

CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

CRIMINAL PROCEDURE

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Venue

Tentative Draft No. 1; November 1971

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Subcommittee No. 1

ARTICLE I. PRELIMINARY

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Section 1. Place of trial. (1) Except as
otherwise provided in this Article, criminal
actions shall be commenced and tried in the county
in which the conduct that constitutes the offense or a result that is
an element of the offense occurred.

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(2) All objections of improper place of trial are waived by
a defendant unless he objects in the manner set forth in sections 4
to 7 of this Article.

Section 2. Place of trial; special provisions. (1) If conduct constituting elements of an offense or results constituting elements of an offense occur in two or more counties, trial of the offense may be held in any of the counties concerned.

(2) If a cause of death is inflicted on a person in one county and the person dies therefrom in another county, trial of the offense may be held in either county.

(3) If the commission of an offense commenced outside this state is consummated within this state, trial of the offense shall be held in the county in which the offense is consummated or the interest protected by the criminal statute in question is impaired.

(4) If an offense is committed on any body of water located in, or adjacent to, two or more counties or forming the boundary between two or more counties, trial of the offense may be held in any nearby county bordering on the body of water.

(5) If an offense is committed in or upon any railroad car, vehicle, aircraft, boat or other conveyance in transit and it cannot readily be determined in which county the offense was committed, trial of the offense may be held in any county through or over which the conveyance passed.

(6) If an offense is committed on the boundary of two or more counties or within one mile thereof, trial of the offense may be held in any of the counties concerned.

(7) A person who commits theft, burglary or robbery may be tried in any county in which he exerts control over the property that is the subject of the crime.

(8) If the offense is an attempt or solicitation to commit a crime, trial of the offense may be held in any county in which any act that is an element of the offense is committed.

(9) If the offense is criminal conspiracy, trial of the offense may be held in any county in which any act or agreement that is an element of the offense occurs.

(10) A person who in one county commits an inchoate offense that results in the commission of an offense by another person in another county, or who commits the crime of hindering prosecution of the principal offense, may be tried in either county.

(11) A criminal nonsupport action may be tried in any county in which the dependent child is found, irrespective of the domicile of the parent, guardian or other person lawfully charged with support of the child.

Section 3. Place of trial; doubt as to place of crime; conduct outside of state. If an offense is committed within the state and it cannot readily be determined within which county the commission took place, or a statute that governs conduct outside the state is violated, trial may be held in the county in which the defendant resides, or if he has no fixed residence in this state, in the county in which he is apprehended or to which he is extradited.

Section 4. Change of venue. In accordance with sections 5 to 12 of this Article, the defendant in a criminal action may have the place of trial changed only once, except for causes arising after the first change was allowed.

Section 5. Motion for change of venue; when made. A motion for change of venue may be made in any criminal action in a circuit or district court when the case is at issue upon a question of fact.

Section 6. Change of venue for prejudice. The court, upon motion of the defendant, shall order the place of trial to be changed to another county if the court is satisfied that there exists in the county where the action is commenced so great a prejudice against the defendant that he cannot obtain a fair and impartial trial.

Section 7. Change of venue in other cases. For the convenience of parties and witnesses, and in the interest of justice, the court, upon motion of the defendant, may order the place of trial to be changed to another county.

Section 8. Transmission of transcript on change of venue.

When the court has ordered a change of venue, the clerk shall forthwith make and retain authenticated copies of the original papers filed in the case and transmit to the clerk of the proper court a transcript of the proceedings and the original papers.

Section 9. Filing of transmitted transcript and papers. The change of the place of trial is complete when the transcript and papers are filed with the clerk of the court to which the trial is transferred, and thereafter the action shall proceed in the same manner as if it has been commenced in that court.

Section 10. Expenses of change; taxation as costs. (1) The expenses of the change of place of trial under section 7 of this Article shall be taxed, as allowed by law, as expenses of the action, and the costs and expenses of the action shall be taxed in the court and paid by the county wherein the trial is held. If the costs and expenses are not recovered from the defendant, the county in which the action was commenced shall repay the county in which the trial is held.

(2) The expenses of a change of place of trial under section 6 of this Article shall not be taxed against the defendant.

Section 11. Attendance of defendant at new place of trial.

(1) When the court has ordered a change of place of trial, if the defendant has been released on bail or recognizance, he must, without further notice, appear at the time and place appointed for trial and not depart therefrom without permission of the court.

(2) An undertaking of the bail is security therefor in all respects as if the action had proceeded to final determination in the court where it was commenced.

Section 12. Conveyance of defendant in custody after change of venue. When the court has ordered a change of place of trial, if the defendant is in custody, the clerk of the court shall issue a warrant directed to the sheriff of the county, directing him to safely convey the defendant and deliver him to the custody of the executive head of the correctional institution of the county where he is to be tried.

COMMENTARY TO SECTIONS 1 to 12

A. Summary

These sections contain the bases for determining in which county in the state a criminal trial will be held.

Section 1 sets forth the general rule that the county in which the offense is committed is to be the place of trial.

Section 2 deals with special circumstances such as having two or more counties involved in a single offense or crimes committed on county boundaries, on moving conveyances or on bodies of water.

Section 3 provides for choice of a place of trial when a suitable location cannot be found under section 1 or 2.

Section 4 imposes a one-time limitation on a change of venue, except for extraordinary circumstances.

Sections 5 to 12 cover the procedural mechanics involved in filing the motion, the grounds for the motion, transmittal of court papers and conveyance of a defendant to the new location.

B. Derivation

Sections 1 to 3 are based on Michigan Revised Criminal Code s. 145 and Illinois Criminal Code s. 1-6, except for s. 2 (10) which is similar to ORS 131.360.

Sections 4 to 12 are based on ORS 131.400, 131.410, 131.420, 131.430, 131.440, 131.450, 131.460 and 131.470. Sections 6 and 7 are based on Fed. Rules Crim. Proc. 21 (a), (b).

C. Relationship to Existing Law.

Subsection (1) of section 1 is comparable to ORS 131.310. Subsection (2) restates existing case law.

Subsections (1) and (2) of section 2 are now covered by similar provisions in ORS 131.340.

Subsection (3) is similar to ORS 131.320 and 131.330. Subsection (4) is a modified version of ORS 131.380. Subsection (5) is new in so far as it deals specifically with

crimes committed on moving conveyances; however, ORS 131.370 deals generally with situations such as this and those covered in subsection (6).

Subsection (7) of section 2 is similar to ORS 131.350, but stated in terms of "theft" as used in the Oregon Criminal Code of 1971. Subsections (8) and (9) are new. Subsection (10) is comparable to ORS 131.390. Subsection (11) is similar to ORS 131.360, but deletes the 60-day provision and is not limited to the "parent." The Commission was of the opinion that the 60-day limitation should be deleted, and that the state should be able to bring a prosecution for nonsupport regardless of the length of time during which the dependent child has resided in the county.

Section 3 is similar to ORS 131.320 with respect to acts committed outside the state, but new with respect to offenses committed within the state.

Section 4 is the counterpart of ORS 131.400. Section 5 restates part of ORS 131.420. Section 5 also is taken from ORS 131.420 and, like the existing statute, applies to actions in circuit and district court. Sections 6 and 7 are based on Fed. Rules Crim. Proc. 21 (a), (b).

Section 8 restates ORS 131.430. Section 9 restates ORS 131.440. Section 10 is similar to ORS 131.450 but would not allow costs to be taxed if a change of venue is necessary to ensure a fair trial for the defendant. Section 11 restates ORS 131.460 and section 12 restates ORS 131.470.

Each of the above existing statutes would be repealed. ORS 52.530 and 156.100 which cover the matter of venue in justice courts would be amended to conform provisions relating to taxation of costs of change of venue. ORS 484.040, venue for traffic offenses, would be amended to incorporate the new references.

Oregon Constitution, Article I, s. 11 provides, in part, that "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed...." However, this does not preclude the legislature from enacting statutes to provide for change of venue or for providing for a place of trial in those cases involving more than one county or where the county in which the crime occurred cannot reasonably be determined. The proposed sections are intended to establish comprehensive guidelines for handling such cases.

On balance, they do not differ greatly from our existing rules although the language is new, and the sections are addressed more specifically to certain kinds of venue questions. Sections 4, 6 and 7, contrary to ORS 131.400 and 131.420, clearly would allow only the defendant to move for a change of venue.

Existing statutes:

131.310 County wherein crime was committed as place of trial. Except as in ORS 131.210 to 131.470 otherwise provided, all criminal actions must be commenced and tried in the county where the crime was committed.

131.320 Where crime commenced outside state is consummated within state. When the commission of a crime commenced outside this state is consummated within its boundaries by the defendant, through the intervention of an innocent or guilty agent or by any means proceeding directly from himself, if the defendant is afterwards found in this state, the action therefor may be commenced and tried in the county in which the offense is consummated although the defendant was out of the state at the time of the commission of the crime charged.

131.330 Where death resulted within state from act done outside state. When the crime of murder or manslaughter has been committed by means of a mortal wound given, injury inflicted or poison administered without this state and the person so wounded, injured or poisoned dies therefrom within this state, if the person committing such crime is found or comes into this state, the action therefor may be commenced and tried in the county where the death happened.

131.340 Where crime extended over more than one county. When a crime is committed partly in one county and partly in another or when the acts or effects thereof constituting or requisite to the consummation of the crime occur in two or more counties, an action therefor may be commenced and tried in any of such counties.

131.350 Where property is taken from one county to another or brought within state. When property feloniously taken in one county by burglary, robbery, larceny or embezzlement is brought into another county, an action for such crime may be commenced and tried in either county. When property so taken without the state is brought within it, the action may be commenced and tried in any county therein into which such property is brought.

131.360 Nonsupport actions. In criminal actions for nonsupport of wife or child, or both, the action may be commenced and

tried in any county of the state in which the dependent wife or child has been an actual resident for not less than 60 days while such failure and neglect to support has continued, irrespective of the domicile of the husband or father.

131.365 Traffic offenses. The venue of a state traffic offense, as defined in ORS 484.010, may be as provided in ORS 131.210 to 131.470 or as provided in ORS 484.040. [1959 c.664 §5]

131.370 Doubt as to place of crime with respect to county line. When a crime is committed on or within one mile of the boundary line of two or more counties, or when the boundary line between two or more counties is unknown or uncertain, and it is doubtful in which county the crime was committed, an action therefor may be commenced and tried in any of such counties.

131.380 Crime committed on water bordering on county. When a crime is committed upon any bay, lake, river or other water situate in two or more counties or forming the boundary between two or more counties, an action therefor may be commenced and tried in any county bordering on such bay, lake, river or other water and opposite the place where the crime was committed.

131.390 Where acts of accessory are committed in county other than that of principal crime. In the case of an accessory after the fact in the commission of a crime, the action must be commenced and tried in the county where the crime of the accessory was committed, notwithstanding the principal crime was committed in another county.

131.400 Change of venue. Either party may have the place of trial changed once, and no more unless for causes not in existence when the first change was allowed; and in no criminal action shall the place of trial be changed except as provided and allowed in ORS 131.410 to 131.470.

131.410 County to which venue may be changed. When the motion for the change of place of trial is allowed, the court shall order the action to be tried in any other county where the action might have been commenced or in the nearest county where a fair and impartial trial can be had.

131.420 When venue in criminal action in circuit or district court may be changed. In any criminal action in a circuit or district court when the cause is at issue upon a question of fact, the court may order the place of trial to be changed, as follows:

(1) When it is made to appear to the satisfaction of the court that a fair and impartial trial cannot be had in the county where the action is commenced;

(2) When the action is commenced in one county and might have been commenced in another, the place of trial may be changed to such other county if it appears in like manner that the ends of justice and the convenience of parties and witnesses would be promoted thereby; and,

(3) That the motion is not made for delay.

[Amended by 1961 c.442 §1]

131.430 Transmission of transcript upon change of venue. When the place of trial has been changed, the clerk shall forthwith transmit to the clerk of the proper court a transcript of the proceedings in such cause with all the original papers filed therein, having first made out and filed in his own office authenticated copies of all such original papers. Such transcript and papers may be transmitted by mail or by the hands of some suitable person appointed by the court or judge thereof.

131.440 Filing of transmitted transcript and papers. Upon the filing of the transcript and papers with the clerk of the court to which the cause is transferred, the change

of the place of trial is complete and thereafter the action shall proceed as though it had been commenced in that court.

131.450 Expense of change; taxation as costs. The expenses of the change of the place of trial shall be taxed as expenses of the action, and the costs and expenses of the action shall be taxed in the court and paid by the county wherein the trial is had; but if such costs and expenses are not recovered of the defendant in the action, they shall be repaid to such county by the county wherein the action was commenced.

131.460 Attendance, at new place of trial, of defendant who has given bail; obligation of bail bond. When an order is made changing the place of trial, if the defendant has given bail, he must, without further notice, appear at the time and place appointed for trial and not depart therefrom without leave of the court. The undertaking of the bail in such case is security therefor in all respects as if the action had proceeded to final determination in the court where it was commenced.

131.470 Conveyance of defendant who is in custody after change. When an order is made changing the place of trial, if the defendant is in custody, the clerk shall issue a warrant directed to the sheriff of the county, commanding him to safely convey the defendant to the jail of the county where he is to be tried and to deliver him to the jailer thereof, to be there safely kept until discharged by due course of law.

Oregon cases:

Where defendant was living in Lane County and cohabiting with another woman as his wife and having a wife living in Portland, crime of bigamy was committed in Lane County. State v. Locke, 77 Or 492, 151 P 717 (1915).

The place where a crime is committed is a material and jurisdictional allegation in an indictment and requires proof beyond a reasonable doubt. State v. Casey, 108 Or 386, 213 P 771 (1923); State v. Miller, 133 Or 256 (1930); State v. Oster, 232 Or 396, 376 P2d 87 (1962); State v. Cooksey, 242 Or 250, 409 P2d 335 (1965).

The provisions of Oregon Constitution, Art I, s. 11, according an accused a fair and impartial trial apply to misdemeanors as well as felonies. State v. Briggs, 198 Or 413, 255 P2d 1055 (1953).

Where defendant in work release program failed to return to his quarters at the end of workday, the court held that he was in constructive custody of OSCI and venue lay in county where the institution was located. State v. Hutcheson, 251 OR 589, 447 P2d 92 (1968). See, also Kneefe v. Sullivan, 90 Adv. Sh.545, ___ Or App ___, 465 P2d 741 (1970) which holds that escapee from work release can be tried in county where he was either physically or constructively in custody.

Where evidence showed that at least part of the crime of unarmed robbery was committed in Lane County, that was a proper venue under ORS 131.340. State v. Freeman, 92 Adv. Sh.183, ___ Or App ___, 481 P2d 638 (1971).

In case where crime of bribery began in one county but was consummated in another, it was proper under ORS 131.340 to hold trial in the county where the bribery commenced. State v. Johnson, 92 Adv. Sh. 1679, ___ Or App ___ (1971).

In prosecution for first degree murder, venue was proper in county where the element of deliberate and premeditated malice occurred, even though the jury found defendant guilty of lesser included offense of second degree murder. State v. Parker, 235 Or 366, 384 P2d 986 (1963).

Under ORS 131.340, an attempt to secret the body of the victim in a different county from the murder situs is part of the "consummation" of the crime, and venue is proper in the county where the body was hidden. State v. Bowling, 243 Or 344, 413 P2d 421 (1966).

Oregon cases (Cont'd.)

Where forged instrument is mailed in one county and received in another, the venue for the offense of uttering the forged document is in the county where received. State v. Swank, 99 Or 571, 195 P 198 (1921).

Venue of the crime of nonsupport is where the support should have been provided. State v. Anderson, 133 Or 632, 290 P 1094 (1930); State v. La Follett, 134 Or 218, 292 P 98 (1930).

A defendant may waive his right to trial in county where the offense was committed by a proper application under the statute (ORS 131.420). Where defendant's motion for change of venue was denied, it was error, after the jury had disagreed and was discharged, to grant a motion for change of venue by the state over defendant's objection. State v. Black, 131 Or 218, 282 P 228 (1929).

An application for change of venue is addressed to the sound discretion of the court and will not be reviewed except in case of an abuse of discretion, to the substantial injury of the accused. State v. Savage, 36 Or 191, 60 P 610 (1900); Packwood v. State, 24 Or 261, 33 P 674 (1893); State v. Estabrook, 162 Or 476, 91 P2d 838 (1939); State v. Little, 249 Or 297, 431 P2d 810 (1967).

In case where defendant brings into the state property stolen outside the state, he may be prosecuted in the county into which the property was brought. State v. Barnett, 15 Or 77, 14 P 737 (1887).

ORS 131.370 is not unconstitutional under Or. Const., Art I, S.11 as denying the defendant the right to trial in the county in which the offense was committed. No variance when proof showed offense was committed 900 feet outside the county line. State v. Lehman, 130 Or 132, 279 P 283 (1929).

The Oregon Constitution and statutes impose a duty on the district attorney of the county where the offense was committed to prosecute the cause in the place to which venue is changed. State v. Anderson, 207 Or 675, 298 P2d 195 (1956).

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TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Place of Trial]

Sec. 145. (1) Criminal actions shall be tried in the county in which the conduct that constitutes the offense or a result that is an element of the offense occurred, except as otherwise provided by law. All objections of improper place of trial are waived by a defendant unless he objects within the time and in the manner provided by court rule.

(2) The following special provisions apply:

(a) If conduct constituting elements of an offense, or results that constitute elements of that offense, occur in 2 or more counties, trial of the offense may be held in any of the counties concerned.

(b) If a cause of death is inflicted in one county and death ensues in another county, trial of the offense may be held in either county.

(c) If the commission of an offense commenced outside the state is consummated within this state, trial of the offense shall be held in the county or counties in which the offense is consummated or the interest protected by the penal statute in question is impaired.

(d) If an offense is committed on any of the Great Lakes or their connecting waterways and within the limits of the state, trial of the offense may be held in any county near the place where the offense was committed, or if that cannot be ascertained, as provided in subsection (3).

(e) If an offense is committed in or upon any railroad train, automobile, aircraft, vessel or other conveyance in transit, and it cannot readily be determined in which county the offense was committed, trial of the offense may be held in any county through or over which the conveyance passed in the course of its journey.

(f) If an offense is committed on the boundary of 2 or more counties or within 1 mile thereof, trial of the offense may be held in any of the counties concerned.

(g) A person who commits theft may be tried in any county in which he exerts control over the property affected if it cannot readily be determined in which county the theft actually took place.

(h) A person who commits an inchoate offense may be tried in any county in which any act that is an element of the offense, including the agreement in conspiracy, is committed.

(i) A person who in one county solicits, aids, abets, or attempts to aid another in the planning or commission of an offense in another county may be tried for the offense in either county.

(3) If an offense has been committed within the state and it cannot readily be determined within which county or counties the commission took place, or a statute that governs conduct outside the state is violated, trial may be held in the county in which the defendant resides, or if he has no fixed residence, in the county in which he is apprehended or to which he is extradited.

Text of Illinois Criminal Code of 1961

§ 1-6. Place of Trial

(a) Generally.

Criminal actions shall be tried in the county where the offense was committed, except as otherwise provided by law. All objections of improper place of trial are waived by a defendant unless made before trial.

(b) Assailant and Victim in Different Counties.

If a person committing an offense upon the person of another is located in one county and his victim is located in another county at the time of the commission of the offense, trial may be had in either of said counties.

(c) Death and Cause of Death in Different Places.

If cause of death is inflicted in one county and death ensues in another county, the offender may be tried in either county.

(d) Offense Commenced Outside the State.

If the commission of an offense commenced outside the State is consummated within this State, the offender shall be tried in the county where the offense is consummated.

(e) Offenses Committed in Bordering Navigable Waters.

If an offense is committed on any of the navigable waters bordering on this State, the offender may be tried in any county adjacent to such navigable water.

(f) Offenses Committed while in Transit.

If an offense is committed upon any railroad car, vehicle, watercraft or aircraft passing within this State, and it cannot readily be determined in which county the offense was committed, the offender may be tried in any county through which such railroad car, vehicle, watercraft or aircraft has passed.

(g) Theft.

A person who commits theft of property may be tried in any county in which he exerted control over such property.

(h) Bigamy.

A person who commits the offense of bigamy may be tried in any county where the bigamous marriage or bigamous cohabitation has occurred.

Text of Illinois Criminal Code of 1961 (Cont'd.)

(i) Kidnaping.

A person who commits the offense of kidnaping may be tried in any county in which his victim has traveled or has been confined during the course of the offense.

(j) Pandering.

A person who commits the offense of pandering may be tried in any county in which the prostitution was practiced or in any county in which any act in furtherance of the offense shall have been committed.

(k) Treason.

A person who commits the offense of treason may be tried in any county.

(l) Criminal Defamation.

If criminal defamation is spoken, printed or written in one county and is received or circulated in another or other counties, the offender shall be tried in the county where the defamation is spoken, printed or written. If the defamation is spoken, printed or written outside this state, or the offender resides outside this state, the offender may be tried in any county in this state in which the defamation was circulated or received.

(m) Inchoate Offenses.

A person who commits an inchoate offense may be tried in any county in which any act which is an element of the offense, including the agreement in conspiracy, is committed.

(n) Accountability for Conduct of Another.

Where a person in one county solicits, aids, abets, agrees, or attempts to aid another in the planning or commission of an offense in another county, he may be tried for the offense in either county. 1961, July 28, Laws 1961, p. 1983, § 1-6.

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Text of Federal Rules of Criminal Procedure (1971)

Rule 21.

TRANSFER FROM THE DISTRICT FOR TRIAL

(a) **For Prejudice in the District.** The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) **Transfer in Other Cases.** For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

(c) **Proceedings on Transfer.** When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.

As amended Feb. 28, 1966, eff. July 1, 1966.

1966 Amendment

Deleted the words "or division" following "district" wherever appearing; inserted, in subdivision (a), the words "whether or not such district is specified in the defendant's motion" and "at any place fixed by law for holding court"; and rewrote subdivision (b), which prior thereto read: "(b) **Offense Committed in Two or More Districts or Divisions.** The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

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