer rest on any sound basis of justice or convenience. There is a strong dissent by Judge Buck, which, however, does little to shake the reader's belief in the soundness of the view of the majority of the court.[14] The case is followed by the Federal Court for the District of Minnesota in *Peyton* v. *Desmond*.[15] The latter case, however, can be sustained on a different ground, as the action there was in the nature of trover.

It is curious to note, in view of the decision in the Little Case, that by statute in Minnesota injuries to lands lying within the state can only be brought in the county where the lands are situated.[16] The court held that this statute had no application to the facts before it, and refused to follow the quite natural inference

[12] 141 App. Div. 366, 125 N. Y. Supp. 1042 (1910); 205 N. Y. 431, 98 N. E. 752 (1912).
[13] This section has been transferred to the Real Property Law, Sec. 536.
[14] Little v. Chicago, *etc.* R. Co., *supra*.
[15] 129 Fed. 1 (1904).
[16] GEN. STAT. MINN. 1913, Sec. 7715.

that the courts would, *a fortiori*, have no jurisdiction where the lands lay not only out of the county but out of the state.

The courts of other states uniformly follow the rule of *Livingston* v. *Jefferson*.[17] Besides the direct adjudications, there are expressions of opinion which practically settle the law in several other states, in cases where the question before the court is one of municipal venue. In Louisiana the rule does not hold. As this is not a common law jurisdiction the ruling would not be of much weight in other states.[18] It has been stated that the rule has been abolished by statute in Virginia. I am unable to accept this statement without qualifications. The provisions of the Virginia code, and the decisions thereunder, only apply in terms to actions within the state, and there is no decision on a cause of action arising outside the state. In most states such code provisions are not considered to change the general rule. The few decisions on contract actions based on privity of estate go to prove that this action is considered local. These are cited above.

Let us now consider how far the doctrine in question is important in municipal venue in the United States. Under the codes, we have an increased tendency to localize actions. In fact, all actions are local in a sense, either the subject matter or the residence of the parties determining the proper county to sue. But in most of these states it is not a jurisdictional error to bring the action in the wrong county. The defendant's only remedy is a timely motion to remove the case to the proper county, and failure to make this motion waives the defect.[19] Moreover, process of a court in one county usually runs throughout the state.

Under these conditions, it is of little moment whether actions for injuries to realty are on the same basis as actions for the recovery of realty, or are classed with ordinary personal actions. In some states process does not run throughout the state, and if we regard these actions as local there will be a failure of justice. Ohio has escaped this difficulty by deciding that actions for injury

[17] Howard *v.* Ingersoll, 17 Ala. 780 (1850); Eachus *v.* Illinois & Michigan Canal Co., 17 Ill. 534 (1856); Du Breuil *v.* Pennsylvania R. Co., 130 Ind. 137, 29 N. E. 909 (1892); Brown *v.* Irwin, 47 Kan. 50, 27 Pac. 184 (1891); Allin *v.* Connecticut River Lumber Co., 150 Mass. 500, 23 N. E. 581 (1890); Farmer *v.* Dakin, *supra;* Karr *v.* New York Jewell Filtration Co., 78 N. J. L. 198, 73 Atl. 132 (1909); Thayer *v.* Brooks, 17 Ohio 489 (1848); Missouri Pacific R. Co. *v.* Culler, 81 Tex. 382, 17 S. W. 19 (1891); Niles *v.* Howes, 57 Vt. 388 (1885); Bettys *v.* Milwaukee & St. Paul R. Co., 37 Wis. 323 (1875).

[18] Holmes *v.* Barclay, 4 La. Ann. 63 (1849).

[19] Fletcher *v.* Stowell, 17 Colo. 94, 28 Pac. 326 (1891).

to real property are transitory in municipal venue.[20] In some states it is a jurisdictional error to bring the action in the wrong county, and the plaintiff is compelled to start another action.[21] There is no reasonable basis for these limitations on the jurisdiction or process of courts within the state. The Colorado rule is the correct one and is embodied in the proposed State-wide Judicature Act.[22]

Returning to the subject of foreign venue, let us consider the reasons for transferring actions of trespass *quare clausum fregit*, and actions for breach of covenants based on privity of estate, to the category of transitory actions. These reasons may be discussed under three heads. In the first place, the rule is a mere historical survival dictated by no logical necessity and serving no useful purpose at the present time. Secondly, it often leads to a manifest failure of justice. Third, there is a long line of judicial opinions condemning the rule from the standpoint of reason, even when following it because of precedent.

Every system of procedure tends to become clogged, in time, with rules which are followed merely because they are rules, not because they are serving any useful purpose. Such rules have grown up for one of two reasons: either because they once served a purpose which no longer needs to be served, or for which better methods have been developed; or else by reason of the tendency of the common-law courts to build up a logically perfect system of procedure, disregarding practical convenience and the ends of justice. The rule which we are now considering has both of these causes to account for it. Originally local because all actions were necessarily local, on account of the nature of the trial by a jury of recognitors, these actions have continued so because of the arbitrary classification made by the courts between causes of action savoring of the realty and those purely and entirely personal. There is a real reason why the two classes, local and transitory actions, should be recognized. But the inclusion of actions of trespass *quare clausum fregit* and actions of covenant based on privity of estate in the former class, merely because they "savor of the realty", has no sound basis. The court has only to award money damages and is not hampered by the necessity of disposing

[20] Genin *v.* Grier, 10 Ohio 209 (1840).
[21] Fritts *v.* Camp, 94 Cal. 393, 29 Pac. 867 (1892).
[22] The State-wide Judicature Act is a model law drafted by the American Judicature Society. See 12A BULL. AM. JUD. SOC.

of property which is beyond its control. The fact that a question of title to land may have to be determined incidentally ought not to defeat the jurisdiction. Such a determination is often necessary in actions on contracts or covenants based on privity of contract, which have always, in modern times, been regarded as transitory.

But it is not merely because the rule under discussion serves no useful purpose that it should be discarded. In many cases it results in a complete failure of justice. In the case of actions to recover an interest in land, some court has always jurisdiction to determine the issue, and the plaintiff is never without relief. But if A trespasses on the land of B in state X, doing substantial injury, and then moves to state Y, B is helpless. He cannot sue A in state X, assuming that A has no property there, because he cannot get service upon him. He cannot sue him in state Y because the courts of that state have no jurisdiction to try this question. A similar result follows in the case of covenants running with the land, where the land has been transferred by the original grantee, and the party liable has left the state.

Judges have long recognized the injustice caused by this rule, and the lack of any real reason for it to stand. But the rigid adherence to precedent which is so characteristic of Anglo-American law has prevented any general breaking away. Even when the question comes up for the first time in a state, the judges always (except in Minnesota) prefer to follow the decisions in other jurisdictions rather than to re-examine the question on the merits. Such a blind following of precedent, in the face of reason and convenience, is inexcusable. Decisions in other jurisdictions ought to have no binding force, and even in the same state the question is hardly one where the doctrine of *stare decisis* should prevail.

The opinion of Lord Mansfield, that the real distinction between local and transitory actions rested on whether title to real property was directly affected or not, has generally been regarded as sound on principle. It is unfortunate that it was not delivered on a question squarely presented to the full bench. Once so decided it would probably have been followed in England and in this country. It seems unlikely that Marshall would have decided *Livingston* v. *Jefferson* as he did, if he had had any precedent to support him in the opposite view. His attitude is clearly expressed in the following excerpt from this case:

"It is admitted that on a contract respecting lands, an action may be maintained wherever the defendant may be found; yet in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may be necessary. A question of boundary may arise, and a survey may be essential to the full merits of the cause; yet these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy where the person who has done the wrong, and who ought to make compensation, is not within the power of the court. That this consideration loses its influence, when the action pursues a thing not within the reach of the court, is of inevitable necessity; but for the loss of its influence where the remedy is against the person and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment. If, however, this technical distinction be established, if all other judges respect it, I cannot venture to disregard it."[23]

This language has been repeatedly cited, but only in Minnesota has the reasoning been followed. In the Little Case Judge Mitchell says:

"But so unsatisfactory and unreasonable is the rule that since that time it has, in a number of states been changed by statute, and in others the courts have frequently evaded it by metaphysical distinctions in order to prevent a miscarriage of justice."[24]

He then cites the Virginia code provisions, the cases where trespass is waived and the action is brought in trover, the earlier New York exception based on negligence, and cases in Ohio and New Hampshire between counties, as supporting his statement, and proceeds:

"Almost every court or judge who has ever discussed the question has criticized or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet they have considered themselves bound to adhere to it under the doctrine of *stare decisis*.

"If the rule be adhered to, all that one who commits an injury to land, whether negligently or wilfully, has to do in order to escape liability, is to depart from the state where

[23] 15 Fed. Cas. No. 8411 (1811).
[24] 65 Minn. 48, 67 N. W. 846 (1896).

> the tort was committed and refrain from returning. In such case the owner of the land is absolutely remediless. We recognize the respect due to judicial precedents and the authority of the doctrine of *stare decisis*, but inasmuch as the rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticized by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor."

In *Brisbane* v. *Pennsylvania Railroad Company*,[25] Cullen, C. J., in upholding the rule, says: "Were the question an open one, I would favor the doctrine that courts have jurisdiction of actions to recover damages for injuries to foreign real estate."

From every standpoint, then, it would seem wise to transfer these two classes of actions to the category of transitory actions. The question is then presented, how is this reform to be accomplished?

In the first place, there is a way of avoiding the injustice done by this doctrine without changing the rule as to jurisdiction. This would be to permit the process of any state to run throughout the Union, so that the trespasser could gain nothing by leaving the state, and could always be effectively sued in the courts having jurisdiction of the land.[26]

This remedy would of course have to be by action of Congress. Conceding it to be within the constitutional power of that body, there remains the question of the advisability of putting it into effect. This clearly involves the consideration of many questions beyond the scope of this article. The great objection would probably be that defendants would be required to travel long distances and be subjected to unreasonable expense. There is not, at the present time, any great likelihood that such a law will be adopted.

A somewhat similar plan is to permit local actions to be brought in any state, removable at the request of the defendant to the state where the cause of action arose. This also has its difficulties in view of the different systems of pleading prevailing in the various states.

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[25] 205 N. Y. 431, 98 N. E. 752 (1912).

[26] This has been advocated by Prof. Cook of Yale and actually prevails in Australia. See 28 YALE L. J. 421.

The two courses which seem most practicable are the changing of the rule by judicial decision, or the adoption of a statutory provision in the nature of Section 982a of the New York code. The former course seems the natural one in states that are not committed to the rule by direct decision. With the precedent of the Minnesota decision and the reasoning of other cases, it would seem that the courts might be prevailed upon to follow the course which reason and justice suggest. Unfortunately there are two obstacles. One is the tendency of which I have spoken to adhere to the majority view adopted in other jurisdictions, as the basis of passing upon questions of first instance, disregarding the inherent reason of the problem and also the fact that the minority view may represent the progressive, modern tendency. The other obstacle is the localization of actions by the codes and the classification of actions for injuries to real property with actions to recover real property. It is very easy to extend this classification, by analogy, to cases where the question is one of international venue, and so find a further ground for regarding trespass *quare clausum fregit* as a local action.

In states where the question has been decided, advocates of a change by judicial action would have to reckon with the doctrine of *stare decisis*. It is true that the question here presented is not one where that doctrine should prevail in its rigid form. There is no question of vested interests or commercial transactions entered into on the faith of the existing law. There is no ground for the view that it is better for questions of this sort to be decided certainly and permanently, than to be decided right. It cannot be said that one has the right to trespass on faith that he cannot be prosecuted in another state. Nevertheless, while all these arguments may influence some courts to reverse themselves, most tribunals are very reluctant to do so, and statutory action seems to be the wiser course to pursue.

The form of the New York code provision seems adequate to accomplish the results desired, and it is recommended that this should be followed. It has been held that the statute does not apply to existing causes of action,[27] and perhaps it is better that it should not do so. It would be easy to include a retroactive provision if this is deemed desirable.

[27] Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837 (1916).