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FEDERAL COURTS-RULE 20 OF FEDERAL RULES OF CRIMINAL PROCEDURE-CONSTITUTIONALITY

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FEDERAL COURTS—RULE 20 OF FEDERAL RULES OF CRIMINAL PROCEDURE—CONSTITUTIONALITY—One of the few real innovations in the Federal Rules of Civil Procedure¹ is incorporated in Rule 20 which provides that a defendant who is arrested in a district other than that in which the indictment has been returned may declare in writing his desire to plead guilty and waive trial in the district of the crime. In this event, with the approval of the United States Attornies for both districts, the clerk of the court to which the indictment was returned is authorized to forward the papers to the clerk of the court for the district in which the accused is held for disposition of the case. The purpose was to provide the defendant a means of avoiding the hardship often involved in returning to the district of the crime for trial. In a recent case² an indictment for forgery was returned into the district court for the district of South Dakota. The accused, having been arrested in Oregon, and having followed the procedure authorized by Rule 20, entered a plea of guilty in the district court for the district of Oregon. The court refused to accept the plea on the ground that it was without jurisdiction.

Venue in criminal cases was declared, in that decision, to be an essential part of the jurisdictional structure of the federal courts as

¹ 18 U.S.C.A. (Supp. 1947) following § 687, 54 Stat. L. 688 (1940).

² *United States v. Bink*, (D.C. Ore. 1947) 74 F. Supp. 603.

ordained by the Constitution. The court stated that neither Congress nor the Supreme Court, through its rule making power, could constitutionally confer jurisdiction to try a case upon a federal court in any state and district other than that in which the crime was committed. The purpose of this comment is to reexamine the applicable provisions of the fundamental law in order to determine whether this needed procedural reform must be abandoned after having been finally achieved. It is clear that the constitutionality of the Rules of Criminal Procedure is still an open question. In this respect they stand on the same ground as the Federal Rules of Civil Procedure, the promulgation of which has been held by the Supreme Court not to foreclose subsequent consideration of their validity.³

1. *The Fifth Amendment*

The constitutional prohibition against holding any person to answer for an infamous crime except on "presentment or indictment of a Grand Jury" has been interpreted to require that the indictment be returned in the state and district where the crime was allegedly committed.⁴ It seems clear, therefore, that any rule which authorized the return of an indictment in any other state and district would be invalid and an indictment so returned would confer no jurisdiction on a court of that district or any other. Similarly, there is no doubt that the federal court of the district where the crime was committed has no jurisdiction to proceed with trial until a proper indictment has been returned there.⁵ Since the application of Rule 20 is conditioned on the pendency of a valid indictment in the district where the crime was committed to serve as the basis of the prosecution in the district of arrest, it appears that the procedure authorized by the rule does not contravene the Fifth Amendment, unless it be assumed that this indictment is an absolute nullity in another judicial district so that any proceeding on it there amounts to a prosecution without any indictment. This assumption is not warranted by either the language of the Fifth Amendment or the purposes of the framers. The guarantee of prosecution by indictment was designed to protect the individual against ill-advised, uninformed and indefinite accusations of crime. The full measure of constitutional protection is afforded when a valid indictment has been returned,⁶ and such an indictment should be able to stand for the purposes of Rule 20

³ *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 66 S.Ct. 242 (1946).

⁴ *Beavers v. Henkel*, 194 U.S. 73, 24 S.Ct. 605 (1904).

⁵ This statement assumes that the accused demands his constitutional rights. Consideration of Rule 7 (b) of the Federal Rules of Criminal Procedure which authorizes proceeding by information when the accused in open court waives prosecution by indictment is not pertinent here. See *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781 (1887).

⁶ *Beavers v. Henkel*, 194 U.S. 73, 24 S.Ct. 605 (1904).

in any other judicial district without abridgment of the defendant's constitutional rights or any impairment of the jurisdiction of the court.

2. *The Sixth Amendment*

The Sixth Amendment declares that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." While the distinction does not always clearly appear,⁷ this provision preserves the ancient institution of the jury of the vicinage and relates to venue only in the practical sense that to employ a jury of the vicinage requires that venue be laid in the vicinage.⁸ If it be borne in mind that the aforementioned provision refers technically not to the place of trial but to the place from which the jury must be drawn, it will be clear that it imposes no limitation which would invalidate the procedural device provided by Rule 20. It may be conceded that if the accused asserts his constitutional right to a trial by a jury of the vicinage, he may not be tried in any district other than that in which the crime was committed since only there can such a jury be impaneled.⁹ Furthermore, the assertion of this right to prevent or avoid trial in another state and district goes to the jurisdiction of the court.¹⁰ It is well settled now, however, that the right to trial by jury may be waived by the accused when he enters a plea of not guilty;¹¹ and when the accused pleads guilty, he cannot claim that he has been denied the right to trial by jury.¹² Since the primary right created by this section of the Sixth Amendment is the right to trial by a jury of the vicinage and the right to be tried in the vicinage is a secondary and incidental concomitant thereof, it seems to follow as a logical necessity that if the primary right may be waived by the accused, the secondary right may also be waived. Thus the Sixth Amendment should present an obstacle to trial in a district other than that in which the crime was committed only when the accused has put material facts in issue by a plea of not guilty and has not waived his right to jury trial. Rule 20 applies only when the accused voluntarily enters a plea of guilty or indicates his desire to do so. The Advisory Committee in obvious deference to the requirements and guarantees of the Sixth Amendment incorporated in the rule a further provision that if

⁷ For example see *Weinberg v. United States*, (C.C.A. 2d, 1942) 126 F. (2d) 1004.

⁸ Blume, "The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue," 43 MICH. L. REV. 59 (1944).

⁹ *United States v. Lombardo*, 241 U.S. 73, 36 S.Ct. 508 (1916).

¹⁰ *Ibid.*

¹¹ *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826 (1904); *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253 (1930).

¹² *Coffey v. Noel*, (D.C. Va. 1926) 11 F. (2d) 399.

the defendant, after transfer of the indictment, pleads not guilty, the papers should be returned to the court in which the prosecution began for further proceedings. It is submitted, therefore, that Rule 20 is not invalidated by the Sixth Amendment, since it fully preserves all of the defendant's constitutional rights.

3. *The Venue Clause*

In Article III, section 2, clause 3, of the Constitution appears another guarantee of the right to trial by jury in criminal cases, and the only real venue clause: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." If Rule 20 is invalid, its invalidity would seem to stem from this provision; but a solution to this apparent impasse may lie in the answers given to two questions: (a) Is the procedure authorized by Rule 20 "a trial" within the meaning of Article III, section 2; and (2) Is the venue provision jurisdictional or does it merely confer a right on the accused?

While there is no doubt that the proceedings and pronouncement of judgment upon a plea of guilty might be considered a trial,¹³ a narrower definition of the term recommends itself where the validity of a needed procedural reform is at stake. In the popular sense a trial may be said to be a testing or a process of determining some disputed matter. Thus, a trial may be defined as that proceeding in court whereby material facts are put in issue by the defendant's plea of not guilty for determination by a jury. Mr. Justice Story wrote in *United States v. Curtis*: "If upon the arraignment the prisoner pleads guilty, there can be no trial at all; for there remains no fact to be tried . . . and nothing remains but to pass the proper judgment of the law upon the premises."¹⁴ This opinion of the eminent jurist, whose proximity to the constitutional framers has given his words added weight, is supported by numerous state authorities which limit use of the term "trial" to the proceedings in which a jury is involved, excluding the preliminary matters such as arraignment and also the final step of pronouncing judgment.¹⁵ If the term trial is thus defined and limited, there is clearly no abridgment of the venue provision when the accused voluntarily enters a plea of guilty and is sentenced in a state and district other than that in which the crime was committed.

¹³ *People ex rel. Burke v. Fox*, 134 N.Y.S. 642, 150 App. Div. 114 (1912), holding that conviction upon a plea of guilty is as much a trial as conviction upon jury's verdict as to contested facts.

¹⁴ 25 Fed. Cas. 726 at 727 (1826).

¹⁵ *Hunnell v. State*, 86 Ind. 431 (1882); *Commonwealth v. Soderquest*, 183 Mass. 199, 66 N.E. 801 (1903); *Byers v. State*, 105 Ala. 31, 16 S. 716 (1894); *Reed v. State*, 147 Ind. 41, 46 N.E. 135 (1897); *Ex parte Dawson*, 20 Idaho 178, 117 P. 696 (1911).

In regard to the second question there is no clear cut decision of the Supreme Court, and other federal courts are in apparent conflict. Unlike the Sixth Amendment, which gives a primary right to trial by jury and only a secondary and incidental right to have the venue laid in any particular place, Article III, section 2 guarantees jury trial in criminal cases and then declares the venue in such form that there can be no doubt that the latter provision is equal to and not dependent upon the former. Whereas the Sixth Amendment declares that "the accused shall enjoy the right . . .," Article III, section 2 supports the two provisions with the categorical "shall be." Are we to conclude then that although the right to jury trial under both provisions may be waived by the accused,¹⁶ the independent venue provision of Article III is mandatory and jurisdictional, unaffected by the waiver elsewhere applicable?

In *Ventimiglia v. Aderhold*,¹⁷ there was a petition for a writ of habeas corpus by a prisoner who had been convicted in the District of Ohio under the National Motor Vehicle Theft Act¹⁸ on an indictment charging the unlawful sale of a car in Pennsylvania. The report does not indicate the plea entered by the accused. Holding that under Article III, section 2 and the Sixth Amendment the accused could be tried only in the district where the crime charged was committed, and that a trial and conviction elsewhere were void for lack of jurisdiction, the court granted the writ of habeas corpus. On the other hand, it was held in *Gowling v. United States*¹⁹ that an objection to the venue not raised until after conviction comes too late. This holding implies that venue is non-jurisdictional, but confers a right on the accused which he may lose by failing to object to its infringement. A clear holding on the point in question is found in *Hagner v. United States*.²⁰ The defendants had appeared in court represented by counsel and entered a plea of not guilty. They raised no objection to the court's jurisdiction but went to trial on the indictment which charged an offense against the laws of the United States of a class over which the court had jurisdiction. On appeal the judgment was attacked on the ground that the court lacked jurisdiction because the indictment did not charge a crime committed in the District of Columbia. Judge Groner, in holding that the venue provision of Article III, section 2 was non-jurisdictional in that it conferred a right which had been waived by the accused, said:

"If . . . a person charged with crime may forego a jury trial by agreeing to waive a jury, it would, we think, be difficult to

¹⁶ *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253 (1930).

¹⁷ (D.C. Ga. 1931) 51 F. (2d) 308.

¹⁸ 18 U.S.C. (1940) § 408, 41 Stat. L. 324 (1919).

¹⁹ *Gowling v. United States*, (C.C.A. 6th, 1933) 64 F. (2d) 796.

²⁰ (App. D.C. 1931) 54 F. (2d) 446.

sustain the view that he may not also in the same manner waive the provision in the same article with relation to the place of trial. Logically it seems to us to follow that both are in the same category. Whatever sanctity growing out of established custom obtains with relation to the trial of a defendant in the vicinage of the crime obtains with equal force with relation to the right to trial by jury, for it was declared as a fundamental principle of the common law in Magna Charta that a person charged with crime should not be convicted except by unanimous verdict of a jury, and this principle of the common law was brought from their old into their new homes by the colonists who first settled this country, but the rule of the common law is expressly rejected in the Patton Case [281 U.S. 276, 50 S.Ct. 253] as no longer justified by modern conditions."²¹

The Court also relied on the analogy to the venue provision for civil actions found in the Judiciary Act which the Supreme Court has held subject to waiver by appearance and plea to the merits.²² These are the federal authorities. In the state courts there is a considerable body of authority holding with the *Hagner* case that constitutional and statutory provisions to the effect that the accused shall have a right to trial by jury of the vicinage and that the venue shall be laid in the county where the crime was allegedly committed are guarantees of rights which may be waived by failing to object to the court's jurisdiction and contesting the case on the merits.²³

The trend of authority is away from holding constitutional and statutory venue provisions jurisdictional and toward the view that they confer important rights on the accused which may nevertheless be waived. On the true nature of the venue clause of Article III, section 2, there is no clear statement by the Supreme Court, but in the light of decisions such as *Patton v. United States* it would seem that a non-jurisdictional approach will be adopted. Considerations of convenience and economy in the efficient administration of the criminal law in federal courts strongly recommend it. It would seem, therefore, that when the accused under Rule 20 enters a plea of guilty in the federal court for the district in which he was arrested, he has effectively waived his venue right, and no constitutional limitation impairs the jurisdiction of the court to pronounce judgment on the plea.

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²¹ Id. at 448.

²² In re Moore, 209 U.S. 490, 28 S.Ct. 585 (1908).

²³ In re Mote, 98 Kan. 804, 160 P. 223 (1916); *State v. Crinklaw*, 40 Neb. 759, 59 N.W. 370 (1894); *State v. Browning*, 70 S.C. 466, 50 S.E. 185 (1904); *Lightfoot v. Commonwealth*, 80 Ky. 516 (1882).