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New Texas Venue Statute: Legislative History Procedure Forum.

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NEW TEXAS VENUE STATUTE: LEGISLATIVE HISTORY*

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I. INTRODUCTION

This article addresses the enactment of Texas Senate Bill (S.B.) 898 by the 68th Texas Legislature in 1983 which substantially revised Texas venue law and practice beginning September 1, 1983.[1] S.B. 898 rewrote the existing venue statute[2] and repealed the statute authorizing interlocutory appeals from plea of privilege judgments.[3]

Some commentators uninvolved in the legislative battle over S.B. 898 will undoubtedly second-guess the legislature's intent behind various provisions of the bill. Old cases will be compared with new provisions to supply some supposed legislative intent. Each word and phrase of S.B. 898 will be dissected, interwoven, and quoted in or out of context to support nice legal propositions. In truth and in fact, such legal niceties had little bearing upon the drafting of S.B. 898. As with most legislation, S.B. 898 was born from negotiations and compromise between competing interest groups who finally agreed to a bill with which neither was wholly satisfied. Hopefully, after-the-fact commentary on S.B. 898 will not strain logic to reach conclusions regarding the drafters' motivation which are incompatible with the true intent behind the major provisions of the bill.

The purpose of this article is to set forth the *real* history behind the passage of S.B. 898 and the *real* intent behind its major provisions. The Texas Association of Defense Counsel (TADC), representing the defense bar, and the Texas Trial Lawyers Association (TTLA), representing the plaintiffs' bar, had for years stymied the passage of various venue-reform bills. Although both groups recognized the need to overhaul Texas' costly and cumbersome venue practice under old article 1995, they could not agree on the remedy. Following lengthy negotiations, both groups finally agreed to a compromise bill on May 12, 1983. The legislative committee hearings on S.B. 898 as originally introduced occurred prior to the May 12

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ciation of Defense Counsel. While the author was involved in all of the negotiations that took place in passing S.B. 898, he has made no attempt to analyze the bill in its entirety. The motivation behind this article is to present an objective history of the bill.

1. *See* Act of May 28, 1983, ch. 385, §§ 1-3, 1983 Tex. Gen. Laws 2119, 2119-24.

2. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-1983), *amended by* Act of May 28, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119-24.

3. *See* Act of April 18, 1907, ch. 133, § 1, 1907 Tex. Gen Laws, Reg. Sess. 248, 248-49 (codified at Tex. Rev. Civ. Stat. Ann. art. 2008 (Vernon 1964)), *repealed by* Act of May 28, 1983, ch. 385, § 2, 1983 Tex. Gen. Laws 2119, 2124.

agreement. Part of that agreement stipulated that there would be no floor debates on or amendments to the agreed bill, and there were none. Therefore, traditional legislative history is scant on S.B. 898. The legislative history of various provisions of S.B. 898 can be seen by comparing the three public versions of the bill as it passed through the legislative process, these being: (1) original S.B. 898 as introduced; (2) S.B. 898 as amended and passed from the Senate Jurisprudence Committee; and (3) S.B. 898 as agreed upon on May 12 and finally passed.[4] Testimony before legislative committees can provide some history, although this testimony occurred prior to the May 12 agreement.

In fact, the major provisions of the agreed bill were hammered out primarily during "private negotiations" between TADC and TTLA. Certain Senators and Representatives, and Chief Justice Pope, were present during most negotiations and were intensely involved in molding the final version of S.B. 898. These persons and numerous other legislators had detailed knowledge of the history and intent behind the bill. This article will contribute to a proper determination of the actual legislative history and intent behind the major provisions of Texas' new venue statute.

II. BACKGROUND TO S.B. 898

Old article 1995 governed venue choice in Texas as well as the degree of proof required to determine venue. Prior to the passage of S.B. 898, the general rule was that a defendant shall be sued in his county of domicile.[5] This "privilege," derived from Spanish law, was first statutorily adopted in Texas in 1836.[6] As of January, 1983, 34 exceptions to the general rule existed under old article 1995, all

4. Appended to this article is a copy of original S.B. 898 as introduced (Appendix 1) and a copy of S.B. 898 as passed out of the Senate Jurisprudence Committee (Appendix 2).

5. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-1983) (amended 1983). *See generally* Spradley, *Texas Venue: The Pathology of the Law,* 36 SW. L.J. 645, 652-90 (1982) (policy considerations behind exceptions). Note that showing a prima facie cause of action was generally not sufficient to establish venue. *See* Foster v. Upchurch, 624 S.W.2d 564, 565 (Tex. 1981). Moreover, the plaintiff had the same general burden of proof in establishing his cause of action in a venue hearing as he did in a trial on the merits. *See* Cowden v. Cowden, 143 Tex. 446, 451, 186 S.W.2d 69, 71 (1945).

6. *See* Act of Dec. 22, 1836, § 5, 1836 Tex. Gen. Laws 198, 1 H. GAMMEL, LAWS OF TEXAS 1258, 1260-61 (1898). *See generally* McKnight, *The Spanish Influence on Texas Law of Civil Procedure,* 38 TEXAS L. REV. 24, 36-40 (1959) (discussion of origins of first Texas venue statute and its Spanish influence).

of which were generally based upon different policy considerations.[7] For example, exception 9a governed negligence actions and allowed suit to be brought either where the negligence occurred or in the county of the defendant's domicile.[8] Exception 23 governed suits against private corporations and associations and authorized suit to be filed, *inter alia,* in the county where the principal office was situated, in the county in which the cause of action or a part thereof arose, or in the county in which the plaintiff resided at the time that the cause of action or a part thereof arose.[9] Exception 25 of old article 1995 governed suits against railroad corporations and allowed suit to be brought in either the county in which the injury occurred or the county where the plaintiff resided at the time of the injury.[10] Exception 27 controlled suits against foreign corporations and allowed suit to be filed in any county where the cause of action or a part thereof accrued, in any county where the company may have an agency or representative, in a county in which the principal office of the company may be situated, or, when the defendant had no agent or representative in this state, in the county where the plaintiff or either of them reside.[11] In some causes of action, such as negligence suits, the plaintiff had to prove the essential elements of his case on the merits in order to establish venue, thus often causing, in essence, two trials of the same case.[12]

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7. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-1983) (amended 1983).

8. *See* Act of April 20, 1953, ch. 107, § 2, 1953 Tex. Gen. Laws, Reg. Sess. 390, 390 (codified as amended at TEX. REV. CIV. STAT. ANN. art. 1995(9a) (Vernon 1964 & Supp. 1982-1983)), *amended by* Act of May 28, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119.

9. *See* Act of April 17, 1874, ch. 89, § 1, 1874 Tex. Gen. Laws 109, 8 H. GAMMEL, LAWS OF TEXAS 107, 107-08 (1898) (codified as amended at TEX. REV. CIV. STAT. ANN. art. 1995(23) (Vernon 1964)), *amended by* Act of May 28, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119.

10. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (25) (1925), *amended by* Act of May 28, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119. Exception 25 and other exceptions singling out railroads are antiquated remnants of early Texas law when railroads were not held in high esteem by the legislature. *See* Spradley, *Texas Venue: The Pathology of the Law,* 36 SW. L.J. 645, 681 (1982).

11. *See* Law of April 4, 1887, ch. 137, § 1, 1887 Tex. Gen. Laws 131, 9 H. GAMMEL, LAWS OF TEXAS 929 (1898) (codified as amended at TEX. REV. CIV. STAT. ANN. art. 1995 (27) (Vernon 1964)), *amended by* Act of May 28, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119. *See generally* Note, *The Constitutional Problem of Providing Venue Classification for Foreign Corporations in Texas,* 18 SW. L.J. 291, 299-304 (1964) (discussion of exception 27 and its application to foreign corporations).

12. *See* Flowers v. Dempsey-Tegeler & Co., 472 S.W.2d 112, 116 (Tex. 1971); Cowden

Article 2008 provided the right to interlocutory appeal from judgments sustaining or overruling a plea of privilege.[13] As of 1983, this right was conferred by the third and only remaining sentence still effective in original article 2008. The first two sentences, dealing with plea of privilege hearings, had been superseded by rules of civil procedure promulgated by the Supreme Court of Texas in 1939.[14]

The Texas legal profession and judiciary urged reform of Texas venue laws for many years.[15] A few persons called for maintaining the status quo. Both sides of the issue were motivated by legitimate concerns as well as some self-serving motives. The following major criticisms and reform recommendations were generally outlined in a 1980 interim report of the Texas House Judiciary Committee.[16]

Concerning venue choice, the argument was made that with 34 exceptions to the general rule, the overall vagueness of the statute's terminology and the discrimination between classes of defendants (a discrimination resulting from periodic fights between competing special interest groups), there was no common principle, rationale, or organization to the venue rules.[17]

Moreover, the determination of venue by means of "plea of privilege" hearings often resulted in two trials of the same case, one to establish venue, and the other to prove the case on the merits.[18] Trial strategy could motivate a plaintiff to unjustly join a defendant

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v. Cowden, 143 Tex. 446, 451, 186 S.W.2d 69, 71 (1945); *see also* Pope, *The State of the Judiciary Message,* 46 TEX. B.J. 362, 363 (1983) (entire case tried twice under venue laws). *See generally* Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue,* 32 BAYLOR L. REV. 563, 566-71 (1980) (discussion of burden of proof necessary at venue hearing).

13. *See* Act of April 18, 1907, ch. 133, § 1, 1907 Tex. Gen. Laws, Reg. Sess. 248, 248-49 (repealed 1983).

14. *See* Act of April 18, 1907, ch. 133, § 1, 1907 Tex. Gen. Laws, Reg. Sess. 248, 248-49, *amended by* Act of May 15, 1939, ch. 27, § 1, 1939 Tex. Gen. Laws 204, 204. *See generally Advisory Opinions,* 8 Tex. B.J. 6, 35-36 (1945) (changes in article 2008 following enactment of rules of civil procedure).

15. *See, e.g.,* Greenhill, *State of the Judiciary,* 42 TEX. B.J. 379, 383 (1979) (revised venue statute would reduce clogged court dockets); Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue,* 32 BAYLOR L. REV. 563, 564 n.5, 584-88 (1980) (new venue statute proposed); Langley, *A Suggested Revision of the Texas Venue Statute,* 30 TEXAS L. REV. 547, 569-74 (1952) (proposed venue statute); *see also* Spradley, *Texas Venue: The Pathology of the Law,* 36 SW. L.J. 645, 694-96 (1982) (criticism of venue procedure).

16. *See* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 12-41 (1980).

17. *See id.* at 12-15.

18. *See id.* at 13, 20.

for venue purposes only, while one of the multiple defendants might file a plea of privilege in order to fragment litigation and, through a plea of privilege hearing, obtain an overview of the plaintiff's case prior to the trial on the merits.[19] Both sides of the docket alleged abuse of the entire system.

A plea of privilege judgment could be appealed by interlocutory appeal under article 2008.[20] This caused an inordinate number of appeals just on the first-tier venue hearing, thus unduly contributing to the clogged appellate court dockets.[21] It was the importance of the venue issue which led to a multitude of appeals of plea of privilege judgments.[22] The 1982-1983 supplement in Vernon's statutes contained 323 pages of cases annotated under old article 1995.[23]

In order to remedy the perceived problems, the Committee first suggested four optional venue choices: (1) county of plaintiff's domicile; (2) county where the cause of action arose in whole or in part; (3) county of defendant's domicile if the defendant was a natural person; or (4) county in which the defendant does business if the defendant is a legal person.[24] This was felt to be more compatible with contemporary living and rapid means of transportation and communications. Justice Clarence Guittard of the Dallas court of appeals had discussed two principles that courts should follow in determining venue: (1) does "the lawsuit have a rational relation to the place where the case is to be tried?"; and (2) is "there some factor connecting the defendant to the county in which he is to be

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19. *See id.* at 14.

20. *See* Act of April 18, 1907, ch. 133, § 1, 1907 Tex. Gen. Laws, Reg. Sess. 248, 248-49 (repealed 1983).

21. *See* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 13, 17-18 (1980). In fact, some commentators after having worked on the subject have concluded "that Texas venue has generated a greater volume of appellate decisions than the venue laws of all the other forty-nine states combined." Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue,* 32 BAYLOR L. REV. 563, 566 (1980).

22. *See, e.g.,* Employers Casualty Co. v. Clark, 491 S.W.2d 661, 662 (Tex. 1973) (exception 23); Flowers v. Dempsey-Tegeler & Co., 472 S.W.2d 112, 114, 116 (Tex. 1971) (exception 30); Spoon v. Penix, 422 S.W.2d 167, 168 (Tex. 1967) (exception 9a).

23. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon Supp. 1982-1983) (amended 1983). Volume 37A of the Texas Disgest in the venue section contains more than 400 pages of annotations of cases dealing with venue.

24. *See* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 15, 18-19 (1980) (Recommendation No. 3).

sued?"[25]

The Committee next recommended eliminating the requirement of factual proof of the case on the merits in order to determine venue, suggesting instead that venue be determined from the pleadings.[26] Therefore, a plaintiff would not have to prove a cause of action by means of evidence outside the pleadings, but would only have to allege relevant venue facts.[27] Still, the pleadings had to allege facts necessary to justify the venue sought.[28]

Finally, the Committee suggested eliminating separate interlocutory appeals from plea of privilege rulings.[29] Venue appeals would be treated as any other possible error by trial courts in discovery or other pre-trial procedures, such as summary judgments.[30] The venue issue would be appealed along with the entire case on the merits.[31] "Any harmful error in sustaining or overruling a plea of privilege could be addressed by the Court of Civil Appeals upon appeal of the main case."[32]

III. PREVIOUS REFORM ATTEMPTS

During the 64th legislative session in 1975, House Bill (H.B.) 771 was introduced.[33] The bill contained many of the ideas that were later addressed in the 1980 House interim report.[34] The proposed bill generally provided six "mandatory venue" provisions (e.g., land: venue in county where land is situated), and thirteen specific "permissive venue" provisions.[35] For example, venue was placed, *inter alia,* in any county where the conduct of the defendant or his agent occurred or where the defendant was required to perform (but

25. *See id.* at 21-22.
26. *See id.* at 15, 17 (Recommendation No. 1).
27. *See id.* at 17.
28. *See id.* at 17.
29. *See id.* at 15, 17-18 (Recommendation No. 2).
30. *See id.* at 18.
31. *See id.* at 18.
32. *Id.* at 18.
33. *See* Tex. H.B. 771, 64th Leg. (1975).
34. *Compare* Tex. H.B. 771, 64th Leg. § 3 (1975) (to establish venue, party must only prove facts establishing venue in particular county) *with* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 12-14 (1980) (venue hearing should consist of only objective facts establishing venue).
35. *See* Tex. H.B. 771, 64th Leg. § 3 (1975).

did not perform) a duty.[36]

In the 67th legislative session in 1981, three major bills were introduced which incorporated previous reform attempts and recommendations. H.B. 909 generally incorporated and reintroduced the provisions of H.B. 771 from the 1975 session.[37] H.B. 2155 and S.B. 979 also reflected ideas of the 1980 House interim report in much the same fashion.[38] The bills provided four venue choices: (1) in the county where the cause of action arose in whole or in part; (2) in the county of plaintiff's residence; (3) in the county of defendant's residence if a natural person; or (4) in the county where the defendant "does business" if the defendant is a legal person ("doing business" defined as the county where the defendant had an agent or a representative).[39] No factual proof on the merits was required, and the court would determine venue from the pleadings.[40] No interlocutory appeal would be allowed.[41] These bills were never reported out of their respective committees in the House and Senate.

IV. PASSAGE OF S.B. 898

A. *Venue Bills Generally*

Numerous bills relating to the wholesale or piecemeal revision of old article 1995 were introduced in the 1983 session;[42] however, the three major bills were H.B. 45, H.B. 1455, and S.B. 898.[43] One venue resolution was also introduced.[44] H.B. 45, modeled after H.B.

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36. *See id.* § 3(a), (b).

37. *See* Tex. H.B. 909, 67th Leg. (1981).

38. *See* Tex. H.B. 2155, 67th Leg. (1981); Tex. S.B. 979, 67th Leg. (1981).

39. *See* Tex. H.B. 2155, 67th Leg. § 2 (1981); Tex. S.B. 979, 67th Leg. § 2 (1981).

40. *See* Tex. H.B. 2155, 67th Leg. § 3(d) (1981).

41. *See* Tex. S.B. 979, 67th Leg. § 3(d) (1981). The defense bar opposed these bills for the same reasons it opposed Senate Bill 898 as it was originally introduced in the 1983 session.

42. *See* Tex. H.B. 1455, 68th Leg. (1983); Tex. H.B. 445, 68th Leg. (1983); Tex. H.B. 45, 68th Leg. (1983).

43. *See* Act of May 28, 1983, ch. 385, §§ 1-4, 1983 Tex. Gen. Laws 2119 (S.B. 898); Tex. H.B. 1455, 68th Leg. (1983); Tex. H.B. 45, 68th Leg. (1983).

44. *See* Tex. H.R. Con. Res. 10, 68th Leg. 1 (1983). House Concurrent Resolution 10 was a resolution to establish a special interim committee to work with the State Bar of Texas and the Texas Supreme Court in drafting venue rules. *See id.; see also* Tex. S. Con. Res. 653, 68th Leg. 3-4 (1983) (Senate resolution which directs Senate Jurisprudence Committee to study, *inter alia,* Texas venue law). The House Resolution coincided with a recommendation made in the 1982 House Judiciary Committee interim report to promulgate new venue rules. *See* TEX. HOUSE JUDICIARY COMM., 68TH LEG., REPORT TO THE SPEAKER AND MEMBERS

771 of the 1975 session, was prefiled in November, 1982.[45] By early April, 1983, however, Representative Bob Bush had decided against trying to pass H.B. 45. H.B. 1455 and S.B. 898 were introduced on March 8 and March 9, 1983, respectively, and while they were identical bills, they were never officially listed as companion bills. S.B. 898, which eventually passed into law, was carried in the House by Representative Bush.

B. *Negotiating Parties*

Senator Kent Caperton, author of S.B. 898, and Representative Bob Bush, author of H.B. 1455, were the primary legislators behind the enactment of S.B. 898. Senator Caperton chaired the Civil Matters Subcommittee of the Senate Jurisprudence Committee to which S.B. 898 was referred, and Representative Bush was chairman of the House Judiciary Committee, to which all venue bills were referred.[46] Also, Senators Ray Farabee and John Montford actively participated in negotiations between the two competing groups.[47] Since most negotiations took place in the Senate while the House was presented with an agreed Senate bill which passed with no debate, individual House members did not publicly participate in the negotiations as much as did Senate members. Numerous House members, however, provided valuable assistance throughout, including Speaker Gib Lewis and Representative Bill Messer.

The entire Supreme Court of Texas and all Texas jurists undoubtedly favored venue reform, primarily urging the elimination of interlocutory appeals in venue cases.[48] Supreme Court Chief Justice

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OF THE HOUSE OF REPRESENTATIVES 79 (1982). Little public effort was made to pass House Concurrent Resolution 10, and it simply faded away before the end of the session.

45. The defense bar opposed this legislation.

46. Both of these lawyer/legislators must be given major credit for the passage of the bill. The accomplishment of this feat was one of the factors first listed in the *Texas Monthly* magazine article listing Senator Caperton as one of the ten best legislators in Texas. *See* TEXAS MONTHLY, July, 1983 at 111. Representative Bush has called for venue reform as long as or longer than any other sitting member of the legislature. Senator Caperton's aide, Alan Schoenbaum, and Representative Bush's assistant, Mel Hazelwood, were also instrumental in seeing to the passage of S.B. 898. For a discussion of the new venue statute authored by Caperton and Schoenbaum, see Capterton, Schoenbaum & Anderson, *Anatomy of the Venue Bill,* 47 TEX. B.J. 244 (1984).

47. Senator Bob McFarland was also of assistance in the final days of the session, helping to work the bill through some serious eleventh hour obstacles in the House.

48. *See, e.g.,* Greenhill, *State of the Judiciary,* 42 TEX. B.J. 379, 383 (1979) (trial delay of two or more years can result from venue appeals); Guittard & Tyler, *Revision of the Texas*

Jack Pope, however, was the Justice involved in the negotiation process surrounding S.B. 898 and was valuable in prompting both groups to continue to work toward an agreed bill. Venue reform was listed in Chief Justice Pope's State of the Judiciary address to the legislature.[49] He constantly brought both groups back to middle ground and was a key to the final passage of the bill.[50]

The political lobbying battle over S.B. 898 was between the defense bar and the plaintiffs' bar. The Texas Association of Defense Counsel (TADC) represented the defense bar's viewpoint.[51] The Texas Trial Lawyers Association (TTLA) represented the plaintiffs' bar's viewpoint.[52] While both associations were strong advocates for their positions and negotiated in good faith, each side finally had to bite the bullet and agreed to a bill with which neither group was completely comfortable.

C. *Significant Dates and Events*

1. S.B. 898 as Introduced (Original S.B. 898)

As noted, H.B. 1455 and S.B. 898 were identical[53] and were

Venue Statute: A Reform Long Overdue, 32 BAYLOR L. REV. 563, 567 (1980) (appeal from venue hearing inevitably delays trial); Pope, *The State of the Judiciary Message,* 46 TEX. B.J. 362, 363 (1983) (old venue laws "extravagant waste of money," new legislation needed); *see also* McElroy, *Proposals for Revisions to Texas Civil Statutes,* 44 TEX. B.J. 257, 257-58 (1981) (article authorizing interlocutory appeal from venue hearing should be repealed); *cf.* Loop Cold Storage Co. v. South Tex. Packers, Inc., 491 S.W.2d 106, 108 (Tex. 1973) (Texas venue law prevents courts from "considerations of better administration of justice").

49. *See* Pope, *The State of the Judiciary Message,* 46 TEX. B.J. 362, 363 (1983).

50. Chief Justice Clarence Guittard of the Court of Appeals of the Fifth Supreme Judicial District of Dallas, though not actively involved publicly in the passage of S.B. 898 in the 1983 session, has historically been one of the key leaders in attempted legislative reform in the venue area. *See* Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue,* 32 BAYLOR L. REV. 563, 584-88 (1980); TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 21 (1980).

51. TADC was represented by President Duffield Smith of Dallas, Bob Sheehy of Waco, Terry Scarborough of Austin, and Damon Ball of San Antonio. Numerous other members participated, but those listed, along with the author of this article, were the primary on-the-spot negotiators for TADC.

52. TTLA was represented by President John Collins of Dallas, President-Elect Lefty Morris of Austin, David Burrow of Houston, Doyle Curry of Marshall, and Phil Gauss, Executive Director of TTLA, of Austin. Numerous other persons participated, but these were the primary negotiators for TTLA.

53. *See* Act of May 28, 1983, ch. 385, §§ 1-4, Tex. Gen. Laws 2119 (S.B. 898); Tex. H.B. 1455, 68th Leg. (1983). S.B. 898, as originally introduced, is appended to this article as Appendix 1. Representative Bush assigned his one legislative preference number to H.B. 1455

modeled after previous legislation. H.B. 1455 was referred to the House Judiciary Committee, of which Representative Bush is chairman. S.B. 898 was referred to the Senate Jurisprudence Committee, of which Senator Caperton is a member and served as chairman of the Civil Matters Subcommittee to which S.B. 898 was referred.

2. Legislative and Political Activities and Negotiations

Prior to the 1983 legislative session, TADC and TTLA had informally discussed negotiating a venue bill but never formally met to consider the subject. Formal negotiations between the two groups did not start until early April, 1983, just following hearings in both the House and Senate on H.B. 1455 and S.B. 898, respectively.[54]

On April 12, 1983, original S.B. 898 underwent public hearing in the Senate Jurisprudence Committee and both groups expressed their views on the bill. For reasons set out later in this article, TTLA representatives testified in favor of, and TADC members spoke in opposition to, original S.B. 898. By a one-vote margin, original S.B. 898 was not tabled but was sent to the Subcommittee on Civil Matters of the Senate Jurisprudence Committee for further study.

The next day, on April 13, 1983, a hearing on H.B. 1455 was held in the House Judiciary Committee, and virtually the same testimony was given by representatives of both groups as had been given the day before in the Senate on original S.B. 898. Representative Bush closed the hearing by criticizing the venue "industry" and urging both groups to negotiate for the good of the entire bar. The first official meeting between TADC and TTLA occurred late in the evening following the April 13, 1983 hearing in the House Judiciary Committee.[55] That evening, the various positions of each group

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which, practically speaking, meant the bill could not be unduly detained in the House Calendars Committee before reaching the House floor for a vote.

54. The first informal meeting of the groups was between Terry Scarborough representing TADC and Doyle Curry, Joe Longley of Austin, and David Burrow representing TTLA, in a meeting which took place in Terry Scarborough's office. Damon Ball and the author also participated in part by phone. The groups made many of their initial views known, but no consensus was reached. TADC had a meeting in Houston to discuss the upcoming hearings before the House and Senate. TADC President Duffield Smith and others had conversations with Chief Justice Pope in reference to the legislative activities surrounding the venue bill.

55. The meeting took place at the TTLA headquarters across the street from the State Capitol. Both groups first reached what they referred to as the "settlement rule," that being

were discussed in detail and despite some good-natured flareups and tough advocacy by each group, both groups agreed to disagree but to continue to work conscientiously toward a compromise bill. TTLA asked TADC to draft a proposed venue bill for the groups to consider.

On April 18, TADC forwarded to TTLA its proposed version of an agreed venue bill, which TTLA rejected shortly thereafter. On April 19, Senators Caperton, Farabee, and Montford and Chief Justice Pope met alone to explore possible areas of compromise.[56]

On April 27, 1983, Duffield Smith, President of TADC, and John Collins, President of TTLA, wrote Chief Justice Pope concerning their thoughts on the bill, and both groups undoubtedly continued to count votes in the Senate. Under the Senate two-third's rule, only eleven Senators are needed to vote against bringing a bill up for consideraton. Between April 27 and May 3, Senator Caperton requested that both groups meet to continue negotiations.[57] A hearing was held on S.B. 898 in the Civil Matters Subcommittee of the Senate Jurisprudence Committee on April 28, 1983, where both groups further espoused their views on the pros and cons of original S.B. 898. Negotiations continued once again and the situation began to look more promising.

Perhaps the most constructive meeting occurred on the morning of May 3, 1983. Senators Caperton, Farabee, and Montford, Chief Justice Pope, and the largest number of representatives from both groups yet assembled at one time met in Senator Caperton's conference room. At this meeting both groups considered major compromises in earnest. At one point during this key meeting, Chief Justice Pope said something to the effect of, "O.K., let's keep going,

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that while the fact that the groups were negotiating was public knowledge, the substance of those negotiations would remain confidential.

56. That same day representatives of TTLA met with Chief Justice Pope to discuss original S.B. 898 as introduced. Several other rather lengthy meetings were held between the groups; however, on April 26, 1983, TADC and TTLA officially terminated negotiations. On that same day, TADC had meetings with Chief Justice Pope and he wrote a letter to both groups urging them to continue to negotiate responsibly.

57. Most negotiations took place in the conference room near Senator Caperton's office on the 10th floor of the Sam Houston Building. Chief Justice Pope was usually present and had a most profound settling effect on both groups. Between April 27 and May 3, 1983, as the differences were clarified and the positions better known, some progress in negotiations was made. At one point the groups came relatively close to an agreement; however, in the long run, negotiations faltered and came to an end.

now we're making sausage," no doubt a reference to the adage that there are two things that the public should never witness, the making of sausage and the making of law.

3. Senate Committee Version (C.S.S.B. 898)

On May 4, 1983, S.B. 898, as amended, was passed out of the Senate Jurisprudence Committee and was placed on the Senate Intent Calendar.[58] Senator Caperton had noted that if the bill was not passed out of committee at that time, then there was no time left for its passage even if an agreement could be reached. He promised to continue good faith negotiations on the bill, and those negotiations were in fact continued. Just prior to May 12, 1983, other negotiations brought the groups closer together with insistance and assistance from Senator Caperton and Chief Justice Pope.

4. Agreed S.B. 898 as Passed (New Art. 1995)

Finally, on May 12, 1983, after an untold number of hours of heated negotiations, TADC and TTLA agreed to a new venue bill. A representative from both groups was asked to literally "sign on" the compromise version of S.B. 898 under a proviso stating that each group accepted S.B. 898 as agreed and without further change.[59] It was agreed that no orchestrated legislative intent would be made on the bill, and none was made in either House. Later that same day, S.B. 898 passed the Senate by a vote of 31 to 0. Representative Bush carried agreed S.B. 898 in the House. On May 16, agreed S.B. 898 was referred to the House Judiciary Committee, and on May 17, it passed out of that Committee.[60]

On May 27, with three days left in the session, and with Chief Justice Pope in the House gallery flanked on each side by representatives of TADC and TTLA, agreed S.B. 898 passed by a voice vote to third reading with no floor debate.[61] On May 28, the bill was

58. *See* Tex. S.B. 898, 68th Leg. (1983) (Senate Jurisprudence Committee substitute bill). A copy of S.B. 898 as it existed at this stage may be found at Appendix 2.

59. The signing took place at 10:45 a.m. on May 12, 1983.

60. Thereafter, ultimate passage seemed temporarily jeopordized due to a collateral fight over the proposed Civil Code. The new venue legislation was codified in the Civil Code. *See* Tex. H.B. 1186, 68th Leg. 10 (1983); *see also* TEX. LEG. COUNCIL, 68TH LEG., SECOND REVISOR'S RPT., CIVIL CODE 13 (Oct. 1983). The Code did pass both houses but was vetoed by Governor Mark White.

61. The crucial vote on second reading took place at approximately 10:27 p.m. It is

finally passed on third reading and sent to the Governor, with only two days of the session remaining. On June 17, 1983, S.B. 898 was signed by Governor Mark White in the presence of Senator Caperton, representatives of the Supreme Court of Texas, and representatives of TADC and TTLA. Unfortunately, Chief Justice Pope and Representative Bush were unable to attend the signing ceremonies.

V. S.B. 898: MAJOR ISSUES

The major (but by no means the only) issues between the defense bar and plaintiffs' bar concerned (1) venue choice, (2) venue determination, and (3) venue appeal. The passage of S.B. 898 is analyzed hereinafter accordingly.[62]

A. *Venue Choice*

When original S.B. 898 was introduced, old article 1995 provided a "general rule" that the defendant had the right to be sued in his county of domicile, then provided 34 exceptions, the most notable (and most relevant hereto) being exceptions 9a, 23, 25, and 27.[63] As introduced, original S.B. 898 provided a "general rule" establishing permissive venue, and seven mandatory venue provisions. The permissive "general rule" stated:

> All law suits, except as provided in Section 2 [Mandatory Venue] of this article, *may* be brought in the county where the cause of action or a part thereof arose, in the county of plaintiff's residence *at the time of suit,* in the county of defendant's residence if defendant is a natural person, or in the county in which defendant *does business* or *has an agent or representative* if defendant is a legal person.[64]

The "mandatory venue" provisions in Section 2 provided, *inter alia,* for suits involving land to be brought in the county "in which

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interesting to note that the House Journal indicates that Representative Tom Craddick subsequently recorded a "no" vote. *See* H.J. of TEX., 68th Leg., Reg. Sess. 3344 (1983). After a voice vote is taken on a bill a legislator may expressly record a contrary vote, and apparently Mr. Craddick chose to do so on S.B. 898.

62. Note that original S.B. 898 was modeled after previous legislation and venue reform recommendations. *Compare* Tex. H.B. 771, 64th Leg. (1975) *and* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 15-19 (1980) *with* Appendix 1.

63. *See supra* notes 8-11 and accompanying text.

64. *See* Appendix 1, § 1 (emphasis added).

the property or a part of the property is located," for actions against counties to be brought in the county, and for an action governed by any other statute prescribing mandatory venue to be brought in the county required by the statute.[65] No separate "permissive venue" section existed in the original bill.

The plaintiffs' bar argued favorably for this provision. TTLA primarily argued that in this day and time of rapid travel and communication, no party, such as a defendant, should have a "privilege" to be sued anywhere, and that the general rule of allowing defendants to be sued in their county of residence was an ancient doctrine founded upon more primitive times which had now outlived its usefulness. They noted that most of the four options in original S.B. 898 were already provided for in most tort cases under old article 1995, in view of the general rule coupled with exceptions 9a, 23, 25, and 27. Option one (county where cause of action arose) was already provided for, for example, in exception 9a. Option two (plaintiff's residence) was already provided for, for example, in exceptions 23 and 25. As to option four (in the county where the defendant "does business"), the plaintiffs pointed out that this was already provided for, in essence, in exceptions 23, 25, and 27 of old article 1995. TTLA argued that "forum shopping" had no bearing upon its support of this proposed "general rule." The plaintiffs contended that the term "may" in the "general rule," as opposed to the term "shall," was used simply to reflect the permissive nature of the "general rule" in Section 1 of original S.B. 898.

On the other hand, the defense bar argued that the "general rule" in original S.B. 898 would promote unlimited "forum shopping" by plaintiffs. TADC noted that the defendant's right to be sued in his county was a valuable right recognized since the beginning of this state[66] and which still existed as the general rule in virtually every state in the nation.[67] The defense bar argued that all that the plain-

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65. *Id.* § 2(a), (e), (f).

66. *See* Act of Dec. 22, 1836, § 5, 1836 Tex. Gen. Laws 198, 1 H. GAMMEL, LAWS OF TEXAS 1258, 1260-61 (1898); *see also* City of Mineral Wells v. McDonald, 141 Tex. 113, 116, 170 S.W.2d 466, 468 (1943) (dominant motivation behind venue statutes to give sued individual right to defend himself in his county of residence).

67. *See, e.g.,* CAL. CIV. PROC. CODE § 395(a) (Deering Supp. 1983) (except where provided otherwise, cause of action shall commence in county of defendant's residence); FLA. STAT. ANN. § 47.011 (West Supp. 1983) (actions brought only in county of defendant's residence); ILL. ANN. STAT. ch. 110, § 5 (Smith-Hurd 1968) (except where otherwise provided, every action must commence in county of defendant's residence). *See generally* Stevens,

tiffs were really attempting to accomplish was statutory "forum shopping," a practice long and universally recognized as inequitable by state and federal courts and legislatures alike. The fact that old article 1995 had numerous exceptions took into account other overriding policy considerations which allowed plaintiffs to sue other than in the defendant's county of residence; however, the "general rule" should not be expanded to allow a plaintiff to choose any county in the State of Texas in which to sue a defendant. The defense bar pointed out that while courts were urging reform, the primary request from the judiciary was for relief in the area of interlocutory appeals, and that the issue of expanding venue was not a burning issue with any court.

As to option one (in county where cause of action arose), the defense bar noted that this was already provided for in exception 9a of old article 1995. Regarding option two (plaintiff's residence), TADC stressed that this was unprecedented and contrary to the general rule prescribed by Texas and virtually every other state in the nation. If this was provided for in exceptions 23, 25, and 27 of old article 1995, then so be it; but this should not be the "general rule." More importantly, the defense bar highly criticized the fact that suit could be brought where the plaintiff resided *"at the time of suit."* It was questioned whether or not this meant when the petition was filed or when the trial was held, and TADC noted that a plaintiff could, after the cause of action arose, simply move to any county in the State of Texas and file suit, which amounted to forum shopping at its worst. Chief Justice Jack Pope stated at the April 12, 1983 Senate Jurisprudence Committee hearing that he, too, did not consider this to be fair.

Concerning option three (county of defendant's residence), the defense bar had no problems with this traditional provision. With respect to option four (county where defendant "does business"), the defense bar emphasized that the words "does business or has an agent or representative" opened the door to forum shopping. It was pointed out that under this language, any business could be sued in any county simply because it happened to "do business" there or have an "agent" (not necessarily "registered agent") or a "represen-

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Venue Statutes: Diagnosis and Proposed Cure, 49 MICH. L. REV. 307, 311, 350-51 (1951) (majority of states establish defendant's residence as proper place to bring suit for "vast majority of civil actions").

tative" in the county. For the benefit of Senator Caperton, who represents the senatorial district encompassing Brenham, Texas, it was pointed out, by way of example, that if a Blue Bell ice cream truck from and exclusively serving Brenham had a collision in Brenham with a Brenham resident, the Brenham plaintiff could still file suit against Blue Bell in El Paso, Houston, Lubbock, Brownsville, or any other county in Texas in which the Brenham-based company "does business" (i.e., sells ice cream), regardless of the fact that all of the evidence and witnesses had been and were solely in Brenham, Texas. In short, the defense bar continued to argue for what it referred to as "logical venue," which embodies the concept stated by Justice Guittard that venue must have a rational relation to the place where the case is tried, and that there must be some factor connecting the defendant to the county in which he is to be sued.[68]

Finally, the defense bar argued that the permissive word *"may"* in the "general rule" could be interpreted as making the entire "general rule" simply permissive; therefore, the defense bar demanded that the word "shall" be inserted in place of the word "may" so that there would be no question that the four choices under the "general rule" were the only permissive choices.

Following negotiations, S.B. 898 was reported out of the Senate Jurisprudence Committee with only two options remaining under the "general rule": (1) the county where the cause of action or a part thereof accrued; or (2) the county of the defendant's residence if the defendant was a natural person.[69] This in essence incorporated the general "place-of-defendant's-residence" rule under old article 1995 and the "cause of action" exception in numerous exceptions, such as exception 9a, under old article 1995. Also, provisions governing venue in suits involving domestic and foreign corporations and unincorporated businesses were added as optional "permissive venue" provisions, which were modeled after exceptions 23 and 27 of old article 1995. Other "permissive venue" provisions found in old article 1995 were also included in a new Section 3. The word "may," however, in the "general rule" remained in the Senate Jurisprudence Committee version of S.B. 898.[70]

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68. *See* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 21-22 (1980).

69. *See* Appendix 2, § 1.

70. *See id.* § 1.

As finally agreed upon by both groups and passed, agreed S.B. 898 contained virtually the same language as the Senate Jurisprudence Committee version in reference to the "general rule," but the word "shall" had been inserted in place of the word "may," so that the "general rule" now reads as follows:

> All lawsuits, except as provided in Sections 2 [Mandatory Venue] and 3 [Permissive Venue] of this article, shall be brought in the county where the cause of action or a part thereof accrued or in the county of defendant's residence if defendant is a natural person.[71]

In the final analysis, there was little if any expansion of venue choice under agreed S.B. 898 as finally passed.[72] The word "shall"

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71. Act of May 28, 1983, ch. 385, § 1, 1983 Tex. Gen. Laws 2119, 2119.

72. The following is a side-by-side comparison of the provisions of new article 1995 (S.B. 898, eff. 9-1-83) and the provisions of old article 1995 from which the new provisions derive.

New Art. 1995 (S.B. 898, eff. 9-1-83)	*Old Art. 1995 (& 2008)* (Corresponding Provisions From Which New Provisions Derived)
Art. 1995	
§ 1 *General Rule:* Either county (1) where cause of action accrued in whole or part, or (2) of defendant's residence.	(1) *See* § 9a (2) 1st sentence of statute.
§ 2 *Mandatory Exceptions*	
(a) land	§ 14
(b) Injunction Against suits	*See* § 17
(c) Injunction Against executions	*See* § 17
(d) Against State	*See* § 20
(e) Against County	§ 19
(f) Other [Statutory] Mandatory Venue	*See* § 30
(g) Libel, Slander, Invasion of Privacy	*See* § 29
§ 3 *Permissive Exceptions*	
(a) Executors, Administrators, etc.	§ 6; *see also* § 11
(b) Insurance	§ 28
(c) Breach of Warranty by Manufacturer	§ 31
(d) Railway Personal Injury	§ 25
(e) Contract in Writing	§ 5
(f) Corporations and Associations	§ 23
(g) Foreign Corporations [or Associations]	§ 27
(h) Other [Statutory] Permissive Venue	*See* § 30

is unquestionably mandatory and not permissive in nature.

B. *Venue Determination*

When original S.B. 898 was introduced, old article 1995 essentially provided that venue was generally to be determined in a plea of privilege hearing by a plaintiff's proof of the merits of his cause of action.[73] This practice had been increasingly criticized by courts and commentators.[74]

As introduced, original S.B. 898 provided that "[i]n all venue

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(i) Transient Persons	§ 2
(j) Nonresident; Residence Unknown	§ 3
§ 4 *General Provisions*	
(a) Joinder of Defendants & Claims	*See* §§ 4, 29a; Tex. R. Civ. P. 39.
(b) Counterclaims, Cross-claims & 3rd Party Claims	*See* art. 1995 § 29a
(c) Transfer	*See* Tex. R. Civ. P. 38, 97.
(d) Hearings	
(1) Proof at hearing	*But see* art. 1995 § 9a (proof required)
No interlocutory appeal	*But see* art. 2008 (repealed)
(2) Appeal on merits and *all* evidence; no harmless error	*Id.; see* Tex. R. Civ. P. 385.

See also Herring, *New Venue Rules and Procedures: Amendments of Article 1995 and the Texas Rules of Civil Procedure,* 46 TEX. B.J. 1300, 1300-03 (1983) (discussion of new venue statute and cross references between new and old provisions).

73. *See* TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964 & Supp. 1982-1983) (amended 1983). Obviously, if a provision in Section 2 applies, suit must be brought in that county. If venue is not governed by Section 2, then the provisions of Sections 1 and 3 are available for determining proper venue. Obviously, the fact that Section 3 refers to "permissive venue" does not mean that the potential venue cites listed therein are simply optional; that is, if a provision listed in the statute is applicable, then it must be applied and a county which is not available under some provision of the venue statute is not a viable option for venue purposes. Many provisions in old article 1995 were set out verbatim or virtually verbatim in new article 1995. This was done for the purpose of avoiding protracted fights between TADC and TTLA over changes in wording between a provision in old article 1995 and new 1995. The intent was to simply arrange the provisions of old article 1995 under appropriate categories in new article 1995. In these instances, where the language of a provision in old article 1995 is reestablished verbatim or virtually verbatim in new article 1995, no substantive or procedural change was intended. For example, section 25 of old article 1995 dealing with "railroad personal injury" was re-enacted verbatim as subsection (d) of Section 3 of new article 1995. In doing so, no substantive or procedural modification was intended.

74. *See, e.g.,* B. MCELROY, TEXAS PRACTICE—CIVIL PRE-TRIAL PROCEDURE § 679 n.70, at 445 (1980) (criticism of excessive delay inherent in Texas venue practice); Harvill, *Venue in Texas: A New Approach to Proof of Venue Facts,* 30 TEX. B.J. 429, 528-32 (1967) (criticisms and suggestions for Texas venue law); Pope, *The State of the Judiciary Message,* 46 TEX. B.J. 362, 363 (1983) (notes "extravagant waste of money for the state and litigants" due to Texas venue procedure).

hearings, no factual proof concerning the merits of the case shall be required to establish venue; but the court shall determine venue questions from the pleadings. . . ."[75] The plaintiffs' bar endorsed this language based upon the arguments of previous critics concerning the waste and delay of the present practice under old article 1995 of requiring, in essence, two trials of the same case.[76] The present system was cumbersome and expensive for all involved.

The defense bar acknowledged the problems under the present system but questioned the proposed remedy. Under original S.B. 898 as introduced, the entire issue would simply turn on a plaintiff's unverified allegations in a petition with no need for any real proof as to whether the allegations were supported by facts. What should a court do if a plaintiff alleged that the cause of action arose in part in Austin (Travis County) and a defendant argued that it wholly arose in Georgetown (Williamson County)? How was this "tie" to be broken? The defense bar pointed out that, under the original proposal, a plaintiff could initially select the particular court which was to hear the case and determine the venue question, a practice which could prove to be extremely detrimental to a defendant. If venue was going to have to be relegated to "pleading practice" as requested by the plaintiffs' bar, the defense bar demanded that sanctions be imposed on a party wrongfully asserting venue and that a viable appeal mechanism be available to remedy the situation where venue was improper in the ultimate county of suit.

As reported out of the Senate Jurisprudence Committee, the "hearings" provision had been amended to provide sanctions as follows, with the italicized words having been added:

> Hearings. *(1)* In all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue; the court shall determine venue questions from the pleadings *and affidavits.* No interlocutory appeal shall lie from such determination. *(2) A court may impose sanctions on a party who falsely asserts venue resulting in an unnecessary hearing. Sanctions may include costs and attorneys' fees*

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75. *See* Appendix 1, § 3(c). This was modeled after language in prior legislation and reform recommendations. *Compare* Tex. H.B. 1455, 68th Leg. § 1(2)(c) (1983) (court shall determine venue matters solely from pleadings) *and* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 15 (1980) (same) *with* Appendix 1, § 3(a) (same).

76. *See* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 13, 20 (1980).

imposed on the party falsely asserting venue.[77]

Thus, sanctions had been added at this stage in an effort to eliminate abuse in the venue-determination process such as alleging venue facts in pleadings which are discovered later to be false.

As finally agreed to by both groups and passed, agreed S.B. 898 was virtually the same concerning venue determination as the Senate Jurisprudence Committee version quoted immediately above, except that the sanction provision had been discarded.[78] In lieu of the sanction provision, the bill now contained the appellate safeguard provision discussed below.[79] Now, a venue hearing will be referred to as a hearing on a "motion to transfer venue" instead of a "plea of privilege" hearing. The proof required does not include the necessity of proving the merits of the case but does require the allegation of necessary facts to establish venue.[80]

C. *Venue Appeal*

When original S.B. 898 was introduced, old article 2008 provided for interlocutory appeal from plea of privilege judgments.[81] That practice was highly criticized, particularly by the judiciary.[82] As introduced, original S.B. 898 concluded its "hearing" provision with the statement that "[n]o interlocutory appeal shall lie from such determination."[83] The plaintiffs' bar supported this language by embracing the arguments of previous critics concerning the detrimental effects of interlocutory appeal.[84]

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77. Appendix 2, § 4(d) (emphasis added).

78. *See* Act of May 28, 1983, ch. 385, § 1(4)(d), 1983 Tex. Gen. Laws 2119, 2124.

79. *See id.* § 1(4)(d)(2), 1983 Tex. Gen. Laws 2124.

80. *See id.* § 1(4)(d)(1), 1983 Tex. Gen. Laws 2124. Note that parties may now, by written agreement, transfer a case to another county at any time. *See id.* § 1(4)(c)(3), 1983 Tex. Gen. Laws 2124.

81. *See* Act of April 18, 1907, ch. 133, § 1, 1907 Tex. Gen. Laws, Reg. Sess. 248, 248-49 (repealed 1983).

82. *See, e.g.,* Greenhill, *State of the Judiciary,* 42 TEX. B.J. 379, 383 (1979) (venue statute allowing two separate jury trials is "gross extravagance of the time of jurors, litigants"); Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue,* 32 BAYLOR L. REV. 563, 567 (1980) (appeal from venue hearing inevitably delays final trial); Pope, *The State of the Judiciary Message,* 46 TEX. B.J. 362, 363 (1983) (archaic statutes result in entire case being tried twice).

83. Appendix 1, § 3(c). Note that original S.B. 898 did not, however, expressly repeal article 2008, which apparently was an oversight.

84. *See* TEX. HOUSE JUDICIARY COMM., 67TH LEG., REPORT TO THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES 13, 17-18 (1980).

The defense bar, however, emphasized that without a strong and viable appeal mechanism, any venue rules were simply hollow rules which would not guard against abuse in venue choice and determination. Generally, it was thought that virtually any time venue was technically improper in the county of suit, this would simply be deemed "harmless error" by an appellate court. That is, absent some gross abuse of discretion, how could an appellate court hold that the mere fact that the case was eventually tried improperly before Judge Smith in County A, instead of properly before Judge Jones in County B, was harmful error (even if it was rumored that Judge Smith was "plaintiff oriented" or "defense oriented"). It was further pointed out that if the allegations in the pleadings were sufficient to justify the trial court's venue ruling, there would not necessarily be any error even if the facts eventually adduced at the trial on the merits showed that there was no evidence to support the allegations initially made and that the allegations were, in reality, false. TADC also acquired some statistics in May, 1983, from one Texas court of appeals which indicated that since September 1, 1981, only 14 of the 255 cases filed (about 5%) were venue cases, which was some evidence that the number of interlocutory appeals was not as high as some people were predicting. Further, while it is true that Texas was in the minority of states allowing interlocutory appeal, it was noted that numerous states also had interlocutory appeal mechanisms, many of them adopting or recognizing a type of interlocutory appeal very recently.[85]

During negotiations, the defense bar suggested that interlocutory appeals from venue judgments under article 2008 be limited to questions of law only and that such interlocutory appeals be given preferential settings pursuant to statutory and court-made guidelines. The imposition of sanctions, including attorneys' fees, was also suggested by TADC as a way to keep the parties honest. As

85. *See, e.g.,* Ford Motor Co. v. Carter, 233 S.E.2d 444, 446 (Ga. Ct. App. 1977) (interlocutory appeal granted to determine whether venue correct); Howell v. Borgsmiller, 411 N.E.2d 47, 48 (Ill. App. Ct. 1980) (interlocutory appeal to decide if trial court order denying change of venue correct); Cornell v. Wunschel, 329 N.W.2d 651, 652 (Iowa 1983) (interlocutory appeal granted to determine proper venue); *see also* Parker v. Parker, 424 So. 2d 1243, 1243 (La. Ct. App. 1982) (ruling on venue has effect of final judgment, therefore appealable); Lincoln v. Transamerica Inv. Corp., 573 P.2d 1316, 1319 (Wash. 1978) (interlocutory appeal proper remedy following lower court's order concerning venue); Aparacor, Inc. v. Department of Indus., Labor and Human Relations, 293 N.W.2d 545, 547 (Wis. 1980) (interlocutory review of venue order permitted upon leave of court).

passed by the Senate Jurisprudence Committee, S.B. 898 still proscribed any interlocutory appeal and now expressly repealed article 2008. The new bill did, however, have a short provision allowing a trial court to impose sanctions, including attorneys' fees and costs, on a party found to have falsely asserted venue.[86] TADC simply could not support the bill at all absent some viable appeal mechanism. At or shortly following this time, TADC suggested that a provision be added whereby the venue issue would be appealed along with the trial on the merits; however, the appellate court would have to look at the entire record and not just the record of the hearing on the motion to transfer, and if venue was improper in the county where suit was ultimately tried, then in no event could this be harmless error but would be reversible error.[87]

As passed, agreed S.B. 898 eliminates all interlocutory appeals and expressly repeals 2008, but provides the following:

> (2) On appeal from the trial on the merits, *if venue was improper* it shall in no event be harmless error and shall be reversible error. In determining whether venue was or was not proper the appellate court shall consider the *entire record,* including the trial on the merits.[88]

This provision, initially drafted by TADC, was originally opposed by TTLA. It served as the center of much debate between the parties. TTLA argued that the provision was harsh and unnecessary; however, TADC insisted that if venue was to be determined merely from allegations contained in unsworn pleadings by a judge in a county initially hand-picked by the plaintiff, then a viable appeal mechanism must replace the former right to an interlocutory appeal. The importance of the venue issue, coupled with the fact that venue would be determined by unverified allegations, rendered venue determination under the agreed bill too prone to fraud, negligence, and exaggeration in pleadings. This fraud or inaccuracy, relied upon by the trial court as "evidence" at the "motion to transfer" hearing, might not be discovered or discoverable at the time of that hearing but only thereafter upon a review of the entire record on appeal. Further, even if it was shown on appeal that venue was

86. *See* Appendix 2, § 4(d)(2).

87. It was also at this time that subsection 2(g), dealing with libel and slander, was amended at the request of various press and broadcast associations to add "invasion of privacy." *See* Act of May 28, 1983, ch. 385, § 1(2)(g), 1983 Tex. Gen. Laws 2119, 2120.

88. *Id.* § 1(4)(d)(2), Tex. Gen. Laws 2124 (emphasis added).

improper in the ultimate county of suit, the defense bar predicted that many appellate courts under traditional standards of appellate review would find it irresistible to hold that, while venue was improper below, this error was harmless. Therefore, TADC insisted upon a harsh appeals' standard conceptually dissimilar to the traditional appellate-review tests in Texas. Because of the unusual nature and the harshness of subsection 4(d)(2), a brief analysis is in order.

First, subsection 4(d)(2) is directed at appellate courts and not trial courts or parties at the trial court level.[89] This is the only provision of the statute addressed solely to appellate courts and the standard of appellate review. Second, what is the issue to be determined on appeal under subsection 4(d)(2)? The issue is *not* whether the trial court or a party erred at the motion to transfer hearing, as it would be under traditional standards of appellate review. The question, therefore, is *not* whether "venue was or was not properly *determined,*" such as by insufficiency of the evidence or abuse of discretion. This traditional standard of appellate review was specifically rejected. Instead, the express language used for appellate review under subsection 4(d)(2) is, simply, whether "venue was or was not proper" in the ultimate county of suit. This precise and unambiguous language statutorily frames the issue on appeal under subsection 4(d)(2). The fact that the issue is not whether "venue was or was not properly determined," but is whether "venue was or was not proper," is a distinction that was clearly known to, debated between, and agreed to by all involved in negotiations. If an appellate point of error is based solely on subsection 4(d)(2), then a case will be reversed if venue was improper in the ultimate county of suit and will be affirmed if venue was proper therein. Other points of error directed at alleged errors at the "motion to transfer" hearing would be subject to the traditional appellate-review standards.

Third, appellate courts are mandated under 4(d)(2) to consider the "*entire* record," including the record of the trial on the merits of the case. The term "entire record" was carefully and purposefully inserted to compliment the unique appellate-review concept embodied in subsection 4(d)(2). This language confirms and emphasizes the fact that the issue on appeal under subsection 4(d)(2) is *not*

89. *See id.* § 1(4)(d)(2), Tex. Gen. Laws 2124.

whether "venue was or was not properly determined" at the "motion to transfer" hearing but is, instead, whether "venue was or was not proper" in the actual county of suit. If the issue was whether the trial court erred at the "motion to transfer" hearing, then the "entire record" language would serve no purpose.

Fourth, subsection 4(d)(2) instructs appellate courts that if the entire record shows venue was improper in the county of suit, then "it shall in no event be harmless error and shall be reversible error." The obvious purpose for this language was to expressly prohibit appellate courts, in as unambiguous and strong a language as possible, from resorting to the "harmless error" rule under traditional appellate-review standards when venue was improper. Chief Justice Pope was asked his opinion on the sufficiency of this language to accomplish its goal, and he agreed that the statute could be no stronger or clearer in its mandate. Therefore, "if venue was improper" in the ultimate county of suit, such cannot be harmless error and the case shall be reversed.

Subsection 4(d)(2) is conceptually distinct from traditional notions of appellate review. It is also a harsh remedy. As a result, some courts and commentators will undoubtedly attempt to circumvent the clear wording of the subdivision by various legal rationalizations.[90] It should be emphasized, however, that the stark reality of the uniqueness and harshness of subsection 4(d)(2)'s appellate-review standard was well known to and fully discussed by all Senators and House members involved, Chief Justice Pope, the defense bar, and the plaintiffs' bar. In the final analysis all parties agreed to the appellate review so simply and clearly set forth in subsection 4(d)(2). Without this two-sentence subsection, there would have been no agreed bill whatsoever. Subsection 4(d)(2) was intended to serve and does serve the beneficial purpose of placing parties at great risk if by fraud, negligence, oversight, or otherwise venue is improper in the ultimate county of suit. All negotiating parties were aware of this risk when the agreed bill was signed, this being the

90. They may argue that subsection 4(d)(2) will simply be too harsh and inequitable to the parties and will be wasteful and an inefficient use of judicial time. Some may attempt to reach their conclusions by weaving an intricate web of legal theories to support their proposition that the statute does not really mean what it clearly says. It may be argued, for example, that despite the unambiguous wording of the statute, a case may in fact be "saved" from the harshness of subdivision 4(d)(2) by resort to the "harmless error" rule or by a stretching of the concept by which a party fails to preserve error at the trial-court level.

same bill which was eventually endorsed by the Chief Justice of the Supreme Court of Texas, the Texas Senate and House of Representatives, the defense bar, and the plaintiffs' bar, and signed by the Governor. This is the only viable deterrent in the bill to abuse or mistake as to improper venue.

D. *Effective Date*

Immediately after the agreement had been reached on agreed S.B. 898 on May 12, 1983, the parties decided that some "effective date" provision should be added and the following was provided:

> This Act takes effect September 1, 1983, and shall not apply to pending appeals on venue questions. For the purpose of appeals on venue questions pending prior to September 1, 1983, the former law is continued in effect.[91]

During negotiations, the suggestion was made that the bill only apply to cases filed after September 1, 1983. It was agreed, however, that the bill should instead go into effect immediately as to pending venue hearings regardless of when the suit was filed in order to begin providing immediate relief to crowded trial and appellate dockets. It should be noted that this provision deals only with the effect of the act on appeals.[92] As to pending plea of privilege hearings at the trial level, apparently old article 1995 governed until September 1, 1983,[93] and new article 1995 applies to such hearings held thereafter, regardless of when the suit was actually filed.[94]

VI. NEW RULES OF VENUE

By order of June 15, 1983, the Supreme Court of Texas promulgated amended rules, effective September 1, 1983, to govern venue hearings.[95] These amendments were made to conform Rules 84-89,

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91. Act of May 28, 1983, ch. 385, § 3, 1983 Tex. Gen. Laws 2119, 2124-25.

92. Note that a venue matter is not pending on appeal until appellate jurisdiction is perfected, until an appeal bond or affidavit is timely filed, or a cash certificate is filed in lieu thereof. *See* Byrd v. Pharris, No. 04-83-00457 (Tex. App.—San Antonio, Nov. 9, 1983, no writ) (not yet reported).

93. *See* Gonzalez v. H.E. Butt Grocery, Co., No. 13-83-431 (Tex. App.—Corpus Christi, Nov. 10, 1983, no writ) (not yet reported).

94. *See* Graue-Haws, Inc. v. Fuller, No. 08-83-00340 (Tex. App.—El Paso, Jan. 11, 1984, no writ) (not yet reported) (new venue statute applies to govern venue determination at a venue hearing held after September 1, 1983, even though suit filed prior thereto).

95. *See* TEX. R. CIV. P. 84-89, 93, 120a, 257-259, 385, 527.

93, 120a, 257-59, 385, and 527 of the Texas Rules of Civil Procedure to new article 1995. Rules promulgated by the Supreme Court of Texas cannot supersede or alter the provisions of S.B. 898.[96]

VII. SUMMARY AND CONCLUSIONS

In summary, all involved in the passage of agreed S.B. 898 sought to simplify and improve venue practice in Texas, and this was accomplished. The give and take of political negotiations between the defense bar and plaintiffs' bar resulted in the implementation of three major concepts underlying new article 1995. First, venue choice is virtually left intact pursuant to the original provisions of old article 1995. Second, venue determination is simplified and the dual-trial requirement is eliminated, but sufficient safeguards are provided against venue abuse under the appeal provisions. Third, interlocutory appeal of venue issues is eliminated, thus assisting the judiciary with its overloaded dockets; however, a viable appeal mechanism is provided in that appellate courts may now look at the entire record to determine if venue was proper or improper in the ultimate county of suit. If venue was improper, then the case must be reversed. This "harmful error" rule was intended to guard against forum shopping and other abuses or mistakes related to improper venue. In short, venue choice was not expanded, venue determination was simplified, and a viable appeal mechanism was maintained.[97]

Hopefully, this article will serve as an extrinsic aid to a proper determination of the actual pre-enactment and enactment history behind the passage of S.B. 898 and the real legislative intent behind its major provisions.

96. *See* TEX. CONST. art. 3, § 45; TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962).

97. If the proposed Texas Civil Code is enacted, new article 1995 will be recodified verbatim in Chapter 15 of the Code. *See* TEX. LEG. COUNCIL, 68TH LEG., SECOND REVISOR'S RPT., CIVIL CODE 13 (Oct. 1983). The proposed Civil Code, H.B. 1186, was enacted, but vetoed in 1983.

VIII. APPENDIX I

S.B. 898 AS ORIGINALLY INTRODUCED
S.B. No. 898 (3/9/83)
FILED BY CAPERTON

A BILL TO BE ENTITLED
AN ACT

relating to venue in civil actions and providing mandatory venue and permissive venue.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 1995, Revised Civil Statutes of Texas, 1925, as amended, is amended to read as follows:

Art. 1995. VENUE

Sec. 1. GENERAL RULE. All lawsuits, except as provided in Section 2 of this article, may be brought in the county where the cause of action or a part thereof arose, in the county of plaintiff's residence at the time of suit, in the county of defendant's residence if defendant is a natural person, or in the county in which defendant does business or has an agent or representative if defendant is a legal person. Suits involving an executor, administrator, guardian, or receiver in his official or representative capacity may be brought in the county of his residence or in the county of the court from which he derives his authority.

Sec. 2. MANDATORY VENUE. (a) Lands. Actions for recovery of real property or an estate or interest in real property, or for partition of real property, or to remove encumbrances from the title to real property, or to quiet title to real property, shall be brought in the county in which the property or a part of the property is located.

(b) Injunctions against suits. Actions to stay proceedings in a suit shall be brought in the county in which the suit is pending.

(c) Injunctions against executions. Actions to restrain execution of a judgment based on invalidity of the judgment or of the writ shall be brought in the county in which the judgment was rendered.

(d) Against state or head of state department. An action for mandamus against the head of a department of the state government shall be brought in Travis County.

(e) Against county. An action against a county shall be brought in that county.

(f) Other mandatory venue. An action governed by any other statute prescribing mandatory venue shall be brought in the county required by such statute.

(g) Two or more venue cites. If more than one county has mandatory venue, the court shall select one of the counties of proper venue, considering the convenience of the parties and the witnesses.

Sec. 3. GENERAL PROVISIONS. (a) Joinder of defendants or claims. When two or more parties are joined as defendants in the same action and/or two or more claims or causes of action are properly joined in one action, and the court has venue of an action of all claims or actions against all defendants unless one or more of the claims or causes of action is governed by one of the provisions of Section 2 of this article requiring transfer of such claim or cause of action, upon proper objection, to another county.

(b) Counterclaims, cross-claims and third party claims. Venue of the main action shall establish venue of a counterclaim, cross-claim or third party claim properly joined under the Texas Rules of Civil Procedure.

(c) Hearings. In all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue; but the court shall determine venue questions from the pleadings and no interlocutory appeal shall lie from such determination.

SECTION 2. The importance of this legislation and the crowded condition of the calendar in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be written [sic] on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

IX. APPENDIX II

S.B. 898 AS PASSED BY SENATE JURISPRUDENCE COMMITTEE 5/4/83 SENATE COMMITTEE SUBSTITUTE FOR SB 898.

A BILL TO BE ENTITLED AN ACT

relating to venue in civil actions and providing mandatory venue and permissive venue, and repealing Article 2008, Revised Civil Statutes of Texas, 1925, as amended.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 1995, Revised Civil Statutes of Texas, 1925, as amended, is revised to read as follows:

Art. 1995. VENUE

Sec. 1. GENERAL RULE. All lawsuits, except as provided in Sections 2 and 3 of this article, may be brought in the county where the cause of action or a part thereof accrued, or in the county of defendant's residence if defendant is a natural person.

Sec. 2. MANDATORY VENUE. (a) Lands. Actions for recovery of real property or an estate or interest in real property, or for partition of real property, or to remove encumbrances from the title to real property, or to quiet title to real property, shall be brought in the county in which the property or a part of the property is located.

(b) Injunctions against suits. Actions to stay proceedings in a suit shall be brought in the county in which the suit is pending.

(c) Injunctions against executions. Actions to restrain execution of a judgment based on invalidity of the judgment or of the writ shall be brought in the county in which the judgment was rendered.

(d) Against state or head of state department. An action for mandamus against the head of a department of the state government shall be brought in Travis County.

(e) Against county. An action against a county shall be brought in that county.

(f) Other mandatory venue. An action governed by any other statute prescribing mandatory venue shall be brought in the county required by such statute.

(g) Two or more venue sites. If more than one county has mandatory venue, the court shall select one of the counties of proper venue, considering the convenience of the parties and the witnesses.

(h) Libel or slander. A suit for damages, for libel or slander shall be brought, and can only be maintained, in the county in which the plaintiff resided at the time of the accrual of the cause of action, or in the county where the defendant resided at the time of filing suit, or in the county of the resident of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff.

Sec. 3. PERMISSIVE VENUE. (a) Executors, administrators, etc. If the suit is against an executor, administrator or guardian, as such, to establish a money demand against the estate which he represents, the suit may be brought in the county in which such estate is administered, or if the suit is against an executor, administrator or guardian growing out of a negligent act or omission of the person whose estate the executor, administrator or guardian represents, the suit may be brought in the county where the negligent act or omission of the person whose estate the executor, administrator or guardian represents occurred.

(b) Insurance. Suit against fire, marine or inland insurance companies may also be commenced in any county in which the insured property was situated. Suits on policies may be brought against life insurance company, or accident insurance company, or life and accident, or health and accident, or life, health and accident insurance company, in the county where the home office of such company is located, or in the county where loss has occurred or where the policyholder or beneficiary instituting such suit resides.

(c) Breach of warranty by a manufacturer. Suits for breach of warranty by a manufacturer of consumer goods may be brought in any county where the cause of action or a part thereof accrued, or in any county where such manufacturer may have an agency or representative, or in the county in which the principal office of such company may be situated, or in the county where the plaintiff or plaintiffs reside.

(d) Railway personal injuries. Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corpora-

tion does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

(e) Contract in writing. (1) Subject to the provisions of subsection (b), if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile.

(2) In an action founded upon a contractual obligtion of the defendant to pay money arising out of or based upon a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household or agricultural use, suit by a creditor upon or by reason of such obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract, or in the county in which the defendant resides at the time of the commencement of the action. No term or statement contained in an obligation described in this subsection shall constitute a waiver of this provision.

(f) Corporations and associations. Suits against a private corporation, association, partnership, joint stock company or any other entity may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose, or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, assocation, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. Suits against a railroad

corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

(g) Foreign corporations. Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representatives in this State, then in the county where the plaintiffs or either of them, reside.

(h) Other permissive venue. An action governed by any other statute prescribing permissive venue shall be brought in the county required by such statute.

(i) Two or more venue sites. If more than one county has permissive venue, the court shall select one of the counties of proper venue, considering the convenience of the parties and the witnesses.

(j) Transient persons. A transient person may be sued in any county in which he may be found.

(k) Non-residents; residence unknown. If all or all of several defendants reside without the State or if their residence is unknown, suit may be brought in the county in which the plaintiff resides.

Sec. 4. GENERAL PROVISIONS. (a) Joinder of defendants or claims. When two or more parties are joined as defendants in the same action and/or two or more claims or causes of action are properly joined in one action, and the court has venue of an action or claim against any one defendant the court also have [sic] venue of all claims or actions against all defendants unless one or more of the claims or causes of action is governed by one of the provisions of Section 2 of this article requiring transfer of such claim or cause of action, upon proper objection, to the mandatory county.

(b) Counterclaims, cross-claims and third party claims. Venue of the main action shall establish venue of a counterclaim, cross-claim or third party claim properly joined under the Texas Rules of Civil Procedure.

(c) Transfer. The court, upon motion filed and served concur-

rently with or before the filing of the answer, may transfer an action to another county of proper venue where:

(1) The county where the action is pending is not a proper county as provided by this Act; or

(2) an impartial trial cannot be had in the county where the action is pending; or

(3) written consent of the parties to transfer to any other county is filed at any time.

(d) Hearings. (1) In all venue hearings, no factual proof concerning the merits of the case shall be required to establish venue; the court shall determine venue questions from the pleadings and affidavits. No interlocutory appeal shall lie from such determination.

(2) A court may impose sanctions on a party who falsely asserts venue resulting in an unnecessary hearing. Sanctions may include costs and attorneys' fees imposed on the party falsely asserting venue.

SECTION 2. Article 2008, Revised Civil Statutes of Texas, 1925, as amended, is repealed.

SECTION 3. The importance of this legislation and the crowded condition of the calendar in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.