

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on January 30, 1995 in Room 313-S-of the Capitol.

All members were present.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfschuhle, Committee Secretary

Conferees appearing before the committee:

Representative Bob Tomlinson
Wayne Stratton, Topeka Attorney
Bob Corkins, Kansas Chamber of Commerce & Industry
Representative Tony Powell
Ron Hein, Hein, Ebert, Weir Chtd.

Others attending: See attached list

Hearings on **HB 2110** - Hearing for probate; uncontested consent, were opened.

Representative Tomlinson, appeared before the committee as the sponsor of the bill. He stated that the proposed bill would allow non self-proven wills to be probated without witness depositions if they are uncontested. (Attachment 1)

Chairman O'Neal asked the Representative to explain why there a requirement for self-proving wills, which is a procedure that is used in the absence of witnesses to the will, if this bill passes. Representative Tomlinson replied that this would be another way to ensure that the person signing the will was the actual person who signed it. Chairman O'Neal voiced his concern that the bill, as worded, would remove some of the safeguards in the law to protect against fraud and undue influence.

Hearings on **HB 2110** were closed.

Hearings on **HB 2111** - Civil procedure, change of venue & Hearings on **HB 2177** - Venue for actions against corporations, were opened.

Wayne Stratton, Topeka Attorney, appeared before the committee as a proponent of the **HB 2111**. This bill addresses the issue of venue. The bill would strike the language that "due consideration of the right of the plaintiff to choose the place of the action." and allow change of venue only when it's convenient to both parties.

Bob Corkins, Kansas Chamber of Commerce & Industry, appeared before the committee as a proponent of both **HB 2111 & HB 2177**. He stated that these two proposals are reasonable litigation reforms and would be an improvement. (Attachment 2)

Ron Hein, Hein, Ebert, Weir Chtd., appeared before the committee as a proponent of both **HB 2111 & HB 2177**. He commented that the law would not encourage forum shopping, and would encourage the most appropriate venue for the convenience of all parties. (Attachment 3)

Representative Tony Powell appeared as the sponsor of **HB 2177**. He told the committee that under current law, lawsuits against corporations can be filed in any county where the corporation transacts business. This proposed bill would provide for venue if the plaintiff is a resident of the county in which the corporation does business at the time of the cause of action. (Attachment 4)

Hearings on **HB 2111 & HB 2177** were closed.

Chairman O'Neal stated that the Uniform Law Commission meets each year to work legislation. As a result of the conference there were two bills in Kansas that are needed; revisions to the Uniform Commercial Code and the Uniform Fraudulent Transfer Act.

Representative Heinemann made a motion to have these two bills introduced as a committee bills. Representative Pauls seconded the motion. The motion carried.

STATE OF KANSAS

BOB TOMLINSON
REPRESENTATIVE 24TH DISTRICT
STATE CAPITOL
TOPEKA, KS 66612-1504
913 296-7640
5722 BIRCH
ROELAND PARK, KS 66205
913 831-1905



TOPEKA

HOUSE OF
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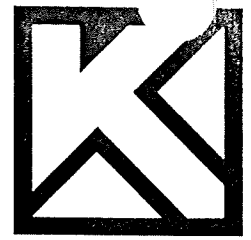
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JOINT COMMITTEE ON PLANNING EDUCATION

TESTIMONY ON HB 2110
Before House Judiciary Committee
January 30, 1995

HB 2110 deals only with uncontested, non self-proved wills. Prior to 1974 wills in Kansas did not have to be self-proved (requiring notaries) wills where witnessed. For a non self-proved will to be probated, depositions must be taken on witnessing signatures. These wills are now at least twenty years old. Depositions are increasingly more difficult to acquire.

HB 2110 would allow non self-proven wills to be probated without witness depositions if they are uncontested.

LEGISLATIVE TESTIMONY



Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

HB 2111 & 2177

January 30, 1995

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the
House Committee on Judiciary

by
Bob Corkins
Director of Taxation

Honorable Chair and members of the Committee:

My name is Bob Corkins, director of taxation for the Kansas Chamber of Commerce and Industry, and I appreciate the opportunity to express our members support for HB 2111 and HB 2177 regarding reforms to Kansas venue statutes for bringing civil claims.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

We view these proposals as embracing those efforts -- goals which are as important to our small businesses as they are to large. In fact, small businesses can be particularly disadvantaged

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plaintiffs seeking to file suit against them in distant counties. The cost of legal representation significantly increases to a small defendant business with limited resources when it is forced to pay the travel expenses of counsel. Even larger enterprises, or those small firms with a greater ability to absorb litigation costs, are nevertheless harmed by overly broad venue guidelines.

The most important policy to consider in evaluating our forum rules is the merit of avoiding bias. We believe that the current provisions of KSA 60-604 and 60-609 allow for a plaintiff bias that distorts the equitable application of judicial procedures. Just as alleged violators are presumed innocent in criminal actions and the state must first present its case that the defendant is not innocent, so too does a civil plaintiff have the initial burden of persuasion in alleging the defendant has breached a duty. We contend that excessive latitude which favors the plaintiff's choice of venue is similar to a presumption of defendant liability.

The current language of KSA 60-609, which HB 2111 proposes to modify, is even-handed as it is literally presented. However, KCCI believes that it provides an open invitation to plaintiff favorable bias. The language which this bill attempts to strike is superfluous. The stricken clause states nothing which is not encompassed in the balance of the sentence: "...upon a finding that a transfer [of venue] will serve the convenience of the parties and witnesses and the interests of justice." Therefore, the only purpose served by retaining the clause in question is to imply a degree of extra weight to which the plaintiff's choice may be accorded.

HB 2177 addresses plaintiff bias of a different sort. Current law in KSA 60-604 gives an added advantage to plaintiffs by greatly expanding the forums in which a plaintiff may choose to sue a defendant corporation. KCCI contends that the phrase "transacting business" is far too broad to serve equity in this context. A defendant manufacturer, for example, could be sued in any district court jurisdiction in which its product is sold...perhaps in all 105 counties. This language permits suit in a county which has no connection to the litigation other than a fortuitous, unrelated and isolated sale within its boundaries. Again we find an open invitation for forum shopping in order to garner the most plaintiff favorable court or jury pool.

An analogous situation appears in the Bellas Hess and Quill line of cases which have received a great deal of notoriety. The issue there is whether an out-of-state retailer has sufficient "contacts" or "nexus" with *State X* in order for *State X* to require the retailer to collect its sales tax. Kansas addressed this issue in 1990 when it redefined the meaning of "retailer doing business in this state" for purposes of Kansas compensating use tax. The 1990 legislature, in an attempt to get

...-Kansas retailers to collect tax on their sales within Kansas, elaborated on what constitutes "doing business".

The statute in question, KSA 79-3702(h), now considers an entity to be doing business in Kansas if it maintains here some type of real estate facility, if it employs here an agent or other representative, or if it engages in a regular or systematic solicitation of sales. This definition was crafted to be very broad in order to impose tax collection duties upon the greatest number of retailers. As expansive as this definition is, our corporate venue statute is even broader by comparison.

HB 2177 offers a resolution to the venue problem while avoiding the Pandora's box scenario of defining "transacting business". Although a clarification of that phrase is desirable, the venue inequities which it creates can be substantially removed -- and with a test which is infinitely easier to administer -- by doing just what HB 2177 proposes. Clarity would be achieved, forum shopping would be greatly reduced, and plaintiffs would still have venue options from which to choose.

KCCI views both of these proposals today as measured and reasonable litigation reforms. Either would be an improvement over the status quo, but we feel they would also work well in tandem. We urge you to recommend both bills favorably for passage. Thank you for your time and consideration.

HEIN, EBERT AND WEIR, CHTD.

ATTORNEYS AT LAW

5845 S.W. 29th Street, Topeka, KS 66614-2462

Telephone: (913) 273-1441

Telefax: (913) 273-9243

*Ronald R. Hein
William F. Ebert
Stephen P. Weir
Stacey R. Empson*

**HOUSE JUDICIARY COMMITTEE
TESTIMONY RE: HB 2177 and HB 2111
Presented by Ronald R. Hein
on behalf of
EVCO
January 30, 1995**

Mr. Chairman, Members of the Committee:

I am Ron Hein, legislative counsel for EVCO, an institutional food distributor based in Emporia. EVCO distributes food by truck to numerous institutions such as jails, schools, etc. throughout the state of Kansas.

Evco strongly urges the Committee to approve HB 2177, and, if possible, to amend the provisions of HB 2111 into HB 2177.

Historically, venue has been permissible where the defendant can be summoned or where the cause of action arose. When the code of civil procedure was adopted in 1963, K.S.A. 60-603 provided for individuals who were defendants to be sued in the county 1) where the defendant resides, 2) in which the plaintiff resides if the defendant is served therein, 3) in which the cause of action arose, 4) in the county where the plaintiff had a place of business if the defendant was served therein, and 5) two additional sections relating specifically to probate and the location of tangible personal property. This section preserved all of the requirements existing at common law, namely that the action be brought where the cause of action arose or where the defendant could be summoned.

However, K.S.A. 60-604 with regards to corporations was handled slightly differently. It provided for service in the county where the registered office of the corporation is located, in which the cause of action arose, or in which the defendant is transacting business at the time of the filing of the petition. The first two subsections still conformed to the common law, but subsection 3 deviated by permitting the action to be brought in a county in which the cause of action may not have arisen or in which the defendant may not have been subject to summons. There was no requirement when suing corporations that there be a place of business as with an individual doing business.

In light of national and even international corporations, where the registered office may be in Topeka or Kansas City or in Wichita, but which might have businesses located all over the state, the "transacting business" subsection seemed to make sense. An individual who resided in that location should be able to sue the business in his or her home county without having to travel at great cost or expense to the plaintiff to the urban area where the corporation has its registered office (legal residence).

Some lawyers have figured out a loop-hole in this language, and a few judges have permitted the venue to be proper utilizing this loop-hole. A corporation such as EVCO, which is based primarily in one city, but which "touches" numerous locations throughout the state simply by driving a truck up to a loading dock and unloading food, under current law, may be sued in virtually any county in the state. It is not necessary that the cause of action arose there, that there be a place of business there, nor that the defendant be served there. The common law rules have been cast to the wind, and forum shopping is permitted.

The law does not encourage forum shopping, but does encourage the forum most appropriate to the convenience of the parties.

A plaintiff who is forced to sue an out of state corporation which simply transacts business in this state, should be permitted to sue where the plaintiff resides so that the plaintiff will not be inconvenienced nor be forced to incur additional costs to go across the state to bring his or her action.

However, by the same token, the plaintiff should not be able to forum shop simply to have leverage against the defendant. Under current law, a business located in Liberal could be sued by a resident of Liberal with a cause of action which arose in Liberal, in Doniphan County, 500 miles away. If the suit is for a small amount of money, it gives the plaintiff considerable leverage on negotiating a nuisance settlement, even if there is no liability, simply because of the cost of the defendant transporting its lawyer, witnesses, and records to the county where the matter will be tried. This is inefficient and costly to the defendant, and serves no purpose other than to give the plaintiff an undue advantage.

HB 2177 helps solve this problem for defendants, while still protecting plaintiffs. This bill will insure the proper balance is maintained between the plaintiff and the defendant, and yet permit the judicial system to operate as efficiently and expeditiously as possible for the mutual convenience of the parties.

EVCO strongly urges your approval of HB 2177, and believes that the language set out in HB 2111 will also help insure that this proper balance is maintained.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

60-603. Actions against residents. An action against a resident of this state, other than an action for which venue is otherwise specifically prescribed by law may be brought in the county,

- (1) in which the defendant resides, or
- (2) in which the plaintiff resides if the defendant is served therein, or
- (3) in which the cause of action arose, or
- (4) in which the defendant has a place of business or of employment if said defendant is served therein, or

(5) in which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant and a demand to enforce such liability has been duly exhibited in the probate proceedings, or

(6) in which there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 at the time of the filing of the action.

History: L. 1963, ch. 303, 60-603; L. 1965, ch. 355, § 2; L. 1976, ch. 251, § 16; Jan. 10, 1977.

Source or prior law:

L. 1865, ch. 55, § 1; G.S. 1868, ch. 80, § 55; L. 1903, ch. 379, § 2; L. 1909, ch. 182, § 55; R.S. 1923, 60-509.

Cross References to Related Sections:

Multiple parties, see 60-608.

Identical provision in code of civil procedure for limited actions, see 61-1902.

Research and Practice Aids:

Venue—10, 23 et seq.

Hatcher's Digest, Venue §§ 1, 2.

C.J.S. Venue §§ 58-60, 83.

Gard's Kansas C.C.P. 60-603.

Vernon's Kansas C.C.P.—Fowks, Harvey & Thomas, 60-603.

Law Review and Bar Journal References:

"Cause of Action Under K.S.A. 60-308 and K.S.A. 60-603(3)," Robert J. Fowks, 38 J.B.A.K. 291, 292, 293, 294 (1969).

CASE ANNOTATIONS

Prior law cases, see G.S. 1949, 60-509 and the 1961 Supp. thereto.

1. Noted; trial court acted prematurely in sustaining motion to transfer venue. *Lambertz v. Abilene Flour Mills Co., Inc.*, 209 K. 93, 95, 495 P.2d 914.

2. Paragraph (3) referred to in determining venue of action to construe insurance policy; based on statute. *Alliance Life Ins. Co. v. Ulysses Volunteer Firemen's Relief Assn.*, 215 K. 937, 939, 529 P.2d 171.

3. Error for trial court to permit defendant to challenge amended motion service of process after alleging service of process for purpose of fixing venue. *Bray v. Bayles*, 228 K. 481, 488, 618 P.2d 807.

60-604. Actions against corporations. An action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county in which:

- (1) Its registered office is located;
- (2) the cause of action arose;
- (3) the defendant is transacting business at the time of the filing of the petition;
- (4) there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 and amendments thereto at the time of the filing of the action; or

(5) equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located, where the subject of such action relates to transportation services or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

History: L. 1963, ch. 303, 60-604; L. 1965, ch. 355, § 3; L. 1989, ch. 178, § 2; July 1.

CASE ANNOTATIONS

5. Venue where surety company sued on fidelity bond examined. *First Hays Banshares, Inc. v. Kansas Bankers Surety Co.*, 244 K. 576, 589, 769 P.2d 1184 (1989).

TONY POWELL
REPRESENTATIVE, 85TH DISTRICT
SEDGWICK COUNTY
7313 WINTERBERRY
WICHITA, KANSAS 67226
(316) 634-0114



TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS

JUDICIARY
RULES AND JOURNAL
TAXATION
TRANSPORTATION

STATE CAPITOL, ROOM 182-W
TOPEKA, KANSAS 66612-1504
(913) 296-7694

TESTIMONY IN SUPPORT OF HB 2177

BY

REPRESENTATIVE TONY POWELL

Mr. Chairman and Members of the Committee:

I am testifying today in support of HB 2177 which would make modifications to K.S.A. 60-604 by making a small, but important, change to the venue statute. Under current law, lawsuits against corporations may be brought in any county where the corporation's registered office is located, where the cause of action arose, or where the corporation is transacting business at the time of the filing of the lawsuit. Unfortunately, this third option can cause many problems for companies, and create a disincentive to do business in some parts of the state.

My legislation, which is identical to legislation currently being considered by the Senate Judiciary Committee, would require the plaintiff to be a resident of the county in which the corporation does business at the time the cause of action arose. In short, this legislation would limit forum shopping and would protect corporations who do business in every part of the state from being subject to lawsuits in every county.

I urge the Committee to support this legislation because of the problem a company in Emporia experienced under the current statute. A wholesale food corporation in Emporia terminated an employee and was sued for wrongful discharge. This company's principal place of business is located in

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Emporia, the employee worked for the company in Emporia, and the employee lived in Emporia. However, this employee sued the company in Wyandotte County!

This company was forced to defend the lawsuit in Wyandotte County, considerably increasing the time and expense its defense, even though this company had no connection with Wyandotte County other than the fact that it operated a couple of trucks there. However, the plaintiff apparently believed he could get a more favorable jury in Wyandotte County, and won the case.

Who won or lost the lawsuit is not important. What is important is that a company was forced to defend itself in a place that had no connection to the cause of action. This is unfair and must be changed. My legislation merely eliminates the ability of plaintiff to engage in unfair forum shopping and gives all companies similar rights currently enjoyed by public utilities pursuant to K.S.A. 60-606.

I thank the Committee for your time and attention and urge your support for HB 2177. I am happy to stand for questions.

Rep. Tony Powell

A handwritten signature in black ink, appearing to read "Tony Powell", written in a cursive style.