The Venue of Probate and Administration Proceedings*

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With the division of each state into counties or districts and the creation in each such subdivision of some court for the probate of wills and the administration of estates, it became necessary to designate which of such courts should undertake these functions in a particular estate. It is not the purpose of this study to consider problems arising out of conflicts of jurisdiction as between states insofar as independent determinations of domicile of a decedent may be made. That a decedent died a resident of the state undertaking an administration upon his estate will be assumed; or, if he died a nonresident, that there are assets within the state justifying administration. This study is concerned solely with the designation and determination of the county within the state where such probate and administration should be entertained and carried out.

Historically, venue in civil actions meant the county in England to which process was issued to the sheriff to bring a jury from that county to Westminster, and later to the county in which the trial was to be had. This fitted in well with the procedural plan then prevailing for summoning the jurors, who were presumably acquainted with the facts, from the very community where the cause of action arose. But when jurors ceased to make findings on their own knowledge, a jury could be drawn from the community of trial, and at the same time it became possible—indeed necessary—to determine venue in advance of trial. It is not possible here to trace the elements which have found their way into statutes for determining venue in civil actions. Suffice it to say that these statutes bear various

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marks of the place where the cause of action arose, where one or more of the parties to the action resided, or where the defendant might be found.\textsuperscript{1}

In the English ecclesiastical courts venue for determining the place of administration upon the estate of a decedent developed in a wholly different setting. The ordinary ecclesiastical courts had jurisdiction to probate wills and grant letters upon the estate of a decedent who died, or who was domiciled, within the diocese.\textsuperscript{2} Where, however, the decedent was possessed of \textit{bona notabilia} (effects of a certain value, usually in excess of £5, but an amount varying in different places and often dependent upon fine distinctions as to the nature of the property)\textsuperscript{3} in another diocese, probate and administration were granted by the Prerogative Court of Canterbury or York.\textsuperscript{4} And where personal property existed in both provinces two probates and grants of letters were necessary.\textsuperscript{5} Also, if it appeared, after letters were duly granted by an ordinary ecclesiastical court, that the decedent was possessed of \textit{bona notabilia} within another jurisdiction, the probate and administration were held to be void.\textsuperscript{6} Because of the ill-defined nature and varying amounts of \textit{bona notabilia}, the difficulties, inconveniences and mistakes incident to the retention of such doctrine in the law and the consequences of void probates and administrations, the royal commissioners, in 1832, recommended the abolition of all ecclesiastical probate jurisdiction.\textsuperscript{7} This recommendation was translated into

\textsuperscript{1} For a discussion of this development, see I Chitty, Pleading (1809) 267 et seq.; Stephen, Pleading (Tyler ed. 1924) 268 et seq.; S Holdsworth, History of English Law (2d ed. 1924) 117–119, 140–142; Foster, "Place of Trial in Civil Actions," 43 Harv. L. Rev. 1217 (1930).

\textsuperscript{2} Burn, Ecclesiastical Law (9th ed. by Phillimore 1842) 292–293.

\textsuperscript{3} Id. at 294–296.

\textsuperscript{4} Id. at 293.

\textsuperscript{5} Id. at 296. See also Report by the Commissioners to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) 23.

\textsuperscript{6} Report by the Commissioners to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales (1832) 23.

\textsuperscript{7} Ibid.
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an accomplished fact in 1857 at which time courts of probate were established fully coordinate with the common-law courts at Westminster.\(^8\)

The doctrine of *bona notabilia* never found its way into this country.\(^9\) It is true that vestiges of the practice of requiring separate administrations on decedents’ estates where property was found in more than one county may be noted in some early American statutes.\(^10\) At the present time, however, the jurisdiction of a probate court extends to all property of a decedent in any county in the state. But what county do the statutes designate for the probate of wills and the administration of estates, and what county should they designate in the interest of convenience and efficiency?

Such designation should primarily serve the ends of convenience, and aid in the prompt and efficient administration of estates. In laying down general rules designed to serve those ends it may be expected that a certain degree of arbitrariness will appear, but it should be kept at a minimum. Fixed rules seem largely to prevail in many old statutes still operating at the present time. Although some of these statutes served well enough in former times when one’s domicile, that of his nearest of kin, and most of his property were all likely to be confined to a single county, they are not always the most satisfactory under modern conditions. The sole justification for fixed rules in determining venue lies in the necessity for having something predetermined to go by, and in resolving conflicts when they do occur. A definite trend away from an absolute fixation of venue is clearly evident in the more recent probate statutes and codes,\(^11\) particularly in the case

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\(^8\) 20–21 Vict., c. 77, p. 423 (1857).

\(^9\) In the Matter of Coursen’s Will, 4 N. J. Eq. 408 at 414 (1843).

\(^10\) See, for example, Act of 1733, c. 5 in 2 Acts and Resolves of the Province of Massachusetts Bay, 1715–1741, p. 689 (1774).

of nonresidents. As will be observed from the text of the proposed Model Probate Code a maximum latitude of choice is given to those who will ordinarily take the initiative in such matters, on the assumption that convenience will govern that choice within the permitted limits.

It should be emphasized at the outset that the statutes under consideration are statutes of venue and not statutes upon which the jurisdiction of courts is predicated. Jurisdiction means power to hear and adjudicate. Venue refers only to the choice or designation of a particular county in which the probate proceedings should be instituted and carried through to


Section 61 of the Model Probate Code dealing with venue for the purposes of probate of wills and for all subsequent proceedings in connection with the administration of estates is as follows:

“Venue.

(a) Proper county. The venue for the probate of a will and for administration shall be:

(1) In the county in this state where the decedent had his domicile at the time of his death.

(2) If the decedent had no domicile in this state, then in any county wherein he left any property or into which any property belonging to his estate may have come.

(b) Proceedings in more than one county. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced shall extend to all of the property of the estate in this state.

(c) Transfer of proceeding. If it appears to the court at any time before the decree of final distribution in any proceeding that the proceeding was commenced in the wrong county or that it would be for the best interests of the estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [ ] court which other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein.”

15 1 BEALE,‘CONFLICT OF LAWS (1935) 274.
Power or jurisdiction to entertain and supervise the administration of estates is conferred generally upon probate courts; venue is the means of dividing or *allocating the work* among all of the probate courts in the state. It has even been suggested that there is but one probate court in each state with a branch in each county.

I. **Factors Which Determine Venue**

A. **A Venue Statute, Not a Jurisdiction Statute**

Under the early statutes designating the particular court in which wills should be probated and administration granted it was usually provided that the court in the county wherein the deceased resided at the time of his death should have "jurisdiction" to grant probate and letters of administration. Death and residence within the county were essential "jurisdictional" facts to be alleged and found by the court. But if either of these was not true in fact, it was said that all proceedings were utterly void and could be attacked at any time, directly or indirectly. Notice to interested parties given by a court without jurisdiction was regarded as no notice at all. "The persons interested cannot be required to watch the proceedings of all the Probate Courts of the State, at all times," said the Cali-

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15 In the words of Mr. Justice Rugg, "The distinction between jurisdiction and venue is plainly established. . . . Jurisdiction is a term of comprehensive import. It concerns and defines the power of judicatories and court. It embraces every kind of judicial action touching the subject of the action, suit, petition, complaint, indictment or other proceeding. It includes power to inquire into facts, to apply the law, to make decision and to declare judgment. . . . Venue in its modern and municipal sense relates to and defines the particular county or territorial area within the State or district in which the cause or prosecution must be brought or tried. It commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all. . . ." Paige v. Sinclair, 237 Mass. 482 at 483-484, 130 N. E. 177 (1921).

See also Southern Sand and Gravel Co., Inc. v. Massaponax Sand and Gravel Corp., 145 Va. 317, 133 S. E. 812 (1926); In re Summerfield's Estate, 158 Kan. 380, 147 P. (2d) 759 (1944).

16 In re Estate of Davidson, 168 Minn. 147 at 151, 210 N. W. 40 (1926).
fornia court in an early case.17 "The proceedings are summary and special, and must be in strict conformity with the law." Such was the common attitude toward probate courts, at that time regarded as inferior tribunals whose proceedings must conform in fact to every requirement of the statute.

In the course of time a very substantial body of authority accumulated which construed such statutes as limiting the jurisdiction of probate courts to the administration of estates of decedents who had actually died domiciled within their geographical limits; yet despite the court's own determination of this so-called "jurisdictional" fact, such determination remained open to attack in subsequent and collateral proceedings. The result was chaotic. Several administrations could be instituted and carried on in different counties at the same time, and debtors subjected to multitudinous actions by different executors or administrators of the same estate. Confusion and uncertainty were in the ascendant. No one could depend upon the title to property obtained through a probate sale. The net effect on titles to real estate was well nigh disastrous.

Gradually, however, the position of probate courts has risen in the law's esteem. Made courts of record in most states, accorded presumptions by statute as to the validity and regularity of their proceedings, and made coordinate with courts of general jurisdiction in a few states, they began to lose their inferiority.18 The utterly indefensible holdings that the jurisdiction of probate courts could be attacked collaterally at any time and all dependent proceedings held for nought were destined to fall. Faith in judicial proceedings was felt to be just as important in probate matters as elsewhere. A court may erroneously assume to act in a given

case. Today its action may be erroneous but ordinarily it is not void.

Nevertheless there remains a small body of authority which continues to construe venue statutes as limiting the jurisdiction of probate courts and making their determinations of jurisdiction inconclusive. Two administration proceedings may be carried on simultaneously, and third parties subjected to two actions for the same thing, without any assurance as to which will be upheld. Fortunately, however, this possibility is confined to two states at the most and is not likely to survive much longer the tests of time and necessity.

B. ESTATES OF RESIDENT DECEDENTS

In formulating a statute specifying the county where the will of a resident decedent should be probated and his estate administered upon, convenience of the persons interested should control. Two elements exist here: convenience as to assets of the estate; and convenience as to parties. Both of these may and usually do suggest the same place. Assets may consist of land, tangible personalty, intangible personalty, and causes of action to be instituted or prosecuted. At times there may be actions to be defended. The various parties involved include heirs and distributees, witnesses who may be called upon to prove the will or to testify in proceedings, and persons to be consulted by the executor or administrator in connection with the administration of the estate.

For resident decedents, the designation in every statute of the venue for probate and administration is the county of

19 "The policy of the statute in fixing venue is the convenience of the parties. It is a mere privilege of the defendant which he may waive, if he wishes, and which he will be deemed to have waived, unless he raised the objection in the manner prescribed by statute. On the other hand, the policy of the statute in fixing jurisdiction is to determine the character or nature of the cause of which the several courts of the state may take cognizance, which cannot be enlarged or defeated by any act of the parties. Neither consent nor waiver can confer juris-
residence or domicile. In the vast majority of cases this will be the most convenient place in terms of the elements mentioned. On the basis of convenience and of the universal acceptance of this single formula in the case of resident decedents, its retention seems a desirable one.

The phraseology of all present statutes is to the effect that administration is to be had in the county in which the decedent was a resident or an inhabitant or where he was domiciled. A very few designate venue as the county where he had his mansion house. All of these phrases are interpreted as equivalent to domicile. A few recent statutes employ the term “domicile” because it has a more definite and fixed legal meaning. This would seem to be the preferable term for determining venue.


Only one significant deviation from this universal formula has been noted. In Alabama a testator may designate the county where administration is to be had on his estate provided he owns property in such county at the time of his death. Ala. Code (1940) t. 61, § 35. Another section provides that when a resident decedent dies intestate and leaves no assets subject to administration in the county of his residence, and no administration is granted in such county within three months after his death, then administration may be granted in any county where he leaves assets. Ala. Code (1940) t. 61, § 80. Both of these sections are designed to serve the interests of convenience.

In all the citations which follow, reference is made to provisions dealing with the probate of wills as well as administration upon estates. A few statutes are explicit to the effect that if probate is had in a given court, administration must also be had there, and vice versa. Others are silent on the subject. While either may be had without the other, clearly they should be in the same court even though not applied for at the same time.


See Atkinson, Wills (1937) 560. Only one dissent from this has been found—an early dictum to the effect that “inhabitant” is a narrower term than “domicile”—which would have little weight today in view of the universal acceptance to the contrary. Holmes v. Ore. & Cal. Ry. (D. C. Ore. 1881) 6 Sawy. 276, 5 F. 523.

C. ESTATES OF NONRESIDENT DECEDENTS

In the case of nonresident decedents the factors determining venue are quite different in most cases. The domicile of the decedent and presumably of his family has been elsewhere. The convenience of the heirs and distributees must be in terms of access to the assets of the estate and to the place of administration. Convenience for the executor or administrator may correspond or differ. Localization of assets is no longer even a theoretical possibility.²⁴ Both tangible and intangible assets may be located in several counties. Consequently it is not surprising to find each state groping for its own formula, each predicated upon some assumed relation between the localization of assets and the place of administration.

In nearly all of the existing statutes designating venue in cases of nonresidents, elaborate provisions are found specifying one or more of the following places as the venue for administration: the county (1) where the decedent’s land or the greater part (or any part) thereof lies; (2) where his personal estate or the greater part (or any part) thereof is located; (3) where his estate or the greater part (or any part) thereof is located; (4) where the decedent died; ²⁸

(5) where he died and left assets; (6) where he leaves assets, having died out of the state; (7) where he leaves estate, having left no estate within the county where he died; (8) where assets come after his death; (9) where there may be


any debt or demand owing to him; 33 (10) where the personal representative or kin of such person has a cause of action; 34 or (11) where any suit in which the estate is interested is to be brought, prosecuted or defended. 35 And in most of them preference or priority is prescribed in a designated order, though all too often without regard to the convenience of anyone. In some instances the presence of land in the state gives precedence over personalty in the determination of venue. 36 In other statutes the very opposite is true. 37 It is not easy to reconcile these different forms or amounts of wealth as a basis for determining venue. The place of death itself would seem to bear no relation to the convenience of anyone insofar as the task of administration is concerned, and yet the county of death is designated as the venue in a surprisingly large number of states, due, no doubt, to the persistent influence of the English ecclesiastical courts, which sometimes authorized probate and administration in the diocese where death occurred. 38 The proximity of the executor, administrator and distributees to the assets of the estate would ordinarily serve their convenience better than an administration in a distant county compelled by the provisions of an arbitrary statute. The importance of this matter can be appreciated where property is to be looked after, rents collected, or a business continued or liquidated.


35 Tenn. Code (Michie, 1938) § 814.5.


38 BURN, ECCLESIASTICAL LAW (9th ed. by Phillimore 1842) 292-293.
After the varied provisions of all the statutes are compared and considered, it seems clear that little advantage is to be gained by a rigid designation of venue. Choice within limits might well be left to those persons who will take the initiative in applying for letters and who will likely be appointed to undertake the task of looking after the estate.\textsuperscript{39} A statute with flexible provisions permitting a degree of freedom may be considered as operating in a medium of individual choices; and in most cases individual choices will be guided largely by convenience.

Doubtless this objective has been paramount in those states having statutes authorizing probate and administration of the estate of a nonresident in any county in which assets of the decedent are located. The presence in any county of assets belonging or due to an estate is an essential and at the same time sufficient condition for a probate court to entertain proceedings for the administration of the estate of a nonresident.

\section*{II. Power of Probate Courts to Determine Venue}

In order for a probate court to grant letters testamentary or of administration there must first be a showing of death. To invoke action by a particular probate court it must be shown secondly that the decedent was domiciled in the county at the time of his death, or, in the case of a nonresident (under the terms of many present statutes), that he died within the county where his next of kin reside.

\textsuperscript{39} One Texas statute goes so far as to permit administration in the county of applicant's residence where the only purpose is to appoint an administrator to receive funds from the federal government. Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293A. A companion statute, based upon presumed convenience, Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293, provides that administration on the estate of a nonresident decedent who died out of the state may be had in the county where his next of kin reside.

As the last of several enumerated places of venue in Missouri, probate and administration may be granted in any county in the state. Mo. Rev. Stat. Ann. (1942) §§ 4 and 531.

These are but isolated instances confined within a narrow compass.
or that some part of his property is located within the county.\(^{40}\)

The judicial determination of the existence of these facts is the basis upon which all subsequent proceedings depend. The important thing to observe in this connection is that the same tribunal which proposes to undertake the administration of an estate also passes upon the very facts necessary to entitle it to do so. This necessity and power to make such a determination corresponds to a similar necessity and power long recognized to exist in courts of general jurisdiction. And such a determination must conclude other courts in the same state.

These two facts are often called "jurisdictional facts."\(^{41}\) Only death is strictly a jurisdictional fact. If the alleged decedent were not dead, the proceedings purporting to administer and distribute his property would be wholly void.\(^{42}\) The second fact—of domicile within the county, or death within or the location of assets within the county in the case of a nonresident decedent—is not truly a jurisdictional fact, although many courts have so treated it, as will be pointed out presently. A court may entertain and allow an administration to proceed to completion, as if local domicile were a reality. At most the statutory directions for venue are violated. This is not deemed a serious error as long as there is no conflict with a probate court in another county, and it would serve no useful purpose to require a new and separate administration again in another county. Indeed positive harm is more likely to result if duplicate proceedings are permitted.\(^{43}\) Consequently, a finding of this jurisdictional fact

\(^{40}\) Atkinson, Wills (1937) \S\ 205; 2 Woerner, Administration (3d ed. 1923) \S\S\ 204-207.

\(^{41}\) See 2 Woerner, Administration (3d ed. 1923) \S\S\ 204, 208.

\(^{42}\) Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108 (1894); Atkinson, Wills (1937) \S\ 205; 2 Woerner, Administration (3d ed. 1923) \S\ 208. We are not here considering the statutes authorizing administration upon estates of absentees.

\(^{43}\) For a case illustrating how far such conflicts may go, see State ex rel. Carter v. Hall, 141 Mo. App. 642, 125 S. W. 559 (1910) where one probate court
III. Conflicts of Venue

A. As to Resident Decedents

Despite the avowed purpose of statutes to limit the supervision of decedents’ estates to one probate court, it is easily possible that administrations may be commenced independently in two or more counties within the same state more or less simultaneously. In the case of resident decedents it may be alleged and judicially determined by each of two or more probate courts that the decedent died domiciled in the same county where the court is located. This has happened in a number of instances. Let us look into the results of such competing jurisdictions.

In the first place this duplication, or possibly triplication, of effort is quite unnecessary. There is no justification for more than one tribunal to undertake the administration. In the second place an unseemly competition between two courts of equal jurisdiction is highly undesirable. Such judicial rivalry cannot be tolerated under any system. Furthermore, confusion, uncertainty and positive injustices may result. Each of two or more executors or administrators may seek to take possession of the same assets belonging to the estate; each may seek to recover debts owing to the estate. In either situation a person may be subjected to more than one action brought for the same purpose. An interpleader or correspond-
ing remedy is possible for such a person, but he would be justified in feeling that a properly drafted probate code should eliminate such a possibility. Real estate titles traced through an administration may be subject to different paths and different ownerships, depending upon which administration is regarded as the controlling one. Such a condition still persists in Kentucky and Rhode Island. It existed in Kansas until remedied by the probate code adopted there in 1939. Many other states likewise formerly adhered to this view.

Where such a view prevailed in the past, one difficulty was no doubt due to the judicial construction of the local statutes, many of which were phrased in terms of "jurisdiction" rather than "venue." Residence was "jurisdictional" and always open to question. Thus the present statutes in Georgia, Iowa, Kentucky, Maine, Massachusetts, Michigan, Montana, New York, North Carolina, North Dakota,


The soundness of the Rhode Island position has recently been questioned by its supreme court in Eckilson v. Greene, 61 R. I. 394, 1 A. (2d) 117 (1938) in view of R. I. Gen. Laws (1938) c. 569, § 1 (enacted since the decision in the Wilcox case), to the effect that "The jurisdiction assumed in any case by the court, so far as it depends on the place of residence of a person, shall not be contested in any suit or proceedings except in the original case or an appeal therein or when the want of jurisdiction appears on the record."

Ohio, 58 Oregon, 59 Virginia, 60 West Virginia, 61 Wisconsin, 62 and Wyoming 63 are unfortunately phrased in terms of jurisdiction. Where collateral attacks have been permitted, courts have treated domicile as jurisdictional. 64 But if such a statute is construed as a venue statute, as is now done in nearly all states, then the probate court first assuming jurisdiction over the administration of a resident decedent’s estate by appropriate proceedings is entitled to retain such jurisdiction and to exercise it exclusive of every other probate court in the state. 65

When proceedings have been begun in two separate probate courts more or less simultaneously, the determination of priority may be simply resolved by requiring courts in which “proceedings are commenced” second in point of time to withhold action so long as jurisdiction over the estate has been assumed and continues to be exercised by the first court. In other words, such jurisdiction first assumed by one court is not subject to collateral attack. The applicable Wisconsin statute 66 is typical:

“The jurisdiction assumed by any county court in any case, so far as it depends on the place of residence of any person or the location of his estate, shall not be contested in any action or proceeding whatsoever except on appeal from the county court in the original case or when the want of jurisdiction appears on the same record.”

The same language, in substance, is contained in the statutes of California, 67 Kansas, 68 Maine, 69 Massachusetts, 70 Mich-

60 Va. Code (1942) § 5247.
62 Wis. Stat. (1943) § 253.03.
66 Wis. Stat. (1943) § 253.05.
Thus the first assumption of jurisdiction prevails and excludes subsequent action by other courts, subject to correction by three methods: (1) by revocation of letters in the first court; (2) by appeal from the decision of that court; or (3) by collateral attack when the "want of jurisdiction appears on the same record."

The application of these provisions against collateral attack would seem to prevent another probate court from granting letters on the same estate. But even though a second grant

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68 Kan. Gen. Stat. (Supp. 1943) § 59-223. The method used here provides for a stay in all courts except the first, until the question of venue is finally determined. See note 12 for form of this statute as it appears in the Model Probate Code.


70 Mass. Ann. Laws (1932) c. 215, § 2. The statute of the form mentioned was superseded by the present statute in 1891 when probate courts were made courts of general jurisdiction. In Kennedy v. Simmons, 308 Mass. 431 at 432, 32 N. E. (2d) 215 (1941) it is stated that the former statute was no longer necessary because under the new statute the decrees of "probate courts were to be given the same effect as that usually attributed to those of a court of superior and general jurisdiction."


72 Minn. Stat. (1941) § 525.82. This statute is like the Kansas statute cited in note 68, supra.

73 N. Y. Sur. Ct. Act, § 44. The form of this statute differs from the others. "Jurisdiction, once duly exercised over any matter by a Surrogate's Court, excludes the subsequent exercise of jurisdiction by another Surrogate's Court over the same matter, . . . Where . . . letters testamentary or of administration have been duly issued from . . . a Surrogate's Court having jurisdiction, all further proceedings to be taken . . . with respect to the same estate . . . must be taken in the same court."


75 Ohio Gen. Code (Page, Supp. 1943) § 10504-15. The result in Ohio is implicit under this statute providing for notice and hearing and from which a right of appeal exists.

76 Okla. Stat. (1941) t. 58, § 7. "The county court of the county in which application is first made for letters testamentary or of administration . . . excludes the jurisdiction of the county court of every other county."


78 Vt. Pub. Laws (1933) § 2727. "When a probate court has first taken cognizance of the settlement of the estate of a deceased person, . . . such court shall have jurisdiction of the disposition and settlement of such estate to the exclusion of other probate courts." Vt. Pub. Laws (1933) § 2728 corresponds to the Wisconsin statute quoted above. See note 66, supra.
of letters is not contested, and thus not made the subject of attack, the probate court there should nevertheless defer or stay all action until the determination by the first court has become final. Thus if it should be duly determined in the first court, or on appeal from that court, that the decedent's domicile was not in its county, then the proceedings there should be dismissed, and the proceedings next begun in another county should continue. If perchance a third court were involved, the same rule as to stay should likewise apply to it. This idea of a positive duty on the part of other courts to stay proceedings first found form in the Minnesota statute referred to above and was later embodied in the Kansas Probate Code with one slight amendment. All this, of course, implies voluntary obedience by the courts which entertain proceedings later in point of time, or compulsory obedience by appropriate proceedings in a superior or supervisory tribunal. The net result is orderly procedure and the exercise of jurisdiction at any given time by one court only.

While this method may, in isolated instances, result in a determination of domicile, and hence place of administration, in a place not too convenient to some of the interested parties, it has the advantages of orderly procedure, the exercise of jurisdiction at any given time by one court only, the avoidance of duplication of function by the courts, and the prevention of more than one action against a debtor to the estate. Also the effect upon titles is salutary where conflict between courts cannot have more than momentary duration.

Perhaps it is not enough to say that when proceedings have been commenced in one court, similar proceedings shall be stayed elsewhere. It may be well to add that the jurisdiction assumed by the first court is not only exclusive and exhaustive but also that any action of a second court is void. The idea is

79 Minn. Stat. (1941) § 525.82.
81 State ex rel. Carter v. Hall, 141 Mo. App. 642, 125 S. W. 559 (1910); Sewell v. Christison, County Judge, 114 Okla. 177, 245 P. 632 (1926).
implicit in the fundamental conception of probate jurisdiction that where one court assumes jurisdiction over the adminis­
tration of an estate, the exercise of control by another court over such estate is thereby exhausted and any attempted or pur­ported exercise of control by another court is void. In short, the power is exclusive; its exercise by one court exhausts the power, subject to the condition that if such court should relinquish its control over the estate, the power would be subject to exercise anew by another court.

B. AS TO NONRESIDENT DECEDENTS

In the case of resident decedents it has been observed that conflicts in jurisdiction may arise because of two or more in­
dependent determinations of domicile within the state. As far as any one state is concerned, it has been generally as­sumed that a person could have but one legal domicile within the state. Hence by some final determination, either in the probate court first entertaining jurisdiction or on appeal from that court, the fact of domicile will be determined so as to be binding throughout the state as far as that administration is concerned. In other words, only one court is entitled to under­take the administration in the first instance. 82

In the case of nonresident decedents there may be a real choice as to venue in two different situations. In addition there is a third situation in which each of two or more probate courts may undertake an administration proceeding approxi­mately concurrently on the basis of an erroneous representa­tion and a finding that the necessary factual basis for venue exists. Each of these situations contains the seeds for two or more simultaneous administrations with their attendant evils. Each deserves a method of resolution.

The first two present genuine choices open to those who may be interested in applying for administration. Thus one type of statute provides in effect that letters may be granted

82 Atkinson, Wills (1937) 560, 562.
in any county where the decedent left assets. Companion statutes here frequently add that the court of that county in which application is first made, and which first grants letters or otherwise assumes jurisdiction, shall have exclusive jurisdiction; or that "the jurisdiction assumed by any court, insofar as it depends on the location of the decedent's estate, shall not be contested except on appeal or when the want of jurisdiction appears on the record." Another common type of statute in the western states modeled after the California Code specifies various bases of venue in categorical order and particularly provides that venue "in all other cases shall be in the county where application for letters is first made." Both of these species of statutes providing for alternative places of venue, it will be noted, deal with cases where any one of several courts is entitled, in the first instance, to undertake the administration on a particular estate. Once proceedings have been commenced in any court, all the estate of

83 See note 30, supra.


85 See notes 66-78, supra.

86 A complete list of such statutes is as follows: Ariz. Code (1939) § 38-101; Cal. Prob. Code (Deering, 1941) § 301; Idaho Code (1932) § 15-101; Mont. Rev. Code (1935) § 10018; Nev. Comp. Laws (Supp. 1941) § 9882.01; N. D. Comp. Laws (1913) § 8526; Okla. Stat. (1941) t. 58, §§ 5-7; S. D. Code (1939) § 35.0101; Utah Code (1943) § 102-1-2; Wyo. Rev. Stat. (1931) § 88-207. This same result is implicit under the Kansas and Minnesota statutes, although not expressed in this manner. Likewise a similar construction obtains under the Texas and Washington statutes.
the decedent is brought under its jurisdiction and control, and further jurisdiction in any other court is no longer possible. Resolution of the conflict here is sometimes, but not always, contained in the statute itself or in the companion statutes mentioned above. Priority in time determines the power to proceed.

The third possibility mentioned above in which conflicts are likely to occur, arises, to put an example, under statutes authorizing the administration of estates in the county where the land or estate of the nonresident decedent, or the greater part thereof, is located. Courts of two different counties may grant administration upon the belief that the greater part of the decedent’s estate lies there. Mathematically the “greater” part may be in only one county, but before undertaking such measurement, such jurisdiction needs definition in terms of value, area, size, or some other appropriate measuring stick. Without pursuing this thought further, it is sufficient to point out that each of two or more courts may honestly believe itself justified in assuming jurisdiction according to its measurement of an extraneous fact upon which its jurisdiction is made to depend. Again we must fall back upon the simple expedient of recognizing that the first court to acquire juris-

diction is entitled to retain it, subject to deprivation of that jurisdiction only in the manner indicated.

C. WHEN JURISDICTION IS ACQUIRED

In addition to the statutes which specify priority as between two or more permissible places of administration according to the county in which the application for letters is first filed, many statutes provide that the court in which proceedings are "first commenced" or "first legally commenced," or the court "where administration is first lawfully granted" or which shall "first take cognizance thereof by the commencement of proceedings" shall be entitled to retain jurisdiction over the administration of the estate to the exclusion of all other probate courts within the state. It is thereby intended to specify the time when a court acquires control and to declare an order of priority as between two or more courts. A definition of this precise point of time is essential whenever legal proceedings are in rem. This problem has been an acute one in states without any specific legislation on the subject as well as under the variously phrased statutes mentioned above. From an examination of the statutes and decisions it appears that there are two views as to just when a court acquires juris-

89 See notes 84 and 86, supra.
91 Minn. Stat. (1941) § 525.82.
diction: (1) when the application or petition for letters is filed with the court; and (2) when the court, acting on the application, appoints an executor or administrator to administer the estate, thus assuming control over it.

The first view is predicated upon the theory that the proceedings are commenced by the filing of a petition for administration; and that the subsequent action of the court in acting on the petition is but a continuation and part of the proceedings already commenced. The simple lodging of the petition for letters vests the court with jurisdiction and control, precluding action by another court. A few statutes specifically provide that a probate proceeding may be commenced by filing a petition and causing it to be set for hearing.\(^9^4\)

The second view stems from the theory of res judicata, that where two actions involving the same issue are pending at the same time, the first one to be determined by final judgment shall control and may serve as a bar in any other action between the same parties involving that same issue.\(^9^5\) This, of course, is a well-recognized rule of civil procedure. Judicial action, not the mere filing of a petition, is the sine qua non of jurisdiction.

It has also been said that a court can only acquire jurisdiction in an in rem proceeding by doing some act which is equivalent to seizing the res; that since a probate proceeding is in rem, no jurisdiction over the estate can exist until the court does some affirmative act amounting to a seizure, such as appointing a personal representative to take charge of the estate.

Undoubtedly in the vast majority of cases the court to

\(^9^4\) Such statutes are found in New York, Kansas and North Dakota. See N. Y. Surr. Ct. Act, § 48; Kan. Gen. Stat. (Supp. 1943) § 59-2204; N. D. Comp. Laws (1913) § 8530; Minnesota formerly had such a statute, Minn. Stat. (Mason, 1927) § 8708, but neither this section nor any similar provision was adopted as a part of the Minnesota Probate Code of 1935. However, the same result will obtain under Minn. Stat. (1941) § 525.82. See note 97 infra.

\(^9^5\) 2 Freeman, Judgments (5th ed. 1925) c. 10. See also Sewell v. Christison, County Judge, 114 Okla. 177, 245 P. 632 (1926).
which a petition is first presented will likewise be the first to grant letters. But such is not always the case, especially where notice for a hearing on the petition must be given for a specified minimum length of time. A second court to which a petition is later addressed may speed up its action to such a degree that it is the first to grant letters. Thus where the hearing and order are in reverse order to that of the filing of the applications, it becomes important to determine the precise time when jurisdiction may be said to attach so as to preclude jurisdiction by another court.

The authorities are divided in their views on this point. Among the states having statutes specifying jurisdiction upon the commencement of proceedings, or having no legislation on the subject, New York, Minnesota, Missouri, Kansas, North Dakota, and Texas are committed to the first view, saying that the commencement of administration proceedings by the filing of a petition is conclusive as to the time when the court acquires jurisdiction; and that any subsequent proceeding in any other court is without jurisdiction and void. The New York statute, for example, pro-

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97 Minn. Stat. (Mason, 1927) § 8708; Hanson v. Nygaard, 105 Minn. 30, 117 N. W. 235, 127 Am. St. Rep. 523 (1908); In re Estate of Martin, 188 Minn. 408, 247 N. W. 515 (1933); In re Gilray's Estate, 193 Minn. 349, 258 N. W. 584 (1935).
98 In the Matter of the Estate of Greening, 232 Mo. App. 78, 89 S. W. (2d) 123 (1936), noted in 1 Mo. L. Rev. 192 (1936). Here the court said that the order of appointment controlled, but that this related back to the "very inception of the proceedings" when the will and application for letters were filed.
100 N. D. Comp. Laws (1913) § 8526.
101 Stewart v. Poinboeuf, 111 Tex. 299, 233 S. W. 1095 (1921).
102 In addition to these five states, there are some 24 additional states where statutes specify the time of application under certain circumstances as equivalent to the time when jurisdiction may be said to attach. See note 84, supra. This makes a total of 29 states where the filing of the application may be said to confer jurisdiction, at least to the extent of determining priority over other courts of coordinate authority.
vides that “jurisdiction, once duly exercised over any matter by a Surrogate’s Court, excludes the subsequent exercise of jurisdiction by another Surrogate’s Court over the same matter. . . .” It was held at a very early date under this statute that the presentation of a petition for probate, alleging residence of the decedent within the county, gives exclusive jurisdiction to try the question of residence, of which the court cannot be deprived by subsequent proceedings in the surrogate’s court of another county.\textsuperscript{103} In addition, statutes exist in twenty-eight states explicitly giving priority in given circumstances to the court in which an application for letters is first filed.

The second view also has its adherents. Delaware,\textsuperscript{104} Indiana,\textsuperscript{105} Nebraska,\textsuperscript{106} New Hampshire,\textsuperscript{107} Ohio,\textsuperscript{108} Oklahoma,\textsuperscript{109} Rhode Island\textsuperscript{110} and South Carolina\textsuperscript{111} do not regard their probate courts as acquiring jurisdiction without some positive action, such as acting on an application by granting letters. Such judicial order or judgment, they say, is the only means by which the court may grasp jurisdiction.\textsuperscript{112} A dozen applications may be pending in as many different courts, but jurisdiction exists in none until acted upon. Thus in an early California case it was said that the statute in effect at that time did not contemplate the “presentation of a petition as the

\textsuperscript{103} Matter of Buckley, 41 Hun (N. Y.) 106 (1886). See REDFIELD, LAW AND PRACTICE OF SURROGATES’ COURTS IN NEW YORK (4th ed. 1890) 116.

\textsuperscript{104} Del. Rev. Code (1935) § 3807.

\textsuperscript{105} Ind. Stat. (Burns, 1933) § 6-302.


\textsuperscript{107} Tilton v. O’Conner, 68 N. H. 215, 44 A. 303 (1894).


\textsuperscript{109} Sewell v. Christison, County Judge, 114 Okla. 177, 245 P. 632 (1926). See also Jackson v. Haney, 166 Okla. 13, 25 P. (2d) 771 (1933), involving conflicting jurisdiction in the appointment of a guardian for a minor.

\textsuperscript{110} R. I. Gen. Laws (1938) c. 569, § 3.

\textsuperscript{111} Phoenix Bridge Co. v. Castleberry (C. C. A. 4th, 1904) 131 F. 175.

\textsuperscript{112} In the statutes of Delaware, Indiana and Nebraska, cited in notes 104, 105, and 106, supra, it is specifically provided that the administration first lawfully granted shall exclude the jurisdiction of every other court.
means of giving the Court jurisdiction," but as information to the court.113

In addition, statutes exist in Connecticut,114 Iowa,115 Maine,116 Massachusetts,117 Michigan,118 North Carolina,119 Vermont 120 and Wisconsin 121 to the effect that the court which shall first take cognizance of the administration of an estate by the commencement of proceedings shall be entitled to retain it to the exclusion of every other court. Thus far, these statutes have received no clear judicial construction as to just when proceedings are commenced.

In favor of the first rule it has been said to be fairer to predicate priority on the filing of the first petition, provided the respective applications for administration have not been made with such haste as to suggest some positive fraud or collusion. As said in a Texas case: 122

"The fairest and most reasonable test is priority in invoking the exercise of jurisdiction. . . . The date of an adjudica-

113 In the Matter of the Estate of Howard, 22 Cal. 395 at 398 (1863). However, the court here was discussing two statutes entirely dissimilar to those under consideration. The sole purpose of quoting from the opinion is to indicate the early conception of the California court as to the office of the petition for probate. Indeed the opinion indicated that a petition was solely for the purpose of indicating to the court a willingness on the part of the executor to accept his trust.
115 Iowa Code (1939) § 11824.
117 Mass. Ann. Laws (1932) c. 215, § 7. In addition to this section, another Massachusetts statute is unique in providing that "If it appears before final decree in any proceeding pending in a probate court that said proceeding was begun in the wrong county, said court may order the proceeding with all papers relating thereto to be removed to the probate court for the proper county, and it shall thereupon be entered and pending in the last mentioned court as if originally commenced therein, and all prior proceedings otherwise regularly taken shall thereupon be valid." Mass. Ann. Laws (1932) c. 215, § 8A.
121 Wis. Stat. (1943) § 253.04. Cf. § 311.01 which gives priority to the administration first legally granted.
122 Stewart v. Poinboeuf, 111 Tex. 299 at 305, 233 S. W. 1095 (1921).
tion on his application may be delayed by circumstances beyond the applicant's control, such as the number of causes on the court's docket or time taken by the court to render a decision. One ought not to lose his right to an adjudication, properly sought, because a clerk or sheriff is delayed in issuing or serving process duly applied for, nor because an earlier adjudication is secured from another court."

Such a rule makes the acquisition of jurisdiction independent of the speed with which two probate courts might otherwise move toward acquiring jurisdiction by granting letters sooner than they would in the ordinary course of events. Where such application is for domiciliary administration and predicated upon domicile, fraud or collusion, if it exists, may be corrected in most cases in the probate court itself or by appeal.123

If there is any weakness in the first view, it may be exemplified by supposing that the first of two courts in which application for letters has been filed, refuses to grant letters or otherwise proceed. The sudden cessation of a jurisdiction over the decedent's estate which the court says it never had, seems an anomaly. In answer it may be said that jurisdiction, or the potential power to assume jurisdiction, exists from the instant the application was filed, but the court terminates its jurisdiction and thus makes it possible for another court to take it up. This corresponds to the express statutory statement that proceedings may be commenced by the mere filing of a petition for probate or administration. Where such

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123 In addition to the remedy by appeal, the assumption of jurisdiction may always be questioned in the probate court directly, although the time for making such a direct attack varies in the different states. Kennedy v. Simmons, 308 Mass. 431, 32 N. E. (2d) 715 (1941) (at any time, by analogy of the common law and equity courts to correct their decrees by bill of review); In re Estate of Neely, 136 Me. 79, 1 A. (2d) 772 (1938) (even after appeal time); Eckelson v. Greene, 61 R. I. 394, 1 A. (2d) 117 (1938) (until the time for appeal has expired); Hotchkiss v. Ladd's Estate, 62 Vt. 209 (1890). Statutes in California and Maine make the grant of letters and assumption of jurisdiction final except on appeal, and not subject to collateral attack except for fraud. Cal. Prob. Code (Deering, 1941) § 302; Me. Rev. Stat. (1930) c. 75, § 16.
statutes exist, it cannot be denied that jurisdiction exists from the time the petition is filed.

The second view, based upon the doctrine of res judicata, has the support of history and of logical consistency. Under civil procedure two or more actions may pend between the same parties and involve the same issue. Ordinarily no serious harm results from the mere pendency of duplicate actions. The ultimate legal rights of the parties are not affected until final judgment. The same cannot be said of a probate proceeding, which is essentially a proceeding in rem. The rights of parties interested in the estate are not affected merely by the decree of final distribution; they are affected by every step taken in the proceeding. In consequence, the jurisdiction of the court must attach at the commencement of the proceeding in order to insure that the court which undertakes to supervise administration of the estate has the exclusive jurisdiction and power to make all necessary orders. Otherwise we witness an unseemly race between courts of coordinate jurisdiction and a species of competition completely unworthy of the judicial process. As was aptly said in a recent Oklahoma case: "To hold that the time of appointment determines jurisdiction would . . . promote mad races between courts of coordinate jurisdiction to see which could enter a final order first. This would tend to discourage that deliberation so essential to a determination of the rights of parties in judicial tribunals." 

In answer to the argument that the in rem character of the proceeding compels the conclusion that it is not initiated until the seizure of the res, two things may be said. First, this is
a question of venue and not of jurisdiction, and if it is more convenient to say that the proceeding is commenced by the filing of the petition no unyielding principle of jurisdiction prevents such a statute. Second, whatever may be said as to a proceeding quasi in rem, there is no rule of law that seizure of the res is always necessary in order for a court to acquire jurisdiction in a proceeding strictly in rem.\textsuperscript{126} The analogy of the admiralty proceeding is not and should not be followed in probate matters.

The provision of the Model Probate Code,\textsuperscript{127} following the language of the Minnesota and Kansas Probate Codes,\textsuperscript{128} has embodied the first view. It has not only expressed this view, but it has specifically provided what shall be done in other probate courts where proceedings have also been started. Such are to be stayed there pending a decision in the first court as to whether such proceedings are in a permissible county under the statute. If jurisdiction is assumed there, the second court, "after making and retaining a true copy of the entire file, shall transmit the original to the proper county." On the other hand, if the first court should decline to take jurisdiction, the second court becomes free to proceed.

Moreover, it is immaterial whether the proceedings first begun are "legal" or not. The question of domicile within the county, assets within the county, or other basis for ap-

\textsuperscript{126} Roller v. Holly, 176 U. S. 398, 20 S. Ct. 410 (1900). See also 2 Page, Wills, (3d ed. 1941) 38 where it is said:

"It is the presence of the thing within the state which confers jurisdiction in rem. It is sometimes said that the seizure of the thing is necessary; but this would seem to be taking a detail in the enforcement of the jurisdiction, which is quite necessary in the case of movable property but not so necessary in the case of immovable property, and turning it into a rule of jurisdiction. Fairness requires that some kind of notice be given so that those who have claims to the property may assert them in time. The due process clause of our constitution may make void or erroneous a decree which is rendered without such notice. It is not, however, the notice which gives the jurisdiction. It is the presence of the thing within the state."

\textsuperscript{127} See note 12, supra.

propriate venue, or whether the first county is one of several counties in which administration might have been begun, is left for final decision in the first court to which an application is presented. But that decision is not necessarily limited to the original decision of this court. It may be redetermined on appeal or in the probate court itself by motion to revoke the letters.\textsuperscript{129} By this means it is ordinarily possible for anyone to contest the first proceeding until a final conclusion is reached. But when the court in which proceedings are first filed renders a final decision that it has jurisdiction in the administration of the estate, that court is entitled to proceed, free from competition elsewhere in the state.\textsuperscript{130}

A Massachusetts statute\textsuperscript{131} permits a change of venue at any time before final decree if it appears that the proceeding was begun in the wrong county. Statutes in Arkansas\textsuperscript{132} are even broader, permitting removal of an administration from one county to another upon the petition of the personal representative or a majority of the heirs stating that the greater portion of the property is in such other county or that a majority of the heirs wish such removal. Such flexibility of venue for the administration of estates was not noted elsewhere, although a similar transfer of venue in guardianship proceedings exists in Minnesota.\textsuperscript{133} Such provisions as these, although isolated, reflect a tendency to adjust probate procedure to the interests of convenience.\textsuperscript{134}

\textsuperscript{129} See cases cited in note 123, supra.

\textsuperscript{130} See the Minnesota and Kansas statutes cited in note 128, supra.

\textsuperscript{131} Mass. Ann. Laws (1932) c. 215, § 8A.


\textsuperscript{133} Minn. Stat. (1941) § 525.57. See also Cal. Prob. Code (Deering, 1941) § 1603 which provides that a guardianship proceeding may be transferred to "any other county which at the time of such transfer would have jurisdiction to issue original letters in such proceeding." In the case of a testamentary trust Cal. Prob. Code (Deering, 1941) § 1128 provides for a transfer of the trust proceedings upon petition of the trustees or any interested party stating the reasons for such transfer. Presumably convenience alone would be sufficient.

\textsuperscript{134} The venue section of the Model Probate Code has been drafted to permit a change of venue and transfer of proceedings in the interest of convenience. See note 12, supra.