

CONSTITUTIONAL LIMITATIONS ON THE POWER OF THE MISSOURI LEGISLATURE TO PROVIDE FOR VENUE IN CRIMINAL CASES

FRANK W. MILLER†

INTRODUCTION*

Like all public law, the law of crimes and of the procedure for the trial of them comes in three layers—constitutional, legislative and judge-made. The rules that determine whether one accused of a particular offense against the substantive criminal law can be tried in a particular Missouri county present an interesting, if sometimes perplexing, picture of the relationship between the three layers in a relatively narrow area, one compact enough to permit study in depth.

Although the exact status of the venue rules at any given point in the common law development is not entirely free from doubt, it has often been said that crimes were treated as local for venue purposes.¹ Whether this meant that every essential part of a crime had to occur in a particular county in order for the grand jury of that county to return a valid indictment is also not entirely free from question, but that requirement has frequently been asserted.² If true, this meant that a crime whose constituent elements occurred in different counties could be prosecuted in none of them, and that conclusion has been

† Professor of Law, Washington University School of Law.

* I wish to take this opportunity to express my appreciation to Mr. Moses Harrison and Mr. Harold Satz, third year students in the School of Law, for preliminary research efforts in connection with the article. My greatest debt is to my colleague, Arno C. Becht, who read the manuscript and contributed innumerable valuable suggestions, editorial and otherwise. The responsibility is, of course, mine.

1. E.g., 1 Russell, *A Treatise on Crimes and Misdemeanors* 27 (8th ed., Ross & McClure 1923), states that the only non-local common law crime was larceny.

2. "And therefore at the common law, if a man had died in one county of a stroke received in another, it seems to have been the more general opinion, that regularly the homicide was indictable in neither of them, because the offense was not complete in either, and no grand jury could inquire of what happened out of their own county." 2 Hawkins, *Pleas of the Crown* 301-02 (8th ed., Curwood 1824). And see preamble to 2 and 3 Edw. 6, c. 24 (1547). Compare, 1 East, *Pleas of the Crown* 361 (1803): "Where the stroke and death are in different counties, it was doubtful at common law whether the offender could be indicted at all, the offence not being complete in either; though the more common opinion was, that he might be indicted where the stroke was given; . . ." East goes on to refer in a note, however, to the preamble to 2 and 3 Edw. 6, c. 24.

reached by many of the text-writers.³ It is certain, on the other hand, that courts assert some power to determine which elements of a crime are "essential" ones. The essential part of the course of criminal conduct is sometimes described as its "gist." If every crime has a "gist" or "kernel," and if that part of it which constitutes the "gist" can only be committed in one place, it seems obvious that the place where the "gist" occurs is the proper place of trial.⁴ This is not to say that all courts agree precisely what constitutes the gist of each crime,⁵ nor to deny that it is sometimes difficult to *prove* where the conduct constituting the gist of the crime actually occurred.

To the extent that courts indulge in fictions of this sort, it seems clear that the danger that there might be a crime without a situs for venue purposes—at least where all the facts are known—is not too great. Perhaps the most accurate general statement of the situation is that

At common law the jurisdiction of English Courts to try persons accused of crime is regulated by the following rules:

1. . . .

2. Indictments for crimes committed within the realm could be found and tried only by juries summoned from the county, liberty, borough, or other judicial area within

3. See note 2 supra.; 1 Chitty, A Practical Treatise on the Criminal Law *177-78 (4th Am. ed. 1841). It has also been asserted that this rule was applied with less rigor in the case of misdemeanors. See Bruce, J., concurring in *The Queen v. Ellis*, [1898] 1 Q.B. 230, 242. 1 Russell, op. cit. supra note 1, at 20 says: "It seems to have been established as a common-law rule that a misdemeanor committed partly in one county and partly in another could be tried in either county."

4. See, e.g., the reasoning of Wills, J., in *The Queen v. Ellis*, supra note 3, at 237:

The making of the false pretences is antecedent to, and not a part of, the obtaining the goods. It is a material circumstance, because it stamps the illegality of the obtaining the goods. The *gist and kernel of the offence* is the obtaining the goods by improper means, not in using the improper means whereby goods were obtained, *and there was therefore an entire offence within the one county*, though the circumstance which stamped it with illegality took place beyond the jurisdiction. (Emphasis added.)

The rule thus announced will be referred to hereafter as the "gist rule."

5. See Model Penal Code § 1.03, comment (Tent. Draft No. 5, 1956):

At common law a prosecution could not be brought except for an offense the "gist" of which occurred within the prosecuting jurisdiction. It was, however, proper to look to acts occurring outside to determine the nature of the offense. Literally applied, the common law rule meant that an offense was not subject to prosecution in more than one jurisdiction. It thus avoided the problem of multiple conviction or punishment in different jurisdictions for the same offense. . . . The difficulty came in determining what constituted the "gist" of the offense.

which the crime *or an integral part of it* was alleged to have been committed. . . .⁶ (Emphasis added.)

The statement takes into account the various fictions used by the courts to solve the problem of venue where the crime was partly committed in one judicial district and partly in another, although it does not purport to define the phrase "an integral part of it." In any event, a study of the Missouri cases, as will become clear in the course of this article, reveals that the Missouri courts have assumed implicitly the existence of a common law rule for determining venue which can accurately be described as the "gist" rule.

Each constitution of the State of Missouri has provided that one accused of crime is entitled to be tried where the crime was committed. That mandate is clearly stated in article I, section 18 (a) of the Constitution of 1945 in the same language which appeared in the Constitution of 1875, its immediate predecessor:

[I]n criminal prosecutions the accused shall have the right to . . . a speedy, public trial by an impartial jury of the county.⁷

The Constitutions of 1820⁸ and 1865⁹ gave the accused the right "to a speedy trial by an impartial jury of the *vicinage*,"¹⁰ but there is no suggestion in the Missouri cases that the shift from "vicinage" to "county" changed the rights of the accused.¹¹

Furthermore, the first two constitutions¹² provided, in effect, that criminal proceedings must be instituted only by indictment, and the third¹³ that indictment was the exclusive accusatory process available in felony cases, though not in misdemeanor cases. These provisions were ultimately interpreted by the Missouri courts as indirect man-

6. 1 Russell, *op. cit. supra* note 1, at 20.

7. Mo. Const. art. I, § 18(a); Mo. Const. art. II, § 22 (1875). From the language alone, it might be argued that the "county" referred to is the one where the indictment is returned or information filed, regardless of where the criminal conduct occurred. That contention seems never to have been seriously advanced in Missouri, and, of course, could be easily refuted historically. See the full discussion in Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59 (1944).

8. Mo. Const. art. XIII, § 9 (1820).

9. Mo. Const. art. I, § 18 (1865).

10. Emphasis added.

11. Professor Blume has suggested in another context that the use of the word "county" in the constitutions of states admitted well after the original thirteen, in contrast to the use of the word "vicinage" in those of many of the first states, led to different interpretations of the extent of constitutional limitations on legislative power to solve venue problems. Blume, *supra* note 7.

12. Mo. Const. art. XIII, § 14 (1820); Mo. Const. art. I, § 24 (1865).

13. Mo. Const. art. II, § 12 (1875). On November 6, 1900, the Constitution of 1875 was amended to permit institution of both felony and misdemeanor prosecutions by information as well as by indictment.

dates that the trial must be in the county where the crime was committed, as we shall see.¹⁴ Although Missouri constitutions have, since 1900, authorized the institution of both felony and misdemeanor prosecutions by either indictment or information,¹⁵ the earlier decisions which utilized the indictment requirement to buttress, if not bottom, the right to be tried in the county where the crime was committed,¹⁶ have still been treated by the Missouri court as providing additional reasons for interpreting the more recent constitutions as continuing to impose such a requirement.¹⁷

The purpose of this study is to define the right to trial in the county where the crime was committed, and, more significantly, to determine the precise extent to which the constitutional provisions which grant that right operate as a limitation on the legislative power to provide for venue in certain kinds of cases which present unusual practical difficulties.

It is analytically convenient—and, I believe, factually accurate—to establish three mutually exclusive categories of venue cases:

1. Those in which there is no doubt where every part of the total course of criminal conduct occurred, and where every part occurred in a single county.
2. Those in which there is doubt—perhaps not resolvable under ordinary burden of proof rules—where some significant part of the total course of criminal conduct occurred.
3. Those in which there is no doubt where every part of the total course of criminal conduct occurred, but where—at least according to some rational view of the matter—some significant part occurred in one county and another significant part occurred in another county.

To anticipate the conclusion reached in this article, it appears that the constitutional mandate seriously limits the scope of legislative power in classes 1 and 2, but not in class 3. To discuss classes 1 and 2 together will contribute to clarity and understanding, so that will be done first.

HISTORICAL DEVELOPMENT

Missouri's earliest constitution contained two provisions arguably relevant to the problem at hand. Article 13, section 9, provided for a "trial by an impartial jury of the vicinage,"¹⁸ and article 13, section

14. See discussion in text at notes 32-45 *infra*.

15. Mo. Const. art. II, § 12 (1875) as amended effective November 6, 1900; Mo. Const. art. I, § 17.

16. *Ex parte Slater*, 72 Mo. 102 (1880), the leading case, and other cases following the *Slater* case, are discussed *infra*, text at notes 36-70.

17. The leading case is *State v. Anderson*, 191 Mo. 134, 90 S.W. 95 (1905), discussed *infra*, notes 65-71.

18. Mo. Const. art. XIII, § 9 (1820).

14, forbade proceeding by information.¹⁹ In addition the Revised Statutes of 1845 contained several sections providing for venue when it was uncertain where the acts occurred,²⁰ as well as some sections providing specifically for trial in a county other than that in which some substantial part of the crime was admittedly committed.²¹

In the earliest case relevant to this study, one Steerman stole property on board a riverboat while making a Mississippi River voyage from Pike County to St. Louis County. His conviction in St. Louis County for the larceny committed on the riverboat somewhere in the course of the voyage, but not necessarily while the boat was in waters abutting on the shore of St. Louis County, was based on the following statute:

When any offence shall have been committed within this state on board of any vessel in the course of any voyage or trip, an indictment for the same may be found, and a trial and conviction thereon had in any county, through which, or any part of which, such vessel shall be navigated in the course of the same voyage or trip, or in the county where such voyage or trip shall terminate, in the same manner, and with like effect, as in the county where the offence was committed.²²

In affirming the conviction, the Missouri Supreme Court said the common law principle clearly was that venue had to be proved as laid²³—in this instance in St. Louis County. But it held that the legislature was competent to change that principle, and had done so in many other situations.²⁴ The following facts should be noted: (1) the prosecution failed to prove that *any* of the acts constituting the crime of larceny occurred in the county of trial; (2) the prosecution was not based on the theory that bringing the fruits of the crime into the

19. Mo. Const. art. XIII, § 14 (1820).

20. Mo. Rev. Stat. c. 138, art. IV, §§ 6, 7 (1845).

21. Mo. Rev. Stat. c. 138, art. IV, §§ 9, 11; c. 47, art. VIII, § 4; c. 47, art. II, § 42 (1845), are illustrative.

22. Mo. Rev. Stat. c. 138, art. IV, § 6 (1845).

23. *Steerman v. State*, 10 Mo. 503 (1847).

24. *Id.* at 506:

This section is not the only anomaly in our criminal code, as for instance, the receiver of personal property that shall have been feloniously stolen, taken or embezzled, may be indicted, tried and convicted, in any court in this State, where he received or had such property, no matter where the theft was committed. So also, where a mortal wound shall have been inflicted in one county, and death ensues in another, the indictment, trial, &c., may be had in either county; and where the wound is inflicted in another State, and death takes place in this State, the indictment may be found in the county where the death happened. And a number of other similar statutory provisions might be cited, passed by the law-making power of the State, *and which we apprehend it was fully competent for them to pass.* (Emphasis added.)

county constituted a "fresh taking";²⁵ (3) the indictment was returned by a grand jury of a county in which it was not proved that the crime was committed; (4) the Constitution of 1820 required, in effect, that prosecution be instituted by indictment, since it expressly forbade beginning a prosecution by information;²⁶ and (5) that the same constitution gave defendant a right to be tried by a jury of the vicinage.²⁷ Although neither of the constitutional provisions referred to were mentioned by the court in its opinion, it is inconceivable that the judges were not aware of them. Thus, those judges saw no constitutional objection to a statute which permitted indictment for and trial of an offense in a county where no part of the offense may have been committed. Not only was this true when the locale of the crime was uncertain and difficult of proof, but in dicta the court approved other venue-laying statutes which were contrary to the "gist" rule.²⁸

In *State v. Grable*,²⁹ while the newer Constitution of 1865 was in force, the court upheld a statute which provided that

Where there is a matter of doubt, in the opinion of the court, in which of two or more counties the offense was committed, the court of either county in which the indictment is found shall have jurisdiction of the offense.³⁰

Certainly, then, the early Missouri cases show no unwillingness on the part of the courts to permit legislative change of the gist rule,

25. See *infra*, text at notes 72-78, for a discussion of the common law exception which permitted trial for larceny in any county into which the thief had transported the goods.

26. Mo. Const. art. XIII, § 14 (1820).

27. Mo. Const. art. XIII, § 9 (1820).

28. See note 24 *supra*.

29. 46 Mo. 350 (1870). Again the court did not refer to the putatively applicable constitutional provisions, but, instead, said of the instruction to the jury that "as the court was in doubt as to which of the counties mentioned in the testimony the offense was committed in, the jury should proceed as though the offense was committed in Buchanan County, where the indictment was found," and that "there is nothing here to prejudice the rights of the defendant." *Id.* at 353.

30. Mo. Gen. Stat. c. 211, § 8 (1865). In addition to the provisions with respect to place of trial (Mo. Const. art. I, § 18 (1865)) and the forbidding of prosecutions by information (Mo. Const. art. I, § 24 (1865)), the constitution in force at the time also empowered the legislature to provide by law for the indictment and trial of persons charged with felonies in a county other than that in which the crime was committed, if an impartial grand or petit jury could not be obtained in the latter county (Mo. Const. art. XI, § 12 (1865)). This provision was not referred to in the case, but in later cases its existence at the time of the Grable case was to assume all-encompassing importance. The legislature had passed an effectuating statute which was in force at the time of the decision in Grable. Mo. Gen. Stat. c. 212, § 42 (1865), discussed *infra*, text at note 29.

and they concede to the legislature the power necessary to provide for cases in which the usual burden of proving venue could not be satisfied, or in which it was clear that no part of the crime occurred in the county of trial.

Subsequent to *Steerman and Grable*, Missouri adopted a new constitution, that of 1875. It contained three changes which have some bearing on our problem. First, it provided *affirmatively* that all felony prosecutions should be begun by indictment, instead of negatively by denying the power to proceed by information;³¹ second, it granted one accused of crime the right to a trial by a jury of the "county" instead of a jury of the "vicinage";³² third, it did not contain the express provision found in the Constitution of 1865 empowering the legislature to provide for indictment and trial in a county other than that in which the crime was committed when an impartial grand jury could not be had there.³³

Under the power granted by that provision of the Constitution of 1865, or, at least, in conformity to it,³⁴ the legislature had enacted the following statute:

Whenever an offense has been committed in any county, and the grand jury of the county has considered the matter, and failed to find an indictment against the offender, and the same is certified to the judge of the same circuit from the foreman of the grand jury or the clerk of the circuit court of such county, and the judge is satisfied that an impartial grand jury cannot be had in the county where the offense was committed, he shall order the examination of the offense to be had in some county adjacent to the said county, where he believes no such cause exists, but no investigation can be ordered by him, except in one county; and, where an indictment is found in such county, a trial before a petit jury shall be had in the county where found, unless removed on application of the defendant.³⁵

In *Ex parte Slater*,³⁶ the grand jury of Clark County failed to return a true bill against petitioner, who was suspected of murder committed in Clark County. Deciding that this was due to the impossibility of obtaining an impartial grand jury in Clark County, the circuit judge assembled a grand jury in Scotland County, pursuant to the above statute. That grand jury returned an indictment charging petitioner

31. Mo. Const. art. II, § 12 (1875).

32. Mo. Const. art. II, § 22 (1875).

33. Mo. Const. art. XI, § 12 (1865). See note 30 supra.

34. I have been unable to trace the precise origin of the statute cited in the following footnote, but it was in force and appeared in the General Statutes of 1865, although I cannot find it in the Revised Statutes of 1855.

35. Mo. Gen. Stat. c. 212, § 42 (1865).

36. 72 Mo. 102 (1880).

with murder committed in Clark County. The petitioner was imprisoned under the indictment and sought habeas corpus.

In ordering his discharge, the Missouri Supreme Court held the authorizing statute invalid³⁷ on the following reasoning. The court said that under article 2, section 12 and article 2, section 22 of the Constitution of 1875, defendant was guaranteed two things pertinent to this inquiry: (1) the right to have any felony prosecution instituted by indictment, and (2) the right after indictment to a trial by an impartial jury of the county.³⁸ The procedure authorized by the statute violated the first of these rights because of the meaning given to the word "indictment" in section 12 of article 22. This term, the court asserted, had a well-settled meaning at common law, and, since there was no indication on the part of the framers to depart from its common law meaning, that meaning controlled.³⁹ Quoting extensively from recognized texts,⁴⁰ but without citing a single case, the court stated that one of the attributes of an indictment at common law was that it had to be returned by a grand jury of the county where the offense was committed.⁴¹ This statute authorized a judge to impanel a grand jury which in turn was empowered to return an indictment charging an offense committed in another county. If the statute and the procedure under it were sanctioned, one could be deprived of his constitutional right to be prosecuted for a felony only by indictment, for the "indictment" returned by the grand jury of Scotland County would not be an "indictment" in the constitutional sense.

The court buttressed its conclusion by pointing out that the Constitution of 1865 had specifically authorized the legislature to provide for this, arguing that the omission of a similar provision from the 1875 Constitution was clear evidence that its framers did not desire such power to be longer vested in the legislature.⁴² In addition, the court noted that no similar provision could be found in the Constitution of 1820, and from that fact inferred that the framers of the Constitution of 1865 felt the necessity of inserting such a provision if the legislature was to have the desired power.⁴³ In short, the inference was that the legislature had this power only during the period 1865 to 1875.

Again several facts are worthy of note. That no case, Missouri or foreign, was cited by the court in its opinion means that the court did

37. *Ibid.*

38. *Id.* at 105-06.

39. *Id.* at 106.

40. *Id.* at 106-07. The texts quoted from are Bacon's Abridgement, Hawkins' Pleas of the Crown, and Bishop's Criminal Procedure.

41. *Ibid.*

42. *Id.* at 109. See note 30 *supra*.

43. *Ibid.*

not face, or at least did not see fit to discuss, the difficulties raised by the earlier cases discussed above—*Steerman*⁴⁴ and *Grable*.⁴⁵ Yet those cases were decided under constitutions which, by forbidding felony prosecutions by information, also required them to be begun by indictment. Furthermore, the Constitution of 1820, in force when *Steerman* was decided, contained no provision empowering the legislature to vary the venue in certain situations as was the case when *Grable* was decided. In fact the court in *Slater* assumed, or at least stated that the framers of the Constitution of 1865 assumed, that the legislature was without such power prior to 1865. Notice should also be taken of the fact that the court, probably because the issue arose after indictment but prior to trial, did not base its decision on the place of trial provision, but rather on the indictment provision. It nevertheless did invalidate the entire statute without effort to distinguish the two facets of it.

Yet, when all this is said, one remains curious. The nominal reasons seem unsatisfactory. Why does "indictment" apparently mean something different—and, at that, something conforming more closely to early common law principles⁴⁶—in 1880 than it did in 1847 and 1870? Why were the earlier cases, which were cited by the attorney-general,⁴⁷ ignored in the opinion? Can all this be due to the fact that some language which appeared in the Constitution of 1865—which was apparently thought unnecessary by the *Steerman* court—was deleted when the new constitution was promulgated? An affirmative answer seems unlikely, especially in view of the fact that the reasoning of *Slater* would necessarily have led to a different result in the earlier cases, a result the court has since reached.⁴⁸

What, then, can be offered by way of explanation? Speculation suggests that the argument based on the characteristics of the common law indictment simply had not been urged on the court in the early cases, and that *Slater* is the result of a brilliant piece of advocacy by the defense attorney. It must be granted, of course, that the person-

44. *Steerman v. State*, 10 Mo. 503 (1847).

45. *State v. Grable*, 46 Mo. 350 (1870).

46. It would appear that even if the common law rule required that all of the facts occur in the county which returned the grand jury, long before 1607 this rule was changed in particular cases by various English statutes. Thus 33 Hen. 8, c. 23 (1541); 2 & 3 Edw. 6, c. 24 (1547) varied the common law venue rules. Yet it cannot be seriously contended that indictments returned under circumstances authorized by them were not common law indictments, in any meaningful sense. 1607 is significant, of course, because Missouri's common law is that of that year including statutes in force at the time. Mo. Ann. Stat. § 1.010 (Vernon 1949).

47. *Ex parte Slater*, 72 Mo. 102, 103-04 (1880).

48. See text supported by notes 65-71 *infra*.

nel of the court changed in the interim between *Steerman* and *Slater*. Furthermore, the statutes sustained in the early cases were all aimed at situations in which there might well be substantial doubt where the offense was committed, although precise proof that it was committed in a county other than that in which the indictment was returned and trial had would not have influenced the result in *Steerman*. In any event *Slater* immediately became, and has remained, the landmark case in Missouri with respect to venue in criminal cases. Shortly after it was decided, a whole series of statutes was invalidated on the strength of the principle it announced.

First came *Petition of McDonald*.⁴⁹ Petitioner and his son allegedly killed X in Ray County but within five hundred yards of Caldwell County. The grand jury of Ray County returned a true bill against the son, but not against the petitioner. While the son was in jail in Ray County, a grand jury of Caldwell County indicted the son and petitioner for murder, the son as a principal in the first degree, and petitioner as a principal in the second degree. The indictment stated explicitly that the murder was committed in Ray County, but within five hundred yards of Caldwell County. In discharging petitioner on habeas corpus, the court held invalid the following statute, which purported to authorize the indictment.

When an offense shall be committed on the boundary of two counties, or within five hundred yards of such boundary, or where the person committing the offense shall be on one side, and the injury be done on the other side of such boundary, an examination thereof may be made and an indictment may be found, and a trial and conviction thereon had, in either of such counties.⁵⁰

The opinion uses precisely the reasoning of *Slater*. The court was faced with a further contention, however, which would not have been appropriate in *Slater*. It was argued that the section of the statutes under consideration should be interpreted as providing merely a rule of evidence, and so be held valid.⁵¹ In rejecting that contention the court made two points. (1) Immediately following the section under discussion, in the Revised Statutes of 1879, was the following section:

Where there is a matter of doubt, in the opinion of the court, in which of two or more counties the offense was committed, the court of either in which the indictment was found, shall have jurisdiction of the offence.⁵²

The court said, correctly, that the latter section was the one designed to provide a rule of evidence in cases where the precise place of crime

49. 19 Mo. App. 370 (1885).

50. Mo. Rev. Stat. § 1697 (1879).

51. 19 Mo. App. at 376.

52. Mo. Rev. Stat. § 1698 (1879).

was in doubt, and that to attribute the same purpose to the section under consideration would be to create a superfluity.⁵³ (2) But, even if the instant section were to be given that meaning, it would be essential that the indictment should allege that the offense was committed in Caldwell County, which it did not, again a correct ruling.⁵⁴

The state also argued⁵⁵ that the reasoning invalidating the instant section would also necessitate a later ruling that the section under consideration in *Steerman* was invalid.⁵⁶ The court's answer was (a) the question was not before it for decision,⁵⁷ and (b) in any event, common law precedent could probably be found for a different handling of cases involving offenses committed on navigable waters, although it was doubtful whether the same could be said of offenses committed on railroad trains.⁵⁸ As we shall see, later events demonstrated the accuracy of the state's prediction.⁵⁹

The following points should be noticed: the court assumed that a statute providing merely a rule of evidence in cases of doubt would be valid, and suggested that an allegation that the offense was committed in a county other than that of the grand jury would always be fatal. Yet, if the offense is alleged in the indictment to have been committed in the grand jury's county, evidence raising a doubt about its situs might not necessarily prove fatal.

*State v. Hatch*⁶⁰ tested the validity of the *McDonald* assumption that section 1698,⁶¹ giving jurisdiction, in cases of doubt, to the county in which the indictment was returned, was constitutional. Defendant was the general collecting agent for a St. Louis firm which sold mowers and reapers throughout the state. He resided in Sedalia, but by the terms of his contract was obliged to account in St. Louis, either in person or by mail, for collections. After making collections in several counties in western Missouri, he represented in person to his employers that he had made no collections, and, on the strength of that representation, drew part of what was then due on his salary. In fact he had appropriated the collected money by using it in grain speculations in Sedalia. Charged in St. Louis with embezzlement of the money appropriated in Sedalia, defendant secured a reversal of his conviction on the ground that the crime of embezzlement was com-

53. 19 Mo. App. at 376.

54. *Id.* at 377.

55. *Id.* at 379.

56. See discussion in text supported by notes 22-28 *supra*, and notes 66-71 *infra*.

57. 19 Mo. App. at 379.

58. *Ibid.*

59. See text at notes 66-71 *infra*.

60. 91 Mo. 568, 4 S.W. 502 (1887).

61. Mo. Rev. Stat. § 1698 (1879).

mitted not in St. Louis, but in Sedalia. The court in a brief opinion held the "in doubt" section invalid, relying on the *Slater* principle.⁶² Again, several points must be observed. Initially, it seems clear that this is not the kind of "doubt" contemplated by the section under consideration. Here the doubt was not about where any act took place, but whether the rule put the *situs* of the crime of embezzlement (1) where the property was converted, or (2) where the duty to account was breached. Certainly this section was never intended to resolve doubts when prosecuting attorneys or judges were uncertain what the Missouri Supreme Court would hold to be the gist of embezzlement, or any other offense. Rather it was intended, and this seems obvious, to apply in cases in which the evidence left it doubtful where the acts constituting the course of criminal conduct occurred. The court, then, should not have passed upon the validity of the statute at all, in spite of the fact that it was urged upon the court by the attorney general as an additional reason for sustaining the conviction.⁶³

Because the attorney general urged the statute on the court as a modification of the gist rule, which required trial in the county where "the essence" of the offense was committed,^{63a} it might be argued that the court treated that rule as one of constitutional law, which the legislature could not change. Although this is not an impossible interpretation of the case, I believe it to be an incorrect one. Instead it seems that the court did not regard the statute as an attempt to circumvent the gist rule but rather as one authorizing trial in a particular county when the evidence did not show where the conduct occurred. Whether this interpretation of the statute is correct is not nearly so crucial to this analysis as is the bare fact that the court chose to treat the statute as totally unrelated to the gist rule. Indeed, I must admit at this point that the validity of my conclusions depends upon the correctness of my interpretation of this important case,⁶⁴ which is, in short, that it did not convert the gist rule into

62. *State v. Hatch*, 91 Mo. 568, 569, 4 S.W. 502 (1887).

63. *Id.* at 569.

63a. See note 4 *supra*, and text supported thereby.

64. Similarly, it might be contended that two other cases established the "gist" rule (see text at note 6 *supra*) as one of constitutional law in this state. In *State v. McGraw*, 87 Mo. 161 (1885), defendant committed burglary and larceny in Clinton County, and brought the fruits of those crimes into Jackson County. His conviction of burglary in Jackson County was reversed, and § 1691 of the Revised Statutes of 1879 held unconstitutional insofar as it applied to a crime like burglary which involved no asportation element. That section was in the following form at the time McGraw was decided:

When property stolen in one county and brought into another, shall have been taken by larceny, burglary or robbery, the offender may be indicted, tried and convicted for such larceny, burglary or robbery, in the

one of constitutional law in Missouri, but implicitly accepted it as the common law rule in the absence of legislative change.

Finally came the sequel to *Slater*, which completed the elimination of the statutes designed to aid in the solution of cases where there was real doubt where the acts occurred, and which also extended the rule, previously applied only to indictments, to informations as well.⁶⁵ Defendant ran a gambling table on a riverboat plying between Missouri's north and south boundaries on the Mississippi River. The voyage terminated at the City of St. Louis. An information charging defendant with a misdemeanor was filed in the St. Louis Court of Criminal Corrections, which had jurisdiction to try misdemeanors committed in the City of St. Louis only. The information was filed under the same statute whose validity was sustained in the first of this line of cases, *Steerman*.⁶⁶ That section, it will be recalled, provided for indictment and trial of offenses committed aboard vessels⁶⁷—now extended to railroad trains⁶⁸—in any county through which the vessel or train passed on the particular trip, or where the trip terminated. It will also be recalled that the statute was sustained easily, indeed

county into which such stolen property was brought, in the same manner as if such larceny, burglary or robbery had been committed in that county.

Mo. Rev. Stat. § 1691 (1879).

In *State v. Smiley*, 98 Mo. 605, 12 S.W. 247 (1889), defendant was prosecuted for bigamy under a statute defining that offense as the entering into a second marriage by one having a husband or wife living, and providing further that:

An indictment for bigamy . . . may be found . . . in the county in which such . . . subsequent marriage . . . shall have taken place, *or in the county in which the offender may be apprehended.* (Emphasis added.)

Mo. Rev. Stat. § 1536 (1879).

The second marriage took place in Johnson County, but the indictment was returned by the grand jury of Madison County, where the defendant was apprehended but did not cohabit. The court held the procedure unconstitutional on the ground that no part of the crime of bigamy was committed in the county whose grand jury returned the indictment, relying on *Slater*.

Although detailed discussion and analysis of these two cases will be postponed (see text at notes 134-37 and 217-20 *infra*), it should be made clear here that their constitutionality could be sustained only if the court were to take the position that under the constitutional provisions we are considering, the legislature has power to lay venue in a county where *no* essential part of the crime was committed. That the Missouri Supreme Court is unwilling to take such a position is abundantly clear. It is also clear, however, that these two cases do not convert the "gist" rule into one of constitutional law in Missouri, for in them, *no* part of the crime was committed in the county of prosecution.

65. *State v. Anderson*, 191 Mo. 134, 90 S.W. 95 (1905).

66. *Steerman v. State*, 10 Mo. 503 (1847).

67. Mo. Rev. Stat. c. 138, art. IV, § 6 (1845).

68. Mo. Rev. Stat. § 2413 (1899).

without discussion, in *Steerman*,⁶⁹ and that dicta in *McDonald*⁷⁰ suggested that common law precedent could be found to sustain it.

But the prediction of counsel in *McDonald* came true: no longer did the legislature have the power to provide for cases in which the situs of the acts was in doubt. The reasoning of *Slater* was adopted in toto, and, furthermore, was extended to informations on the theory that

It is clear that under the constitutional provision a proceeding by information cannot be of any broader scope than that by indictment, and if an indictment must be returned by the grand jury of the county in which the offense was committed, it logically follows that the information must be lodged in the county in which the offense was committed.⁷¹

Thus the full gamut was run. From a clear recognition of legislative power to solve a difficult practical problem in administering criminal justice, the court steadily retreated, and ended by putting the problem beyond the competence of the legislature. In cases falling within the first of the categories, those in which there is no doubt where every part of the total course of criminal conduct occurred and where every part occurred in a single county, the legislature is without power to provide for venue in any different county. In cases falling within the second of the categories, those in which there is doubt—perhaps not resolvable under ordinary burden of proof rules—where some significant part of the total course of criminal conduct occurred, the defendant simply cannot be convicted if all the proper objections are made at the proper times.

LARCENY EXCEPTION

The great common law exception to the strict venue rules was that one could be indicted for and convicted of larceny in any county into which he brought the goods though he had stolen them elsewhere.⁷² That exception early became a part of Missouri's statutory law as well.⁷³

69. See discussion at notes 22-28 supra.

70. Petition of *McDonald*, 19 Mo. App. 370 (1885). See discussion at notes 49-59 supra.

71. *State v. Anderson*, 191 Mo. 134, 144, 90 S.W. 95, 99 (1905).

72. 2 *Hawkins, Pleas of the Crown* 302 (8th ed. Curwood, 1824); *Bishop, Criminal Procedure* 32 (3d ed. 1880); *Starkie, Criminal Pleading* 3 n.g (1st Am. ed. 1824); 1 *Russell*, op. cit. supra, note 1 at 27.

73. At this point recognition must be given the fact that there are two different situations which raise the problem. The first arises when the goods are stolen outside the state and brought into the state. The first statutory reference I have found to that situation is Mo. Rev. Stat. art. IX, § 3 (1835). In its present form, Mo. Ann. Stat. § 541.040 (Vernon Supp. 1957) provides:

In a series of cases upholding it, the court has, either as hold-

Every person who shall steal, or obtain by robbery, the property of another from any other state or country, and shall bring the same into this state, may be convicted and punished for stealing or robbery in the same manner as if the property had been feloniously stolen or taken in this state, and in any such case the stealing or robbery may be charged to have been committed, and every such person may be prosecuted in any county into or through which such stolen property shall be brought.

Whether, at common law, one could be prosecuted in England for larceny because he stole property elsewhere and brought it into the realm is doubtful. See 1 Bishop, *Criminal Law* §§ 136-42 (9th ed. 1923) for a full discussion of this problem. See 1 Russell, *A Treatise on Crimes and Misdemeanors*, 20, n.(e) (8th ed., Ross & McClure 1923), for a flat statement that the common law did not permit conviction in England in the circumstances under consideration. The Missouri cases are interesting. In those decided prior to Slater, the court recognized a conflict in other states about the common law rule, but simply held that the matter was settled in Missouri by the statute under consideration. *State v. Butler*, 67 Mo. 59 (1877); *State v. Williams and Howard*, 35 Mo. 229 (1864); *Hemmaker v. State*, 12 Mo. 453 (1849). The leading post-Slater case, *State v. Mintz*, 189 Mo. 268, 88 S.W. 12 (1905), was decided on exactly the same reasoning as was utilized in the pre-Slater cases. See also, *State v. Parker*, 301 Mo. 294, 256 S.W. 1040 (1923). It must be pointed out that the rationale of Slater would seem to demand resolution of the state of the common law authorities, but that was not done in this series of cases.

On the other hand, when goods stolen in one Missouri county are transported to another the court has always recognized the common law rule permitting trial in either county. *State v. Williams*, 147 Mo. 14, 47 S.W. 891 (1898); *State v. Smith*, 66 Mo. 61 (1877). In fact the earliest statute which I have been able to locate codifying the common law rule when the original theft occurred in a different county but within the state is Mo. Rev. Stat. c. 211, § 19 (1865). The earlier statute had provided that:

When property stolen in one county, and brought into another, shall have been taken by burglary or robbery, the offender may be indicted, tried and convicted for such burglary or robbery, in the county into which such stolen property was brought, in the same manner as if such burglary or robbery had been committed in that county.

Mo. Rev. Stat. art. IV, § 14 (1835).

It is significant that this statute did not cover the common law larceny situation, presumably because the legislature regarded it as unnecessary, but did attempt to extend the common law principle to robbery and burglary. The present statute is Mo. Ann. Stat. § 541.070 (Supp. 1957). It provides:

When property is stolen or taken by robbery in one county and brought into another the offender may be prosecuted for such stealing or robbery in the county into which such stolen property was brought in the same manner as if such stealing or robbery had been committed in that county.

It seems clear that if no constitutional obstacle exists when the theft occurs outside the state, none can exist when the theft occurs within the state but in a county other than that of trial. Certainly either the "fresh asportation" or the "continuing offense" theory would support such a conclusion.

In *Mintz*, *supra*, at 292, 88 S.W. at 20, however, the court relied in part on

ing or in dictum, advanced four principal reasons:⁷⁴ (1) the common law recognized such an exception,⁷⁵ and presumably the indictment requirement of the constitution was drafted in the light of the whole common law and not merely part of it; (2) larceny is, in its nature, a continuing offense;⁷⁶ (3) each transportation into another county constitutes a "fresh theft" because it necessitates a "fresh asportation";⁷⁷ (4) the legislature is free to name offenses as it sees fit, and if it wishes to place the label of larceny on the thief's act of transporting property he has stolen into a different county, it can do so.⁷⁸

Of the first reason, it can be said that it combines a recognition of

the opinion of Cooley, J., in *People v. Williams*, 24 Mich. 156 (1871), and quoted from it as follows:

" . . . The present is a case of trespass upon private right begun, indeed, in another State, but continued into our own, and which the paramount law of the land requires that we should see righted on demand of the party aggrieved. The persistence in the wrong here, then, as against the right of one whom the State is bound to protect to the full extent that it must protect one of its own citizens, is not only not a matter of indifference to the State, but is a *flagrant contempt of its authority*, and it is eminently proper that the State should treat it as a crime," (Emphasis added.)

Part of this argument would not apply to an inter-county situation, but the emphasized words seem superfluous in any event, and the equal protection of the laws argument is simply fallacious.

Resting then on the assumption no court which would sustain the validity of a statute authorizing trial within the state, where the larceny occurred outside it, would invalidate a statute permitting trial in any county into which the goods were taken when they were stolen in a different county within the state, the cases involving construction of both statutes will be cited indiscriminately in the following notes.

74. In the following cases, the court seems to be saying that the mere fact that the legislature has passed the statute is conclusive. *State v. Parker*, 301 Mo. 294, 256 S.W. 1040 (1923); *State v. Jackson*, 86 Mo. 18 (1885); *State v. Ware*, 62 Mo. 597 (1876); *State v. Harney*, 54 Mo. 141 (1873); *State v. Williams & Howard*, 35 Mo. 229 (1864); *State v. Abney*, 311 Mo. 700, 702, 278 S.W. 724 (1925) (dictum).

75. *State v. Williams*, 147 Mo. 14, 47 S.W. 891 (1898); *State v. Butler*, 67 Mo. 59 (1877); *State v. Smith*, 66 Mo. 61 (1877).

76. *State v. Mintz*, 189 Mo. 268, 292, 88 S.W. 12, 20 (1905) (dictum); *Ex parte Slater*, 72 Mo. 102, 109 (1880) (dictum).

77. *State v. Crow*, 337 Mo. 397, 402, 84 S.W.2d 926, 929 (1935); *State v. Williams*, 147 Mo. 14, 19, 47 S.W. 891 (1898); *State v. Smith*, 66 Mo. 61, 63 (1877); *State v. Hatch*, 91 Mo. 568, 570, 4 S.W. 502 (1887) (dictum); *State v. McGraw*, 87 Mo. 161, 163 (1885) (dictum); *Ex parte Slater*, 72 Mo. 102, 109 (1880) (dictum). Considerable doubt is cast on the present validity of this rationale in Missouri by *State v. Bockman*, 344 Mo. 80, 124 S.W.2d 1205 (1939). See the discussion in text at notes 84-89 *infra*.

78. *State v. Crow*, *supra* note 77 (semble); *State v. Mintz*, 189 Mo. 268, 88 S.W. 12 (1905); *State v. Butler*, 67 Mo. 59 (1877); *Hemmaker v. State*, 12 Mo. 453 (1849). Similarly, considerable doubt is also cast on the soundness of this

the facts of legal history⁷⁹ with a legitimate inference about the intention of the constitution-makers. In short, if *Slater* is sound, so is it sound to engraft the common law exception to its rationale, nothing to the contrary appearing. The second and third reasons are fictions. The offense of *larceny* is complete at a single point in time: it does not continue. Furthermore, a thief is, by definition, one who gets possession, and the basic theory of larceny is a taking from possession.⁸⁰ Any suggestion⁸¹ that one may trespass on his own possession is an obvious fiction, which can be justified only because it supports a result. If it is desirable to reach that result, however, a frank statement of the reasons would always be more satisfactory.

The fourth reason is a makeshift because it does not fit with any reasonable view of legislative intention. The theory behind it is, of course, that the offense is actually "transporting into another county goods which the thief has previously stolen" and that calling that crime "larceny" or "shiskabob" is entirely within the legislative prerogative. Indeed, if it were the legislative intention to make a separate crime out of re-asporting goods, already once asported as part of the original larceny, the fact that the second asportation is over a geographical boundary line would seem entirely unrelated to that purpose.

But we need not confine ourselves to speculation and theorizing. Section 541.050 of the Missouri statutes, a provision going back in substance to 1835,⁸² provides as follows:

Every person prosecuted under section 541.040 may plead a former conviction or acquittal for the same offense in another state or county, and if such plea be admitted or established, it shall be a bar to any other or further proceedings against such person.⁸³

This section, of course, only applies to prior convictions or acquittals outside the state; it does not cover cases in which the prior conviction or acquittal is in a different Missouri county, and there is no analogous section in the Missouri statutes covering the latter situation.

However, in 1939 the Missouri Supreme Court was faced with the necessity for ruling on that precise issue.⁸⁴ Defendants apparently stole several articles from the same person at the same time, the theft

rationale by *State v. Bockman*, supra note 77, discussed in text at notes 84-89 infra.

79. 1 Russell, op. cit. supra note 1.

80. See, e.g., the discussion in Perkins, *Criminal Law* 202-03 (1957).

81. See the elaborate rationale worked out in justification of this reasoning in 1 Bishop, op. cit. supra note 72; and in 1 Bishop, op. cit. supra note 73, at §§ 136-42. This is not to deny that the same conclusion, but without the same elaborateness of rationale, can be found in most other treatises as well.

82. Mo. Rev. Stat. 212, § 4 (1835).

83. Mo. Ann. Stat. § 541.050 (Vernon 1949).

84. *State v. Bockman*, 344 Mo. 80, 124 S.W.2d 1205 (1939).

taking place in Carter County. Charged with, tried for, and convicted of taking some, but not all, of the articles in Carter County, defendants appealed from the judgment of conviction. While that appeal was pending, defendants were prosecuted in Oregon County for larceny of part of the property which they had carried into Oregon County. Defendants' plea of former conviction was overruled at the trial, and they were convicted. While their appeal from the second conviction was pending, the supreme court dismissed their appeal from the first conviction. They thus stood convicted, with no further right to appeal, of larceny in Carter County, when the court was called upon to decide the appeal from the second conviction.

In reversing the second conviction, the court held that stealing several articles from the same person at the same time constituted but one offense under Missouri law, a point which had been conceded by the state.⁸⁵ Taking judicial notice of its action in dismissing the appeal from the first conviction,⁸⁶ the court went on to rule that defendants had

sufficiently invoked the protection of their rights under that maxim of the common law, approved by varying Federal and state constitutional and statutory provisions, that no man shall be twice put in jeopardy of life and limb (or convicted) for the same offense.⁸⁷

Finally the court, apparently in answer to a contention that the original larceny was one offense and the transporting across a county boundary a distinct offense so that no double jeopardy or related problem arose, made the following statement, which bears directly on our problem:

We are not unmindful of the statements in *State v. Smith*, . . . and *State v. Williams*, . . . that ". . . each transportation of stolen property from one county to another is a fresh theft." Section . . . [541.070] . . . is a venue statute and is clearly so treated in *State v. Crow*. . . The issue in the *Smith* and *Williams* cases involved venue, *not substantive law*.⁸⁸ (Emphasis added.)

It is tenable to argue when the theft occurs outside the state and the goods are brought into the state, that there are two distinct offenses, a concept which would give rise to no jeopardy problem. This view is supported by the fact that the Missouri legislature felt it necessary specifically to prevent a conviction for bringing stolen goods into this state whenever the defendant had been convicted or acquitted of the original (other?) crime in the foreign state.⁸⁹ But even if that con-

85. *Id.* at 81, 124 S.W.2d at 1206.

86. *Id.* at 83, 124 S.W.2d at 1206.

87. *Id.* at 82, 124 S.W.2d at 1206.

88. *Id.* at 82, 124 S.W.2d at 1206.

89. Mo. Ann. Stat. § 541.050 (Vernon 1949).

clusion be correct, it is clear that under the case, transporting property stolen in County A into County B by the original thief is not a separate substantive offense. It might be added here that this ruling seems unquestionably correct. More significantly, that would seem to leave only the arguments that the common law permitted conviction in County B and that larceny is a "continuing offense" to support the validity of the larceny exception to *Slater*.

Despite the fact that this exception is firmly established as a part of Missouri statutory law that has been upheld repeatedly against constitutional attacks, the reasons advanced in support of the exception need further consideration. This is because those reasons may aid or hinder efforts, whether made by prosecutors or the legislature, to provide alternative places of trial by analogy to the larceny exception. Thus, a study of the fate of efforts to accomplish this end is next indicated.

THE FATE OF ATTEMPTS TO PROVIDE FOR VENUE

In addition to attempts by prosecutors to convince the court to permit alternative places of trial in certain situations, seven principal statutory efforts have been directed to this purpose. Some of these efforts have been bottomed on assumed analogies to the larceny situation; others have proceeded without explicit reference to it. Six of the statutory efforts have an ancient lineage, the other is very recent. The six provide places of trial for the crimes of homicide,⁹⁰ burglary,⁹¹ kidnapping,⁹² bigamy,⁹³ receiving,⁹⁴ and for accessoryship:⁹⁵ the sev-

90. See the statutes cited in notes 97-101 *infra*.

91. Mo. Rev. Stat. 483, § 14 (1835), provided that:

When property stolen in one county, and brought into another, shall have been taken by *burglary* or robbery, the offender may be indicted, tried and convicted for such *burglary* or robbery, in the county into which such stolen property was brought, in the same manner as if such *burglary* or robbery had been committed in that county. (Emphasis added.)

As is indicated in text supported by notes 217-24 *infra*, the attempt to apply this rule to burglary prosecutions resulted in a decision that that part of the statute was unconstitutional in *State v. McGraw*, 87 Mo. 161 (1885). It is interesting to note that apparently no attempt was ever made to extend the principle to burglaries committed outside the state. The original section applied only to larceny and robbery (Mo. Rev. Stat. 212, § 3 (1835)) and the present section is similarly limited. Mo. Ann. Stat. § 541.040 (Vernon Supp. 1957).

92. Mo. Rev. Stat. 172, § 39 (1835), after defining two forms of kidnapping in §§ 37 and 38, provided as follows:

Every offence prohibited in either of the two last sections, may be tried in the county in which the crime may have been committed, or in any county through which the person so seized . . . shall have been taken, carried or brought.

The present substantive sections defining kidnapping and kidnapping for ransom

enth is a more comprehensive effort to provide for crimes of appropriation in addition to larceny.⁹⁶

Homicide

The relevant legislation for homicide begins with a statute of 1808 containing the following provision:

If at any time a party receiving a wound or other injury in

are Mo. Ann. Stat. §§ 559.230 (1) and 559.240 (1) (Vernon 1949). Subsections 2 of each of those sections are, with minor differences, in the following language:

Any person charged with such offense may be tried in any county into or through which the person so seized, . . . shall have been taken, carried or brought.

Mo. Ann. Stat. § 559.240 (2) (Vernon 1949). See discussion in text at notes 138-45 *infra*.

93. Mo. Rev. Stat. 206, § 4 (1835) provided:

An indictment for bigamy . . . may be found, and proceedings, trial, conviction, judgment and execution thereon had, in the county in which such second or subsequent marriage, or the cohabitation, shall have taken place, or *in the county in which the offender may be apprehended*. (Emphasis added).

The last phrase did not appear in the Revised Statutes of 1889 and later revisions, because of the effect of the decisions in a line of cases culminating in *State v. Smiley*, 98 Mo. 605, 12 S.W. 247 (1889), discussed in text at notes 134-37 *infra*.

94. The original statute seems to appear first in Mo. Rev. Stat. c. 138, art. IV, § 5 (1845). Apart from changes in form it remains part of our statute law, appearing as Mo. Ann. Stat. § 541.060 (Vernon 1949). See discussion in text at notes 158-74 *infra*.

95. The earliest statute is Mo. Rev. Stat. 319, § 18 (1825). It provided:

Where any crime or indictable offence, shall be committed and done in one county, and other person or persons shall be accessory in any manner, to any such crime or offence, in any other county; then an indictment found and taken against such accessory or accessories, in the county where the offence of accessory shall be committed or done, shall be as good and effectual in law, as if the principal offence had been committed or done within the same county, or the accessory or accessories may be proceeded against in the county where the principal offence was committed.

From 1835 (Mo. Rev. Stat. 483, § 12 (1835)) to the present, the statute has not contained language expressly authorizing trial in the county where the principal crime was committed. See Mo. Ann. Stat. § 541.110 (Vernon 1949). The problem is discussed in the text at notes 150-57 *infra*.

96. Mo. Ann. Stat. §§ 541.040 and 541.070 (Vernon Supp. 1957). See also Mo. Ann. Stat. § 541.035 (Vernon Supp. 1957), which provides:

Offenses for failure or refusal to comply with any law requiring a report to be filed or made in or to the state of Missouri, or any department or officer thereof, shall be held to be committed in the county of the residence of the person failing or refusing to file or make such report, except where the person shall reside without the state of Missouri, in which event the unlawful act is deemed to have been committed in the county wherein the report is required by law to be filed.

one district, shall die of the same wound or injury in another district, it shall be lawful to prosecute the offender in either of these districts.⁹⁷

By 1825, this section was expanded to include the following:

and if at any time, a party receiving a wound or other injury within this state, shall die of the same, without the jurisdiction of this state, it shall be lawful to prosecute the offender or offenders, both principals and accessaries, in the county within this state where the wound or injury may have been inflicted.⁹⁸

By 1835, the Revised Statutes also contained the following section:

If any such wound or mortal injury shall have been inflicted in another state, on any human being, who shall die thereof within the state, an indictment may be found, and a trial and conviction thereon had, in any county in which the death happened. . . .⁹⁹

The present versions of these statutes combine in three sections¹⁰⁰ the following rules: (1) If death occurred within the state, the prosecution may be in that county of the state where the death occurred, whether the mortal wound was inflicted in the same county, a different county in the state, or even outside the state; (2) If the mortal wound was inflicted within the state, trial may be had in the county where the wound was inflicted, whether death occurred in the same county, a different county in the state, or even outside the state. This has been the Missouri statutory law since at least 1835.¹⁰¹ The problem posed for our consideration is whether any part of those statutes fails to meet the test of constitutionality in Missouri under the principles developed in *Slater* and the cases following it.

Some examination must be made of the common law rules. When the mortal wound and the death both occurred within the state, but in different counties, the common law was unsettled. It has been contended that at common law venue was in the county where the mortal wound was inflicted,¹⁰² although it has also been stated that no

97. 1 Mo. Terr. Laws 217, § 34 (1808). In 1808, the Territory of Missouri was a subdivision of the Territory of Louisiana.

98. Mo. Rev. Stat. 318, § 17 (1825).

99. Mo. Rev. Stat. 483, § 11 (1835).

100. Mo. Ann. Stat. §§ 541.080-100 (Vernon 1949).

101. See notes 97-100 *supra*.

102. There is an elaborate defense of this as the common law position in 1 Bishop, *Criminal Law* § 115 n.25 (9th ed., Zane and Zollman 1923). The following statement appears in 1 Hale, *Pleas of the Crown* *426 (1st Am. ed. 1847):

At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent, and might be found tho in another county, . . . and if the party died in another county,

prosecution by indictment was possible if the two events occurred in different counties.¹⁰³ It is clear that, for the purpose of resolving the doubt, Parliament in 1547 provided by statute that when the mortal stroke was given in one county in England, but death occurred in a different county, the indictment must be returned by a grand jury of the county in which the death occurred.¹⁰⁴

In view of the fact that Missouri common law includes those English statutes in force in 1607,¹⁰⁵ it seems clear that the statute referred to should be considered part of our common law. There was, however, no similar statute in force in 1607 for cases in which the mortal wound was inflicted outside the realm, and death occurred within it. Apparently, then, the English common law we inherited, including the appropriate statutes, was that in the absence of statute there could be no prosecution by indictment for homicide unless both the death and the mortal wound were inflicted in the same county, except in-so-far as 2 and 3 Edward 6, chapter 24, provided for trial in the county of death if the mortal wound was inflicted in a different county.

The Missouri cases, however, tell a different story. In the first of them making reference to the problem, *State v. Blunt*,¹⁰⁶ defendant shot one Majors on a train while the train was in Newton County. The death occurred in Lawrence County. In affirming the conviction in Newton County, the court characterized the death as "a mere incident and result of a crime previously consummated in another county."¹⁰⁷ The court cited what is now section 541.080 of the Missouri statutes,¹⁰⁸ authorizing trial in either county under the circumstances, and stated, curiously enough, that the section merely codified the rule found in 2 and 3 Edward 6,¹⁰⁹ which is the common law in Missouri.¹¹⁰

Furthermore, the court went on to say that:

Hence, in this case, there can be no doubt as to the indictment

the body was removed into the county, where the stroke was given, for the coroner to take an inquest *super visum corporis*. . . .

See also, 1 East, Pleas of the Crown 361 (1803).

103. Starkie, Criminal Pleading 3 (1st Am. ed. 1824); 2 Hawkins, Pleas of the Crown 301-02 (8th ed., Curwood 1824).

104. 2 & 3 Edw. 6, c. 24 (1547). The preamble to the statute states, as an assumption, that in the circumstances under consideration, an indictment could be returned at common law by a grand jury of neither county.

105. Mo. Ann. Stat. § 1.010 (Vernon 1949).

106. 110 Mo. 322, 19 S.W. 650 (1892).

107. *Id.* at 337, 19 S.W. at 654.

108. Mo. Ann. Stat. § 541.080 (Vernon 1949).

109. 2 & 3 Edw. 6, c. 24 (1547).

110. 110 Mo. 322, 338, 19 S.W. 650, 654 (1892).

having been found in the proper county, the county where the offense was committed, the blow given, and the circuit court of that county had, therefore, jurisdiction, and the indictment is, therefore, not obnoxious to the objection now being discussed. *Under this view we forbear discussing the question, because not presented by the record, whether an indictment would be jurisdictionally and constitutionally valid if found in the county of the death.*¹¹¹ (Emphasis added.)

In every subsequent case except *State v. May*,¹¹² the trial has been held in the county where the mortal wound was inflicted, and it has been assumed¹¹³ or held¹¹⁴ immaterial that death occurred in a different county or even outside the state. In fact, the validity of the provision authorizing trial in the county where the mortal wound was inflicted seems not to have been discussed. On the other hand, one curious statement in a case reversed on other grounds makes it doubtful whether trial may constitutionally be had in the county of death.¹¹⁵

111. *Id.* at 338, 19 S.W. at 654.

112. 142 Mo. 135, 43 S.W. 637 (1897).

113. *State v. Medlin*, 355 Mo. 564, 197 S.W.2d 626 (1946); *State v. Conway*, 351 Mo. 126, 171 S.W.2d 677 (1943); *State v. Majors*, 329 Mo. 148, 44 S.W.2d 163 (1931); *State v. Garrison*, 147 Mo. 548, 49 S.W. 508 (1898).

In *State v. Borders*, 199 S.W. 180 (Mo. 1917), the indictment in a murder prosecution failed to contain an allegation of the place of death. Defendant contended that the omission rendered the indictment fatally defective in that it deprived him of his constitutional right to be informed of the nature and cause of the accusation. In rejecting this contention, the court conceded that the statute of jeofails did not change the rule that the indictment must allege every substantive fact necessary to be proved to establish the offense, but held that the place of death is not such a substantive fact. The court said:

Regardless of the rule at the common law or in other jurisdictions as to the materiality of the averment in question on the ground that it should appear that the death occurred within the realm or within the county where the charge was laid, no such reason exists for its averment here, and it not only has not been so held, but, so far as we have been able to determine from the reported cases, it has not been seriously urged as of such materiality that the omission of same would render an indictment violative of the Constitution.

Id. at 182.

114. *State v. Batson*, 339 Mo. 298, 96 S.W.2d 384 (1936).

115. In *State v. May*, 142 Mo. 135, 43 S.W. 637 (1897), a conviction of murder was reversed for various errors. Although the headnote digests the case as saying that the state must prove that the mortal wound, rather than the death, occurred in the county of trial, the only statement in the opinion is curiously uninformative. The following statement, without more, appears in the opinion: "The State proved in what county Wm. I. Burdette *died*, but not in what county the mortal wound occurred." *Id.* at 151, 43 S.W. at 641.

The inference drawn by the reporter is neither plainly true nor plainly false. Because of the other errors the court was not obliged to decide the precise point.

The following observations are pertinent. If 2 and 3 Edward 6 is indeed the common law in Missouri, as the court held in *Blunt*, the only proper place of trial is the county where the death occurred, and then only when the mortal wound was inflicted within the state. Yet the court misread 2 and 3 Edward 6 as authorizing trial in the county where the mortal wound was inflicted, and, in addition, cast doubt whether trial might be had in the county where the death occurred. Then the court, without detailed consideration of the problem, applied the same rule to cases in which the death occurred outside the state from a wound inflicted within the state.¹¹⁶ It is also important to notice that the statements in *Blunt* and *May* pertaining to the validity of the statute authorizing trial where the death occurred are dicta. As a matter of fact, only one Missouri appellate decision has been found in which the prosecution may have occurred in the county of death, and that case was reversed on other grounds.¹¹⁷

The homicide cases, then, provide no basis for assuming that the court would countenance alternate places of trial except as the common law permitted. Although the court's interpretation of the common law and particularly of the pertinent received statute seems erroneous, two things can be said of it: (1) the interpretation of the common law is not unusual,¹¹⁸ and (2) having made that

I believe, however, that the trial probably was held in the county of death, and that the court saw the resulting problem, but did not have to decide it.

116. *State v. Medlin*, 355 Mo. 564, 197 S.W.2d 626 (1946); *State v. Majors*, 329 Mo. 148, 44 S.W.2d 163 (1931); *State v. Garrison*, 147 Mo. 548, 49 S.W. 508 (1898).

117. See *State v. May*, 142 Mo. 135, 43 S.W. 637 (1897), discussed in note 115 *supra*.

118. In point of fact, most of the American cases have so stated the common law. See, for an excellent discussion, *Riley v. State*, 28 Tenn. *646 (1849), where, in discussing the effect of Tenn. Laws 1809, c. 126, § 1, which provided simply that the trial of criminal cases shall be in the county where the crime was committed, and of Tenn. Const. art. 1, § 9 (1834), to the same effect, the court said:

It is insisted by the counsel for the prisoner that the act of 1809 does not repeal the statute (2 & 3 Edw. VI.), but is only declaratory of the law as enacted by that statute. We think this construction erroneous. For although at common law it was said the offense was not complete until the death, yet it would be doing violence to language to say that the offense was committed in the county where the death happened, although the stroke were given in another county. Therefore, when the act of 1809 prescribes that the trial shall be had in the county where the offense was committed, the intention of the legislature was not to declare the law as enacted in 2 & 3 Edw. VI, c. 24, but to alter the law, and establish a different rule. But it is insisted that this construction only restores the common-law rule, and involves the subject before us in all the uncertainty that existed before the statute of Edw. VI; and,

interpretation so long ago, it is unlikely that the court would retreat from it. On the other hand, it is also unlikely that the court would hold invalid section 541.080¹¹⁹ authorizing trial in the place of death when the wound is inflicted within the state,¹²⁰ for that result is clearly justified under a proper reading of 2 and 3 Edward 6. The same conclusion with respect to section 541.100,¹²¹ authorizing conviction in Missouri if death occurs within the state from a mortal wound inflicted outside it, is not nearly so inevitable.¹²² It is of particular interest that homicide has never been characterized as a continuing crime in any of the cases under consideration. As we shall see at a later point in this article, it is arguable that such a characterization could be applied to it.¹²³

as a consequence, if the stroke be given in one county and the death happen in another, the party can be indicted in neither. We do not think these consequences follow. In the first place, the statute of Edw. VI. was enacted to remove all doubt upon the subject, because different opinions, growing out of the refinements of that period of the common law, had been expressed. We find no decision in which it had been held that the murderer in such case could be indicted in neither county. On the contrary, East says the common opinion was that he might be indicted where the stroke was given. That alone is the act of the party. He commits this act, and the death is only a consequence. Therefore, when the legislature enacted that the party shall be tried in the county where the offense may have been committed, they intended where the active agency of the perpetrator was employed. And this law is only in accordance with the Constitution, which declares that he shall have "a speedy public trial, by an impartial jury of the county or district in which the crime shall have been committed." Art. 1, sec. 9. These provisions of the Constitution, and of the act of 1809, were intended to secure the right of trial with certainty, in the neighborhood of the witnesses, so that they might be easily procured, and thus secure the defendant a fair trial.

Id. at *657-58.

It is significant that the Tennessee constitutional provision and statute are nearly identical with Missouri's provisions. See Mo. Const. art. I, § 18(a); Mo. Ann. Stat. § 541.030 (Vernon 1949). It is also significant that the Tennessee Supreme Court has given full scope to the constitutional provision as has Missouri. Compare *Armstrong v. State*, 41 Tenn. *337 (1860), with *Petition of McDonald*, 19 Mo. App. 370 (1885).

119. Mo. Ann. Stat. § 541.080 (Vernon 1949).

120. But see the reasoning of the Tennessee court in *Riley v. State*, 28 Tenn. *646 (1849), discussed in note 118 *supra*.

121. Mo. Ann. Stat. § 541.100 (Vernon 1949).

122. The leading cases upholding such convictions are *Commonwealth v. Malloon*, 101 Mass. 1 (1869) and *Tyler v. People*, 8 Mich. 320 (1860).

123. See "Summary and Recommendations" *infra*.

Bigamy

Although bigamy was originally only a canonical offense,¹²⁴ it was made a statutory felony in 1604.¹²⁵ The substantive statute also contained the following provision relating to venue:

[A]nd the party . . . so offending shall receive such and the like proceeding, trial and execution in such county where such person . . . shall be apprehended, as if the offence had been committed in such county where such person . . . shall be taken or apprehended.¹²⁶

Because this statute was in force in 1607, it would appear to be part of Missouri's received common law. But again, an examination of the cases leads to a different conclusion.

Some background of Missouri's substantive bigamy law is essential. At least since 1835,¹²⁷ the crime denominated "bigamy" by the legislature can be committed in the following ways: (1) by a married person marrying a second time,¹²⁸ (2) by a married person marrying a second time outside the state, and cohabiting within the state with the person with whom he went through the second marriage ceremony,¹²⁹ (3) by an unmarried person knowingly marrying a married person under circumstances where the married person would be guilty.¹³⁰ Also beginning in 1835, the following statute was in force in Missouri until the italicized phrase was declared unconstitutional in 1889:

An indictment for bigamy, . . . may be found and proceedings, trial, conviction, judgment and execution thereon had, in the county in which such second or subsequent marriage, or the cohabitation, shall have taken place, *or in the county in which the offender may be apprehended.*¹³¹ (Emphasis added.)

In *State v. Griswold*,¹³² the first of three cases, defendant, while his first wife was alive, remarried in Wisconsin and cohabited with

124. 2 Archbold, Criminal Practice and Pleading 1807 (8th ed., Pomeroy 1880).

125. 1 James 1, c. 11 (1604).

126. 1 James 1, c. 11, § 1 (1604). See 1 Hale, Pleas of the Crown *694 (1st Am. ed. 1847), for a statement that indictment and trial could be had either where the subsequent marriage occurred or where the offender was apprehended.

127. Apparently only the previously married person could be guilty prior to 1835, since there seems to be no section comparable to that cited in note 130, *infra*, in the Revised Statutes of 1825.

128. Mo. Rev. Stat. 205, art. VIII, § 1 (1835). The present statute is Mo. Ann. Stat. § 563.170 (Vernon 1949).

129. Mo. Rev. Stat. 206, art. VIII, § 3 (1835). The present statute is Mo. Ann. Stat. § 563.190 (Vernon 1949). The constitutionality of this section was established in *State v. Stewart*, 194 Mo. 345, 92 S.W. 878 (1906).

130. Mo. Rev. Stat. 206, art. VIII, § 5 (1835). The present statute is Mo. Ann. Stat. § 563.210 (Vernon 1949).

131. Mo. Rev. Stat. 206, art. VIII, § 4 (1835).

132. 53 Mo. 181 (1873).

his new wife in Laclede County, Missouri. An indictment charging bigamy was returned by the grand jury of Greene County, where defendant was later taken into custody. In reversing the conviction, the supreme court did not question the validity of the statute authorizing indictment and trial in the county of apprehension, but insisted that at common law the apprehension had to precede the indictment in order to give jurisdiction to the court of the county in which the apprehension occurred.

In *State v. Fitzgerald*,¹³³ defendant, a single woman, was charged with bigamy as a result of her marriage to a married man in Maries County and her cohabitation with him in Gasconade County where the indictment was returned and trial had. In reversing this conviction the court made the following points: (1) cohabitation within the state does not charge a crime unless the second marriage occurs outside the state, and since that was not true here, venue could not be sustained on the ground that it was laid where the cohabitation took place; (2) nor could venue in Gasconade County be upheld on the ground that defendant was apprehended there, because apprehension was not alleged to have occurred prior to indictment. With respect to the latter point, the court relied, of course, on *Griswold*. The court stated that a conviction under such circumstances conflicted with the *Slater* principle, but it is important to note that the conclusion rested on the fact that indictment and apprehension occurred in the wrong order, and not on any assumption that one could never be tried for bigamy in the county of apprehension.

Finally, however, the part of the statute authorizing trial in the county of apprehension met the fate of so many other venue statutes of that era. In *State v. Smiley*,¹³⁴ defendant, a married man, married a woman in Johnson County. Prior to the return of the indictment in Madison County, he was apprehended there. In reversing his conviction, the court pointed out that cohabitation is not an element of the crime of bigamy except when the bigamous marriage occurs outside the state. Therefore, venue could be laid only in the county where the bigamous marriage ceremony occurred, unless the statute authorizing indictment and trial in the county where the offender was apprehended could be sustained. Relying on *Slater* and its progeny, the court then invalidated the venue-laying part of the statute because (a) "this clause has nothing to do with the elements of the offense,"¹³⁵ and (b) the larceny exception is not applicable.¹³⁶

133. 75 Mo. 571 (1882).

134. 98 Mo. 605, 12 S.W. 247 (1889).

135. Id. at 607, 12 S.W. at 247.

136. Id. at 608, 12 S.W. at 247. It should be noted that if any crime could logically be regarded as "continuing in nature," it is the crime of cohabitation

What is most significant here is not what the court held, but what it did not hold. The court did not say that the legislature was powerless to provide for trial in the county where cohabitation occurred even when the bigamous marriage occurred in a different county in the state; instead, it held that the legislature had not so provided. The court subsequently upheld the statute making cohabitation an offense when the second marriage occurred outside the state, and, in so doing, necessarily held that the county where the cohabitation occurred was the proper county of trial; if, therefore, the legislature were to make cohabitation between two persons, at least one of whom was also guilty of bigamy—either in Missouri or outside it—a crime, it seems unlikely that the court would invalidate either the substantive statute or a provision of it authorizing trial in the county where the cohabitation occurred.

It is also important to observe that the *Smiley* case, at least by inference, states a minimum requirement for venue-laying statutes: some element of the offense must occur in the county of indictment and trial. It is not enough, then, that the common law permitted trial in a particular county. A departure from *Slater* can only be justified on the ground that it provided for trial in a county in which some constituent element of the offense occurred. This rationale will be developed in detail at a later point in the article.¹³⁷

Kidnapping

Another legislative effort to provide multiple venue appears in Missouri's substantive kidnapping statutes. In essence those statutes provide that kidnapping may be committed (1) by a false imprisonment aggravated by the additional fact that (a) the kidnapper actually took the victim outside the boundaries of the state by force, or (b) intended (i) to take him outside the state, or (ii) to confine him secretly within it;¹³⁸ or (2) by an attempted or consummated false imprisonment, aggravated by secret confinement, for the purpose of collecting a reward or ransom.¹³⁹

within the state by one who marries bigamously outside the state, or, if the legislature should so designate it, cohabitation by anyone bigamously married.

137. See "Summary and Recommendations" *infra*.

138. Mo. Ann. Stat. § 559.240 (1) (Vernon 1949):

If any person shall, wilfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, he shall, upon conviction, be punished

139. Mo. Ann. Stat. § 559.230 (1) (Vernon 1949):

If any person or persons shall wilfully, without lawful authority, seize, confine, inveigle, decoy, kidnap or abduct or take or carry away by

Each of the Missouri statutes contains a second section, in substantially identical language:

Any person charged with such offense may be tried in any county through which the person so seized, . . . shall have been taken, carried or brought.¹⁴⁰

In so far as I am able to discover, the language has never been construed by a Missouri appellate court.¹⁴¹ I have likewise been unsuccessful in finding any direct English common law authority.¹⁴²

any means whatever, or attempt so to do, any child of any age, or any person or persons and attempt or cause such child or person or persons to be secretly confined against their will, or abducted for the purpose and with the intention of causing the father or mother or any other relative of the person so abducted or anyone else, to pay or offer to pay any sum as ransom or reward for the return or release of any such child or person or persons, said person or persons so guilty . . . shall . . . be punished

140. The quoted language is Mo. Ann. Stat. § 559.240(2) (Vernon 1949). Section 559.230(2) is almost identical.

141. The only case I have found which is concerned at all with the locality of the crime in a kidnapping case is *State v. McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935). There, however, the abduction occurred in the county where the trial was had, although the victim was taken outside the state and held for ransom there. The prosecution was under what is presently § 559.230 of the statutes. Referring to that section, the court said that it

. . . insofar as here material denounces the taking or carrying away of any person and (a) the causing of such person to be secretly confined against his or her will, or (b) the causing of such person to be abducted for the purpose and with the intent of causing the father or such person to pay any sum as ransom for the return or release of such person. The gist of the taking or carrying away is unrestricted as to place. The evidence established a taking or carrying away in Jackson County, Missouri, for the purpose of causing the father to pay a ransom for the release of his daughter.

Id. at 1102, 83 S.W.2d at 110. No mention was made of the venue-laying section of the statute, probably because it was inapplicable. Jackson County adjoins Kansas, and it is unlikely that more than one Missouri county was involved.

142. 10 Halsbury's Laws of England 329 (3d ed., Simonds 1955) states that the related offense of abduction is committed "not only in the county in which the woman or girl is originally taken, but also in any county into which she is carried by force." The authority cited is *R. v. Gordon*, discussed in 1 Russell, *op. cit. supra* note 1, at 934, and *Fullwood's Case*, Cro. Car. 482, 484, 488, 493, 79 Eng. Rep. 1017, 1019, 1021, 1026 (1625). The latter case held that if the defendant forcibly takes a woman, in violation of 3 Hen. 7, c. 2 (1487), in one county, and marries or defiles her in another, an indictment may properly be found in the second county, provided the force continued in the second county. Whether the defendant can also be tried in the first county depends on whether the marriage or defilement is an essential part of the offense. On the latter point the judges were not in agreement. Russell states that the rule of *Fullwood's Case* was recognized in the *Gordon* case in an instruction by Lawrence,

It is arguable that the rule of the statute was the common law rule in 1607.¹⁴³ It is, moreover, accurate to describe kidnapping as a continuing offense,¹⁴⁴ and if the court meant its characterization of larceny as a continuing offense¹⁴⁵ to have importance as a criterion for determining the validity of multiple venue statutes generally, it seems likely that the court would sustain the venue-laying provisions of the kidnapping statutes.

Accessoryship

The second major purpose and consequence of the Statute of 2 and 3 Edward 6,¹⁴⁶ already discussed in another connection,¹⁴⁷ was to provide for venue for the trial of accessories. Its preamble deplored the technical rules which insulated an accessory from trial in either of two counties, when the acts of accessoryship occurred in one and the principal offense in another. It provided, in such cases, for trial of the accessories in the county in which the acts of accessoryship

Jr., to acquit the prisoners because the evidence failed to disclose an absence of consent in the second county.

But see, *Bruton v. Morris*, Hob. 182, 80 Eng. Rep. 328 (1646) where a question was raised in dictum:

Quaere, if the taking, and the lands, and the marrying or deflowering, were in several counties; for it is felony composed of all those things, as murder is of the stroke and death.

Id. at 183, 80 Eng. Rep. at 330.

Except for the doubt suggested by the last quoted material, there seems to be substance to the view that so long as force is used in both counties, as would invariably be the case in kidnapping, the common law rule would permit the indictment to be found in either county.

In the leading American case, *State v. Whaley*, 2 Del. (2 Harr.) 538 (1837), an accessory gave aid to his principals in abducting a person; this aid was given entirely within the county of abduction. The principals subsequently carried the victim into another county. The accessory was indicted in the second county and discharged on the ground of improper venue. He was then indicted in the county of abduction, and the court affirmed his conviction. In its opinion the court, in dicta, said that the discharge of the accessory in the second county was not an authority that the principals could not have been tried there. As there had been an asportavit in both counties, it said, it was clear that the principals could not have been tried in the second county if they could not have been tried in the first, stating that more of the corpus delicti was proved in the first county than in the second.

See also 1 East, Pleas of the Crown 453 (1803), who states the English common law as I have stated Fullwood's Case, *supra*.

143. See note 142 *supra*.

144. 2 Bishop, Criminal Law 573 (9th ed., Zane & Zollman 1923).

145. See text at note 76 *supra*.

146. 2 & 3 Edw. 6, c. 24 (1547).

147. See text at note 105 *supra*.

took place.¹⁴⁸ Since that statute has been declared to be part of our received law,¹⁴⁹ trial of an accessory can constitutionally be had in the county where the acts of accessoryship take place and, under *Slater*, in none other. The controlling Missouri statute has been almost a carbon copy of 2 and 3 Edward 6 since at least 1835.¹⁵⁰ No cases have been found construing it.

It must be pointed out, however, that the problem, if it were to be raised today, is somewhat more complicated than it once was. Section 556.170 provides that:

Every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall, upon conviction, be adjudged guilty of the offense in the same degree and may be charged, tried, convicted and punished in the same manner, as the principal in the first degree.¹⁵¹

Although it is clear that this section abolishes whatever distinctions there were at common law between first degree principals, second degree principals, and accessories before the fact, in so far as punishment is concerned,¹⁵² our interest is in the question whether it has any effect on the venue rules. Does this statute permit trial of an accessory before the fact—a principal in the second degree would have to be present, at least constructively, at the scene of the crime¹⁵³—in the county where the principal offense was committed if the acts of accessoryship took place in a different county? And if it were construed tentatively as having that effect, would the *Slater* principle cause the court either to invalidate the statute partly, or to construe it in a more limited fashion? Putting aside the constitutional problem, the authorities in other states are not in accord.¹⁵⁴ One can

148. 2 & 3 Edw. 6, c. 24 (1547).

149. See *State v. Blunt*, 110 Mo. 322, 19 S.W. 650 (1892), discussed in text supported by notes 106-07 and 110-11, *supra*.

150. Mo. Ann. Stat. § 541.110 (Vernon 1949). Compare Mo. Rev. Stat. 319, § 18 (1825). The latter statute authorized trial either in the county where the acts of accessoryship took place or in the county where the principal offense occurred. The statute was already converted to its present form by 1835. See Mo. Rev. Stat. 483, § 12 (1835).

151. Mo. Ann. Stat. § 556.170 (Vernon 1949).

152. For an excellent discussion of the law of parties to crimes at common law, see Perkins, *Parties to Crime*, 89 U. Pa. L. Rev. 581 (1941).

153. *Ibid.*; see also, 1 Hale, *Pleas of the Crown* 438 (1st Am. ed. 1847).

154. Compare *Carlisle v. State*, 31 Tex. Crim. App. 537, 21 S.W. 358 (1893), with *People v. Hodges*, 27 Cal. 340 (1865). In the latter case the court said that:

[T]hrough the common law distinction between principal and accessory is in the main obliterated, yet it is retained for the purposes of venue. 27 Cal. at 342. In *Carlisle*, the court analyzed the case as turning on whether the "accomplice to a felony be guilty of a distinct offense from the felony committed by his principal." 31 Tex. Crim. App. at 537, 21 S.W. at 358. In holding that

only speculate, but I would hazard that the Missouri court would treat the statute as permitting trial in either county in such a case, on the analogy to cases in which the first degree principal is only constructively present—i.e., when he uses an innocent agent to consummate his purposes,¹⁵⁵ and to misdemeanor cases, in which everyone who participates sufficiently to be guilty of the offense at all is guilty as a principal.¹⁵⁶ But I must admit that strict adherence to the rule of 2 and 3 Edward 6 would lead the Missouri court to an opposite conclusion.¹⁵⁷

Receiving

Although the preamble to 2 and 3 Edward 6 suggests that at common law the receiver of stolen goods was an accessory after the fact to larceny, that inference should not be drawn.¹⁵⁸ Our key date is again 1607, the date as of which English statutes in force are regarded as part of Missouri's common law.¹⁵⁹ Both before and after 2 and 3 Edward 6, there was no separate substantive offense designated receiving.¹⁶⁰ Nor was the receiver considered as an accessory after the fact to larceny until 1691, when a statute so designating him was enacted.¹⁶¹ However, there was another method for punishing conduct which today would be regarded as knowingly receiving stolen property.

It was at least theoretically true that anyone with knowledge that a

there was only one crime in such a situation the court relied on the fact that the punishment was the same, that no such distinction is recognized in misdemeanors, that principals in the first degree who are only constructively present are treated as present for venue purposes, and that the general rule of law is that what one does through another is regarded as done by himself. The court concluded, then, that the statute abolished the distinction for venue as well as other purposes.

155. See Perkins, *supra* note 152.

156. *Ibid.*

157. Accessories after the fact raise no similar problem. They are not treated with other accessories under Mo. Ann. Stat. § 556.170 (Vernon 1949), but retain their separate identity under Mo. Ann. Stat. § 556.180 (Vernon 1949); therefore, they may be tried only in the county where the act of accessoryship takes place.

158. See Starkie, *Criminal Pleading* 6 n.(n) (1st Am. ed. 1824). See also 2 Hawkins, *Pleas of the Crown* 447 (8th ed., Curwood 1824), where the author says:

Also I take it to have been generally agreed, . . . that neither the receiving of other men's goods, known to have been stolen, nor the taking of one's own goods again from one that had stolen them, on an agreement not to prosecute him, . . . did make a man an accessory to the felony, unless he also had received the thief. . . .

The omitted portions refer to the changes resulting from 3 & 4 Will. & M., c. 9 (1691), and 5 Anne, c. 31, § 5 (1707).

159. Mo. Ann. Stat. § 1.010 (Vernon 1949).

160. See the excellent discussion in Perkins, *Criminal Law* 276, 442 (1957).

161. 3 Will. & M. c. 9, § 4 (1691). See Perkins, *op. cit. supra* note 160, at 274.

felony had been committed by another was under a legal duty to bring the facts to the attention of the authorities: failure to do so constituted a common law misdemeanor, known as misprision of felony.¹⁶² How diligently violations of this rule were enforced does not immediately concern us.¹⁶³ It is clear, however, that it was a device regularly employed in certain situations, and that one of those was receiving stolen property. The result was that the receiver was punished at common law for misprision of felony.¹⁶⁴

Those facts lead to an inquiry about venue in misprision cases in 1607. Lord Hale is authority for the proposition that although a grand jury could not return an indictment for any felony partly committed in one county and partly in another, yet an indictment charging misprision of that felony could be returned by a grand jury of either county.¹⁶⁵ Certainly, whatever other limitations might be imposed,¹⁶⁶ this would be adequate authority for the suggestion that at common law the grand jury of the county where the receiving occurred could take cognizance of the larceny in another county, *when it did so for the purpose of determining whether a misprision of felony had occurred*. It is probably also authority for the proposition that the grand jury of the county where the larceny occurred could "look into" the county where the act of receiving occurred, provided it did so to find a basis for returning a misprision indictment.

In spite of this state of affairs, it is frequently said to be the common law rule that venue in receiving cases was in the county where the receiving took place.¹⁶⁷ But that is much later common law than that of 1607. It is likely, however, that a statute reflecting a rule developed after 1607 would be regarded as common law codification today by the Missouri court. In fact, the Missouri statute contains just such a provision.¹⁶⁸ In *State v. Miller*,¹⁶⁹ an indictment returned by the grand jury of Jackson County charged, in two counts, larceny and receiving. The supreme court reversed a con-

162. Perkins, *op. cit. supra* note 160, at 274.

163. Perkins, *op. cit. supra* note 160, at 442 suggests that receiving was one of the few specific situations to which it was applied. He also suggests, at 377, that it once was commonly used in connection with the offense of treason.

164. Perkins, *op. cit. supra* note 160, at 442.

165. 1 Hale, *Pleas of the Crown* 652-53 (1st Am. ed. 1847).

166. Lord Hale describes a situation in which persons committing a substantive offense partly in one county and party in another could be convicted of the substantive offense in neither, but of misprision of that very offense in either. *Ibid.*

167. See, e.g., 10 Halsbury's *Laws of England* § 604 (3d ed., Simonds 1955). The case relied on in support is *Queen v. Martin*, 1 Den. 398, 169 Eng. Rep. 297 (1849).

168. Mo. Ann. Stat. § 541.060 (Vernon 1949).

169. 71 Mo. 89 (1879).

viction of receiving on the ground that, although the evidence tended to show that the theft occurred in Jackson County, there was a total failure to prove where the receiving occurred. The court said that

as there was no evidence tending to show that the offense charged in the second count of the indictment was committed within the jurisdiction of the court, the judgment rendered upon the verdict of the jury must be reversed. . . . While the evidence tends to show that a part of the stolen goods were [sic] found at the "place of business" of defendant, it entirely fails to show where that place of business was. . . .¹⁷⁰

Because it is clear that the indictment in this case was returned by the grand jury of the county where the larceny occurred,¹⁷¹ one can only conclude that trial for receiving is not permitted in the county where the theft occurs unless the receiving also occurs there. One cannot be certain whether this is because (a) the court conceived the common law rule as so providing, or (b) the statute¹⁷² changed and superseded the common law rule, or (c) the indictment or place of trial provisions of the constitution¹⁷³ require such an interpretation of the statute. It is clear, however, that the case is not a holding that the legislature could not constitutionally provide for trial of the receiver in either county. It is, then, consistent with the earlier analysis¹⁷⁴ showing that the gist rule is not one of constitutional law.

Non-Support

Before completing consideration of the statutory efforts to provide alternative places of trial or otherwise vary common law venue rules, some attention must be given to the efforts of prosecutors to persuade the courts to relax the strict rules. These efforts have been made with respect to quite variant crimes, and with markedly different degrees of success. The semantic techniques employed by the courts in resolving these problems are interesting, and may throw some light on the resolution of our major problem—constitutional limitations on legislative power to vary the venue rules.

It will be recalled that one of the reasons frequently advanced for

170. *Id.* at 90.

171. *Ibid.* The trial occurred in Clay County, apparently on defendant's motion for change of venue, but the indictment was found by the grand jury of Jackson County. There was evidence tending to show the theft occurred in Jackson County.

172. No statute is cited in the opinion. The controlling, if valid, statute was Mo. Gen. Stat. c. 211, § 5 (1865). The statute is indential to the present Mo. Ann. Stat. § 541.060 (Vernon 1949).

173. Mo. Const. art. I, §§ 17, 18(a).

174. See text at notes 134-37 *supra*.

sustaining the larceny exception to *Slater*¹⁷⁵ is that larceny is a "continuing offense."¹⁷⁶ One line of Missouri cases demonstrates that this reasoning has proved useful, though in a limited area, in expanding venue rules. If a "continuing offense" is defined narrowly as an omission to perform a legal duty which continues wherever the obligor—(or obligee?)—happens to be, the non-support cases immediately come to mind: and a study of Missouri's non-support cases throws some important light on our inquiry.

An earlier Missouri non-support statute¹⁷⁷ was interpreted as requiring that both an abandonment and non-support be shown in order to prove a violation.¹⁷⁸ The statute was later amended so that a showing of either abandonment or non-support was sufficient to support a conviction.¹⁷⁹

The first case decided under the amended statute was *State v. Christopher*.¹⁸⁰ Defendant and his wife lived for many years in Jefferson County, where defendant conducted a business in which his wife assisted him. The wife at one time instituted suit for divorce in Jefferson County, but the differences were composed and the suit dismissed. On February 22, 1923, the defendant came to St. Louis on business, and the wife closed up the business in Jefferson County on the same day and came to St. Louis to live with her mother. The following day she filed suit for divorce in St. Louis. An ancillary decree enjoined defendant from disposing of his property. The restraining order was dissolved on March 22, 1923. On March 24, the wife obtained a warrant charging defendant with failure to support her on that day. At the close of the case, the defendant's motion in the nature of a demurrer to the evidence was overruled, even though the state's attorney confessed that the court was without jurisdiction to try the offense.

The St. Louis Court of Appeals reversed and ordered defendant discharged. The court reasoned that venue was in Jefferson County, because otherwise

the wife may leave the husband at home and take up her residence in any county in the state which she may elect, and the venue would become peripatetic; the crime under that theory being wherever the wife may choose to locate. It needs no

175. Ex parte Slater, 72 Mo. 102 (1880).

176. See text at note 76 supra.

177. Mo. Rev. Stat. § 3274 (1919).

178. *State v. Miller*, 90 Mo. App. 131 (1901); *State v. Weber*, 48 Mo. App. 500 (1892).

179. Mo. Laws 281 (1921).

180. 267 S.W. 62 (Mo. App. 1924).

discussion to show that this cannot be done in this kind of a case. . . .¹⁸¹

Shortly thereafter, two other cases arose under the statute. One was appealed to the St. Louis Court of Appeals, the other to the Springfield Court of Appeals and thence to the supreme court. In the first of them, *State v. Hobbs*,¹⁸² defendant and his wife were married, lived and were divorced in Stoddard County. At the time of the divorce the two children of the marriage were four and five years old. The mother immediately went with the two children to Cape Girardeau County, where she obtained a job and supported herself and her two children, in meager fashion, without help from the defendant. Defendant remained in Stoddard County, remarried, and had another family there.

The prosecuting attorney of Cape Girardeau County filed an information charging defendant with non-support of the two children. On appeal from his conviction, defendant contended, *inter alia*, that venue was in Stoddard County where he lived. Although it reversed on other grounds, the St. Louis Court of Appeals distinguished *Christopher*¹⁸³ and stated that venue was properly laid in Cape Girardeau County. The court reasoned that

no hard and fast rule can be laid down which will categorically fix the venue for every case of a failure to support children by a parent. . . . The venue of the crime in this character of a case cannot always follow the father, nor can it in every conceivable case follow the mother, although she has the children with her. . . .¹⁸⁴

Pointing out that the children were not moved about without the consent of the father, and that prosecution was not begun immediately after the children were removed from the father's residence, but only after the residence of the children was clearly established, the court concluded that the crime, if committed, was committed in Cape Girardeau County because it was there that

they were being neglected by the father in the necessities of life. It was there that they were receiving no such contribution as the law requires the parent to furnish them. . . .¹⁸⁵

Finally the court alluded to the offense charged as a continuing one, which "may begin in one jurisdiction and continue in another,"¹⁸⁶ and stated that "in such cases it is generally held that the defendant

181. *Id.* at 63.

182. 220 Mo. App. 632, 291 S.W. 184 (1929).

183. *State v. Christopher*, 267 S.W. 62 (Mo. App. 1924).

184. *State v. Hobbs*, 220 Mo. App. 632, 637, 291 S.W. 184, 185 (1926).

185. *Id.* at 638, 291 S.W. at 184.

186. *Ibid.*

may be tried in either county.”¹⁸⁷ The latter statement enabled the court to distinguish abandonment cases (single act) from non-support cases (continuing omission).

The facts in *State v. Winterbauer*¹⁸⁸ were similar to those in *Hobbs*. Defendant married the complaining witness after illicit sexual intercourse with her resulted in the conception of a child. They lived together but a few days, when defendant sent her to her father in Oregon County, Missouri, where she and the child of the marriage lived from then on. Defendant, living in St. Louis, refused to support the child, and finally notified the complaining witness by letter that he was through with her. He was tried and convicted, in Oregon County, for non-support of the child.

Reversing for other reasons, the Springfield Court of Appeals nevertheless stated that venue was in Oregon County, relying on the *Hobbs* characterization of the offense as a “continuing” one.¹⁸⁹ The court buttressed its conclusion by pointing out that in the instant case the complaining witness and the child resided in Oregon County at the express direction of the defendant.¹⁹⁰

On appeal, the supreme court agreed that venue had properly been laid in Oregon County.¹⁹¹ The court stated that the father’s duty to support followed the mother and child “wherever he sent them.”¹⁹² The court, however, also approved *Hobbs*, and it will be recalled that there the wife and children went to another county, not at the father’s direction, but because of the necessity for finding a means of support. But it may be significant that in quoting from *Hobbs*, the supreme court did not refer explicitly to the “continuing offense” language in that case.

But the reliance of the two courts of appeals on the “continuing offense” concept needs further analysis. If it be conceded that the duty to support continues wherever the father may be and wherever the child may be, and if it be further conceded that an omission to perform that duty does not happen at a single point of time, but “continues,” still recognition of the “continuing offense” concept seems to have little bearing on whether the venue should be the father’s place of residence or that of the neglected child. To elaborate: suppose (1) the charge is that the father failed to support for a period of one year prior to the filing of the information, and (2) the facts are that the father lived for six months in County A and six months in County B

187. *Ibid.*

188. 296 S.W. 219 (Mo. App.), *aff’d*. 318 Mo. 693, 300 S.W. 1071 (1927).

189. 296 S.W. at 222.

190. *Ibid.*

191. *State v. Winterbauer*, 318 Mo. 693, 300 S.W. 1071 (1927).

192. *Id.* at 697, 300 S.W. at 1073.

during that year. Now a "continuing offense" concept clearly would be relevant to a finding that the defendant could be tried in either County A or County B, *provided that the proper venue is in the county where the defendant resides*. On the other hand suppose the same charge and that defendant lived in County A throughout the year, but the child lived for six months in County X and six months in County Y. Again the "continuing offense" concept would be relevant in determining that defendant could be tried in either County X or County Y, *provided that proper venue is in the county where the child resides*. The courts of appeals have implicitly utilized the "continuing offense" concept to hold that venue may be where the child resides, even though the residence of neither father nor child has changed. Presumably the father's place of residence is also a proper venue, although the point cannot be regarded as clearly settled.¹⁹³

The result reached by the court is thus completely out of line with the basic assumptions of Missouri jurisprudence in this area—it does not fit in with the gist rule. In terms of results, the courts have recognized in these cases that crimes frequently are committed partly in one county and partly in another. I do not mean to suggest that this recognition is expressly offered by the courts; it is, however, the rationale which fits the results of the cases. The result is that there may be a choice of venue, at least in the non-support cases, a choice which, as we shall see,¹⁹⁴ is denied to prosecutors in analogous areas.

Attempts and Conspiracies

It is rare for a crime to suit the concept of a "continuing offense" as neatly as those omission cases, in which the duty to render aid or support extends over a period of time. Still two of the traditional inchoate crimes, attempt and conspiracy, comfortably wear the label "continuing." It must be admitted that any member of a conspiracy or anyone attempting a crime becomes guilty at a particular point in time, although in a conspiracy of more than two persons, guilt may attach to one member at one time, and to other members at a different time.¹⁹⁵ Nevertheless, conspiracies generally, and attempts often, con-

193. It is possible that in any particular non-support case, proper venue may be only where the father resides, whereas in another particular non-support case, proper venue may be only where the child resides. In short, it is possible that there is only one proper venue in any given non-support case. This seems unlikely, but it is a possibility not conclusively ruled out by the language of the opinions.

194. See text at notes 196-225 *infra*.

195. Certain rules which apply to the crime of conspiracy have become so well settled as not to require exposition or citation of authority. These are: (a) That a person may be convicted of a conspiracy to commit a defined substantive offense against the law, even though such latter

sist of a series of acts extending over a period of time and occurring in different places.

I have been unsuccessful in finding common law venue rules in attempt cases prior to 1607. Missouri has no statutory provision relating to the problem. Two cases, however, deserve consideration. In *State v. Terry*,¹⁹⁶ a fraternal organization incorporated in Maryland had for one of its purposes the payment of death benefits to beneficiaries of deceased members. As part of a scheme to defraud, defendant and others initiated a dying man into a Missouri chapter of the organization. Upon the initiate's death, the defendant and others presented proofs of death—with a false cause of death—to the Missouri Council for forwarding to the headquarters in Maryland, which was done. The scheme was discovered before any payment was made. Defendant and others were indicted for attempted false pretenses in Missouri. Although the conviction was reversed on other grounds, the Supreme Court of Missouri rejected defendant's contention that because "the money (if any) to be obtained was to be obtained in Maryland"¹⁹⁷ the crime was committed there and not in Missouri. The court said:

The charge in the case at bar is not of a consummated crime, but of an attempt to commit the crime. Such attempts are cognizable in the place where made. . . . The venue of the offense was, therefore, properly laid as being within this state.¹⁹⁸

*State v. Fraker*¹⁹⁹ presents a more complicated set of facts, and a somewhat different view of venue in attempts cases. Defendant, a resident of Clay County, obtained an insurance policy in Ray County. He executed a will, probably in Clay County. He then went to a spot on the Missouri River in Ray County, where he pretended to drown himself. In any event he disappeared until he was found much later hiding in the woods in Minnesota. In the meantime, his executor, who believed defendant to be dead and was otherwise entirely innocent, presented defendant's will for probate in Clay County. The executor, after presenting proofs of death to the insurance company, instituted suit upon the policy in Clay County. After the case was removed to a

offense be actually and entirely consummated; (b) that a person who knowingly enters into a conspiracy after its formation, but before it is ended, is equally as guilty as are those who were in it at its formation; and (c) that a criminal conspiracy once formed continues until the object of it has been accomplished unless abandoned short of an overt act, or broken up by the arrest of the participants.

Farris, J., in *McDonald v. United States*, 89 F.2d. 128, 133 (8th Cir. 1937).

196. 109 Mo. 601, 19 S.W. 206 (1891).

197. See summary of defendant's contentions, *id.* at 602, 19 S.W. at 206.

198. *Id.* at 622, 19 S.W. at 212.

199. 148 Mo. 143, 49 S.W. 1017 (1899).

federal court, judgment in favor of the executor was entered by agreement. Apparently the scheme was discovered before any payment was actually made.

On these facts, the grand jury of Ray County indicted defendant for attempted false pretences. His conviction was reversed on several grounds,²⁰⁰ among them that venue was not in Ray County because no act which went beyond preparation was done there. The court stated that

all of the acts alleged, constitute in the aggregate, but one alleged attempt, but this series of acts is scattered through several counties. . . . When, as here, a crime consisting [sic] of a series of acts, part done in one county and part in another, it is dispunishable at common law in either, unless enough be done in one county to amount to a completed and punishable act . . . ; and this rule holds in the absence of statutory enactment to the contrary. . . . (Whether such a statute would be valid under our organic law is *dehors* the present record.)²⁰¹

200. Among others was the insufficiency of the indictment. *Id.* at 156, 49 S.W. at 1019.

201. *Id.* at 159-60, 49 S.W. at 1021. Reference should also be made to two prosecutions under what is now Mo. Ann. Stat. § 557.090 (Vernon 1949). That section among other things makes it a crime ". . . by bribery, menace or other means, directly or indirectly [to] induce or attempt to induce any witness, . . . to absent himself or avoid a subpoena or other process. . . ." (Emphasis added.)

In both cases money was offered to a witness in a case to leave the jurisdiction so as to avoid testifying, and in both cases the bribe was accepted. In each case the offer was made and accepted in one county, but the actual payment was made in another. Each prosecution was in the county where the offer was made and accepted rather than the one in which the payment was made. In both cases, venue was held properly laid. *State v. Ballew*, 56 S.W.2d 827 (Mo. App. 1933); *State v. Tummons*, 225 Mo. App. 429, 37 S.W.2d 499 (1931).

In *Tummons*, the court stated that the gist of the statutory offense was the offer or attempt. Two things should be noted: (1) in a sense this becomes another attempt case and simply supports the general rule expressed in the cases discussed in the text that venue for an attempt is laid properly in the county where the attempt is made; but (2) Mo. Ann. Stat. § 556.160 (Vernon 1949) provides that there can be no conviction of an attempt if the offense attempted was actually perpetrated. Of course, the latter statute is not explicitly applicable to common law attempts which have been labeled substantive offenses by statute, like the attempt in the principal case. But, since the court treated the case like any other attempt, a thorough consideration of § 556.160 might have led it to the conclusion that the attempt could not be prosecuted because the crime had been consummated. The point was not raised.

It is very doubtful that the court would have stressed the attempt aspect if the prosecution had occurred in the county where the payment was made, for this would have led it to deny venue there, a totally unreasonable result.

One might conclude that when a statute makes the crime the same whether it is merely attempted or actually consummated, the prosecutor has a choice of trying the case in either county. Of course, if § 556.160 applies to such offenses, there could be no prosecution in the county where the attempt was made.

Two things seem clear. (1) In the absence of statute, the proper venue in an attempt case is basically where the attempt is made. But in the usual situation, a course of "preparation" is carried out before the actor proceeds far enough to be guilty of an attempt. If that preparation is carried out in County A, and the act which enables the court to say that the conduct passes from the category of preparation to the category of perpetration occurs in County B, the trial must take place in County B, if, indeed, there can be a trial. (2) The court has never passed on the question whether a statute permitting trial in either county would fall afoul of the *Slater* rule—in short *Fraker* is not a holding that the gist rule is one of constitutional law in Missouri. Some attempts are "continuing" offenses at least to the extent that larcenies are, and if the "continuing offense" rationale is applicable to cases other than larceny, a statute providing for multiple venue in those attempt cases should be sustained.

The problem of venue in conspiracy cases is decidedly more complicated. Prior to 1611,²⁰² the law of conspiracy was so limited that it is of little help to us. Although the common law rule is sometimes said to be that venue in conspiracy cases is in the county where the agreement was reached,²⁰³ it has also been said that venue may be laid in any county where an overt act in furtherance of the conspiracy occurred.²⁰⁴ But both statements refer to the common law of a time well after 1607. Consequently history does not help us much. Furthermore, the absence of both statutory provisions and decided cases in Missouri is a handicap. In these circumstances one can do no more

202. This date is selected because it marks the time when the doctrine that a conspiracy had to be carried out in order to constitute a crime was abandoned. See *The Poulterers' Case*, 9 Co. Rep. 55b, 77 Eng. Rep. 813 (Ct. of Star Ch. 1611). For a discussion of the history of conspiracy, see Wright, *The Law of Criminal Conspiracies and Agreements* 5-7 (1891).

203. 1 Russell, op. cit. supra note 1, at 185. Russell did not say that venue was exclusively in the county where the agreement was reached. See the next footnote.

204. See Starkie, op. cit. supra note 72, at 30-31. See also 10 Halsbury's *Laws of England* § 607 (3d ed., Simonds 1955), where the following passage appears:

Conspiracy may be tried in the place where the conspirators agreed to do the wrongful act which is the object of the conspiracy, but as the place of agreement is often unknown, conspiracy is generally a matter of inference deduced from criminal acts of the accused persons which are done in pursuance of a common criminal purpose, and are often not confined to one place; a charge of conspiracy may consequently be laid at common law in any county where one of these criminal acts is committed.

The cases relied on in support, however, were decided nearly 200 years after 1607. See also 1 Russell, op. cit. supra note 1, at 185.

than examine the nature of the crime, and particularly the relationship between the law of conspiracy and that of parties to crime.

The inchoate crime of conspiracy was complete at common law when an agreement to do an unlawful act by lawful means or a lawful act by unlawful means was entered into.²⁰⁵ It was not necessary to prove any overt act other than the act of agreeing.²⁰⁶ It was also true that a conspirator became criminally liable for the acts of other conspirators pursuant to the agreement.²⁰⁷ But the latter liability was that of a party to the crime itself—in felonies as an accessory before the fact²⁰⁸ or as a principal in the second degree;²⁰⁹ in misdemeanors as a principal (for the law of parties applied only to felonies).²¹⁰ It is important, therefore, to separate conspiracy convictions from those of the criminal offenses growing out of conspiracies.²¹¹ It would seem logical, therefore, that if the question is where may a conspirator be tried *for crimes committed by a fellow conspirator*, the venue rules relating to parties will control, but that if the question is where may a conspirator be tried for the crime of conspiracy itself, those rules are immaterial. Logically, again, the place of indictment and trial would be the place where the agreement was entered into, for it is there that the *minimum common law requirements for the crime of conspiracy are met*. It is perhaps due to a failure to keep these questions separate that the rules as developed by the later common law cases are not entirely consistent with the general principle that the venue is where the gist of the crime occurs.

The situation in Missouri is further complicated by the fact that the common law conspiracy rules have been changed for some conspiracies, but not for others. Following a section which defines conspiracy

205. After discussing various common law definitions, Professor Perkins offers the following: "A conspiracy is a combination for an unlawful purpose." Perkins, *Criminal Law* 529 (1957).

206. *Id.* at 531. See also note 202 *supra*.

207. *Id.* at 546.

208. An accessory before the fact is one who is guilty of felony by reason of having aided, *counseled, commanded or encouraged* the commission thereof, without having been present either actually or constructively at the moment of perpetration. (Emphasis added.)

Id. at 575.

209. A principal in the second degree is one who is guilty of felony by reason of having aided, *counseled, commanded or encouraged* the commission thereof in his presence, either actual or constructive. (Emphasis added.)

Id. at 570.

210. *Id.* at 567.

211. The law relating to venue in accessoryship cases has already been discussed (see text at notes 146-47 *supra*), and is not affected by the fact that the accessory before the fact is nearly always guilty of conspiracy as well.

broadly,²¹² giving the term substantially its common law meaning, section 556.130 imposes additional requirements in some but not all cases:

No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement.²¹³

In short, (1) if the agreement is to commit a felony upon the person or to commit arson or burglary, the common law concept, which does not require an additional overt act, is adopted, but (2) no other agreement becomes a conspiracy until some overt act occurs in addition to the act of agreeing.

Rigorous adherence to the common law concept of venue as modified by the gist rule would suggest that for conspiracies falling within the first class, the place where the agreement was reached is the proper, and exclusive, venue, but that conspiracies falling within the second class should be prosecuted where an additional overt act was done, since that overt act is necessary to complete the crime. Because ordinarily many overt acts are done, not infrequently in different counties, it is likely that venue would be in any county where an overt act was done. If, but only if, we superimpose on this scheme a "continuing offense" concept—and, at that, one delineated more carefully than in the larceny cases—we could also say that the place of agreement would be a proper place of trial even if no additional overt act were perpetrated in that county.

But the above analysis is not only theoretical; it is complex. More practically, the court might not separate the two kinds of conspiracy for venue purposes, and might employ the "continuing offense" concept to hold that venue in any conspiracy case could be in the county where the agreement was entered into or where any additional overt act took place. The probabilities in favor of the adoption of this solu-

212. Mo. Ann. Stat. § 556.120 (Vernon 1949) provides:

If two or more persons shall agree, conspire, combine or confederate: First, to commit any offense; or, second, falsely or maliciously to indict another for any offense, or procure another to be charged or arrested for any offense; or, third, falsely or maliciously to move or maintain any suit; or, fourth, to cheat and defraud any person of any money or property, by means which are in themselves criminal; or, fifth, to cheat and defraud any person of any money or property by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretenses; or, sixth, to commit any act injurious to the public health, or public morals, or for the perversion or obstruction of justice, or the due administration of the laws, they shall be deemed guilty of a misdemeanor.

213. Mo. Ann. Stat. § 556.130 (Vernon 1949).

tion are increased by the fact that conspiracy is frequently described as a "continuing offense," though, it is true, for quite a different purpose.²¹⁴ In any event, such speculation aids us in solving our primary problem only by pointing out certain areas in which it is not unlikely that the Missouri courts will utilize the "continuing offense" concept to expand the venue rules.

Burglary and Robbery

The major effort to expand the larceny exception has been made in the area of crimes of appropriation other than larceny, and of burglary, itself an offense against the habitation but normally committed for the purpose of and resulting in larceny. An early statutory effort to include the crimes of burglary and robbery under the larceny exception dates back to 1835,²¹⁵ and appeared in the Revised Statutes of 1879 in the following language:

When property stolen in one county and brought into another, shall have been taken by larceny, burglary or robbery, the offender may be indicted, tried and convicted for such larceny, burglary or robbery in the county in which such stolen property was brought, in the same manner as if such larceny, burglary or robbery had been committed in that county.²¹⁶

In *State v. McGraw*,²¹⁷ defendant committed burglary and larceny in Clinton County, and shortly thereafter brought the fruits of the crime into Jackson County. Indicted and convicted there for both larceny and burglary, he appealed his conviction. The court reversed and remanded his larceny conviction because of an error in admitting evidence, and then reversed his burglary conviction outright for improper venue. In doing so, the court necessarily invalidated the statute to the extent that it applied to the crime of burglary. It reasoned that the larceny exception to *Slater* was based on the theory that each transportation of stolen goods into another county constituted a fresh theft, and held this theory inapplicable to the crime of burglary. The court has since held that, for double jeopardy purposes, there is only one larceny in such a situation, dismissing the earlier cases as merely relating to venue.²¹⁸ It is difficult to assess the effect of this later decision on *McGraw*. Two reasons for continuing

214. Ordinarily conspiracy is spoken of as a continuing offense when the question is whether persons not parties to the conspiracy at the time certain overt acts are done may nevertheless be held responsible therefor.

215. Mo. Rev. Stat. 483, § 14 (1835).

216. Mo. Rev. Stat. § 1691 (1879).

217. 87 Mo. 161 (1885).

218. See *State v. Bockman*, 344 Mo. 80, 124 S.W.2d 1205 (1939), discussed in text at notes 84-89 supra.

to adhere to *McGraw* present themselves: (1) the fresh theft theory, though unsound, is still valid for determining venue; and (2) other reasons not affected by *Bockman* for confining the exception to larceny have frequently been stated. It will be recalled that the court has described larceny as a "continuing offense," and that the common law exception was confined to larceny.²¹⁹ Certainly it is doubtful that burglary could be described as a "continuing offense" in any meaningful sense, and it is clear that burglary was not included within the larceny exception at common law.²²⁰ Furthermore, it is difficult to conceive of burglary as being partly committed in one county and partly in another.

Although no Missouri cases have been found construing the statutory attempt to extend the larceny exception to robbery, the following observations seem appropriate. It is clear that at common law the larceny exception did not extend to cases of robbery.²²¹ On the other hand because robbery is simply an aggravated form of larceny, it, like larceny, requires an asportation.²²² But any fictional subsequent asportation could only be one of the kind found in simple larceny cases, i.e., it would not have the elements of force or coercion essential to robbery. Therefore, the rationale which justifies the larceny exception, on the ground that each carrying into a new county involves a fresh asportation and so a fresh theft, seems even more nebulous in the robbery cases. In the same sense, the "continuing offense" concept also fits robbery less readily than it does a simple larceny. But it must be remembered that both of these rationales are based on abstractions—indeed on fictions—so that practical analysis is difficult. It could be maintained, certainly, that the larceny is a "continuing offense" for the reason that benefiting from its fruits is an essential objective of it, and that the same thing is true of robbery. And that explanation is, in any event, no less realistic than the whole complex analytical structure built up by the common law to solve venue problems. In view of the weakened position of the fresh asportation rationale,²²³ the additional conceptual complexities involved in treating robbery as a "continuing offense," and, most important of all, the fact that robbery did not fall within the exception at common law, make it doubtful that the

219. See text at notes 75-76 supra.

220. This seems an obvious conclusion from the fact that even robbery, a compound larceny, did not fall within the exception. 2 Russell, op. cit. supra note 1, at 1238.

221. 2 East, Pleas of the Crown 772 (1803).

222. Ibid.; Perkins, Criminal Law 236-37 (1957).

223. See text at notes 84-89 supra.

court would sustain an isolated statute simply lumping robbery with larceny for venue purposes.²²⁴

Embezzlement and False Pretences

The preceding analysis of burglary and robbery would not apply to the other major crimes of appropriation, embezzlement and false pretences. But the Missouri courts have consistently, both explicitly and implicitly, refused to extend the venue rules for larceny to them.²²⁵ Detailed examination of the cases would not be useful, but they are cited in the previous footnote so that the doubting may verify my conclusion. It is important, however, to note that the amount of time and money spent in litigating venue issues in embezzlement and false pretences cases has been substantial, has undoubtedly been a hardship to accused persons, and has certainly placed a heavy burden on taxpayers. Because in none of them has the court held that the gist rule is a rule of constitutional law, the latest development may be viewed without having the results of the inspection foreclosed.

"Stealing"

In 1955, the Missouri Legislature, as part of a general revision of the criminal appropriation sections, combined the offenses which previously fell under the general headings of (1) larceny, (2) larceny by trick, (3) embezzlement and (4) obtaining property by false pretences.²²⁶ The single section delineating the new offense labels it "stealing."²²⁷ As part of the revision, section 541.070 was amended to read as follows:

224. This position may seem inconsistent with that taken in the text supported by notes 236-38 *infra*, with respect to the stealing statute. I suggest, however, that permitting a prosecution for robbery in the second county, like permitting one for burglary, is quite a different thing, both factually and conceptually, from permitting a prosecution *for a crime of appropriation alone* in the second county, whether or not circumstances attended the crime of appropriation that made it also an offence against the person or the habitation.

225. The following cases deal with venue problems in embezzlement. *State v. Fluesmeier*, 318 Mo. 803, 1 S.W.2d 133 (1927); *State v. Fischer*, 297 Mo. 164, 249 S.W. 46 (1923); *State v. Sheets*, 289 S.W. 553 (Mo. 1926); *State v. Bouslog*, 266 Mo. 73, 180 S.W. 859 (1915); *State v. Mispagel*, 207 Mo. 557, 106 S.W. 513 (1907); *State v. Shour*, 196 Mo. 202, 95 S.W. 405 (1906); *State v. Bacon*, 170 Mo. 161, 70 S.W. 473 (1902); *State v. Hatch*, 91 Mo. 568, 4 S.W. 502 (1887).

The following cases deal with venue problems in false pretences: *State v. Page*, 186 S.W.2d 503 (Mo. App. 1945); *State v. Mandel*, 353 Mo. 502, 183 S.W.2d 59 (1944); *State v. Marion*, 235 Mo. 359, 138 S.W. 491 (1911); *State v. Lichliter*, 95 Mo. 402, 8 S.W. 720 (1888); *State v. Shaeffer*, 89 Mo. 271, 1 S.W. 293 (1886); *State v. Dennis*, 80 Mo. 589 (1883).

226. Mo. Ann. Stat. § 560.156 (Vernon Supp. 1957).

227. Mo. Ann. Stat. § 560.156 (2) (Vernon Supp. 1957).

When property is stolen or taken by robbery in one county and brought into another the offender may be prosecuted for such stealing or robbery in the county into which such stolen property was brought in the same manner as if such stealing or robbery had been committed in that county.²²⁸

The problem that immediately suggests itself is whether conduct formerly denominated embezzlement, or conduct formerly denominated false pretences, but now called, along with the old larceny and the old larceny by trick, "stealing," is triable in a county where the gist of the offense could not be said to have occurred under the older labels. The Missouri Supreme Court has in the past differentiated the other appropriation crimes from larceny on the ground that the former do not require asportation,²²⁹ and has, therefore, refused to apply to them the venue rules for larceny. It could now sustain the validity of this part of the new statute only by distinguishing or overruling its earlier cases.²³⁰

It is true, of course, that some of the other reasons advanced for differentiating larceny from other crimes for venue purposes could be emphasized. If those reasons are equally applicable to crimes of appropriation other than larceny, they could be used as arguments that those other crimes should be treated like larceny for venue purposes. First, the argument could be made that the offense is really transporting property, obtained by criminal appropriation, from one county to another, and that the label placed on the conduct is immaterial.²³¹ An obvious fiction, rejected as a basis for avoiding double jeopardy problems,²³² this reasoning might still be used to support the venue in larceny cases.²³³ And if the fact that it is a fiction is no obstacle there, it should be none in cases arising under the new stealing statute. Second, any form of stealing under that statute could be labeled "continuing" with as much factual justification as common law larceny.

The two rationales, however, are not likely to be accorded equal validity. It is true that stealing and larceny are equally continuous,

228. Mo. Ann. Stat. § 541.070 (Vernon Supp. 1957).

229. Embezzlement—*State v. Hatch*, 91 Mo. 568, 4 S.W. 502 (1887). False Pretences—*State v. Fraker*, 148 Mo. 143, 49 S.W. 1017 (1899).

230. See text supported by notes 231-38 *infra* for some suggested means of distinguishing the earlier cases.

231. See text supported by notes 84-89 *supra* for discussion of this rationale employed in larceny cases, as well as its limitation to venue problems.

232. *Ibid.*

233. The fact that in *State v. Bockman*, 344 Mo. 80, 124 S.W.2d 1205 (1939), discussed in text supported by notes 84-89 *supra*, the court, in rejecting the rationale for double jeopardy purposes, nevertheless recognized its previous use for venue purposes, leaves it at least arguable that it can still be utilized in solving certain venue problems.

but it is also true that the same could always have been said—and was not—of embezzlement and false pretences.²³⁴ It seems unlikely that the court would at this late date repudiate the reasoning underlying so many cases. On the other hand, the *legislature* had never previously attempted expressly to include embezzlement and false pretences within the venue statute for larceny. All efforts to apply the larceny rule to such cases had been made by prosecutors without statutory direction. At this point the fact that the court has never held the gist rule to be one of constitutional law is vital. For now the court can say that the legislature has made it a crime—for venue purposes only, it will be recalled²³⁵—for a thief to transport the fruits of “stealing” into another county.

Two arguments against any such conclusion could be made: (1) the legislative attempt to do the same thing for burglary ran afoul of *Slater*;²³⁶ (2) the real basis for the larceny exception to *Slater* is the historical common law. Against the first of these arguments is the fact that burglary is a crime complete without any “fruits” being obtained at all,²³⁷ and, therefore, in a sense not so readily describable as “continuing,” as crimes of appropriation are. It is possible then that the legislature is powerless to provide for multiple venue in burglary cases while it is at the same time empowered to provide for it in crimes of appropriation. Furthermore, the court has permitted one who committed both burglary and larceny in the same transaction in County A to be prosecuted in County B *for the larceny*, if he carried the fruits of the crimes into County B.²³⁸ It is nearly impossible to imagine a case in which one commits a burglary in County A and carries the fruits thereof into County B, without also committing larceny in County A. Consequently, it is not unreasonable to conclude that the court has already permitted the legislature to make a crime of transportation out of larceny or larceny and burglary combined, when the thief takes the goods into another county, but has refused to permit it to make two crimes of this same act, even for venue purposes.

The second objection is more difficult to rebut. Only by explicitly

234. Care should be taken here to note that the cases did *not* say that embezzlement and false pretences were *not* continuing offenses. Rather the failure to use the continuing offense rationale is some evidence that the court did not believe it appropriate.

235. See text supported by notes 84-89 *supra*.

236. See *State v. McGraw*, 87 Mo. 161 (1885), discussed in text supported by notes 217-20 *supra*.

237. Perkins, *Criminal Law* 166 (1957). I.e., burglary is not necessarily committed for the purpose of stealing, and even when that is the purpose, the crime is complete even though that purpose is never achieved.

238. *State v. McGraw*, 87 Mo. 161 (1885).

recognizing legislative power to vary the gist rule in appropriate cases and by finding a legislative intention to do so for crimes of appropriation, could the court sustain the statute without overruling *Slater* and the cases decided in reliance on its principles. I would hazard a guess that the court will sustain the statute, though not necessarily on reasoning paralleling my own.

In summary, then, it appears that carefully drafted legislation making it clear that the gist rule is being abolished would solve some of the problems raised by the cases in Missouri. That would hold true of cases falling in class 3—those in which there is no doubt where every part of the total course of criminal conduct occurred, but where—at least according to some rational view of the matter—some significant part occurred in one county and another significant part occurred in another county. Later in this article I will suggest the general outlines of the kind of legislation I believe appropriate to accomplish that purpose.

That legislation, however, could have no effect on the problems arising in class 2—those in which there is doubt—perhaps unresolvable under ordinary burden of proof rules—where some significant part of the total course of criminal conduct occurred. The constitutional barrier imposed by the *Slater* case would clearly stand in the way of any direct attempt to resolve doubts by the use of presumptions or by arbitrary fiat. But certain Missouri statutes and cases need further attention in order to evaluate accurately the solidity of that constitutional barrier.

WAIVER

Missouri courts have held that the constitutional guarantee of trial in the county where the crime was committed is a personal privilege which may be waived;²³⁹ it is, therefore, important to explore the circumstances under which a waiver might be found. Since Missouri authority is so scant on the point, much of what follows must be classified as speculation and conjecture.

If a waiver of the guarantee is ever possible, it is obvious that one would be found when a defendant deliberately and expressly asks for a trial in another county. This is merely a long way of saying that a statute giving defendant a right to a change of venue under certain circumstances is not unconstitutional, a self-evident proposition. When the possible waiver is not intentional, or at least not made explicit, difficulties arise.

239. *State v. Cobb*, 359 Mo. 373, 221 S.W.2d 745 (1949); *State v. Page*, 186 S.W.2d 503 (Mo. 1945). See also *State v. Wilson*, 66 Mo. App. 540 (1896).

The following statutory provisions are relevant.

Section 541.120 :

When it appears at any time before verdict or judgment that the defendant is prosecuted in a county not having jurisdiction of the offense, the court may order that all the papers and proceedings be certified and transmitted to the proper court of the proper county, and recognize the defendant to appear before such court on the first day of the next term thereof, to await the action of the grand jury. The witnesses shall also be recognized to appear at such court, that the prosecution may be proceeded with as provided by law.²⁴⁰

Section 541.130 :

When a jury has been impaneled in the case contemplated in section 541.120, such jury shall be discharged without prejudice to the prosecution.²⁴¹

Section 541.140 :

If the defendant be in actual custody or confinement, the body of the defendant shall be removed to the jail of the proper county, in like manner and with like effect, in all respects, as in cases of change of venue.²⁴²

Section 541.150 :

The provisions of law relating to changes of venue shall, in all respects, as far as they may be applicable, govern in cases provided in sections 541.120 to 541.140; and the defendant, officers and witnesses shall be subject to the same duties and penalties as are enjoined and inflicted by law upon like persons, as in cases of change of venue.²⁴³

Those sections of the statutes must be considered in connection with the following rules of criminal procedure.

Rule 25.06 :

(a) Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(b) Defenses and objections based on defects in the institution of the proceedings or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised by motion before trial. Failure to present such defenses or objections constitutes a waiver thereof, but the court for good cause shown may grant relief from such waiver. Lack of jurisdiction or the failure of an indictment or information to charge an offense may be noticed by the court at any time during the pendency of the proceeding.²⁴⁴

240. Mo. Ann. Stat. § 541.120 (Vernon 1949).

241. Mo. Ann. Stat. § 541.130 (Vernon 1949).

242. Mo. Ann. Stat. § 541.140 (Vernon 1949).

243. Mo. Ann. Stat. § 541.150 (Vernon 1949).

244. Mo. R. Crim. P. 25.06.

Rule 26.02:

(4) If the defendant's counsel shall have reserved his opening statement until the close of the state's case-in-chief, he may then state his defense, or if such statement has already been made, he may next offer evidence in support thereof, *or he may by proper motion challenge the sufficiency of the state's case-in-chief to sustain a conviction.* (Emphasis added.)²⁴⁵

Rule 26.10:

Motions for directed verdict are abolished and motions for judgment of acquittal are substituted in their place. The court either on motion of a defendant, or its own motion, shall order entry of judgment of acquittal of one or more offenses charged by indictment or information if, after the evidence on either side is closed, the court concludes as a matter of law that such evidence is not sufficient to sustain a judgment of conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the state's case-in-chief is not granted the defendant may offer evidence without having reserved the right.²⁴⁶

Rule 24.07:

It shall not be necessary to state any venue in the body of any indictment or information, but the county or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same.²⁴⁷

Two main possibilities present themselves: (1) the indictment or information may show improper venue on its face; or (2) proof offered under a proper indictment or information may disclose incorrect venue, or even fail to show any venue. First, some possible situations arising from an indictment or information showing a defective venue on its face will be considered.

It is, of course, inconceivable that an information filed by the prosecuting attorney of County A should name in its margin a county other than County A. In spite of the fact that rule 24.07 makes it unnecessary to state any additional venue,²⁴⁸ still it is not unlikely that facts relating to venue would be included in the body of an information or indictment. Although such a pleading would not state that all of the acts took place in a county other than noted in the margin, it is again not unlikely that it would contain allegations that certain acts took place in a different county. For instance it might allege in a false pretences case²⁴⁹ being tried in County A that the title to the property

245. Mo. R. Crim. P. 26.02(4).

246. Mo. R. Crim. P. 26.10, as amended Oct. 11, 1954, effective July 1, 1955.

247. Mo. R. Crim. P. 24.07.

248. Ibid.

249. Although obtaining property by false pretences is no longer a separate offense, having been subsumed under the heading "stealing" along with other

passed in County B as a result of false representations made in County A. This, of course, would result from a failure to read properly the Missouri cases dealing with the question of venue in false pretences cases.²⁵⁰ It would be, in an important sense, a defect in the indictment or information apparent on its face.

What must a defendant do in such a situation in order to avoid waiving the defect, and what will be the consequences of any action he might take? The first question to be answered is whether the defect is one which "fails to show jurisdiction in the court" within the meaning of that phrase as found in rule 25.06.²⁵¹ Because the Missouri courts have held that the guarantee of trial where the crime is committed is merely a personal privilege capable of being waived,²⁵² it is clear that a waiver does not have the effect of conferring on the court jurisdiction by consent. Or to put it in more usual terms, the constitutional guarantee as currently interpreted applies to jurisdiction over the person and not to jurisdiction over the subject matter of the proceeding. It also seems clear that the purpose of the rule was to preserve, as not subject to waiver, two basic objections—in the older terminology, failure to state a cause of action and lack of jurisdiction over the subject-matter of the action.²⁵³ An example of the latter would be an effort to try a felony in a court which only has jurisdiction to try misdemeanors.

If the above interpretation of the rule is sound, the defendant in our hypothetical situation would be required to act, or would be held to have waived the venue objection. Furthermore, subject to some discretion in the trial judge, he must act promptly, that is, by motion before trial.²⁵⁴ But what form should his action take? It is at this point that the relation between this rule and the statutory sections set out above becomes important. The defendant should move to transfer to the proper county, in accordance with the provisions of sections 541.120 to 541.150.²⁵⁵ If, instead, he moves to dismiss, I as-

crimes of appropriation by Mo. Ann. Stat. § 560.156 (Vernon Supp. 1957), it is not at all certain that the venue difficulties have been eliminated. See discussion, text at notes 234-38 *supra*. In any event it provides the clearest illustration of the problem.

The Missouri cases clearly establish proper venue in false pretence cases to be the county where title to the property passes rather than that in which the false representation was made. See the cases cited in note 225 *supra*.

250. *Ibid*.

251. Mo. R. Crim. P. 25.06(b).

252. See note 239 *supra*.

253. The federal provision is the same as the Missouri provision. See Fed. R. Crim. P. 12(b)(2).

254. See Mo. R. Crim. P. 25.06.

255. Mo. Ann. Stat. §§ 541.120-.150 (Vernon 1949).

sume that the trial judge would deny the motion, but would treat it as a motion to transfer as above. Consequently, it seems clear that if the venue defect is apparent on the face of the indictment or information, the defendant should not be discharged if he objects to venue, but his case should be transferred to the appropriate county. If he does not object, he waives his privilege to be tried in the county where the crime was committed. Of this procedure it can be said that it avoids turning loose accused persons on technical grounds unrelated to the merits, but, on the other hand, it is cumbersome and relatively expensive, not only for the accused, but for witnesses and the state as well.

Problems next arise when the indictment or information is not subject to motion, but the proof is in some way defective. Two principal variations suggest themselves. The first of them can again be illustrated hypothetically. An information is filed charging defendant with the crime of obtaining property by false pretences. The venue noted in the margin is County A, and the body of the information contains nothing contradicting that statement. The state's evidence, however, discloses that although the false representation was made in County A, title to the property passed in County B. Superficially, the proper action to be taken by the defendant would seem to be a motion for judgment of acquittal in conformity with rules 26.02(4)²⁵⁶ and 26.10²⁵⁷. But once again it seems clear that defendant is only entitled to have the case transferred to the court of County B for appropriate action in accordance with the provisions of sections 541.120 to 541.150.²⁵⁸ Consequently, defendant's proper course of action would be to move for such a transfer, and if he instead moves for judgment of acquittal, the trial judge should overrule that motion and order the transfer *sua sponte*. If defendant does not act at all, he will be held to have waived his privilege of being tried where the crime was committed.

The second principal variation can best be illustrated by stating the facts of one of the few Missouri cases raising the problem.²⁵⁹ An information was filed in the circuit court of the City of St. Louis charging one Cobb with committing statutory rape on a thirteen year old girl in the City of St. Louis. The court described the state's evidence as showing that the crime was committed in defendant's apartment at 1117a Frey Avenue, but "neither the City of St. Louis nor the State of Missouri were mentioned in any manner in connection with the matter of venue in the state's evidence in chief."²⁶⁰ At the close of the

256. Mo. R. Crim. P. 26.02(4).

257. Mo. R. Crim. P. 26.10.

258. Mo. Ann. Stat. §§ 541.120-150 (Vernon 1949).

259. *State v. Cobb*, 359 Mo. 373, 221 S.W.2d 745 (1949).

260. *Id.* at 378, 221 S.W.2d at 747.

state's evidence, defendant moved for a directed verdict—(under the new rules, for judgment of acquittal)—on the ground that the state had failed to prove that the crime was committed in the City of St. Louis. Defendant's motion was overruled, and he then offered evidence which included statements by the defendant adequate to prove that the crime, if committed, was committed in the City of St. Louis. On appeal from his conviction, defendant assigned as error the overruling of his motion for directed verdict. The Missouri Supreme Court affirmed the conviction, holding that any failure on the part of the state's evidence to show venue was waived. It is possible that the waiver resulted merely from the fact that the defendant did not stand on his motion for directed verdict, but instead offered evidence in his own behalf. The court intimated as much in one part of the opinion.²⁶¹ If this is the rule of the case it might work a serious hardship on the defendant. Elsewhere, however, the court seems to treat the defect in proof of venue as cured by the defendant's own evidence, so that the jury was entitled to find on the whole evidence that the crime was committed in the City of St. Louis.²⁶² That interpretation is unobjectionable.

Several things should be noted. If the state does not prove venue, the defendant's motion for judgment of acquittal should be granted. In this situation, such a motion should not be treated as a motion to transfer, for neither the information nor the proof discloses any place to which a transfer could properly be made. It must be admitted that failure to prove venue in a case like *Cobb* is not likely to recur, but there are cases in which there simply is inadequate evidence to prove venue, even though the rule is that venue can be proved circumstantially.²⁶³ It is in this class of cases that the impact of the constitutional provision is greatest, and is seemingly insurmountable in Missouri. Although such cases are rare, the use of automobiles to whisk away potential murder or rape victims makes their occurrence more likely.

SUMMARY AND RECOMMENDATIONS

Perhaps the clearest way to summarize what has been said is to proceed by illustration rather than exclusively by exposition. Suppose that the legislature has enacted the following two hypothetical sections:

1. One who has carnally known any woman not his wife by force and against her will in any county in this state shall be imprisoned for not less than ten years.

261. *Ibid.*

262. *Id.* at 379, 221 S.W.2d at 747.

263. *E.g.*, *State v. McGinnis*, 76 Mo. 326 (1882).

2. One who has carnally known any woman not his wife by force and against her will in any county in this state shall be imprisoned for not less than ten years, provided that he afterwards takes up residence in a different county in this state.

It is clear that under existing Missouri law the defendant accused of rape could be tried only in the county where he committed the rape.²⁶⁴ Would the presence of the second section change this in any way? The answer is clearly no. But on what principle? That it does not define a crime? But in a sense it does, for there could be no conviction for its violation unless something was done which was a serious crime at common law and which the section immediately preceding it also declares criminal.

Well, why, then, could not the defendant be tried in the county of his later acquired residence as a violator of section 2? The answer is not that section 2 does not define a crime, but rather that it does not define a different crime from that defined in section 1; it does not provide for additional distinctive conduct of such a nature that the legislature can use that additional conduct as a basis for saying that the rape without the move to another county is a different crime from the rape followed by a move to that other county.

But should the statutes be read together as a rather peculiar effort to provide alternative places of trial in rape cases? Because that would seem to be the only sensible construction of the statute, it would certainly be argued. If the gist rule *were* one of constitutional law, the effort would clearly be held invalid. But suppose that the legislature does have some power to vary that rule. Would the power extend this far? The answer seems clear; it would not. Under any view of the crime of rape, the residence of the perpetrator has no rational relationship either to the reason for the proscription or to the character of the conduct proscribed. It follows then, that even though the gist rule may be changed in some cases and under some circumstances, the result of the change must be related to the nature of the crime and the reasons for forbidding the conduct.

By way of contrast, suppose the following section were enacted:

Whoever, being married, either (a) goes through a second marriage ceremony, or (b) goes through a second marriage ceremony and cohabits with a person not his spouse, or (c) cohabits with a person not his spouse, shall be guilty of bigamy.

The crime of bigamy can be regarded as committed in one of three ways under this section: (1) merely by going through the second marriage ceremony; (2) by cohabitation without having gone through the second marriage ceremony; (3) by cohabitation following a sec-

264. Essentially this is true because rape is not a crime which can rationally be broken up into parts for any purpose.

ond marriage ceremony. Suppose that we consider only possibilities 1 and 3. If the second marriage ceremony occurs in County A, and defendant cohabits in Counties B, C and D, may defendant be prosecuted only in County A? The answer seems clear. Defendant could be prosecuted in any of the four counties. What is the essential difference? It is entirely rational to say that entry into a second marriage by one already married is a crime, but that cohabitation following that second marriage is an additional crime, and a more serious one. Thus in situation 3, defendant could be prosecuted in both County A and in any of the other three counties. (It is even arguable that he could be prosecuted in all three of them on the theory that cohabitation in one county is sufficiently separate from cohabitation in any other to constitute a separate crime.) In effect, the legislature would have created more than one crime out of conduct ordinarily considered a single offense. That it has power to do so is illustrated by the legislative decision to separate abandonment and non-support—a decision which was sustained, even for venue purposes.²⁶⁵

But can the legislature go further? Suppose that after defining the substantive crime of kidnapping in its usual form, the legislature provided that:

The crime of kidnapping as above defined may be prosecuted either where the abduction takes place, or where the kidnapped person is hidden or confined, or where the demand for ransom is made, or where the ransom money is actually paid over.

If those elements occurred in four different counties, in which of them could prosecution be begun without violating the constitution? The answer here, if indeed there is one, is not so simple. It is essential to review the theory of the cases. The basic reasoning underlying cases announcing the constitution-based restrictive rule is essentially this:

1. Prosecution must occur where the crime was committed;
2. No statute considered in those cases specifically defined the place of crime, but some clearly purported to place venue in a county other than that in which the crime was committed;
3. In the cases declaring statutes unconstitutional, it was clear that under any rule for determining situs of crimes, the crimes were committed in a different county from that of trial;
4. In the cases in which some elements admittedly took place in one county while others occurred in a different county, no statute specifically stated that the part of the course of criminal conduct which occurred in the county where venue was laid was there punishable, nor was there any general statutory substitute for the gist rule.
5. In this situation, the court could look only to common law rules, which provided that the crime was committed where its

265. See text at notes 177-94 *supra*.

gist occurred, for although there was some disagreement about what constituted the gist of a particular crime, the courts agreed that each crime had a gist.

6. The obvious process was, therefore, (a) determine what the gist of the crime in question was at common law, (b) find out whether that part of the crime occurred in the county of trial. If it did, venue could be laid there, otherwise not.

If we view the hypothetical kidnapping statute as an effort to change the gist rule, we may now ask whether the attempt would be successful. The key link in the chain of reasoning is that the gist rule was used in default of anything else which could serve as a substitute. With the hypothetical kidnapping statute, the court *could* take the position that the legislature provided that substitute. Thus it could hold that enough of the crime of kidnapping occurred to justify trial for the completed offense in the county where abduction took place, or where the confinement occurred, or where the ransom demand was made, or where the ransom was paid.

Of course, if the legislature attempted to make residence by the defendant in some county in the state part of the crime, it is doubtful whether trial could be had in the county of residence if none of the other four elements occurred there. There are limits. No doubt some "necessary," "substantial," "important," "material" element of the criminal conduct would have to occur where venue is laid. Although the principle seems clear, precision in stating it is more difficult.

If this were a matter of first impression in Missouri in 1958, I believe this hypothetical venue statute would be upheld. Because of the long history discussed in this article, however, substantial arguments that such a statute would be unconstitutional could be made. I believe that those arguments may be overcome by focusing attention on the key step in the reasoning underlying the Missouri cases. Resort to the gist rule was necessary because there was no legislative declaration to the contrary.

If we assume that the legislature could vary the gist rule by specifying *for each crime* various venue possibilities—within the constitutional limit that the part of the conduct occurring within the county of prosecution must bear some reasonable relationship either to the reason for the proscription or to the character of the conduct proscribed—is there any reason why the legislature may not adopt a different route to the same end? In short, could the legislature validly enact a general venue statute changing the gist rule but keeping the venue variations within the constitutional limits? Again illustration is helpful. Many jurisdictions have statutes in approximately the following form:

When a public offense is committed partly in one county and

partly in another county, or the acts or effects thereof constituting or requisite to the offense occur in two or more counties, the venue is in either county.²⁶⁶

Under such a statute, the court is given the basic responsibility for determining whether on a given set of facts the crime is committed partly in one county and partly in another. Although such statutes have been very generally upheld,²⁶⁷ and although I believe that the Missouri courts would declare such a statute valid, it is also true that the cases decided under such statutes show that just as many problems of interpretation arise under them as under the gist rule.²⁶⁸ I do not believe that the enactment of such a general statute would improve the situation in Missouri. On the other hand, it would be unwieldy to have each separate substantive criminal statute contain its own venue section. Furthermore, if the legislature went beyond the constitutional limits in some cases, or if the whole scheme seemed uneven in its application, further difficulties would arise.

Is there, then, no alternative? As part of a proposed model penal code, draftsmen for the American Law Institute have recommended to the Institute a section defining the territorial application of the code.²⁶⁹ Although this section applies to criminal conduct occurring across state lines, it could readily be adapted to the problem of venue. Relying then on the current draft of the American Law Institute proposal, I recommend for adoption by the Missouri legislature the following statute:

A person may be tried and convicted of an offense against the State of Missouri in any county thereof where he has wholly or partly committed the offense. An offense against the State of Missouri is committed wholly or partly within a particular county of the State under the following circumstances:

1. If the offense consists of specified conduct but does not require either a purpose to cause or the causing of a particular result, the offense is wholly committed within a county whenever the conduct occurs within that county.²⁷⁰
2. If the offense consists of specified conduct engaged in with a purpose to cause a particular result but does not require that result to occur, the offense is committed wholly within

266. See Annot., 30 A.L.R.2d 1267, for a discussion of cases arising under statutes of that general type.

267. Ibid.

268. Ibid.

269. Model Penal Code § 1.03 (Tent. Draft No. 5, 1956), hereafter cited as "Model Penal Code."

270. The code illustrations are carrying a concealed weapon, reckless handling of a vehicle, or reckless handling of firearms. Model Penal Code, comment to § 1.03.

- a county if the conduct with the requisite purpose occurs within that county.²⁷¹
3. If the offense consists of specified conduct which actually causes a particular result, the offense is committed wholly within a county whenever the conduct and the result both occur within that county.
 4. If the law imposes a duty of performance within a county, an offense based upon an omission to perform that duty is committed wholly within that county regardless of where the person is when the omission occurs.
 5. If the offense consists of specified conduct which causes a particular result, the offense is committed partly within a county if
 - a. the result is caused within that county by conduct occurring outside it; or
 - b. the result is caused outside that county by conduct within that county if the conduct within that county constitutes an attempt to commit the offense charged.
 6. Murder or manslaughter is committed partly within a county if
 - a. the bodily impact causing death occurs within that county; or
 - b. conduct within that county constitutes an attempt to commit murder or manslaughter; or
 - c. the victim dies within that county.

It would be absurd to assert that no problems of interpretation would arise under the recommended statute. It is clear, however, that more definite guide-lines would be set out for the court than by the representative statute discussed previously. On the other hand, consistency in principle would be accomplished, something that would be difficult to achieve if the alternative of drafting specific venue provisions for each substantive offense were adopted. I believe that this statute would be upheld by the Missouri Supreme Court, and that it would provide a sensible solution to the problems created by cases falling into category 3—those in which there is no doubt where every part of the total course of criminal conduct occurred, but where, at least according to some rational view of the matter, some significant part occurred in one county and another significant part occurred in another county.

Obviously, such a statute would not reach the problems arising in the second category of cases—those in which there is doubt—perhaps not resolvable under ordinary burden of proof rules—where some significant part of the total course of criminal conduct occurred. Because all attempts to solve the problem for cases in this class have been struck down by the Missouri courts, and because those attempts

271. Obvious examples are attempts and conspiracies.

seem to have exhausted the practical possibilities, I regard it as a matter for constitutional amendment.

Finally, it should be made clear that no attempt has been made here to handle cases where part of the conduct occurred outside the state and part within it. Reflection suggests, however, that under the Missouri court's interpretation of the Missouri Constitution, the problem of extraterritoriality and the problem of venue run parallel through nearly all of their course. The statute currently under consideration by the American Law Institute, used as a model for the venue statute proposed herein, would seem to be admirably suited for the purpose of defining the territorial scope of Missouri's criminal law, provided some minor changes were made.²⁷²

272. Model Penal Code § 1.03.

WASHINGTON UNIVERSITY LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1958

February, 1958

Number 1

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published in February, April, June, and December at
Washington University, St. Louis, Mo.

EDITORIAL BOARD

JULES B. GERARD
Editor-in-Chief

GERHARD J. PETZALL
Associate Editor

MARTIN SCHIFF, JR.
Associate Editor

ALBERT J. HALLER
Business Manager

EDITORIAL STAFF

DONALD E. BONACKER
BARNEY J. GISSENAAS

WILLIAM D. OLSON
JEROME F. RASKAS
CHARLES A. SEIGEL

RALPH RICHARD STRAUB
BRUCE E. WOODRUFF

BUSINESS STAFF

ROBERT S. COHEN

DONALD P. GALLOP

FACULTY ADVISOR

HIRAM H. LESAR

ADVISORY BOARD

CHARLES C. ALLEN III
ROBERT L. ARONSON
FRANK P. ASCHEMEYER
EDWARD BEIMFOHR
G. A. BUDER, JR.
RICHARD S. BULL
REXFORD H. CARUTHERS
DAVE L. CORNFELD
SAM ELSON
ARTHUR J. FREUND
JOSEPH J. GRAVELY

JOHN RAEBURN GREEN
FORREST M. HEMKER
GEORGE A. JENSEN
LLOYD R. KOENIG
ALAN C. KOHN
HARRY W. KROEGER
FRED L. KUHLMANN
WARREN R. MAICHEL
DAVID L. MILLAR
ROSS E. MORRIS
RALPH R. NEUHOFF
NORMAN C. PARKER

CHRISTIAN B. PEPPER
ORVILLE RICHARDSON
W. MUNRO ROBERTS
STANLEY M. ROSENBLUM
A. E. S. SCHMID
EDWIN M. SCHAEFER, JR.
GEORGE W. SIMPKINS
KARL P. SPENCER
MAURICE L. STEWART
JOHN R. STOCKHAM
WAYNE B. WRIGHT

Subscription Price \$4.00; Per Current Copy \$1.25. A subscriber desiring to discontinue his subscription should send notice to that effect. In the absence of such notice, the subscription will be continued.

CONTRIBUTORS TO THIS ISSUE

SAMUEL H. LIBERMAN—Counsel, Lewis Rice Tucker Allen & Chubb. LL.B. 1918, University of Missouri. General Counsel to the Commission of Government Security. Member of the Missouri Bar.

FRANK W. MILLER—Professor of Law, Washington University School of Law. B.A. 1946, LL.B. 1948, S.J.D. 1954, University of Wisconsin. Assistant to draftsman, Bulk Sales article of the Uniform Commercial Code. Author of various leading articles. Member of the Wisconsin Bar.