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Change of Venue and Venire in Kentucky

By JERRY FULLER*

Some general confusion relative to the rights of both the accused and the Commonwealth to change of either venue or venire is indicated by the number of criminal appeals which involve questions concerning such rights. A brief review of the constitutional and legislative provisions authorizing such changes, together with some historical data, may aid in preventing future confusion.

The present statutory provisions relating to change of venue, KRS sec. 452.210-452.340, are derivatives of Carroll's Statutes, sec. 1109-1125. The section of the statute authorizing a change, KRS sec. 452.210, was derived from Carroll's Statutes, sec. 1109, and dates back to an act passed by the Legislature in 1890.¹ This act was the first to authorize specifically a change of venue in favor of the Commonwealth, although a general law relative to change of venue was enacted as early as 1851.² Some confusion existed during the period extending from 1850 to 1890 regarding constitutional authorization for a change of venue in favor of the Commonwealth. The delegates to the Constitutional Convention of 1890 concluded that whether or not the 1850 Constitution gave such authority section 11 of the new Constitution should be amended to provide expressly for it.³ Arguing vigorously in favor of allowing the Commonwealth as well as the defendant the right to a change of venue, one of the delegates from Fayette County, Mr. Charles J. Bronston, said:

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¹ Public Acts 1890, Chapter 1834, pp. 164, 165.

² Public Acts 1850-51, Volume 1, Chapter 493, p. 52.

³ Debates Constitutional Convention 1890, Volume 1, p. 953.

No one could ever have anticipated scarcely that in Kentucky the occasion would ever arise when communities would become so barbarous and uncivilized as to demand a change of venue for the commonwealth as well as the defendant; but as a part of the history of the commonwealth, however much we might love to blot it out, yet we must admit it is true. There are sections of the commonwealth today where, if you were to undertake to try a man in the county where the offense was committed, it would be worse than a mockery of justice. Whether it be for the defense—whether it be for the protection of society at large—I say the framers of our constitution meant, and we should so express ourselves, that the Legislature may provide the necessary means to secure a fair and impartial trial.⁴

Bitterly opposed to the provision was Mr. J. G. Forrester, delegate from Harlan, Perry, Bell and Leslie Counties, who remarked:

I was surprised at the gentleman from Lexington when he said that there are counties and districts in this State in which, if you try the accused, that the trial would be a mockery and a farce. I do not know of such a county in this commonwealth, but I do not profess to be acquainted with Fayette County. It may be so there; but I am satisfied that in the counties with which I am acquainted it would not be a farce. A man may have a jury that is acquainted with him, they may be privately his friends, but I think that they will not consider that when they come to sign the verdict, and will bring in such a one as the case demands.⁵

As the debates over the section neared completion and the vote was about to be taken, Mr. A. J. Auxier, delegate from Pike, Martin and Johnson Counties, spoke as follows:

I have never been able to discover any reason why the commonwealth should not be entitled to a change of venue, as well as the defendant. There are certain counties in this commonwealth where the defendant cannot possibly be brought to an impartial trial. His relationship, his influence and connection in some counties place him at such an advantage that justice cannot in those

⁴ Id. at 544.

⁵ Id. at 648.

counties be obtained, and I think it is perfectly legitimate and sufficient that under the supervision of the Court, at the request of the commonwealth's attorney, a change of venue should be ordered in favor of the commonwealth. While I do not like to single out any one particular county and mention any one instance, yet the very fact that the Legislature, without any amendment to the Constitution, passed a law authorizing a change of venue in favor of the commonwealth, by which certain prosecutions were transferred from Perry County down into Clark, has settled a difficulty and a war that has been waged in that country so long. The feuds are now at an end, because those parties can be indicted and brought to a county where they can be brought to justice. The interests of the people, when prosecutions are instituted in favor of the commonwealth for the suppression of lawlessness, and for the prevention of crime, demand that the commonwealth have such a right.⁶

It was not unusual for delegates from the more peaceful communities to promote measures designed to prevent permanently the recurrence of notoriety which feuds had been bringing to the name of Kentucky for some time. The delegates from strife-ridden counties, on the other hand, resented what appeared to be the rape of their jurisdiction to try their own culprits. All delegates were aware of the case to which Mr. Auxier referred. That case reached the Court of Appeals and was decided January 24, 1891.⁷ The decision was in favor of the constitutionality of the legislative act of 1890 under article 2, section 38 of the Constitution of 1850.⁸ It is thus apparent that the present statute authorizing a change of venue is constitutional under the present Constitution and was constitutional under the Constitution of 1850 as well.

Prior to 1850 change of venue in favor of the defendant could be accomplished in individual cases by special legislative acts.⁹ The Constitution of 1850 rendered such special acts unconstitutional while providing for a change of venue as follows:

⁶ Id. at 951, 952.

⁷ The arguments quoted were presented between October 11 and October 29, 1890.

⁸ *Commonwealth v. Davidson*, 91 Ky. 118, 15 S.W. 53, 12 Ky. Law Rep. 709 (1891).

⁹ For examples of such acts see Acts of 1820, Chapters I and XXXII, pp. 7 and 38.

The General Assembly shall not change the venue in any criminal or penal prosecution, but shall provide for the same by general laws.¹⁰

As mentioned heretofore, the Legislature passed such a general law in 1851. But they went even further in the 1853-54 session when section 194 of the present Criminal Code was originally enacted. That section read as follows:

If the judge of the court is satisfied, after having made a fair effort, in good faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free of bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed.¹¹

There has been little change in the section from the date of the adoption until the present time. Its constitutionality, though questioned, has never been resolved satisfactorily. The case of *Moseley v. Commonwealth*, 84 S.W. 748, 27 Ky. Law Rep. 214, which upholds the constitutionality of the section, relies upon earlier cases which are not authority for the proposition in support of which they are cited.¹²

No cases have been found wherein the section was questioned under the Constitution of 1850. Evidently it had been used in cases from which no appeal was taken.¹³ The proponents of the committee's draft of a proposed section 11 for the present Constitution favored inclusion of the language of section 194 of the Criminal Code in the Constitution, so as to remove all doubt as to its constitutionality. The pertinent portion of the proposed section follows:

Provided: That in cases of trial by jury, the General Assembly may authorize the Court to cause a jury to be summoned and empaneled to try the case, from any ad-

¹⁰ Constitution of 1850, art. II, § 38.

¹¹ Johnson, Harlan and Stevenson, Criminal Code of 1854, § 195, p. 284.

¹² The cases cited in *Moseley v. Commonwealth* are *Brown v. Commonwealth*, 49 S.W. 545, 20 Ky. Law Rep. 1552; *Massie v. Commonwealth*, 36 S.W. 550, 18 Ky. Law Rep. 367; and *Roberts v. Commonwealth*, 94 Ky. 502, 22 S.W. 845. All of these cases authorize the use of section 194 of the Criminal Code in stated instances, but none rules on its constitutionality.

¹³ Debates Constitutional Convention 1890, Volume 1, p. 451.

jacent county or counties, or from other counties conveniently near the place of the trial, whenever the Court may be satisfied that a fair and impartial jury cannot be procured in the county where the trial is had, and make an order to that effect: *Provided further*, The General Assembly may provide by law for a change of venue in favor of the defendant in such prosecutions. . . .¹⁴

Conspicuously absent from the proposed constitutional provision were the words: "after having made a fair effort, in good faith, for that purpose," but the committee intended to leave this requirement to the discretion of the Legislature.¹⁵

After hearing the numerous arguments supporting the proposed section because of the otherwise dubious constitutionality of the provision, the convention, nevertheless, chose to adopt the present section 11, a substitute for the committee's draft.¹⁶ Thus the present Constitution (1) specifically authorizes passage by the Legislature of a general law providing for change of venue in favor of either the defendant or the Commonwealth;¹⁷ (2) specifically prohibits passage of any special laws providing for change of either venire or venue,¹⁸ and (3) does not specifically authorize a general law providing for a change of venire. It would seem that the intentional omission of the language of section 194 of the Criminal Code, under the circumstances described, without thereafter authorizing legislative enactment of similar provisions, signaled the intent of the majority of the delegates to the constitutional convention to eliminate from the laws of Kentucky the right to a change of venire—if, in fact, such a right ever existed constitutionally after 1850.

¹⁴ *Id.* at 951.

¹⁵ *Id.* at 963.

¹⁶ *Id.* at 965.

¹⁷ Constitution of Kentucky, § 11, which follows:

Rights of accused in criminal cases; change of venue.—In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the general assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

¹⁸ Constitution of Kentucky, § 59. See the second and third proviso of this section.

In tracing the historical development of change of venue it becomes obvious that the proponents of such a right in favor of the Commonwealth placed emphasis upon the adjective "impartial" in the phrase "impartial jury of the vicinage." The opponents, on the other hand, placed emphasis upon "vicinage," and in so doing practically excluded the requirement of impartiality. It is submitted that emphasis has belonged properly on the requirement of impartiality under all of Kentucky's constitutions.

Prior to 1782, when Kentucky was a district of Virginia, all criminal cases were tried in either Richmond or Williamsburg, Virginia.¹⁹ Upon obtaining the status of a Commonwealth, Kentucky gained jurisdiction of its own criminal trials. The original court system of Kentucky provided for a court of oyer and terminer, to be located at Harrodsburg, with jurisdiction over all criminal cases.²⁰ But, despite the fact that a single court had statewide jurisdiction, the Legislature provided for obtaining jurors from the county where the offense was committed.²¹ The court of oyer and terminer was extinguished in 1795 and criminal jurisdiction vested in the district courts, the Frankfort District Court gaining jurisdiction over "all criminals within this state."²²

The jurisdiction of the Court of Appeals in criminal cases was limited to cases penal in nature. Thus if the sentence included imprisonment, the Court of Appeals had no jurisdiction—their jurisdiction not extending beyond cases where the sentence was a pecuniary fine or penalty.²³ The venue of the

¹⁹ Henning's Statutes at Large (Va.) Volume X, Chapters XXI and XXII, pp. 89, 90. These statutes authorize establishing permanent quarters for the General Court at Richmond, Va. and the Court of Appeals at Williamsburg; the Court of Appeals being subject to move if the Legislature should so direct.

²⁰ See 1 Littell, Chapter XXIII, § 14, p. 99. The court of oyer and terminer was probably established to take over the functions of the District Court at Harrodsburg. The Virginia Legislature authorized a District Court in Harrodsburg in 1782. The authorization represented an attempt to overcome the hardships occasioned by having sole jurisdiction for Kentucky criminal cases vested in the General Court and High Court of Chancery. See Henning's Statutes at Large, (Va.) Volume XI, Chapter XLVIII, p. 85.

²¹ 1 Littell, Chapter XXIII, § 9, p. 97.

²² Id. Chapter CCI, § 2, p. 300. The methods of statewide criminal jurisdiction represented by the court of oyer and terminer and the Frankfort District Court either proved unworkable or were at their institution intended to be only temporary. The Frankfort District Court lost statewide criminal jurisdiction by legislative act in 1796, and each district court thereafter had jurisdiction of the cases arising within its district. 1 Littell, Chapter CCLXIII, § 20, p. 480.

²³ Commonwealth v. Mitchell, 26 Ky. (3 JJ Marsh) 630; See also Montee v. Commonwealth, 26 Ky. (3 JJ Marsh) 132.

action during the period from 1795 to 1850 was the county where the crime occurred, but a change could be obtained by special act of the Legislature.²⁴

There are no cases of a major criminal character reported in Kentucky prior to 1850, probably due to lack of jurisdiction in the Court of Appeals, and it would be extremely difficult if not impossible to determine the exact conditions motivating changes of venue during that period. The language of special acts of the Legislature indicates, however, that they were not too dissimilar from conditions which would allow a change today.

Since change of venue had been granted previously by special acts, it was, perhaps, necessary to provide in the 1850 Constitution for the elimination of such acts and the substitution of a general law. The present constitutional provision is, however, statutory in character, and, in the absence of the antecedent special acts and the constitutional provision of 1850, it would have been better to provide in the Constitution only for a fair trial by an impartial jury. The history of trial by jury shows that the original reason for obtaining a jury from the vicinage was to secure people who knew the defendant. Persons who knew a man's virtues as well as his vices were presumed to be most capable of rendering an impartial verdict. Vicinage in those days meant neighborhood, and vicinage probably meant neighborhood in the early days of the Commonwealth, since jurors were to be summoned not only from the county but from the vicinity of the crime's occurrence.²⁵ But by 1890 the word "vicinage" had become practically synonymous with the word "county" in this State's legal parlance.²⁶ Presumably the same meaning attaches to it today.²⁷

In the early days of the Commonwealth the area was settled sparsely. Everyone in any single county knew, or had at least heard of, everyone else residing in that county. The county was, in part, a large neighborhood—its occupants clannish. An impartial jury, if such could be found in the county, knew the

²⁴ *Supra* note 9.

²⁵ 1 *Littell*, Chapter XXIII, Section 9, p. 97.

²⁶ *Debates Constitutional Convention 1890*, Volume 1, p. 450. *Contra* see p. 543.

²⁷ "Vicinage in this connection [Constitution, section 11] means that the original venue is in the county in which the offense charged, or part of it, was committed." *Woosley v. Commonwealth*, 293 S.W. 2d 625 (Ky. 1956).

accused's weaknesses as they knew his strengths. They were the best equipped persons to determine his capabilities of crime.²⁸

By 1890 the situation had changed. New settlements had become villages; villages, towns; and in several areas full-fledged cities had developed. The cases in which jurors polled from the county were acquainted with the accused were rapidly diminishing. Only in the more clannish counties were such cases arising, and there an impartial jury could hardly be obtained. These were the counties which insisted upon retaining juries from the vicinage and their reasons centered upon retaining partial juries.

It becomes obvious, upon reading the debates of the constitutional convention of 1890 that those who opposed change of venue in favor of the Commonwealth did so because the interpretation of the laws of the Commonwealth differed in the various counties.²⁹ The more strife-ridden counties wanted to try their own cases by the law of the county rather than by the law of the Commonwealth. This they could do only by retaining juries from the county, juries partial to the law of the

²⁸ Though a juror who knew the defendant would be, perhaps, the best juror if he were willing to uphold the law of the Commonwealth, it is possible that the reasons for a neighbor juror had ceased to exist long before Kentucky became a Commonwealth. As pointed out by Mr. J. Procter Knott, Constitutional Convention Delegate from Marion County, under old English law the accused was not entitled to counsel. Under such circumstances, though it was presumed that "the Court, in the plenitude of its sympathy and its exalted sense of justice, would shield the prisoner with the protecting aegis of the law from all unfairness on his trial," there was also "a propriety in securing to the accused the poor privilege of being tried among those who knew him best, who could realize the enormous disadvantages under which he labored, and whose sympathies might be interposed between him and the prejudice of the judge. . . ." Constitutional Debates 1890, Volume 1, p. 733.

²⁹ One member of the convention stated:

In some part of the country if an insult is offered to a female member of a gentleman's family, and he takes his rifle and the man who offers that insult is made to hear the keen crack of a Kentucky rifle, there is no jury in any part of the state that would inflict punishment upon him. . . . How it would be in some other parts of the country I know not. It is not because the citizens knew the facts of the case but because they knew the motives that were demanded by the conventional rules of society. If a man permitted his wife or daughter to be insulted without resenting it, he is sunk in the estimation of the whole community in my part of the country, and he is forced by the rules of society to resent such an insult. I hope to God no change will ever be made in regard to that rule. You may call it barbarism, you may call it unwritten law, or what you please. I am attached to that rule, and I hope it will never be abandoned in the Commonwealth of Kentucky. . . . Debates Constitutional Convention 1890, Volume 1, p. 520.

county. The juries generally advocated allowing individuals to settle their own differences. This was not the law of the Commonwealth, but in all fairness to those who advocated such trials it should be noted that, if not the best, this had been, for years, the only feasible method for obtaining justice in remote and inaccessible areas. By the law of the counties the defendants were obtaining trials by an impartial jury of the vicinage. By the law of the Commonwealth the trials were mere farces, the juries mere forms. The neighbor juror had ceased being an arbiter of facts who determined the extent of punishment within prescribed bounds, and had become an arbiter of law who overruled the Legislature. That juror was no longer qualified, especially when sympathetic counsel was available to protect the accused from possible judicial prejudice.

Thus even in 1890 the person who knew the defendant was becoming the least desirable juror. The neighbor juror was more prone to protect an accused from interference by the state, less prone to convict though justice demanded conviction. In the more law-abiding communities the jurors, though polled from the county, were quite apt to be totally unacquainted with the accused—just as they are today. Here justice was much more likely to be meted out.

It is readily apparent that whenever a defendant is tried by an impartial jury, the constitutional rights originally guaranteed him are not impaired. In the early days a jury from the vicinage was presumed to be the most impartial and the presumption may have accounted for the inclusion of the requirement "from the vicinage" in the first three constitutions. By 1890 population increases had led to creation of additional counties, with a corresponding shrinkage in county area. But the same increases had created more compact neighborhoods within the individual counties. The neighborhood no longer included the entire county nor even the entire town, but the word "vicinage," by custom, came to mean county rather than town or neighborhood. It is possible that the new interpretation of vicinage had no place in considering juror qualifications. If the accused was no longer tried by his neighbors, then *impartial* strangers could be obtained just as easily or perhaps more easily in another county. Nevertheless the expenses involved in changes

of venue necessitated and still necessitate some restrictions on its use. The delegates to the constitutional convention were aware of such expenses,³⁰ but were probably more concerned with retaining familiar phrases in order to insure adoption of the Constitution when they included the vicinage requirement.³¹ An amendment which would have allowed "an impartial jury according to the law of the land" was severely criticized.³²

The proposed amendment could have protected adequately the rights of an accused and would have left considerations which are more statutory than constitutional in character to the discretion of the Legislature. But even under such an amendment the constitutionality of section 194 of the Criminal Code would be doubtful today. Recent cases indicate that presently a fair trial cannot always be had by merely changing venue.³³ The presence of hostile spectators may create prejudice in a jury impartial when sworn, thus rendering the trial unfair according to the law of the land.

But the proposed amendment was not adopted and our concern must be with the Constitution as it is rather than as it might have been.

According to the latest decisions the word "vicinage" remains synonymous with "county."³⁴ The right to a change of venue is a constitutional one and if refused, after an accused shows good cause, it constitutes reversible error regardless of whether the accused shows he was prejudiced thereby.³⁵ Furthermore, merely changing the venue when an accused asks for and is entitled to a change of venue does not afford adequate protection.³⁶

The accused is also protected from changes of venue on behalf of the Commonwealth, for though such changes may be had it must be shown that failure to grant the change would deny the Commonwealth a fair trial.³⁷ And the Commonwealth cannot secure a change of venue unless the judge first makes

³⁰ Debates Constitutional Convention 1890, Volume 1, pp. 648, 952, 953.

³¹ *Id.* pp. 450, 501, 583.

³² *Id.* pp. 501, 519, 520.

³³ See *Bennett v. Commonwealth*, 309 S.W. 2d 183, (Ky. 1958); *Keeton v. Commonwealth*, 314 S.W. 2d 204 (Ky. 1958).

³⁴ *Woosley v. Commonwealth*, 293 S.W. 2d 625 (Ky. 1956).

³⁵ *Keeton v. Commonwealth*, 314 S.W. 2d 204 (Ky. 1958).

³⁶ *Ibid.*

³⁷ Ky. Rev. Stat. § 452.201.

a fair effort to obtain a jury from the county wherein the offense was committed. Ordinarily, "fair effort" in this context requires something more than exhaustion of the regular panel without obtaining a local jury in the absence of a previous trial of the case or a trial of a companion case involving the same or a similar character of crime.³⁸

When it is shown that a change of venue should be granted the Constitution limits that change to the most convenient county. Statutory limitations impose an added restriction which requires us to look first to adjacent counties when making a change. Section 194 of the Criminal Code requires looking first to adjacent counties when making a change of venire also, but this provision has remained less than mandatory since the Court of Appeals, while condemning the practice, held that error in going to a non-adjacent county was not reviewable.³⁹

To make change of venue a procedural rather than a constitutional question would, at first blush, seem impossible. Nevertheless all that is actually necessary is a change in legal thinking followed by some judicial interpretations to produce a change in legal parlance. As we have shown, the word "vicinage" originally meant "neighborhood" then grew to mean "county" and there stagnated. The reasons for interpreting the word to mean neighborhood vanished when an accused was no longer tried by his neighbors. The reasons for interpreting the word to mean county are near the vanishing point. Increased ease in transportation makes it possible for jurors and witnesses to attend a trial in an adjacent county with little added expense, in some instances with less expense. If the populace were educated out of its antiquated interpretation of "vicinage," change of venue might become more and more a procedural issue, less and less a constitutional one.

A change in the interpretation of "convenient county" may also be necessitated in the not too distant future. The Legislature's interpretation of the Constitution's "convenient county" is obviously "adjacent county." If adjacent and nonadjacent counties become equally accessible transportation-wise and expense-wise, perhaps the procedural question concerning a given

³⁸ Bennett v. Commonwealth, 309 S.W. 2d 183 (Ky. 1958).

³⁹ Frasure v. Commonwealth, 180 Ky. 274, 202 S.W. 653 (1918).

court's case load could be considered in determining which county is convenient.

It should be remembered that the present interpretation of the constitutional provisions while perhaps antiquated in urban areas is not necessarily so in rural areas. Any general revision of the individual safeguards by judicial interpretation should be made on an individual basis. This is easily done if the accent is always placed on the requirement of impartial jurors. For example, the extension of vicinage to include larger areas would not allow bringing a citizen of Kentucky's more remote areas into Jefferson County for trial. Residents of those remote rural areas who had retained the customs and language of their forefathers might find those customs and that language rousing prejudice against them. The urban resident by analogy could be prejudiced in a rural trial.

Nevertheless some immediate revision in legal parlance and its effect on constitutional interpretations could be made. An accused should not be heard to complain of violation of constitutional rights merely because a procedural error occurs in effecting a change of venue. Had not the meaning of "vicinage" been improperly extended to "county," practically every criminal trial in the Commonwealth today would violate the constitutional rights of the accused, for it is rare indeed for one's neighbors to be jurors on his trial. Legal parlance changed with the times and could do so again. "A *fair* trial by an *impartial* jury in a *convenient* county" and "A fair trial by an impartial jury of the vicinage" could be synonymous.