Rule 98. Place of Trial.

Colorado Court Rules

Colorado Rules of Civil Procedure

Chapter 11. Change of Judge; Place of Trial

As amended through Rule Change 2017(5), effective May 11, 2017

Rule 98. Place of Trial

(a) **Venue for Real Property, Franchises, and Utilities.** All actions affecting real property, franchises, or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated.

(b) **Venue for Recovery of Penalty, etc.** Actions upon the following claims shall be tried in the county where the claim, or some part thereof, arose:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite the place where the offense was committed;

(2) Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform.

(c) **Venue for Tort, Contract, and Other Actions.**

(1) Except as provided in sections (a), (b), and (c)(2) through (6) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(2) Except as provided in subsection (3) of this section, an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in

the county where the same was to be performed.

(3) (A) For the purposes of this Rule, a consumer contract is any sale, lease, or loan in which (i) the buyer, lessee, or debtor is a person other than an organization; (ii) the goods are purchased or leased, the services are obtained, or the debt is incurred, primarily for a personal, family, or household purpose; and (iii) the initial amount due under the contract, the total amount initially payable under the lease, or the initial principal does not exceed twenty-five thousand dollars.

(B) An action on a consumer contract shall be tried (i) in the county in which the contract was signed or entered into by any defendant; or (ii) in the county in which any defendant resided at the time the contract was entered into; or (iii) in the county in which any defendant resides at the time the action is commenced. If the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(C) In any action on a consumer contract if the plaintiff fails to state facts in the complaint or by affidavit showing that the action has been commenced in the proper county as described in this Rule, or if it appears from the stated facts that venue is improper, the court may, upon its own motion or upon motion of any party, dismiss any such action without prejudice; however, if appropriate facts appear in the record, the court shall transfer the action to an appropriate county. Any provision or authorization in any consumer contract purporting to waive any rights under subsection (3) of section (c) of this Rule is void.

(D) Any debt collector covered by the provisions of the Federal "Fair Debt Collection Practices Act" shall comply with the provisions of said Act set forth in 15 U.S.C. 1692(i) concerning legal actions by debt collectors, notwithstanding any provision of this Rule.

(4) An action upon a contract for services may also be tried in the county in which the services were to be performed.

(5) An action for tort may also be tried in the county where the tort was committed.

(6) An action in interpleader may also be tried in any county where a claimant resides.

(d) **Venue for Injunction to Stay Proceedings.** When any injunction shall be granted to stay a suit or judgment, the proceeding shall be had in the county where the judgment was

obtained or the suit is pending.

(e) **Motion to Change Venue; When Presented; Waiver; Effect of Filing.**

(1) Except for actions under section (c)(3), (f)(2), or (g) of this Rule, a motion to change venue shall be filed within the time permitted for the filing of motions under the defenses numbered (1) to (4) of section (b) of Rule 12, and if any such motion, or any other motion permitted by Rule 12, is filed within said time, simultaneously therewith. Unless so filed, the right to have venue changed is waived. A motion under sections (c)(3), (f)(2), or (g) of this Rule, shall be filed prior to the time a case is set for trial, or the right to have venue changed on said grounds is waived, unless the court, in its discretion, upon motion filed or of its own motion, finds that a change of venue should be ordered.

(2) If a motion to change venue is filed within the time permitted by section (a) of Rule 12 for the filing of a motion under the defenses numbered (1) to (4) of section (b) of Rule 12, the filing of such motion by a party under the provisions of subsection (1) of this section (e) alters his time to file his responsive pleading as follows: If the motion is overruled the responsive pleading shall be filed within 14 days thereafter unless a different time is fixed by the court, and if it is allowed the responsive pleading shall be filed within 14 days after the action has been docketed in the court to which the action is removed unless that court fixes a different time.

(3) Except as otherwise provided in an order allowing a motion to change venue, earlier ex parte and other orders affecting an action, or the parties thereto, shall remain in effect, subject to change or modification by order of the court to which the action is removed.

(f) **Causes of Change.** The court may, on good cause shown, change the place of trial in the following cases:

(1) When the county designated in the complaint is not the proper county;

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

(g) **Change from County.** If either party fears that he will not receive a fair trial in the county in which the action is pending, because the adverse party has an undue influence over the minds of the inhabitants thereof, or that they are prejudiced against him so that he cannot expect a fair trial, he may file a motion supported by an affidavit for a change of venue. The opposite party may file a counter motion and affidavit. If the motion is sustained the venue shall be changed.

(h) **Transfers Where Concurrent Jurisdiction.** All actions or proceedings in which district and county courts have concurrent jurisdiction, may, by stipulation of the parties and order of the court, be transferred by either court to such other court of the same county. Upon

transfer, the court to which such cause is removed shall have and exercise the same jurisdiction as if originally commenced therein.

(i) **Place Changed if All Parties Agree.** When all parties assent, or when all parties who have entered their appearance assent and the remaining nonappearing parties are in default, the place of trial of an action in a district court may be changed to any other county in the district. The judgment entered therein, if any, shall be transmitted to the clerk of the district court of the original county for filing and recording in his office.

(j) **Parties Must Agree on Change.** Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all the plaintiffs or defendants, as the case may be.

(k) **Only One Change; No Waiver.** In case the place of trial is changed the party securing the same shall not be permitted to apply for another change upon the same ground. A party does not waive his right to change of judge or place of trial if his objection thereto is made in apt time.

Cite as Colo. R. Civ. P. 98

History. Source: (e)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Case Notes:

Annotation

I. General Consideration.

Law reviews. For an article on change of venue in actions involving performance of contracts, see 16 Dicta 13 (1939). For article, "Rules Committee Proposes Changes in Civil Procedure", see 21 Dicta 159 (1944). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964).

This rule determines place of trial or venue in courts of record of general jurisdiction. *Slinkard v. Jordan*, 131 Colo. 144, 279 P.2d 1054 (1955).

Statute fixing place where an action must be brought does not control place of trial. *People ex rel. Bear Creek Dev. Corp. v. District Court*, 78 Colo. 526, 242 P. 997 (1925) (decided under § 25 et seq. of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Bringing an action and trying it are two different matters. *People ex rel. Bear Creek Dev. Corp. v. District Court*, 78

Colo. 526, 242 P. 997 (1925); *Caldwell v. District Court*, 128 Colo. 498, 266 P.2d 771 (1953).

Where a statutory remedy provides for a jury trial and there are no change of venue provisions provided for in that statute, then the procedure to obtain a change of venue is governed by this rule of civil procedure. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

The substance, not the form, of the action must control in ascertaining the proper venue. *Jameson v. District Court*, 115 Colo. 298, 172 P.2d 449 (1946).

In ascertaining the venue of an injunctive proceeding, the court should probe for the primary purpose of the suit. *City & County of Denver v. Glendale Water & San. Dist.*, 152 Colo. 39, 380 P.2d 553 (1963).

Dismissal on basis of forum non conveniens limited. The power of a Colorado court to dismiss an action on the basis of forum non conveniens is severely limited. *State Dept. of Hwys. v. District Court*, 635 P.2d 889 (Colo. 1981).

Change of venue absent affidavit or hearing is abuse of discretion. The court abused its discretion when it ordered a change of venue in the absence of a supporting affidavit or an evidentiary hearing. *Ranger Ins. Co. v. District Court*, 647 P.2d 1229 (Colo. 1982).

Improper venue not a jurisdictional defect which can be raised for the first time on appeal. Where trial court made an express finding of proper venue and defendant did not contest venue at trial, appellate court refused to reverse on grounds of improper venue. *Sisneros v. First Nat. Bank of Denver*, 689 P.2d 1178 (Colo. App. 1984).

Denying such change of venue because remedy is sought pursuant to "habeas corpus" is incorrect. A trial court incorrectly bases its denial of a motion for change of venue on the belief that a change of venue is not available because the remedy sought arises pursuant to a writ of "habeas corpus". *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

This rule governs venue in habeas corpus proceedings. *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977).

This rule does not apply to workers' compensation division-sponsored independent medical examination proceedings. *Kennedy v. Indus. Claim Appeals Office*, 100 P.3d 949 (Colo. App. 2004).

Venue subservient to jurisdiction, so trial court not deprived of subject matter jurisdiction by purported transfer to a foreign nation of an action involving property located in that nation. *Sanctuary House, Inc. v. Krause*, 177 P.3d 1256 (Colo. 2008).

Applied in In re Femmer, 39 Colo. App. 277, 568 P.2d 81 (1977); *Gonzales v. District Court*, 629 P.2d 1074 (Colo. 1981); *In re U.M. v. District Court*, 631 P.2d 165 (Colo. 1981); *First Nat'l Bank v. District Court*, 653 P.2d 1123 (Colo. 1982); *Hollemon v. Murray*, 666 P.2d 1107 (Colo. App. 1982).

II. Venue for Property, Franchises, and Utilities.

Annotator's note. Since section (a) of this rule is similar to § 26 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The substance of the action, not the form, controls in determining the question of venue under section (a). *Colo. Nat'l Bank v. District Court*, 189 Colo. 522, 542 P.2d 853 (1975); *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

This section deals with a specified class of cases. *Welborn v. Bucci*, 95 Colo. 478, 37 P.2d 399 (1934).

Form of relief not determinative. Although the complaint prayed for a variety of relief, both legal and equitable, where the substance of the action directly affected the ownership of a ranch and sought to have declared the respective rights and interests of the petitioners and respondent in the ranch, the action should be tried where the ranch is located. *Colo. Nat'l Bank v. District Court*, 189 Colo. 522, 542 P.2d 853 (1975).

Action in personam is not an action dealing with property within the contemplation of section (a) of this rule. *Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs*, 187 Colo. 113, 528 P.2d 1305 (1974); *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896).

It has reference exclusively to actions in rem, where specific property is to be directly affected. *Kirby v. Union Pac. Ry.* , 51 Colo. 509, 119 P. 1042, 1913B Ann. Cas. 461 (1911).

This provision is applicable to county courts as well as to district courts. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891).

This provision is not restricted to real property. *Jameson v. District Court*, 115 Colo. 298, 172 P.2d 449 (1946).

It concerns actions affecting specific property and does not control in an action in which there is no issue as to title, lien, injury, quality, or possession, but which is concerned only with recovery of the purchase price. *Craft v. Stumpf*, 115 Colo. 181, 170 P.2d 779 (1946).

Language of this section is mandatory. Insofar as the designation of the venue is concerned, the language used in this section is mandatory. *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140 (1893).

The word "affect", as used in this rule, is as broad a term as "to determine a right or interest in". *Jameson v. District Court*, 115 Colo. 298, 172 P.2d 449 (1946).

An action does not "affect" a utility under this section when the defendants are being sued, not as a utility, but in their proprietary or quasi-private capacities as parties to a contract; as such, petitioners are not entitled to relief under this section. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

This section deals with the situation where the lawsuit directly affects the construction or operation of the utility itself. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

Rule eliminates issue of where greater portion of property is found. Since an action may be brought in the county where a substantial portion of the property is located, the difficult question of where the greater portion of franchise is located is eliminated. *People ex rel. City & County of Denver v. District Court*, 80 Colo. 538, 253 P. 24 (1927).

Section applies to municipal corporations. The fact that defendant irrigation district happens to be a quasi-municipal or municipal corporation cannot abrogate the provision of this section as to venue. *Bd. of County Comm'rs v. Bd. of County Comm'rs*, 3 Colo. App. 137, 32 P. 346 (1893); *Bd. of County Comm'rs v. Bd. of County Comm'rs*, 2 Colo. App. 412, 31 P. 183 (1892); *North Sterling Irrigation Dist. v. Dickman*, 66 Colo. 8, 178 P. 559 (1919).

Section 36-1-128 , concerning venue for suits by the state board of land commissioners, does not conflict with this rule requiring all actions affecting property to be tried in the county in which the subject of the action or a substantial part thereof is situated. *Dallas v. Fitzsimmons*, 137 Colo. 196, 323 P.2d 274 (1958).

Section controls an action against an irrigation district. An action for an injury to lands by seepage from the ditch of an irrigation district is properly brought in the county in which the lands are situated. *North Sterling Irrigation Dist. v. Dickman*, 66 Colo. 8, 178 P. 559 (1919).

A sanitation district is a municipal utility, and being such, it should be sued in the county in which it was located. *City & County of Denver v. Glendale Water & San. Dist.*, 152 Colo. 39, 380 P.2d 553 (1963).

Section contrives an action to cancel real estate mortgage. An action to cancel a real estate mortgage indemnifying a surety against loss on a contractor's bond, under this provision, was triable in the county where the property was situated, although the responsibility of the contractor was a question to be determined in another county. *Allen v. Sterling*, 76 Colo. 122, 230 P. 113 (1924).

An action to terminate lease and recover possession of real estate, upon the ground that covenants of the lease have been violated, is an action "affecting" real estate and is properly brought in the county in which the said real estate is located. *Gordon Inv. Co. v. Jones*, 123 Colo. 253, 227 P.2d 336 (1951).

Claim to quiet title to property. The proper venue for the claim to quiet the title to the property was laid in the county where it is located. *Twin Lakes Reservoir & Canal Co. v. Bond*, 156 Colo. 433, 399 P.2d 793 (1965).

Actions to determine county boundaries. The venue of an action to determine county boundaries is controlled by this section. *People ex rel. Bd. of Comm'rs v. District Court*, 66 Colo. 40, 179 P. 875 (1919).

Action on land use regulation not within scope of section (a). Where the relief sought is directed to the validity of county land use regulations and there is no issue as to title, lien, injury, quality or possession, property is not affected within the meaning of section (a). *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

In case when requested relief is directed to the validity and operative effect of H.B. 1041 land use regulations passed by county, there is no issue as to the title, lien, injury, quality, or possession of the property, franchises, or utilities within the meaning of section (a). Controlling venue issue turns on the residence of the governmental body that adopted the challenged land use regulations. Here, Pueblo county board passed the amended regulations in its official capacity, and the regulations address facilities planned to be located in Pueblo county and impacts that may occur there. That the city's planning for project features and water delivery in El Paso county may ultimately be impacted by such regulation does not mandate venue in El Paso county district court. Substance of city's complaint addresses the validity and enforceability of the Pueblo county board's adoption of the challenged H.B. 1041 regulation. Thus, venue is proper only in the Pueblo county district court under section (b)(2). *City of Colo. Springs v. Bd. of County Comm'rs*, 147 P.3d 1 (Colo. 2006).

Likewise actions concerning water rights. An action to quiet title to a water right is triable in the county in which the water right is situated. *People ex rel. City & County of Denver v. District Court*, 80 Colo. 538, 253 P. 24 (1927).

A water right can be said to be "situated" under this section only at the point of diversion or at the place of use. *Field v. Kincaid*, 67 Colo. 20, 184 P. 832 (1919).

Actions for injury due to flooding. In view of this provision, an action for damages resulting from flooding plaintiff's land is triable in the county in which the subject of the action is situated. *Twin Lakes Reservoir & Canal Co. v. Sill*, 104 Colo. 215, 89 P.2d 1012 (1939).

An action to rescind a contract to sell timber is in substance an action to determine title to the timber, and thus must be tried in the county in which the timber or a substantial part of it is located. *Jameson v. District Court*, 115 Colo. 298, 172 P.2d 449 (1946).

Transitory, in personam actions are not subject to this section. This section does not apply to an action to restrain interference with the business of a railway company by unlawfully dealing in its nontransferable tickets. Such an action is a transitory action in personam. *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911).

Railroad tickets do not have the characteristics of property as that term is used in this subdivision. At most a railroad ticket is mere evidence of a contract, a mere token to show that the person properly in possession of it has paid his fare. *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911).

This section does not apply to an action on an oral contract for leasing sheep. This section dealing with specified classes of cases does not apply to an action on an oral contract for the leasing of sheep. *Welborn v. Bucci*, 95 Colo. 478, 37 P.2d 399 (1934).

Section not applicable to foreclosure proceedings. There is no requirement that foreclosure proceedings be filed in the county where the property affected is located. *Hastings v. Security Thrift & Mtg. Co.*, 145 Colo. 36, 357 P.2d 919 (1960).

An action to recover the reasonable value of furniture, fixtures, and equipment of a restaurant and liquor sales

business sold to defendant was not an action affecting property within section (a) of this rule. *Craft v. Stumpf*, 115 Colo. 181, 170 P.2d 779 (1946).

A dissolution of marriage action is not an action "affecting real property, franchises, or utilities" within the meaning of section (a). *Brownell v. District Court ex rel. County of Larimer*, 670 P.2d 762 (Colo. 1983).

Where defendants made no showing that ownership of land was disputed and did not seek any remedies pertaining directly to the property, the action was not an action "affecting real property". *Sanctuary House, Inc. v. Krause*, 177 P.3d 1256 (Colo. 2008).

III. Venue for Recovery of Penalty.

Annotator's note. Since section (b) of this rule is similar to § 28 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This section deals with a specified class of cases. *Welborn v. Bucci*, 95 Colo. 478, 37 P.2d 399 (1934).

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896).

Consent of all defendants is not required for a motion to change venue under section (b)(2). *7 Utes v. District Court*, 702 P.2d 262 (Colo. 1985).

An action to recover a penalty, whether it be one ex contractu or ex delicto, comes under the provisions of this section. *Woodworth v. Henderson*, 28 Colo. 381, 65 P. 25 (1901).

Claims for injunctive relief against public officers arise, within the meaning of section (b) of this rule, in the county in which the public body has its official residence and from which any action by the board pursuant to the injunction must emanate. *Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs*, 187 Colo. 113, 528 P.2d 1305 (1974).

The mere fact that public officers were named defendants, does not constitute an action against public officers within the meaning of section (b)(2). *7 Utes v. District Court*, 702 P.2d 262 (Colo. 1985).

Section (b)(2) controls venue for all actions against public officers for acts done or the failure to perform acts in public office. *Executive Dir. v. District Ct. for Boulder County*, 923 P.2d 885 (Colo. 1996).

The language of section (b)(2) indicates that it is the official act, or failure to act, by the public officer that gives rise to the cause of action and establishes venue. *Executive Dir. v. District Ct. for Boulder County*, 923 P.2d 885 (Colo. 1996).

An action to set aside an order of a public official is sufficiently similar to an action for injunctive relief against public officers to be governed by the same venue rules. *Farmers Cafe v. State Dept. of Rev.*, 752 P.2d 1064 (Colo. App.

1988).

"Some part" of plaintiffs' 42 U.S.C. § 1983 claim against public officers in Fremont county did not arise in Boulder county by virtue of plaintiffs' phone call from Boulder county, where the basis of plaintiffs' claim was that such public officers deprived plaintiffs by refusing visitation of prisoners at the department of corrections facility in Fremont county, not the visitation arrangement itself. It was the DOC's refusal in Fremont county to allow visitation that gave rise to the plaintiffs' claim and establishes venue in this case. *Executive Dir. v. District Ct. for Boulder County*, 923 P.2d 885 (Colo. 1996).

Section 18-4-405 establishes a statutory penalty requiring the case to be tried in the county where the claim arose. *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265 (Colo. App. 2006).

An action to recover damages for personal injury is not an action to recover a penalty. An action to recover damages for personal injuries is not to recover a penalty simply because punitive damages were asked and awarded. Such an action is to recover compensatory damages; exemplary damages are only an incident, not the basis, of the cause of action. *Robbins v. McAlister*, 91 Colo. 505, 16 P.2d 431 (1932).

In case involving determination of proper venue for lawsuit concerning validity of H.B. 1041 land use regulations passed by county, venue is proper under section (b)(2) where the actions of the governing board giving rise to the dispute took place. Regardless of the potential impact outside the county, a claim involving the validity and effectiveness of regulations passed by a governing board must be heard in the county where the board acted to pass those regulations. Controlling venue issue turns on the residence of the governmental body that adopted the challenged land use regulations. Here, substance of city's complaint is directed at the official actions of the Pueblo county board, and the primary purpose of the lawsuit is to determine the validity of those actions as they apply to the city's water supply and storage project. Because issue here is the validity and enforceability of land use regulations adopted by Pueblo county board, venue is proper in Pueblo county where challenged official actions occurred. *City of Colo. Springs v. Bd. of County Comm'rs*, 147 P.3d 1 (Colo. 2006).

IV. Venue for Tort, Contract, and Other Actions.

A. In General.

Annotator's note. Since section (c) of this rule is similar to § 29 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of section. The general assembly by these provisions intended to limit the right to bring actions in any court having competent jurisdiction and imposed a limitation as to the forum in which the action should be commenced. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

The first sentence of this section is construed as a general rule, which is modified in particular instances by the succeeding sentences. *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404 (1899).

General rule. The general rule is that personal actions, such as actions for breach of warranty, shall be tried in the county in which the defendants, or any of them, reside at the time of the commencement of the action, or in the county where plaintiff resides when service is made on the defendant in such county, unless the case is brought within some of the exceptions of this section. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926).

Section (c) applies only if sections (a) and (b) are not controlling. *Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs*, 187 Colo. 113, 528 P.2d 1305 (1974).

Section (c)(1) does not apply to motions made under subsection (b)(2). *7 Utes v. District Court*, 702 P.2d 262 (Colo. 1985).

Section provides more than one proper county. The counties designated in the first sentence of this section are proper counties for the trial of all cases except those enumerated in the two preceding sections; but where the action is for goods sold and delivered, or upon a contract, or upon a note or bill of exchange, or for a tort, the county where the goods were sold, or the contract was to be performed, or the bill of exchange was made payable, or the tort was committed, is also a proper county for trial. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896).

Where trial may be lawfully had in either of two counties under this section, the selection rests with the plaintiff. *Welborn v. Bucci*, 95 Colo. 478, 37 P.2d 399 (1934).

Nonresidence of defendant is no objection to court's jurisdiction. Nonresidence of the defendant within the territorial jurisdiction of the court is no objection to the jurisdiction of the court of the cause, if actual jurisdiction of the person of such defendant is obtained by service of process within the territorial jurisdiction of such courts. *Weiner v. Rumble*, 1 1 Colo. 607, 19 P. 760 (1888).

Nonresident may be sued in county designated by complaint. In a suit for breach of contract, where the defendant is a nonresident, the proper county in which to institute the action is that "designated in the complaint". *Great Am. Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051 (1931).

Where the defendant is a nonresident of Colorado, the action may be tried in the county designated in the complaint. *International Serv. Ins. Co. v. Ross*, 169 Colo. 451, 457 P.2d 917 (1969).

Once the district court determined that a change of venue was warranted under subsection (c), it has no jurisdiction over the cause of action except to order the change of venue. *Millet v. District Court of El Paso County*, 951 P.2d 476 (Colo. 1998).

Applied in *City & County of Denver v. Glendale Water & San. Dist.*, 152 Colo. 39, 380 P.2d 553 (1963).

B. Actions on Contracts.

General rule. Actions on contracts are triable in the county in which the defendants or any of them reside at the commencement of the action, or in the county where the plaintiff resides, when service is had on the defendants in such county, or in the county where the contract is to be performed. *Coulter v. Bank of Clear Creek County*, 18 Colo.

App. 444, 72 P. 602 (1903).

Contract action relating to real property. A contract action, seeking only damages and not claiming title to any property, is properly brought in Colorado even though the real property involved is located in Kansas. *Centennial Petroleum, Inc. v. Carter*, 529 F. Supp. 563 (D. Colo. 1982).

Action may be tried in county where contract is to be performed. One of the exceptions to the general rule of place of trial is that actions on contracts may be tried in the county in which the contract is to be performed, where by its terms it is to be performed at a particular place. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926).

This exception applies only where the contract is, by express terms, to be performed at a certain place. *People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court*, 66 Colo. 330, 182 P. 7 (1919); *People ex rel. Tripp v. Fremont County Court*, 72 Colo. 395, 211 P. 102 (1922).

The words in this section, "the county in which the contract was to be performed", refer to contracts which by their terms are to be performed at a particular place. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926); *Kimberlin v. Rutliff*, 93 Colo. 99, 23 P.2d 583 (1933).

Where a contract is silent as to place of performance the provision relative to the right of trial in the county where the contract is to be performed is not applicable. *People ex rel. Burton v. District Court*, 74 Colo. 121, 218 P. 1047 (1923); *Kimberlin v. Rutliff*, 93 Colo. 99, 23 P.2d 583 (1933).

Where there is no place of performance expressed in a contract, no change of venue can be granted on that ground. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925).

Contract did not specify place of performance. The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence. *Smith v. Post Printing & Publishing Co.*, 17 Colo. App. 238, 68 P. 119 (1902).

An indemnity bond given to a sheriff to indemnify him against damage for seizing personal property under a writ of attachment, which contains no provision making it payable in any particular county, is not a contract to be performed in the county wherein the attachment is levied within the meaning of this section providing that actions upon contracts may be tried in the county in which the contract was to be performed. *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404 (1899).

Where place of performance of contract was changed by assignment of promissory note to California company, and payer was directed to mail its payments to San Diego rather than to Denver as originally stated in the note, venue was not proper in Denver. Trial court should have transferred case to Boulder county, where defendants resided. *Resolution Trust Corp. v. Parker*, 824 P.2d 102 (Colo. App. 1991).

The place where a cause of action for a breach of contract arises is generally-almost universally-the place where the

contract is to be performed. *Grimes Co. v. Nelson*, 94 Colo. 487, 31 P.2d 488 (1934).

In determining the place of trial of an action for breach of warranty the question is, where were defendants required to perform the things they were to do under the contract. What plaintiff was to do, is not in the case. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926).

Action may be brought in county of defendant's residence. Personal actions on contracts which are silent as to place of performance, are triable in the county of defendant's residence. *Kimberlin v. Rutliff*, 93 Colo. 99, 23 P.2d 583 (1933).

In an action on contract, no place of performance being expressly specified, the action should be tried in the county where defendant resides unless the case is brought within some of the exceptions of the rule. *People ex rel. Burton v. District Court*, 74 Colo. 121, 218 P. 1047 (1923).

Where the terms of the contract were not sufficient to indicate an intent to perform in the county of the plaintiff's residence the defendant was entitled to change of venue to its place of residence. *Maxwell-Chamberlain Motor Co. v. Piatt*, 6 5 Colo. 140, 173 P. 867 (1918).

An action upon a contract against a school district must be tried in the county of that district, unless the case is within one of the exceptions provided for in this section. *People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court*, 66 Colo. 330, 182 P. 7 (1919).

An action for breach of contract, which is silent as to the place of performance, must be regarded as a personal one and triable in the county of defendant's residence. *Cliff v. Gleason*, 142 Colo. 500, 351 P.2d 394 (1960).

Where it was sufficiently shown that the county in which the action was brought was the county in which the contract was to be performed, and was therefore the proper county for trial, the motion for change was correctly denied. *Coulter v. Bank of Clear Creek County*, 18 Colo. App. 444, 72 P. 602 (1903).

Generally, unless service is made in the county of plaintiff's residence, trial shall be in the county of defendant's residence. Regardless of residence and place of service, actions upon contract may be tried in the county in which the contract is to be performed. *Grimes Co. v. Nelson*, 94 Colo. 487, 31 P.2d 488 (1934); *E. F. Gobatti Eng'r & Mach. Corp. v. Oliver Well Works, Inc.*, 111 Colo. 193, 139 P.2d 269 (1943).

Where, under the terms of an agency contract, plaintiff was required to and did confine his business activities within the limits of a specified county, his action was properly instituted in such county, and there was no error in the refusal of the court to change the venue to another county wherein the principal maintained its offices and where it was served with summons. *Navy Gas & Supply Co. v. Schoech*, 105 Colo. 374, 98 P.2d 860 (1940).

This rule permits actions on contract to be tried in the county where the contract is to be performed. *Cliff v. Gleason*, 142 Colo. 500, 351 P.2d 394 (1960).

Where a contract is entered into, and payment of the fee is to be made in Denver, the action is properly tried in

Denver. *Bamford v. Cope*, 31 Colo. App. 161, 499 P.2d 639 (1972).

Under this section an action upon contract may be instituted and prosecuted in the county where the contract was to be performed. Even though defendant resides in another county he is not entitled to a change of venue. *Gould v. Mathes*, 55 Colo. 384, 135 P. 780 (1913).

This section does not make the trial mandatory in the county where the contract is to be performed. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

Rather, it merely makes such venue permissive by providing that the action may also be tried in the county in which the contract is to be performed at the election of the plaintiff. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

An action for breach of contract in which there are several defendants is properly brought in the county where one such defendant resides. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

Debt presumed payable where creditor resides. In an action on contract for the payment of money advanced by a bank, no other place of payment being stipulated, the debt is presumed to be payable at the bank, and the action was properly brought in the county of the creditor's residence under this section. *People ex rel. Columbine Mercantile Co. v. District Court*, 70 Colo. 540, 203 P. 268 (1921); *Chutkow v. Wagman Realty & Ins. Co.*, 80 Colo. 11, 248 P. 1014 (1926).

Where the contract is silent as to the place of payment, the debtor is obliged to seek the creditor in the county of residence and his usual place of business or abode and make payment there. Unless an insurance policy contains a provision definitely fixing the place of payment elsewhere, the county of plaintiff's residence is a proper place for the trial of an action to collect thereon. *Progressive Mut. Ins. Co. v. Mihoover*, 87 Colo. 64, 284 P. 1025 (1930).

A breach of the contract does not abrogate this section as to the place of trial of an action thereon, nor spell anything as to what the contract says as to place of performance. *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926).

Signers of bond must be sued in county of their residence where bond is silent as to place of payment. The signers of a bond must be sued in the county of their residence, or where some of them reside, unless the bond itself specifically provides that the place of performance is elsewhere. *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404 (1899).

C. Tort Actions.

The general rule is that personal actions may be tried in either the county in which the defendant resides, or any of them reside, or in the county where the plaintiff resides when service is made on the defendant's in such county. *Denver Air Center v. District Court*, 839 P.2d 1182 (Colo. 1992).

Venue requirements must be satisfied for all defendants where the defendants did not act in concert or engage in the same tortious act. *Spencer v. Sytsma*, 67 P.3d 1 (Colo. 2003).

Rule authorizes prosecution of action in county in which defendant has its principle place of business and in which it was served with process. *Combined Com. Corp. v. Pub. Serv. Co.*, 865 P.2d 893 (Colo. App. 1993).

Section provides equally proper counties. In an action for a tort, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896); *Carlson v. Rensink*, 65 Colo. 11, 173 P. 542 (1918).

Plaintiff must bring case within exception for place of tort to prevent change to defendant's residence. In an action for tort brought against a defendant in another county where the summons was served in the county in which defendant lived, it was incumbent upon plaintiff in resisting a motion for a change of venue to bring the case within the exception to this section that actions for torts can be brought in the county in which the tort was committed. *Byram v. Piggot*, 38 Colo. 70, 89 P. 809 (1906).

Where an action was brought in Logan county by a resident of that county against a resident of Weld county to recover damages for a tort committed in Morgan county, with service of summons in Logan county, a motion for change of place of trial from Logan county to Weld county was properly denied. *Robbins v. McAlister*, 91 Colo. 505, 16 P.2d 431 (1932).

Exemplary damages have no bearing upon question of venue. Where a plaintiff asks for both compensatory and exemplary damages in a tort action, exemplary damages is only an incident, not the basis, of the cause of action, and has no bearing upon the question of venue. *Robbins v. McAlister*, 91 Colo. 505, 16 P.2d 431 (1932).

Action for breach of warranty. In an action for the breach of the warranty where fraudulent misrepresentations inducing purchase were alleged and plaintiffs resided in Lincoln county, the action was properly brought in Lincoln county, both because that was the county where the contract was to be performed, and because of the character of the action as one of tort; and defendant was not entitled as of right to change the venue to the county of its residence. *Denver Horse Importing Co. v. Schafer*, 58 Colo. 376, 147 P. 367 (1915).

Action for conversion of machinery. In an action by a lessee of a mine against his lessors for damages for an alleged conversion of machinery and appliances, where the complaint charged the wrongful conversion by defendant of personal property belonging to plaintiff, the cause is properly brought in the county where defendants or any of them reside. *Updegraff v. Lesem*, 15 Colo. App. 297, 62 P. 342 (1900).

Action by receivers. The court's power of control in receivership proceedings does not deprive a stranger who claims by paramount title, of the right to have the suit or proceedings instituted by the receiver to try the question of title, determined as are other actions under the rules of civil procedure, in the appropriate court of the county where the defendant resides, and where process is served upon him, where the tort was committed in the county of the defendant's residence. *Pomeranz v. Nat'l Beet Harvester Co.*, 82 Colo. 482, 261 P. 861 (1927).

D. Other Actions.

The word "goods", as used in section (c) of this rule, should not be restricted to merchandise sold in course of trade. The word should be given the broad meaning ordinarily ascribed to it and be held to include furniture and equipment. *Craft v. Stumpf*, 115 Colo. 181, 170 P.2d 779 (1946).

Action of guaranty distinguished from action for goods sold and delivered. An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator is an action upon the guaranty contract, and not an action for goods sold and delivered, and the provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply. *Smith v. Post Printing & Publishing Co.*, 17 Colo. App. 238, 68 P. 119 (1902).

Action on partnership account may be brought in county where plaintiff resides. This section expressly authorizes an action by one partner against his copartner for the balance found due upon a settlement of the partnership affairs to be brought in the county where the plaintiff resides. *Bean v. Gregg*, 7 Colo. 499, 4 P. 903 (1884).

Actions on notes are triable in county where made payable. This section expressly provides that all cases, unless otherwise provided, shall be tried in the county of defendant's residence, unless service of summons is made upon defendant in the county where plaintiff resides, with an exception, among others, that actions upon notes or bills of exchange may be tried in the county where the same are made payable. *Ashton v. Garretson*, 37 Colo. 90, 85 P. 831 (1906).

This section applies to actions for divorce. The provisions of this section that in certain circumstances civil actions shall be tried in the county of the defendant's residence applies to actions for divorce. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

This rule governs venue in dissolution of marriage proceedings. *Brownell v. District Court ex rel. County of Larimer*, 670 P.2d 762 (Colo. 1983).

On the question of venue in divorce actions, this section is controlling, notwithstanding statutory provisions concerning divorce actions and kindred matters. *People ex rel. Stanko v. Routt County Court*, 110 Colo. 428, 135 P.2d 232 (1943).

Petitioner and respondent in dissolution of marriage proceeding are equivalent of plaintiff and defendant. For the purpose of the venue requirements in this rule, the petitioner and respondent in a dissolution of marriage proceeding are the equivalent of a plaintiff and defendant, respectively. *Brownell v. District Court ex rel. County of Larimer*, 670 P.2d 762 (Colo. 1983).

The divorce act must be read in connection with this and following sections. In view of the fact that the divorce act provides the rules of civil procedure shall apply, except as expressly modified by its own provisions, the mandate of the act with respect to where actions for divorce shall be brought must be read in connection with this and the

following section. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

Residence of corporation is place where principal office is to be kept. The residence of a corporation is the place where, by the certificate of incorporation, its principal office is to be kept. *Woods Gold Mining Co. v. Royston*, 46 Colo. 191, 103 P. 291 (1909).

Thus, an action begun in the Mesa county of plaintiff's residence against a corporation resident of another county, summons in which is served in a third county, where the corporation carries on business, must, on proper application, be removed to the county in which the defendant has its residence. The fact that the corporation filed its certificate of incorporation in the county of its business, and failed to file one in the county where its office was to be kept, is immaterial. *Woods Gold Mining Co. v. Royston*, 46 Colo. 191, 103 P. 291 (1909).

A creditor of a corporation cannot take advantage of its failure to file the certificate of incorporation in the county where its principal office is to be kept, in order to prosecute an action against it in another county. *Woods Gold Mining Co. v. Royston*, 46 Colo. 191, 103 P. 291 (1909).

Action against foreign corporation. A corporation organized under the laws of New York was conducting business in Colorado, maintaining its principal office in the city of Denver. In an action instituted in another county, the process in which was served in Denver, it applied for a change of venue to the county of Denver, on the ground that its residence was in that county. Under this section the motion was properly denied, as the corporation was a resident of New York and a nonresident of Colorado within the meaning of this section. *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 P. 899 (1911).

Undesignated action. An action for damnification brought by a mortgagor against an assuming grantee who failed to pay the mortgage debt, thus forcing the mortgagor to pay, is one of the undesignated actions under section (c), and a motion for change of venue to the county of defendant's residence was properly granted. *Cave v. Belisle*, 117 Colo. 180, 184 P.2d 869 (1947).

V. Venue for Injunction to Stay Proceedings.

Annotator's note. Since section (d) of this rule is similar to § 162 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of that section has been included in the annotations to this rule.

This section does not specify where action must be brought. This section, even giving to it the most strict and limited construction permissible, simply specifies, like the provision upon places of trial, the county in which the action may or shall be tried, subject to change of the place of trial, and not where it must or shall be brought. If commenced in another county, it is not a jurisdictional or fatal defect. *Smith v. Morrill*, 12 Colo. App. 233, 55 P. 824 (1898).

Proceedings after complaint and order tried in county of judgment. By the terms of this section, the proceedings to enjoin must be had in the county where the judgment was rendered. The proceedings referred to could be only those subsequent to the mere commencement of the suit by the filing of a complaint and to the issuance of a temporary

restraining order. *Smith v. Morrill*, 12 Colo. App. 233, 55 P. 824 (1898).

Privilege of conducting proceedings where judgment rendered may be waived. The district court has jurisdiction to entertain an application for writ of injunction to restrain the enforcement of an invalid judgment rendered in another county, and in the absence of an application for change of venue seasonably made the parties waive their privilege to have the proceedings conducted in the county where the judgment was rendered. *Smith v. Morrill*, 12 Colo. App. 233, 55 P. 824 (1898).

VI. Motion to Change Venue.

Annotator's note. Since section (e) of this rule is similar to § 25 et seq. of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Doctrine of forum non conveniens has only limited application in Colorado courts, and except in most unusual circumstances the choice of a Colorado forum by a resident plaintiff will not be disturbed. *McDonnell-Douglas Corp. v. Lohn*, 192 Colo. 200, 557 P.2d 373 (1976).

The doctrine of forum non conveniens has little place in Colorado courts. *Kelce v. Touche Ross & Co.*, 192 Colo. 202, 557 P.2d 374 (1976).

Venue motions to be filed together. Section (e)(1), of this rule, when read together C.R.C.P. 12, requires that all venue motions, except those based on sections (c)(3), (f)(2), and (g) of this rule, must be filed together. *Bd. of Land Comm'rs v. District Court*, 191 Colo. 185, 551 P.2d 700 (1976).

Where both parties to a dissolution case reside in a county outside of the judicial district where the case is filed, a directive or rule of court could properly authorize that court on its own motion to change venue, unless for good cause shown by the parties, or either of them, venue should be retained by the court in which the case is filed. *Walsmith v. Lilly*, 194 Colo. 270, 571 P.2d 1107 (1977).

Right to change venue waived by failure to make motion to change at proper time. *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911).

The right of a defendant to a change of a place of trial upon the ground of residence is a personal privilege which may be waived by not applying in apt time. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902); *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906).

If, after a change of venue is granted, the resisting party elects to proceed to trial without further objection, he thereby waives any error in granting the change of venue. *Smith v. Huber*, 666 P.2d 1122 (Colo. App. 1983).

Change of venue not restricted by time of filing or consent of all parties. A discretionary change of venue under section (f)(2) is not restricted by the time of filing or by the necessity for the consent of all parties to the request. *Tillery v. District Court*, 692 P.2d 1079 (Colo. 1984).

Where enlargement of time not obtained. By failing to file motions for change of venue within 20 days after service of the summons and complaint as required by this rule, then, by not having obtained enlargement of the time from the court, the right to file over objection is lost. *Town of Grand Lake v. District Court*, 180 Colo. 272, 504 P.2d 666 (1972).

VII. Causes of Change.

A. In General.

Annotator's note. Since setion (f) of this rule is similar to § 31 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The duty of changing the place of trial is not devolved upon the court of its own motion. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891).

Presumption is that suit is brought in proper county. It will be presumed that the county in which the suit was brought is the proper county for trial unless there should be a disclosure of something to the contrary; and the court commences the consideration of an application for a change of venue with the assumption of the existence of the necessary conditions requiring the retention of the case in that county, except insofar as the contrary may appear from the application. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629 (1900).

The change of venue is required to be made only "on good cause shown". These words plainly imply that a party considering himself aggrieved by the bringing of the action in a wrong county, or considering himself likely to be prejudiced by the trial thereof in the county where the action is pending, must apply to the court and show good cause therefor, in order to have the place of trial changed. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891).

Inconvenience and expense not sufficient to change forum. Inconvenience and expense are inherent in all litigation and are insufficient to oust a resident plaintiff from his chosen forum. *McDonnell-Douglas Corp. v. Lohn*, 192 Colo. 200, 557 P.2d 373 (1976); *Kelce v. Touche Ross & Co.*, 192 Colo. 202, 557 P.2d 374 (1976).

Burden of proof on motion to change venue is on party seeking change, but the party opposing must balance the showing made by the moving party. *Cliff v. Gleason*, 142 Colo. 500, 351 P.2d 394 (1960); *Sampson v. District Court*, 1 97 Colo. 158, 590 P.2d 958 (1979).

The burden of proof on a motion for change of venue is upon the party seeking the change. *Ranger Ins. Co. v. District Court*, 647 P.2d 1229 (Colo. 1982).

The substance, not the form, of the action must control in determining a motion for change of venue. *Caldwell v. District Court*, 128 Colo. 498, 266 P.2d 771 (1953); *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

Right to change of venue depends on conditions existing at the time of demand, and must be determined by

conditions at the time the party claiming the right first appears in the action. *Cliff v. Gleason*, 142 Colo. 500, 351 P.2d 394 (1960).

Absent most unusual circumstances, choice of forum of resident plaintiff will not be disturbed. *Kelce v. Touche Ross & Co.*, 192 Colo. 202, 557 P.2d 374 (1976).

Venue of joined claim should not be changed. Where the venue of one claim for relief is properly laid in the county in which it is brought, a court should not, except under extraordinary circumstances, change the venue of another claim properly joined with the first claim. *Twin Lakes Reservoir & Canal Co. v. Bond*, 156 Colo. 433, 399 P.2d 793 (1965).

Statute on place where trial must be brought is consistent with right of change. There is nothing in the statutory provisions concerning eminent domain proceedings inconsistent with the right of change of venue. The action must be brought in the county of the plaintiff municipality, but bringing an action and trying it are two different things. The statute as to place of trial means what it says, and its provisions are not jurisdictional. An action may be brought in a county where, if objection were made, it could not be tried. *People ex rel. Bear Creek Dev. Corp. v. District Court*, 78 Colo. 526, 242 P. 997 (1925).

The right to have the place of trial changed because the action is brought in an improper county is not jurisdictional. *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911); *Slinkard v. Jordan*, 131 Colo. 144, 279 P.2d 1054 (1955).

Bringing an action in improper county is not a jurisdictional or fatal defect. If it were so regarded, a plea in abatement or to the jurisdiction of the court would be the proper remedy. Instead of this, this section expressly provides for a change of the place of trial. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891).

The jurisdiction of courts of record is coextensive with the state, and where an action is brought in a county other than that in which it should be tried, the defendant's only remedy, if he objects to the venue, lies in an application to remove the case to the proper county. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896).

If an action for injunction under section (d) of this rule is commenced in another county from where it may be tried, it is not a jurisdictional or fatal defect. *Smith v. Morrill*, 12 Colo. App. 233, 55 P. 824 (1898).

The fact that an action is brought in a county other than the one in which the real property is situate does not affect the jurisdiction of the court to hear and determine the case unless the defendant moved to change the place of trial. *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906).

The right is a mere personal privilege. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891); *Smith v. People*, 2 Colo. App. 99, 29 P. 924 (1892); *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140 (1893); *Smith v. Morrill*, 12 Colo. App. 233, 55 P. 824 (1898); *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906); *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911); *Slinkard v. Jordan*, 131 Colo. 144, 279 P.2d 1054 (1955).

The provision in section (c) that an action on a promissory note may be tried in the county where the same is made payable does not give a defendant sued elsewhere an absolute right to a change of venue, but, at best, only a

privilege that may be waived. *Reed v. First Nat'l Bank*, 23 Colo. 380, 48 P. 507 (1897).

The right may be waived. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891); *Smith v. People*, 2 Colo. App. 99, 29 P. 924 (1892); *Reed v. First Nat'l Bank*, 23 Colo. 380, 48 P. 507 (1897); *Smith v. Morrill*, 12 Colo. App. 233, 55 P. 824 (1898); *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902); *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906); *Kirby v. Union Pac. Ry.*, 51 Colo. 509, 119 P. 1042 (1911); *Slinkard v. Jordan*, 131 Colo. 144, 279 P.2d 1054 (1955).

Privilege waived by failure to appear. *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891).

Waiver through failure to apply for a change of venue to proper county. *Forbes v. Bd. of County Comm'rs*, 23 Colo. 344, 47 P. 388 (1896).

The defendant entered a general appearance, indicating no intention whatever to exercise his right to have the place of trial changed, taking no steps to bring that matter to the attention of the court until 80 days thereafter, indicating submission of the case in all its phases to the court in which the action was brought. Hence, the defendant waived his right to a change of the place of trial. *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906).

If the right to a change of venue is waived, it is not error for the trial court to refuse to change the place of trial. *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906).

Right is not waived by answer and trial. Where a motion for change of venue filed by a defendant is denied, he may thereafter file an answer and proceed to trial without waiving the question of error based upon the denial of said motion, or the right, if any, to a change of venue. *Colo. State Bd. of Exam'rs of Architects v. District Court*, 126 Colo. 340, 249 P.2d 146 (1952).

Erroneous denial of motion may require reversal of judgment. The party who resists a motion for change of venue, to which his opponent is clearly entitled as a matter of right, does so at his peril. If the motion erroneously is denied and the moving party suffers adverse judgment, a reversal of the judgment with direction to change the venue would certainly follow. *Colo. State Bd. of Exam'rs of Architects v. District Court*, 126 Colo. 340, 249 P.2d 146 (1952); *Denver & Rio Grande W. R. R. v. District Court*, 141 Colo. 208, 347 P.2d 495 (1959).

Error in granting change of venue may be waived. Where plaintiffs, without objection, went to trial, they invested the court with full jurisdiction to proceed therein, waived the error in granting the change of venue, and cannot now be heard to urge that objection. *Raymond v. Harrison*, 27 Colo. App. 484, 150 P. 727 (1915).

Where a judge in vacation of his own motion ordered a cause transferred to the district court of another county, and the court to which the transfer was made had jurisdiction of the subject matter, and when the cause was called for trial the plaintiff appeared and consented to proceed with the trial, he waived objection to the order of the court transferring the case. *Cheney v. Crandell*, 28 Colo. 383, 65 P. 56 (1901).

A district court is without jurisdiction to transfer a cause involving a receivership while the case is pending in the

supreme court. *George Sparling Coal Co. v. Colo. Pulp & Paper Co.*, 88 Colo. 523, 299 P. 41 (1931).

Applied in *Britto v. District Court*, 176 Colo. 197, 489 P.2d 1304 (1971).

B. Sufficiency of Pleading.

A change of venue is not required under this section where no compelling reason has been shown to interfere with the discretion of the trial judge. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

Affidavits in support of motions for change of venue should state facts. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925).

Application should negate every favorable hypothesis. An application to change the trial of a cause from one county to another should negate every hypothesis in favor of the county in which the action was commenced. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629 (1900).

Motion must negate allegation that contract was to be performed where action was brought. Where a complaint alleges that the contract upon which recovery is sought was to be performed in the county in which the action is brought, a motion to change the place of trial on the ground that defendant resides in another county and was served with summons there, and which fails to negate the allegation of the complaint that the contract was to be performed in the county where the action is brought is insufficient and is properly denied. *Peabody v. Oleson*, 15 Colo. App. 346, 62 P. 234 (1900); *E. F. Gobatti Eng'r & Machinery Corp. v. Oliver Well Works, Inc.*, 111 Colo. 193, 139 P.2d 269 (1943).

In an action for the price of apples alleged to have been sold and delivered in the county in which the action was brought, an application for change of place of trial on the ground of the residence of defendant in another county, which fails to negate the allegation that the apples were sold and delivered in the county in which suit was brought was insufficient and was properly denied. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629 (1900).

Where plaintiff met the defendant's affidavit in support of a motion to change venue to county of defendant's residence with an affidavit alleging that the note was by its terms payable in the county where the action was brought, which is a proper county under section (c), and these statements were not controverted, the application to change the place of trial to the county of defendant's residence was properly denied. *Coulter v. Bank of Clear Creek County*, 18 Colo. App. 444, 72 P. 602 (1903).

Or that all defendants reside in county where action is brought. In an action against two defendants, an application to change the venue to another county on the ground that one of the defendants resides in the county to which the change is sought is insufficient unless it also negates the residence of the other defendant in the county in which the action is brought. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629 (1900).

To sustain a motion for change of place of trial for actions brought under section (c) of this rule, it must appear that no defendants reside where the suit is brought, where the motion is made on the ground that some of the defendants reside in another county. *People ex rel. Tripp v. Fremont County Court*, 72 Colo. 395, 211 P. 102 (1922).

It need not negate all exceptions in section (c). Upon motion to change the place of trial of a cause on the ground that

defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negate all the exceptions provided in section (c) whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions. *Smith v. Post Printing & Publishing Co.*, 17 Colo. App. 238, 68 P. 119 (1902).

Application consistent with assumed jurisdiction fails. Application for change will be denied if the supposition of the jurisdiction of the court in which an action is brought is consistent with the statements made in the application. *People ex rel. Columbine Mercantile Co. v. District Court*, 70 Colo. 540, 203 P. 268 (1921).

In an action against two defendants, an application to change the place of trial which alleged that one of the defendants resided in the county to which the change was sought, and that the other defendant was not within the state, was insufficient, as an allegation that one of the defendants was not within the state at the time the application was made did not negate the fact of his residence in the county in which the action was brought, but was entirely consistent with such residence. *Adamson v. Bergen*, 15 Colo. App. 396, 62 P. 629 (1900).

There was no error in denying a motion for change of venue on the ground that all proper defendants were nonresidents of the county, where from the allegations of the complaint it appeared that the one defendant who resided in the county where the action was commenced was alleged to be a party to the contract and was therefore a proper party to the suit. *Newland v. Frost*, 83 Colo. 207, 263 P. 715 (1928).

C. When County Is Improper.

Right to change place of trial is controlled by this section. The right to change the place of trial of an action against a county is controlled by this section, which necessarily requires the change of the place of trial to the county designated as the place of trial by statute. *Forbes v. Bd. of County Comm'rs*, 23 Colo. 344, 47 P. 388 (1896).

Venue in improper county will be changed on motion. Where the action is not brought in the proper county, the venue will be changed to the county where the cause is triable on application of the defendant. *Coulter v. Bank of Clear Creek County*, 18 Colo. App. 444, 72 P. 602 (1903).

When an action is brought in a county other than that in which it should be tried, the defendant may avail himself of his right to change the venue to the proper county. *Ashton v. Garretson*, 37 Colo. 90, 85 P. 831 (1906).

Upon sufficient application, the duty to change venue is mandatory. While the action may be brought in any county, at the election of the plaintiff, upon sufficient application by the defendant, made within the proper time, to change the place of trial of the cause on the ground that the county designated in the complaint is not the proper county, the duty of making the change becomes mandatory upon the court. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896).

Upon a proper showing that an action has been brought in a county other than that in which it should be tried, the duty of the court to grant the change is mandatory. *Ashton v. Garretson*, 37 Colo. 90, 85 P. 831 (1906).

The right of a defendant to a change of place of trial upon the ground of residence is one which, when the showing is in compliance with the rules, the court to which it is addressed must grant without discretion, unless it has been waived. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

Where it is clear from the face of the pleading that the substance of an action is that of an action affecting not only a substantial part of the property which finally became the subject of the action, but all of the property, and that that property was located in a certain county, it is mandatory upon the trial court to grant the motion for change of venue as provided in this rule. *Caldwell v. District Court*, 128 Colo. 498, 266 P.2d 771 (1953).

A proper application for a change of venue from an improper county, timely made, leaves the trial court no alternative but to grant such application. *City & County of Denver v. Glendale Water & San. Dist.*, 152 Colo. 39, 380 P.2d 553 (1963); *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

The court's jurisdiction is divested except for the purpose of making the order of removal to the proper county. *Denver & New Orleans Constr. Co. v. Stout*, 8 Colo. 61, 5 P. 627 (1884); *Fletcher v. Stowell*, 17 Colo. 94, 28 P. 326 (1891); *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140 (1893); *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896); *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404 (1899); *Ashton v. Garretson*, 37 Colo. 90, 85 P. 831 (1906); *Woods Gold Mining Co. v. Royston*, 46 Colo. 191, 103 P. 291 (1909); *People ex rel. Columbine Mercantile Co. v. District Court*, 70 Colo. 540, 203 P. 268 (1921); *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926); *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

When a party requests a change of venue upon a ground which entitles it to the change as a matter of right, the trial court loses all jurisdiction except to order the change. *Ranger Ins. Co. v. District Court*, 647 P.2d 1229 (Colo. 1982).

If an action involving real estate is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced. *Smith v. People*, 2 Colo. App. 99, 29 P. 924 (1892).

Where an application for a change of place of trial is made by a defendant based upon a ground which entitles him to the change as a matter of right, the court is ousted of jurisdiction to proceed further with the cause other than to enter the order of removal. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

When an application, sufficient in form, uncontradicted, and supported by allegations in the plaintiff's complaint itself, is made for a change of place of trial, the court has jurisdiction of the cause only for purpose of removal to the proper county. *Cliff v. Gleason*, 142 Colo. 500, 351 P.2d 394 (1960).

The court's retention of the case after motion for change constitutes reversible error. *Byram v. Piggot*, 38 Colo. 70, 89 P. 809 (1906).

All subsequent proceedings therein are void. *Brewer v. Gordon*, 27 Colo. 111, 59 P. 404 (1899); *Woodworth v. Henderson*, 28 Colo. 381, 65 P. 25 (1901); *Cliff v. Gleason*, 142 Colo. 500, 351 P.2d 394 (1960).

Further proceedings in a trial court after an erroneous denial of a proper motion for change of venue are a nullity and void. *Bd. of County Comm'rs v. District Court*, 632 P.2d 1017 (Colo. 1981).

The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the resubmission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void. *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 P. 140 (1893).

Prohibition lies to prevent court from proceeding further. Where a defendant in a divorce suit made application for a change of place of trial to the county of his residence under circumstances which entitled him to the change as a matter of right, and the application was denied, the supreme court will issue a writ of prohibition to prevent the court denying the change from proceeding further in the cause and directing that all proceedings had in excess of jurisdiction be quashed and that an order be entered removing the cause to the proper county, notwithstanding the fact that the erroneous action of the court in denying the change of venue was reviewable on appeal or writ of error. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902).

In an action in one county by a firm of architects against a school district of a second county for services rendered in the building of a school house, the contract not specifying the place of performance or payment, a motion for a change of venue having been denied by the district court, prohibition was granted. *People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court*, 66 Colo. 330, 182 P. 7 (1919).

In an action on contract where no place of performance is specified, it appearing that defendant was entitled to have the case tried in the county of his residence, prohibition is allowed against trial in another county. *People ex rel. Burton v. District Court*, 74 Colo. 121, 218 P. 1047 (1923).

Where the venue is proper in either of two counties, then a change of venue cannot properly be granted from either unless some other provision requiring the change arises. *City of Cripple Creek v. Johns*, 177 Colo. 443, 494 P.2d 823 (1972).

Where an action on an accident insurance policy might be commenced under section (c) either in the county of the defendant's residence, when service is had there, or in the county where the contract was to be performed, either county was the proper one, and from neither can a change of venue be properly granted. *Progressive Mut. Ins. Co. v. Mihoover*, 87 Colo. 64, 284 P. 1025 (1930).

In an action for a tort, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896); *Carlson v. Rensink*, 65 Colo. 11, 173 P. 542 (1918).

The provision in section (c) that suit may be brought on a contract where it is to be performed does not give the

defendant, if served with summons elsewhere, an absolute right to a change of venue to the county in which it is to be performed; for, notwithstanding this provision, an action on such contract may be tried in the county in which the defendant resides at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county. *Bales v. Cannon*, 42 Colo. 275, 94 P. 21 (1908).

Although proper for the plaintiff to bring the action in the county of defendant's residence, he was not obliged to do so. He had a right to bring it in the county where the contract was to be performed under section (c) of this rule, and having done so, there was no error in denying the motion for a change of venue. *Gould v. Mathes*, 55 Colo. 384, 135 P. 780 (1913).

Under section (c) of this rule, in an action for the price of goods sold, it is the privilege of the plaintiff to designate the county of his residence as the place of trial. An application for a change of venue, in such case, solely upon the ground that such county is not the proper county, should be denied. *Raymond v. Harrison*, 27 Colo. App. 484, 150 P. 727 (1915).

Where the plaintiffs claimed under a decree adjudicating water rights first entered in one county, and the defendants under a decree entered in a second county, the subject matter of the action was situated in both counties, both counties were proper for venue under section (a) of this rule, and the defendant's petition for change of the place of trial was properly denied. *Field v. Kincaid*, 67 Colo. 20, 184 P. 832 (1919).

Refusal to order change was error. Where an action involving the title to real estate was brought in a different county from the one in which the land was located, it was reversible error to refuse to change the place of trial to the county where the land was located, upon motion seasonably made by defendant. *Campbell v. Equitable Sec. Co.*, 12 Colo. App. 544, 56 P. 88 (1899).

When a defendant files a motion for a change of venue on the grounds that neither the plaintiff nor the Colorado defendants reside in the county in which the action was filed and that the tort underlying the action did not occur there, it was error not to grant the defendant's motion. *Denver Air Center v. District Court*, 839 P.2d 1182 (Colo. 1992).

Proper to refuse change of venue. In an action by a lessee of a mine against his lessors for damage for an alleged conversion of machinery and appliances placed by the lessee for the purpose of working the mine, where the complaint charged the wrongful conversion by defendants of personal property belonging to plaintiff, the venue will not be changed to the county in which the mine is located on the ground that it involved an interest in real estate, since if it should be determined that the subject matter of the action is real estate, no recovery could be had under the complaint. *Updegraff v. Lesem*, 15 Colo. App. 297, 62 P. 342 (1900).

D. When Convenience and Justice Are Promoted.

Section (f)(2) is directed to a change of venue which contemplates that venue is properly placed in the court in which the motion is filed. *Brownell v. District Court ex rel. County of Larimer*, 670 P.2d 762 (Colo. 1983).

Change for convenience or justice is discretionary. A motion to change the place of trial, on grounds of convenience

or justice, is addressed to the sound discretion of the court. *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189 (1888); *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896); *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925); *Lamar Alfalfa Milling Co. v. Bishop*, 80 Colo. 369, 250 P. 689 (1926).

A motion to change venue based on the convenience of the parties lies in the sound discretion of the trial court. *Bd. of Land Comm'rs v. District Court*, 191 Colo. 185, 551 P.2d 700 (1976).

A motion for change of venue on the ground of convenience of witnesses is addressed to the sound discretion of the trial court, whose decision will be accepted as final on review unless an abuse of discretion is apparent. *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977); *Sampson v. District Court*, 1 97 Colo. 158, 590 P.2d 958 (1979); In re Agner, 659 P.2d 53 (Colo. App. 1982); *Weston v. Mincomp Corp.*, 698 P.2d 274 (Colo. App. 1985).

An application for a change of venue in a will contest, for the convenience of witnesses, is within the discretion of the trial court. *Miller v. Weston*, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 6 7 Colo. 534, 189 P. 610 (1920).

A motion for change of venue for the convenience of the witnesses in a divorce proceeding is addressed to the sound discretion of the trial court. *Bacher v. District Court*, 186 Colo. 314, 527 P.2d 56 (1974).

Burden of proof on motion to change venue for convenience. While the movant, under section (f), must show, through affidavit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be better accommodated by the requested change in venue, the party opposing the change must at least balance the showing made by the moving party; otherwise, the motion should be granted. *State Dept. of Highways, v. District Court*, 635 P.2d 889 (Colo. 1981).

The decision of the court on the question will be accepted upon review as final. *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189 (1888); *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896); *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925); *Great Am. Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051 (1931); *Keohane v. Wilkerson*, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

Unless an abuse of discretion is apparent. *De Wein v. Osborn*, 12 Colo. 407, 21 P. 189 (1888); *Denver & R. G. R. R. v. Cahill*, 8 Colo. App. 158, 45 P. 285 (1896); *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925); *Great Am. Ins. Co. v. Scott*, 89 Colo. 99, 299 P. 1051 (1931); *Keohane v. Wilkerson*, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

The determination of the trial court will not be disturbed if no abuse of the discretion appears. *Miller v. Weston*, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 6 7 Colo. 534, 189 P. 610 (1920).

It is unlike the cases where the ground alleged is one of absolute right. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925).

The filing of this motion does not deprive the court of jurisdiction except to order the change. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925).

Section (f)(2) requires showing of identity, testimony, and accommodation. When a motion for a change of venue is

made under section (f)(2), the movant must show, through affidavit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be better accommodated by the requested change in venue. *Sampson v. District Court*, 1 97 Colo. 158, 590 P.2d 958 (1979); *Tillery v. District Court*, 692 P.2d 1079 (Colo. 1984).

The court must of necessity rely largely on the good faith of the affidavits or other evidence of what the testimony at the trial will be. *Enyart v. Orr*, 78 Colo. 6, 238 P. 29 (1925).

Application properly denied. There was no abuse of discretion or error in denying the application for a change of venue demanded upon the ground of the convenience of witnesses where it appeared from the affidavits filed that the expense and inconvenience to plaintiff occasioned by the change and consequent delay would have been great, and where it appeared also that no sufficient excuse was given for not interposing the motion at an earlier moment. *Bean v. Gregg*, 7 Colo. 499, 4 P. 903 (1884).

The allegation that the convenience of witnesses, and the ends of justice, would be subserved by the change of venue was not supported where the defendant in his affidavit named 11 witnesses who were stated to be able to prove that the plaintiff fairly lost the race and wager on which he put up the money in the complaint mentioned, which matter was not and could not become an issue in the case, and evidence of it, if offered, would not have been admissible. *Corson v. Neatheny*, 9 Colo. 212, 11 P. 82 (1886).

Retention of court file by original court. In a case in which the change of venue is discretionary with the original court, the original court should retain the court file for ten days to allow for reconsideration of the order changing venue, before forwarding the file to the receiving court. After ten days, the original court loses jurisdiction to reconsider its order changing venue. Therefore, a motion for the original court to reconsider or vacate its initial discretionary order must be filed during the ten days before the original court forwards the case file to the receiving court. *Tillery v. District Court*, 692 P.2d 1079 (Colo. 1984).

The existence of prejudice justifying a change of venue is a question of fact within the discretion of the trial court. The movant bears the burden of establishing such prejudice by affidavit or evidence. *Keohane v. Wilkerson*, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

Although all parties did not stipulate to the change of venue, the facts stipulated to by a majority of the defendants provided sufficient good cause for change. Moreover, defendants did not allege prejudice to their substantial rights, so procedural flaws, if any, would constitute harmless error. *Keohane v. Wilkerson*, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

VIII. Change from County.

Annotator's note. Since section (g) of this rule, is similar to §§ 31 through 33 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Where a jury trial is granted, the right to a fair and impartial jury is a constitutional right which can never be abrogated. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

If a community is prejudiced against a citizen, or if other circumstances are likely to deny him a fair and impartial jury trial, then a change of venue must be granted. *Brisbin v. Schauer*, 176 Colo. 550, 492 P.2d 835 (1971).

The burden of establishing that undue prejudice in the community exists is on the party seeking the change. *Powell v. City of Ouray*, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Whether community prejudice against a party exists is a question of fact that may be developed at "voir dire". *Powell v. City of Ouray*, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Feeling of inhabitants immaterial where trial is by court. The fact that the issues between defendants and the landowners are of such magnitude that strong local feeling and bitter prejudices will be engendered is of no consequence, the cause being a chancery cause, triable to the court. If the trial judge should imbibe any of the local feeling, a change of venue could be granted, or the judge of another district called in. *People ex rel. Walpert v. Rogers* , 12 Colo. 278, 20 P. 702 (1888).

Petition should set out facts. In a petition for change of venue, in respect to the prejudice of inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments. *De Walt v. Hartzell*, 7 Colo. 601, 4 P. 1201 (1884).

Denial of motion was not abuse of discretion. Where an application for a change of venue on the ground of prejudice of the inhabitants of the county was supported by the affidavits of the applicant and six residents of the county, and counter affidavits were filed by 10 citizens of the county who stated that they had never heard of the controversy between the parties and denied that the inhabitants of the county were prejudiced, it was not an abuse of discretion of the trial court to deny the application. *Doll v. Stewart*, 30 Colo. 320, 70 P. 326 (1902).

Denial of motion for change of venue on the ground of prejudice of the inhabitants was not prejudical error. *Western Wood Prods. v. Tittle*, 79 Colo. 473, 246 P. 791 (1926)

This rule presupposes that the action is pending in the county where venue for trial is properly laid. *Evans v. District Court*, 194 Colo. 299, 572 P.2d 811 (1977).

It is for the trial court to consider the facts and grant or deny the motion for change of venue. *Powell v. City of Ouray*, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Where a motion for change of venue is not supported by an affidavit as required, it is properly denied as not complying with this rule. *Powell v. City of Ouray*, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Section is mandatory only when party brings case within provisions. This section providing for a change of venue where the inhabitants of the county wherein the action is pending are prejudiced against the applicant is only mandatory upon the court where the party applying has brought himself within its provisions. *Roberts v. People*, 9

Colo. 458, 13 P. 630 (1886).

This is true although no counter affidavits are filed. *Daugherty v. People*, 78 Colo. 43, 239 P. 14 (1925).

Motion directed to discretion of court. The granting or refusing a motion for change of venue on the ground of prejudice of the inhabitants is within the sound discretion of the trial court. *Doll v. Stewart*, 30 Colo. 320, 70 P. 326 (1902); *Fitzhugh v. Nicholas*, 20 Colo. App. 234, 77 P. 1092 (1904); *Nordloh v. Packard*, 45 Colo. 515, 101 P. 787 (1909).

Ruling is reviewable for manifest abuse of discretion. Unless there is a manifest abuse of such discretionary power, the action of the trial court in refusing such application is not reviewable. *Power v. People*, 17 Colo. 178, 28 P. 1121 (1892); *Michael v. Mills*, 22 Colo. 439, 45 P. 429 (1896); *Doll v. Stewart*, 30 Colo. 320, 70 P. 326 (1902); *Powell v. City of Ouray*, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Matters not per se contemptuous may be set forth in a petition for a change of venue without subjecting the petitioner to punishment for contempt. *Mullin v. People*, 15 Colo. 437, 24 P. 880 (1890).

IX. Transfers Where Concurrent Jurisdiction.

Where a cause of which the district court would have had original jurisdiction is brought to it by appeal from the county court, and the parties proceed to trial without objection predicated upon the absence of jurisdiction in the county court, all defects in the jurisdiction of the county court are waived. *Brown's Estate v. Stair*, 25 Colo. App. 140, 136 P. 1003 (1913).

Transferor court can still accept notices and filings. Since after the change of venue order in the case of filing of an answer or of a notice to dismiss the power of the court to act is not invoked, the clerk of the transferor court can accept notices and filings. *Alexander v. Morrison-Knudsen Co.*, 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

X. Place Changed if all Parties Agree.

A subsequent intervenor must abide with a change of venue agreed upon by original parties to an action. *North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n*, 180 Colo. 314, 505 P.2d 377 (1973).

Location of default hearing proper. An action filed in the county having proper venue, where the defendant was in default, could be heard in an adjoining county for the convenience of the court and of counsel under the provisions of section (i), and the default judgment entered subsequent to this hearing was neither irregular, erroneous, nor void. *Orebaugh v. Diskocil*, 145 Colo. 484, 359 P.2d 671 (1961).

XI. Parties Must Agree on Change.

Consent is not a mere acquiescence; it is not a vacant or neutral attitude, it is affirmative in its nature. *Kirchhof v. Sheets*, 118 Colo. 244, 194 P.2d 320 (1948).

Statement that venue is immaterial does not constitute consent to change. A motion for change of venue is properly overruled when made by one defendant, when another defendant states that venue is immaterial, since this statement does not constitute consent to the codefendant's motion. *Kirchhof v. Sheets*, 118 Colo. 244, 194 P.2d 320 (1948).

Action by two of five defendants in filing answers to the complaint clearly demonstrated their acquiescence in the choice of venue by petitioner and such action foreclosed any favorable consideration of the request by the remaining defendants for a change of venue. *Howard v. District Court*, 678 P.2d 1020 (Colo. 1984).

XII. Only One Change; No Waiver.

This section has no application in an action for divorce. *People ex rel. Stanko v. Routt County Court*, 110 Colo. 428, 135 P.2d 232 (1943).

Change based on error of court does not violate section. There was no violation of section (k) of this rule, which allows only one change of venue on a particular ground, where further change of venue was ordered based on error of court. *Liber v. Flor*, 160 Colo. 7, 415 P.2d 332 (1966).

What is considered "apt time" must be determined by the circumstances of each particular case in which the question arises. It would be impossible to formulate a rule which would serve as a guide in all cases. *People ex rel. Lackey v. District Court*, 30 Colo. 123, 69 P. 597 (1902); *Burton v. Graham*, 36 Colo. 199, 84 P. 978 (1906).

Application for the change of the venue was not in apt time. *Miller v. Weston*, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 6 7 Colo. 534, 189 P. 610 (1920).

Cross References:
For change of venue in criminal cases, see Crim. P. 21; for change of judge, see C.R.C.P. 97 ; for transfer of venue of multiple proceedings under the "Colorado Probate Code", see § 15-10-303 , C.R.S.; for types of pleadings, see C.R.C.P. 7(a).