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Civil Procedure--Ancillary Venue in Third-Party Practice in Missouri

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Recent Cases

CIVIL PROCEDURE – "ANCILLARY" VENUE IN THIRD-PARTY PRACTICE IN MISSOURI

State ex rel. Garrison Wagner Co. v. Schaaf[1]

Novoson Investment Trust, Inc., lessor of a building located in the City of St. Louis, filed suit in the Circuit Court of St. Louis County against its lessee, Emerson Electric Co., for an alleged breach of maintenance and repair covenants in the lease. Emerson Electric Co., a corporation located in St. Louis County, filed a third-party petition impleading its sublessee Garrison Wagner Co., which had taken possession of the premises subject to similar maintenance and repair obligations. Garrison, served at its office in the City of St. Louis, sought dismissal of the third-party petition for improper venue and lack of jurisdiction.[2]

Garrison asserted that venue was improper on the ground that neither the general venue statute[3] nor the special corporations venue statute[4] authorized suit against Garrison in St. Louis County, although venue was proper as between the parties to the original claim. Garrison contended that the general venue statute was controlling and, if not, that the cause of action accrued or would accrue in the City of St. Louis for purposes of the corporations venue statute. The Missouri Supreme Court, in an original proceeding in prohibition, assumed that the cause of action accrued or would accrue in the City of St. Louis and that the venue as to Garrison would therefore be improper under the corporations venue statute.[5] The court held, nevertheless, that venue need not be independently established in a third-party petition but could rest on venue properly

1. 528 S.W.2d 438 (Mo. En Banc 1975).

2. In Missouri, the service of process in a county of improper venue may be quashed, so the venue objection results in a want of personal jurisdiction. *See* notes 10-17 *infra*.

3. The general venue statute, § 508.010, RSMo 1969, provides in part:

> Suits instituted by summons shall, except as otherwise provided by law, be brought:
>
> (1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found; . . .

4. The special venue statute applicable to corporate defendants, § 508.040, RSMo 1969, provides:

> Suits against corporations shall be commenced either in the county where the cause of action accrued, . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.

5. In State *ex rel.* Baker v. Goodman, 364 Mo. 1202, 274 S.W.2d 293 (En Banc 1954), the court held that when two corporations are joined as defendants, § 508.040 is controlling, not the general venue statute, § 508.010, which governs when corporations are joined with individual defendants. The *Garrison* court felt that in the impleader action, *Goodman* required it to look to the corporations venue statute.

shown in the original claim. Therefore, a third-party petition may now be allowed in Missouri even though the statutory venue requirements would not be met if the claim asserted in impleader was brought in a separate action.

The Missouri impleader rule[6] is silent on the question of venue in third-party practice. While rule 41.01 authorizes a liberal construction of the procedural rules, rule 51.01 cautions that they are not to be interpreted to extend the venue limitations.[7]

In addition to those competing textual attitudes concerning construction of procedural rules, the Missouri decisions are uniform in holding that the rule governing service of process is subject to the statutory venue requirements,[8] despite the language of the service rule allowing service of process anywhere within the state.[9] The consequence of modifying the service rule by the venue statute is that in Missouri, venue is jurisdictional. Proper venue is necessary before service of process will confer jurisdiction over the person of the defendant.[10]

It is generally accepted that venue and jurisdiction are distinct con-

6. Mo. Sup. Ct. R. 52.11 (a). The pertinent text of the rule, identical to Fed. R. Civ. P. 14 (a), is as follows:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to him for all or part of the plantiff's claim against him. . . . Any party may move to strike the third-party claim, or for its severance or separate trial.

The rule is based upon the theory of indemnification express or implied in law. Wright, *Third Party Practice—Non-Contractual Indemnification,* 28 Mo. L. Rev. 307 (1963). The substantive basis of a right to indemnification may be in contract or it may arise by operation of law. For rights of indemnification arising from agreement in Missouri, *see, e.g.,* Moberly v. Leonard, 339 Mo. 791, 99 S.W.2d 58 (1936) (contract); Govero v. Standard Oil Co., 192 F.2d 962 (8th Cir. 1951) (lease). Rights of indemnification conferred by rule of law in Missouri are collected in Wright, *supra.*

7. Mo. Sup. Ct. R. 41.03 provides that the civil rules ". . . shall be construed to secure the just, speedy and inexpensive determination of every action." Compare rule 51.01 which states that "[t]hese Rules shall not be construed to extend or limit the jurisdiction of the Courts of Missouri, or the venue of civil actions therein." Article V, § 5 of the Missouri Constitution authorizes the supreme court to promulgate the rules of procedure for all courts in the state, provided it does not thereby change, *inter alia,* any substantive rights. The 1959 committee note to rule 51.01, *see* V.A.M.R. 51.01, at 27-28 (1970), observes that venue might not be substantive in the sense of the above constitutional prohibition, but that the issue is nevertheless avoided by the mandate of strict construction with respect to venue and jurisdiction in rule 51.01.

8. State *ex rel.* Boll v. Weinstein, 365 Mo. 1179, 295 S.W.2d 62 (En Banc 1956); State *ex rel.* Bartlett v. McQueen, 361 Mo. 1029, 238 S.W.2d 393 (En Banc 1951).

9. Mo. Sup. Ct. R. 54.13 (c).

10. The foundation case in Missouri is Yates v. Casteel, 329 Mo. 1101, 49 S.W.2d 68 (1932). For recent affirmations of *Casteel, see, e.g.,* State *ex rel.* Bowden v. Jensen, 359 S.W.2d 343 (Mo. En Banc 1962); State *ex rel.* Boll v. Weinstein, 365 Mo. 1179, 295 S.W.2d 62 (En Banc 1956). In addition, the foregoing cases add the refinement that service must be had upon the defendant within the county of venue. *Id. But see* note 13 *infra.*

cepts.[11] Jurisdiction is grounded in the state's inherent power to adjudicate the controversy, whereas the purpose of venue is to allocate the place of trial for the convenience of the parties and their witnesses.[12] The distinction generally has not been recognized in Missouri.[13] In an action against a single defendant, a Missouri court is without jurisdiction unless suit is brought in a county of proper venue and service is had upon the defendant in that county.[14] And if two or more defendants are joined in an action, the venue statutes must be complied with as to each defendant, though joinder is otherwise appropriate. Where the co-defendants reside in different counties, suit may be brought in any such county and venue will be proper with respect to each.[15] But where the co-defendants reside in the same county, suit must be brought in that county or each co-defendant must be found in the county of the plaintiff's residence.[16]

Missouri case law has, however, carved out an apparent exception for counterclaims which are "incidental to the main claim."[17] The inci-

11. *See, e.g.*, Alamida v. Wilson, 53 Hawaii 398, 495 P.2d 585 (1972); Associated Grocers of Alabama v. Graves Co., 272 Ala. 158, 130 So. 2d 17 (1961).

12. Alamida v. Wilson, 53 Hawaii 398, 495 P.2d 585 (1972).

13. *See* note 10 *supra*. *But cf.* State *ex rel.* Union Elec. Co. v. Scott, 470 S.W.2d 1 (St. L. Mo. App. 1971) which contains dictum supporting the distinction where venue was not under attack.

To the extent that process may be served in a county other than that in which suit is properly brought, jurisdiction is not identified with venue in Missouri. In impleader, the third-party petition may be served in a county other than that in which the original claim was brought following *Garrison*. *Garrison* overruled sub silentio the corollary of the rule in State *ex rel.* Carney v. Higgins, 352 S.W.2d 35 (Mo. En Banc 1961), which permitted service of the third-party petition only in the county in which suit was properly brought. Service of the third-party petition will probably be restricted to an individual third-party defendant's residence or the corporate place of business, as in *Garrison*, though *Garrison* does not address the point.

Process may also be served outside the county of venue in cases where the venue is prescribed by § 508.010(2), RSMo 1969, *see* note 15 *infra*, and where venue is laid in the county where the cause of action accrued under the corporations statute, § 508.040, RSMo 1969. *See* State *ex rel.* Carney v. Higgins, 352 S.W.2d 35 (Mo. En Banc 1961); State *ex rel.* Baker v. Goodman, 364 Mo. 1202, 274 S.W.2d 293 (En Banc 1954). In both *Carney* and *Baker*, the process was served at the defendant's principal place of business, the alternative county of venue under the corporations venue statute. Presumably, service outside the alternative county of venue in either situation would be invalid under §§ 508.040 and 508.010(2), RSMo 1969.

14. Yates v. Casteel, 329 Mo. 1101, 49 S.W.2d 68 (1932). *Cf.* Hankins v. Smarr, 345 Mo. 973, 137 S.W.2d 499 (1940) (dictum).

15. Section 508.010(2), RSMo 1969. As the statute necessarily contemplates, the defendants residing in counties other than that of suit may be served outside the county in which suit is brought. *See* State *ex rel.* Stamm v. Mayfield, 340 S.W.2d 631 (Mo. En Banc 1960).

16. State *ex rel.* Bartlett v. McQueen, 361 Mo. 1029, 238 S.W.2d 393 (En Banc 1951); *cf.* Hankins v. Smarr, 345 Mo. 973, 137 S.W.2d 499 (1940). In that situation, § 508.010(1), RSMo 1969, applies, and "defendant" is construed in the collective sense. *See Bartlett supra*.

17. *See* Hewitt v. Price, 204 Mo. 31, 102 S.W. 647 (1907) which was a suit to recover the balance due following foreclosure of a deed of trust. The defendant, served in the county of suit where venue had been properly laid, filed an equitable counterclaim affecting title to the real property secured by the deed of trust.

dental or ancillary venue concept is not inconsistent with the Missouri holdings that condition jurisdiction on proper venue. The filing of a counterclaim need not be accompanied by service of process because the person against whom it is asserted is already a party to the action.[18] "Improper venue" with respect to a counterclaim[19] does not, therefore, affect jurisdiction. The incidental venue concept illustrates the ancillary treatment accorded counterclaims where jurisdiction would not be violated. Further, the plaintiff has undertaken to bring suit in the county in which the counterclaim is filed. It would, therefore, add nothing to insist on proper venue with respect to the counterclaim if the goal of venue is convenience. The application of the ancillary venue principle to counterclaims provides an example of the subservience of the statutory venue provisions where the often-competing policies of judicial economy and consistency are at stake.

Where the defendant files a claim against a third party, *i.e.,* in impleader, venue as to that claim had been independent until the court in *Garrison* overruled *State ex rel. Carney v. Higgins.*[20] In *Higgins,* plaintiff homeowners hired defendant corporation to construct a basement under their house in Clay County, Missouri. The defendant subcontracted the excavation to the third-party defendant, who struck one of the structural supports, causing the house to collapse. The plaintiff brought suit against the contractor in Clay County, where the cause of action had accrued, and the contractor was properly served under the corporations venue statute. The defendant filed a third-party petition alleging negligence against the subcontractor who was served at his residence in Jackson County. The court held that the general venue statute was applicable to the impleader claim, barring suit against the subcontractor in Clay County

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Since the real estate was situated in a different county, the plaintiff objected to the venue of the counterclaim pursuant to the forerunner of the current "local" venue statute, § 508.030, RSMo 1969. Section 508.030 provides that suits affecting the title to real estate shall be brought in the county in which the real estate is situated. The court held that the special venue statute did not apply to a counterclaim which raised the question of title to real propery when it was merely incidental to the main claim.

18. It is actually a non sequitur to speak of proper venue with respect to a counterclaim. The general venue statute applies only to "suits instituted by summons. . . ." § 508.010, RSMo 1969. A counterclaim is not instituted by summons. *See* note 19 *infra.* Section 508.040, RSMo 1969, directs in which counties ". . . [s]uits against corporations shall be commenced. . . ." Unless a counterclaim can be viewed as a suit being commenced against the (corporate) plaintiff, then § 508.040 is also inapplicable to counterclaims. Since the legislature has not provided a venue statute to govern counterclaims, insistence upon proper venue with respect to a counterclaim would appear to be illogical.

Nevertheless, given *Hewitt,* note 17 *supra,* and the confusion of venue and jurisdiction in Missouri, venue of counterclaims may be something to be reckoned with.

19. The defendant must only serve a copy of the pleading upon the plaintiff. Mo. Sup. Ct. R. 43.01. The plaintiff's voluntary appearance before the court will confer jurisdiction over his person. *See* State *ex rel.* Lindell Tower Apartments v. Guise, 357 Mo. 50, 206 S.W.2d 320 (1947).

20. 352 S.W.2d 35 (Mo. En Banc 1961).

where venue was proper in the main claim.[21] The court rejected the ancillary venue concept and established instead an independent venue requirement in impleader. Curiously, however, the court added that its decision did not mean that there could never be a third-party claim so "inseparably linked with, and ancillary to, the original suit as to derive proper venue therefrom."[22]

In part, the *Higgins* court felt that allowing the venue in a third-party claim to rest upon that established in the main claim would be an unwarranted judicial enlargement of the venue statute. It also feared that ancillary venue would lead to serious abuses of process. The court in *Garrison* was untroubled by either ground in overruling *Higgins'* independent venue requirement in impleader. The effect of the *Higgins* rule was to frustrate the policy underlying third-party practice,[23] which fosters consistent results and economy of litigation through the avoidance of multiple actions involving identical or similar evidence.[24] The court concluded that the legislature could not have intended such a substantial obstacle—that of an independent venue requirement—to the usefulness of impleader. Like the federal courts addressing the issue,[25] the *Garrison* court resolved the textual difficulties in favor of furthering the policy of impleader and ignored the mandate of strict construction of rules affecting venue.

The court noted that in abandoning the technical and the useless, the rights of the litigants were still safeguarded because allowance of a third-party petition is discretionary with the trial judge.[26] Potential abuses of process can be curbed at the trial level because the court may in its discretion withhold permission to file a third-party petition even if the claim is one within the language of the impleader rule.[27] Or the third-

21. Missouri had previously reached this result in Memphis Bank and Trust Co. v. West, 260 S.W.2d 866 (St. L. Mo. App. 1953) (replevin action against bona fide purchaser; third-party claim against the vendor for fraud). The court held that the impleader statute [superseded by Mo. Sup. Ct. R. 52.11(a)] did not extend the general venue statute, so service upon the third-party defendant in a county other than that in which the suit was properly filed did not confer personal jurisdiction over him.

22. 352 S.W.2d 35, 39. Yet *Higgins* would seem to be precisely such a case where the third-party claim was "inseparately linked with" the original claim.

23. In a Georgia case reaching the *Higgins* result on state constitutional grounds, Register v. Stone's Independent Oil Distribs., Inc., 227 Ga. 123, 179 S.E.2d 68 (1971), one commentator felt that the holding "basically eliminated third-party practice in Georgia." 23 Mercer L. Rev. 667, 670 (1972). Clearly, an independent venue requirement severely limits the use of impleader.

24. 528 S.W.2d at 442, approving the language in State *ex rel.* Laclede Gas Co. v. Godfrey, 468 S.W.2d 693, 698 (St. L. Mo. App. 1971).

25. *See* text accompanying note 7 *supra*. The Federal Rules of Civil Procedure contain provisions corresponding to the sections governing interpretation of the Missouri rules. *See* Fed. R. Civ. P. 1 and 82. The federal courts have virutally ignored rule 82, which requires interpretations that do not affect venue. *Ancillary Process and Venue in The Federal Courts,* 73 Harv. L. Rev. 1164 (1960).

26. 528 S.W.2d at 442.

27. State *ex rel.* Green v. Kimberlin, 517 S.W.2d 124 (Mo. En Banc 1974). Where the impleader would cause great inconvenience to the third-party defendant, it should be denied. Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir. 1959). The trial court's discretion is not unlimited, however, and

party claim could be severed from the action at a later stage upon a showing of inconvenience to the impleaded party.[28] In addition, the requirement of jurisdiction over the person of the third-party defendant establishes a measure of convenience to him which cannot be reduced.[29]

Formerly, a Missouri defendant whose potential third-party defendant was protected by the independent venue barrier could only avail himself of the common law device of vouching to warranty, or "vouching in," as it is commonly known. "Vouching in,"[30] which was supplemented but not superseded by third-party practice,[31] is a technique whereby an indemnitee may bind an indemnitor as to the existence and amount of the indemnitee's liability established in a suit against him. The indemnitee must give the indemnitor notice of the action, the opportunity to defend, and the control and management of the defense of the suit.[32] Whether or not the indemnitor appears, in a subsequent suit against him to enforce the right of indemnification, he is bound by the necessary determinations in the original suit by operation of collateral estoppel.[33]

The drawback of "vouching in" is that if the indemnitor refuses to voluntarily discharge his obligation, two suits are required instead of one. In impleader, the third party is a formal party to the action and

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must be exercised on sound legal principles. State *ex rel.* Laclede Gas Co. v. Godfrey, 468 S.W.2d 693, 698 (St. L. Mo. App. 1971).

28. *See* Mo. Sup. Ct. R. 52.11 (a); Globig v. Greene & Gust Co., 184 F. Supp. 530 (E.D. Wis. 1960).

29. Mo. Sup. Ct. R. 52.11 (a) requires the third-party plaintiff to cause a summons and petition to be served upon the person not a party to the suit who is or may be liable to him. The federal cases are in accord. *See* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1445, at 237 (1971) and authorities cited therein. Clearly, however, service of a third-party petition in a county where venue was improper prior to *Garrison* is now valid in Missouri. *See* note 13 *supra.*

30. *See generally* 3 J. Moore, Federal Practice ¶ 14.02 (2d ed. 1974). *See also* §§ 400.2-607 (5) (a), .2-607 (6), .3-803, RSMo 1969.

31. *See* Wright, *supra,* note 6.

32. Although the procedure in actions under the Uniform Commercial Code is slightly different, *see, e.g.,* § 400.3-803, RSMo 1969, the case law suggests that all three conditions must be met to preclude relitigation of the issues in the underlying suit. Springfield v. Clement, 205 Mo. App. 114, 225 S.W. 120 (Spr. Ct. App. 1920) (notice); Lane v. Hartford Fire Ins. Co., 343 F. Supp. 79 (E.D. Mo. 1972) (opportunity to defend); Drennen v. Wren, 416 S.W.2d 229 (Spr. Mo. App. 1967) (control and management). The judgment does not, of course, have collateral estoppel effect if obtained by fraud or collusion. *Id.*

The notification must adequately apprise the third party of his opportunity to appear, but little formality is required. *See* U.S. Wire & Cable Corp. v. Ascher Corp., 34 N.J. 121, 167 A.2d 633 (1961).

33. The issues which he would not be precluded from litigating in the second suit are the existence of a relationship or agreement giving a right over; fraud in obtaining a right of indemnification; breach of an essential condition by the indemnitee; any defense that the indemnitor could not interpose in the original action; and incidental or collateral issues in the original suit though they might have been determined. Drennan v. Wren, 416 S.W.2d 229 (Spr. Mo. App. 1967).

Under the Uniform Commercial Code, the indemnitor is bound by any factual determinations common to both suits, not just those necessary to the determination of the first suit. *See, e.g.,* § 400.3-803, RSMo 1969.

is therefore bound by the judgment, so only one suit is required. A party who is "vouched in," however, is not a named party to the original suit. Consequently, after the determination of the voucher's liability, the voucher must bring a subsequent action to enforce his right of indemnification against the vouchee by proving the judgment, notice, and that the claim is within the indemnity obligation.[34]

The obvious value of the "vouching in" device is that it may be used where it is impossible to acquire personal jurisdiction over the indemnitor. It will also serve as a means of binding the indemnitor in a limited sense where the court in its discretion denies leave to file a third-party petition. Thus, "vouching in" should not be overlooked where the more efficient impleader device is not feasible.

In *Garrison,* Missouri joined the weight of authority in viewing venue of a third-party claim as ancillary in impleader.[35] The decision also implicitly adopted the preferred position that once venue is properly laid in the main action, a showing of proper venue between the plaintiff and the third-party defendant is not necessary.[36] In Missouri now, in an impleader action the third party may be bound by the judgment where venue would have been improper if compliance with the venue statutes had been required.

The holding in *Garrison* is a progressive development in Missouri law and greatly expands the potential of impleader, which is preferable to

34. 1B J. MOORE, FEDERAL PRACTICE, ¶ 0.405[9] (2d ed. 1974). The nature of the voucher's liability will ordinarily be determined in the original action and will be conclusive in the second suit. The question in the second suit is whether the liability which has become fixed is within the scope of the indemnity obligation. *Id.*

Another drawback of "vouching in" is that the indemnitee must surrender control of the defense of his suit if the indemnitor chooses to manage the suit. Shawe v. Wendy Wilson, Inc. 25 F.R.D. 1 (S.D.N.Y. 1960).

35. *See* Annot., 100 A.L.R.2d 693 (1965) for a collection of state and federal authorities. Except for a handful of dated cases, *see, e.g.,* Habina v. M. A. Henry Co., 8 F.R.D. 52 (S.D.N.Y. 1948), federal cases hold that venue in third-party practice is ancillary to that of the main claim. The leading case is United States v. Acord, 209 F.2d 709 (10th Cir. 1954). Federal courts have analogized to the concept of ancillary jurisdiction, concluding that if constitutional limitations on subject matter jurisdiction do not apply to third-party claims, a fortiori statutory rules allocating place of trial do not. *See Ancillary Process and Venue in the Federal Courts,* 73 HARV. L. REV. 1164, 1168 (1960).

Since the federal impleader rule, FED. R. CIV. P. 14, is virtually identical to the language adopted in MO. SUP. CT. R. 52.11 (a), after *Garrison* Missouri no longer has the curious result of the "same rule in text but not in meaning." 23 MERCER L. REV. 667, 671 (1972).

36. *See, e.g.,* United States v. Acord, 209 F.2d 709 (10th Cir. 1954); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1445, at 243 (1971). Venue would have been improper between the parties to the third-party petition because the corporations venue statute was not complied with. For the same reason, venue would have been improper *vis-à-vis* the plaintiff and the third-party defendant. Neither the plaintiff nor the third-party defendant in *Garrison* asserted a claim against the other arising out of the subject matter of the original claim. Where such a permissive right is asserted, *see* MO. SUP. CT. R. 52.11 (a), venue should continue to rest upon venue properly shown upon the original claim. *See* 3 J. MOORE, FEDERAL PRACTICE ¶ 14.28[3] (2d ed. 1974).