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Criminal Procedure—Venue—Perjury

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first requirement—*is the accused properly informed of the charge against him?*

Chief Justice Adair in his dissenting opinion sets forth an elaborate analysis of the information and comes to the conclusion that it sufficiently informed Hale of the charge against him. The essence of his argument is that under the Montana Code the legislature has provided the courts with the yardstick to measure the sufficiency of an information. Section 94-6401 states that the Code alone governs the form and sufficiency of criminal pleadings. In section 94-6410 the Code provides that words used in the information are given their common meaning except words and phrases defined by law, which are construed according to their legal meaning. Finally section 94-6412 lists the tests by which to determine the sufficiency of an information.[20] Regardless of the correctness of his conclusion the fact remains that he proceeded in the proper manner—an analysis of the information in the light of the Code provisions.

The intent of the legislature in enacting the above mentioned sections was clearly to do away with the technical and highly impractical requirements of sufficiency under the common law, and to substitute in their place much simpler tests. It is suggested, therefore, that the majority opinion in the instant case, in requiring a more complicated information, has taken a backward step in the progress toward more liberal application of the rules of criminal pleading and practice.

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CRIMINAL PROCEDURE—VENUE—PERJURY.—Defendant Rother was alleged to have signed a false affidavit in the presence of a notary public in Lake County, Montana, certifying that he was lawfully entitled to a state gasoline tax refund.[1] The State Board of Equalization, in Lewis and Clark County, received the affidavit through the mails. There was a fair inference that the defendant mailed the letter or gave it to another to be mailed in Missoula or Lake County. Upon prosecution for perjury in Lewis and Clark County the court directed a verdict for the defendant on the ground that the prosecution had failed to prove venue. On appeal to the Montana Supreme Court, *held,* affirmed. The crime of perjury is completed at the place where the perjurer parts with possession of the affidavit by deposit in the mails or delivery to an agent for mailing "with the intent that it be uttered or published as true." *State v. Rother,* 303 P.2d 393 (Mont. 1956) (Justices Adair and Bottomly dissenting).

It is fundamental that a crime is deemed committed in the county,

[20]"The indictment or information is sufficient, if it can be understood therefrom—

. . .

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

[1]REVISED CODES OF MONTANA, 1947, § 84-1818. All section numbers cited herein refer to the REVISED CODES OF MONTANA, 1947, unless noted otherwise.

state, or country where its object and purpose is completed.[2] Montana has also adopted this proposition in section 94-5602, which provides that where an offense is commenced in another state and consummated in Montana, the jurisdiction is in the county where the offense was consummated. This is true whether an innocent or guilty agent intervenes or not. Apparently the legislature intended to go even further in passing a double venue statute, stating that venue may be in either county or in any of the counties involved when the "acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties."[3] Cases involving the mails have generally reached the conclusion that the offense is completed upon receipt of the letter. In a case of embezzlement it was held that the crime could not be completed until the letter had arrived and exerted influence on the victim's mind.[4] Similarly, the United States Supreme Court, in an opinion by Justice Holmes, held that the crime of solicitation could not be complete until the letter purporting to solicit had reached its destination, as it might have miscarried or have been burned before it could accomplish its purpose.[5]

In the instant case, both the majority and minority opinions applied section 94-3809 to show where the offense was consummated. This statute provides:

> The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

The majority opinion believed that the words "any other person" could refer to anyone to whom the defendant chose to deliver the letter to be mailed or taken to the post office, whether post office employee or private person, and that the requisite consummation took place at the point of this delivery. The majority of the court has thus given the statute an extremely limited and literal interpretation without considering the policy and legislative intent behind section 94-5605 providing for double venue.

Many analogous statutes relating to such crimes as forgery,[6] libel[7] and counterfeiting coin[8] use the words "uttered," "published," "alters," or "passes" to show when an offense is deemed to be complete. Decisions of the Montana court under the forgery statutes have held that where a person uses the mails to complete his crime the venue is only at the place where the letter is received.[9] In a notable case a false statement was mailed in one county and addressed to the banking superintendent in another county. The court held that the crime was consummated in the second county and could have been tried in either county.[10]

[2]United States v. Thayer, 209 U.S. 39 (1908); State v. Tummons, 225 Mo. App. 429, 37 S.W.2d 499 (1931); *Ex parte* Lucas, 33 Okla. Crim. 407, 243 Pac. 990 (1926).
[3]R.C.M. 1947, § 94-5605.
[4]Regina v. Rogers, 14 Cox C. C. 22 (1877).
[5]United States v. Thayer, 209 U.S. 39 (1908).
[6]R.C.M. 1947, §§ 94-2001, 94-2006, 94-2007.
[7]R.C.M. 1947, § 94-2802.
[8]R.C.M. 1947, § 94-2008.
[9]State v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L.R.A. 775 (1893).
[10]State v. Cassill, 70 Mont. 433, 227 Pac. 49 (1924). The majority relied on this case to show that Montana recognizes both perjury and false swearing. Here, the offense was false swearing under a statute controlling banks, rather than under the general perjury statutes.

It is apparent that the decision in the instant case has caused the question of the venue of an offense to become uncertain. The majority's holding that the state must prove venue, and that the crime was consummated where the defendant relinquished possession of the affidavit, raises several important questions. May a defendant escape all liability for a crime against the state if the state is unable to prove the county where the relinquishment of possession took place when the instrument was in fact perjurious? It may be impossible for the state to establish where the defendant relinquished possession, particularly if he goes to any pains to hide his crime.[11]

If the defendant delivered the letter to another in New York to be mailed for him, and then received his refund upon returning to this state, would New York be likely to prosecute the case for Montana? The court in the principal case held that Lewis and Clark County was not the county in which the crime was consummated. Hence, this state would have no jurisdiction to prosecute in the hypothetical situation posed above, because both the jurisdictional statute, section 94-5602, and the double venue statute, section 94-5605, are dependent upon where the offense is deemed to be complete. Surely this was not the intent of the legislature.

Venue, requiring trial at the place where the crime was consummated, developed at the common law to prevent a defendant from incurring great expense and hardship by having to go a great distance for the purpose of defending a lawsuit.[12] Although there must be some rule governing the place of trial, some authorities believe that venue has only become a means of obstructing justice by requiring unnecessary expense, time and effort. In recent years a number of articles have called for a revision of the venue statutes.[13] It appears that some liberalization is needed. Four states have statutes providing that the failure of a defendant to attack venue improperly laid constitutes a waiver.[14] These states have made venue non-jurisdictional, which tends to eliminate appeals based on a failure to prove venue with the ultimate result of remanding or dismissing the complaint.

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[11]The state, in this situation, could have retained the envelopes in which the refund requests were mailed as prima facie evidence of venue. This would not appear to be practical, however, and in other situations this solution might be impossible.

[12]30 TEXAS L. REV. 547 (1952). Of course venue was originally based on the "concept that a jury of the vicinage was the source rather than the arbiter of the evidence." See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 367 (1947).

[13]Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307 (1951); 30 TEXAS L. REV. 547 (1952). See also Grouse, *A Critique of Canadian Criminal Legislation*, 12 CAN. B. REV. 545, 575 (1934), for a discussion of why Canada has eliminated venue in criminal procedure, and 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 273 (1883), for reference to England's elimination of venue requirements for indictable offenses.

[14]COLO. R. CIV. P. 12(h) (1941); IND. ANN. STAT. § 2-1011 (Burns 1946 Replacement); MO. REV. STAT. ANN. § 847.66 (1942); VA. CODE ANN. § 8-133 (1950).