CRIMINAL LAW: Venue of crimes committed with absentee
ABSENTEE VOTING: voting is in county where affidavit and ballot are received and cast.

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Mr. John H. Keith
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Iron County
Ironton, Missouri

Dear Sir:

This will acknowledge your request for an opinion, based on the following facts:

> "A person who lived in St. Louis, Missouri, who was registered there and voted there in the general election on November 5th, applied for and received an application to vote an absentee ballot in this County which formerly was his home. The application and ballot were prepared in St. Louis and forwarded to the county clerk here by mail.
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> "The application was made in due time prior to the election and his ballot received in due time.
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> "Of course he could not legally vote there and also here. He had been registered as a voter in St. Louis since July 7, 1944. As above stated, he was not in this county when he applied for, received and prepared the application for an absentee ballot and prepared the ballot, and it was sent by mail as stated.
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> "I hardly understand that I could file a criminal charge against him in this county. Let me have your opinion, as to whether or not he could be legally prosecuted here."

At the outset, we wish to state that we are unable to find a case in Missouri or in any jurisdiction in point, or a case containing facts similar to the one in question; nor can we find a statute establishing the venue in criminal cases relating to absentee voting or affidavits made by such voter.

Section 2, Article VIII of the 1945 Constitution, provides the qualifications of voters, and is as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people: * * *"

For the purpose of this opinion we are assuming, from the facts stated in your request, that this voter was a resident and a legally qualified and registered voter of the City of St. Louis, and was entitled to cast his vote there in the general election held November 5, 1946. Based upon this assumption, we have concluded that the voter was not a resident of Iron County, as provided by the Constitution; that the affidavit made by this person was false, and that the absentee vote cast by him in that county was illegal and would therefore be the acts upon which any criminal action should be founded. To strengthen this conclusion, we believe the constitutional provision quoted heretofore would be a complete defense to a charge against this voter that the ballot he cast in St. Louis was illegal or constituted a violation of the criminal laws.

Having concluded that making of the false affidavit and the voting of the absentee ballot constituted violations, the question then arises as to which sections of the statutes were violated. We have examined the several statutes relating to absentee and fraudulent voting, and it is our opinion that Section 4355, R.S. Mo. 1939, covers the situation as to the actual voting. Said section is as follows:

> "Every person who shall, at any election held in pursuance of the laws of this

> state, or of any city or other municipality thereof, vote more than once, either at the same or a different place, or shall knowingly cast more than one ballot, or shall vote at any such election knowing that he is not a qualified voter and is not entitled to vote, and every person who shall knowingly advise or procure any person to vote who is not entitled to vote, or shall knowingly advise or procure any illegal vote to be cast at any such election, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than fifty dollars, or by both such fine and imprisonment."

Section 11480, R.S. Mo. 1939, applies as to the false affidavit, and is as follows:

> "If any person shall wilfully and falsely make any certificate, affidavit or statement, which certificate, affidavit or statement is required to be made by the provisions of this article, such person shall upon conviction thereof be deemed guilty of a felony and punished by imprisonment in the penitentiary for two years or by a fine of not less than fifty dollars and imprisonment in the county jail for not less than thirty days nor more than one year. If any person shall violate any provision of this article, or fail to comply with any provision hereof for which no other punishment is herein provided, such person shall upon conviction thereof, be deemed guilty of a misdemeanor."

Having reached the conclusion that the making of the false affidavit in St. Louis and the casting of the absentee ballot in Iron County (by mail from St. Louis) constitute a

violation of Section 4355, supra, it must then be determined whether the venue of any criminal action would be in the City of St. Louis where the affidavit and ballot were prepared, or in Iron County where it was received by mail and cast with the other ballots voted at the election.

The Legislature passed laws permitting absentee voting and enacted, among them, a section declaring the purpose of the laws. Said Section is 11481, Mo. R.S.A., which provides as follows:

> "This article shall be deemed to provide a method of voting by voters absent from their county on the day of election and is in addition to the method now provided by statute in cases where the voter is present in the county where such voter resides on the day of such election and to such extent is amendatory of and supplemental to existing statutes, not herein expressly repealed."

By stating that absentee voting provides a method of voting by a person in their county when absent is an addition to the method provided for voting when they are present in the county, it could be construed to mean that the person voted in his county and for the purpose thereof was at least constructively present therein when he prepared and voted an absentee ballot.

In 29 C.J.S., Elections, Section 337, page 451, it is stated:

> "Matters relating to jurisdiction and venue in prosecutions for violations of election laws are governed by the principles applicable in criminal cases generally, * * * *"

It might be well to add here that the new Constitution of Missouri does not make any provisions regarding the venue in criminal cases.

Section 3767, Mo. R.S.A., provides:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

As stated above, we do not find any other provision of the statute relating to the venue in these kind of cases so that the general law placing venue in the county in which the offense was committed would be applicable, therefore it must be determined where the offense was committed.

As stated hereinafter in our conclusion, we are of the opinion that the offenses were committed in Iron County, and in support thereof cite the following:

22 C.J.S., Criminal Law, Section 173, page 265, which is as follows:

> "By 'venue' is meant the jurisdictional locality, ordinarily the county, in which criminal acts are alleged to have occurred. * * * * 'Venue' has also been defined as the county or jurisdiction in which the action is brought for trial. Venue is a jurisdictional fact, but it is not an element of the offense, and need not, as a general rule, be proved beyond a reasonable doubt, * * * * further, it has been said that persons obviously guilty of criminal acts cannot escape punishment through technical questions of venue."

Section 174 of the same volume, pages 265 and 266, is as follows:

> "An offense is committed of course in that county in which the acts constituting the same are done, and, where the acts are done in different counties, the general rule is that the offense is committed in that county in which it is consummated, although in such a case statutes often permit the venue to be laid in either county, * * * * A person accused of crime cannot himself, or through the connivance of others, get himself arrested and bound over to give jurisdiction to a county of his preference, in fraud of the prosecuting officers, acting in good faith, to fix it elsewhere if they chose to do so in the interest of a fair trial. * * * *"

Section 103 of the same volume, page 277, provides:

> "The presence of the offender within the county where a crime is committed is not always essential, but some portion of the act, or of the omission to act, must have taken effect there.
>
> "Where a person procures the commission of a crime in one county through the agency of an innocent person, he is a principal and indictable in the county where the crime was committed, although he was not in such county at the time of its commission."

The new Constitution of Missouri, Section 7 of Article VII, provides that a person may vote an absentee ballot within or without the state, and if it was held that the place of preparing the ballot and signing the affidavit established the venue or the place the crime was committed, such holding would defeat any prosecution for illegal voting because it would not be possible to force the attendance of witnesses or the production of the elections records and documents in another state.

The foregoing is stated for the purpose of pointing out the impracticability of a rule requiring the voter's actual physical presence in a county or state before he could be tried therein for casting a fraudulent ballot. Furthermore, it is the county in which the ballot is cast that is affected by the fraud. If a person applied for a ballot and received same along with the form of affidavit to be executed, and completed same and marked the ballot but did not return same to the county from which he received the affidavit and ballot, the criminal offense would not be complete and it could not be said he committed an offense in the county where he prepared same. These acts would be more or less similar to the process of conceiving a criminal offense in one county to be actually perpetrated or committed in another. We think this proposition is analogous to the cases where forged instruments are prepared in one jurisdiction and sent to another for completion of the transaction, and also obtaining money or property by false pretenses where the pretense is made in one jurisdiction and the money or property actually delivered or received in another. In the case of State v. Randell, 183 S.W. (2d) 59, l.c. 64, the court said:

> " * * * * The general rule is announced to be that the proper venue in prosecutions for obtaining money by false pretenses is in the county where the money or property is actually obtained. In the case before us Mrs. Springer parted with her money in the City of St. Louis when the checks were charged to her account. Until that occurred she had full dominion over it. A case in point is Raymond v. State, 116 Tex. Cr. R. 595, 33 S.W. 2d 192. It was there held in a prosecution for obtaining money under false pretenses that the venue was in Shackelford county. The check upon which the money was obtained was drawn on a bank in Shackelford county but cashed by the defendant in a bank in Tarrant county. The exact situation as that in the case before us. We rule that the venue of the crime was in the City of St. Louis. The fact that the $500 cash and the draft for $1000 drawn on a bank in Franklin county were delivered to appellant in St. Louis county does not defeat the prosecution for the money obtained falsely in the City of St. Louis. * * * *"

Based on the foregoing rule, it could not be said that the false affidavit or ballot constituted an offense or in any way affected the purity of the election in Iron County until it was received there, and by the same token it could be said that when the affidavit and ballot were received it completed the criminal act, and the criminal intent of the voter to perpetrate a crime by means of a false affidavit and fraudulent ballot was committed against and in Iron County.

It is stated in 14 Am. Jur., Criminal Law, Sections 227 and 232, pages 926 and 929, as follows:

> Sec. 227.
> "A question often arises as to the jurisdiction of a crime where the accused, while in one state, sets in motion a force which operates in another state, as where a shot is fired at a person across a state line or an injurious substance is sent to a person

in another state with intent to injure him. In such cases the view has generally been taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there; for if a crime is the immediate result of his act, he may be made to answer for it in its courts, although actually absent from the state at the time he does the act. * * * *"

Sec. 232.
"At early common law, the proper venue of a crime was the county where it was committed. This is generally the rule today in this country, the rule having been recognized by the courts or established by constitutional provision. By the provisions of the Federal Constitution, criminal trials must take place in the state and district wherein the crime was committed, but it was long ago determined that these provisions apply only to prosecutions in Federal courts. The place where the person who committed the crime was at the time is not necessarily the place where, in contemplation of law, the crime was committed. The place where a crime is consummated is often, in contemplation of law, the place where it was committed. This is true as to the offense of obtaining property by false pretenses which were made in one state or county but effectuated in another. The locality of a crime in the commission of which the United States mails are used depends on where the crime is consummated. Sometimes, the crime is complete as soon as the communication is put into the mails; sometimes, when the communication reaches its destination. Depositing a forged instrument, for instance, in the mail directed to another county makes, not the county in which it was mailed, but the county where the instrument was received, the place of offense of uttering it, if such offense is committed. A charge of bribery, alleged to

> have been committed by mailing a letter in one state directed to certain officers in another, is triable in the latter. * * * *"

The Supreme Court of Missouri said in the case of State v. Mispagel, 207 Mo. 557, l.c. 582:

> "In State v. Fraker, 148 Mo. l.c. 160, this court, in discussing the correct rule as applicable to the question now under consideration, said: 'When, as here, a crime consisting of a series of acts, part done in one county and part done in another, it is dispunishable at common law in either, unless enough be done in one county to amount to a completed and punishable criminal act,'' citing 1 Bishop's New Cr. Proc., sections 54, 55 and cases cited, 'and this rule holds in the absence of statutory enactment to the contrary.'"

Applying this rule to the case in question, since we do not have a constitutional or statutory provision applying to venue for the violation of absentee election laws, it could be said, and we think the natural conclusion would be, that while some of the essential acts were committed in another county, the parts which establish a completed and punishable criminal act were performed in Iron County, namely, the receiving of the false affidavit and the casting of the ballot.

In the case of Straughan v. Meyers, 268 Mo. 590, the court passed only on the constitutionality of an absentee voting law, but we cite this case because it throws some light on the question as to <u>where</u> the vote was cast. At l.c. 598 the court said:

> "It is next urged by respondent that the act violates that part of section 2, article 8, of the State Constitution, which reads as follows:
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> "'Every male citizen . . . possessing the following qualifications shall be entitled to vote at all elections by the people. . . He shall have resided in the county, city or town where he shall offer to vote at

least sixty days immediately preceding the election.'

"It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, or the ballots prepared, deposited or counted; but merely the qualifications of the voters. It is true, under this provision, a person can vote only in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote. The word 'vote' means suffrage, voice or choice of a person for or against a measure or the election of any person to office. It is not synonymous with 'ballot,' which is merely the means or instrument by which the person votes, or rather expresses his choice or exercises his right of suffrage. (Clary v. Hurst, 138 S.W. 566; State ex rel. v. Blaisdell, 119 N.W. 360; State v. Custer, 66 Atl. 306; Gillespie v. Palmer, 20 Wis. 544; Davis v. Brown, 34 S.E. 839.)

"Had this measure provided that such absent voter could vote, that is, could exercise a right of choice for or against matters relating to the place where he did not reside, for instance, candidates of a county or district other than that of his residence, there would be no doubt of its invalidity; but it does not so undertake. The act specifically provides that the ballot shall not be deposited in the ballot box, nor entered upon the poll books, but that same shall under certain safeguards and regulations, be transmitted to the clerk of the county where the voter resides, and be there counted. The act of legally voting, as the term is understood in law, embodies the right to have the vote counted. This act does not undertake to authorize a person to vote in a place other than that of his residence, but merely provides a system or method through

> which he may vote in the place of his residence."

The necessity of the voter being actually present when he casts his vote is discussed in 14 A.L.R., page 1263. This is not a criminal case, but it supports the theory that the act of voting and acts incident thereto are in the county in which the voter casts his ballot. The North Carolina Supreme Court said:

> "And it was contended in the reported case (Jenkins v. State Bd. of Elections, ante, 1247), in reference to the Absentee Voters Law of North Carolina (Public Laws of 1917, chap. 23, as amended by chap. 322 of Public Laws of 1919), that the words 'in which he offers to vote' in the constitutional provision that voters shall have resided in the state two years, in the county six months, and in the precinct, ward, or other election district in which he offers to vote, four months next preceding the election, and the words, 'every person offering to vote,' in the provision that every person offering to vote shall be at the time a legally registered voter, necessarily implied that the voter must be present in person at the polls and tender his ballot. The court denied this contention, upon the ground that an offer to vote might be made in writing, and that was what the absent voter did when he selected his ballot, and attached his signature to the form, and mailed the sealed envelop to the proper official, and upon the further ground that, if the framers of the Constitution wished to require the personal presence of the voter, they could have easily used words which would have put their meaning beyond doubt. * * * *"

In Virginia, Colorado and Kansas the courts have also held actual physical appearance was not necessary. 121 A.L.R., pages 940 and 941, cites cases from these states, and quotations therefrom are as follows:

> "The constitutionality of the Absent Voter's Law was challenged in Moore v. Pullem (1928) 150 Va. 174, 142 S.E. 415, upon the ground

that in dispensing with the personal appearance of the voter at the polls, certain provisions of the Virginia Constitution relating to the elective franchise containing such phrases as 'the precinct in which he offers to vote' and 'that in which he offers to vote,' were violated, the theory being that such language imperatively required the personal appearance of the voters at the polling places on the day of election in order to entitle the elector to vote. The court rejected the contention that the Absent Voters' law was in contravention of the state Constitution, calling attention to the fact that the former phrase was used in connection with a provision relative to the qualification of voters, and the latter in relation to conditions for voting, and stated that there could be no more fallacious or misleading method of construing language than to divorce it from the subject in connection with which it was used. It was then pointed out that the constitutional provision relating to the method of voting contained no word requiring the personal appearance of the voter at the polls, and that the framers of the Virginia Constitution had therein (Sec. 56) specifically provided that the manner of conducting and making returns of elections, of determining contested elections, and of filling vacancies in office, in cases not specially provided for by the Constitution, should be prescribed by law, and the general assembly might declare the cases in which any office should be deemed vacant where no provision was made for that purpose in the Constitution, the court declaring 'these considerations supply the obvious and, to us, the sufficient reply to all of the objections to the power of the general assembly to enact this statute. The method of voting is not alluded to in the sections relied on, except that it shall be by ballot, be secret, and that some voters may and some may not be assisted in the preparation of their ballots. The method of voting is a different subject, is elsewhere provided for, and is incongruous

to the subjects of these sections, which, as we have stated, and as must be conceded, relate primarily to the voting qualifications, registration, and prerequisites. To suppose that the draftsmen of the Constitution paused in the writing of those elaborate provisions relating to these different subjects and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the general assembly from passing such a statute, appears to us to ignore fundamental rules of construction.'

"The preceding decision was followed in Goodwin v. Snidow (1928) 150 Va. 54, 142 S.E. 423.

"Similarly in Bullington v. Grabow (1931) 88 Colo. 561, 298 P. 1059, an act relating to absent voters was held not violative of constitutional provisions that every person possessing certain qualifications should be entitled to vote, among which qualifications was that of residence in a state for twelve months immediately preceding the election at which he offered to vote, and provisions that the general assembly should pass laws to secure the purity of elections and guard against the abuses of the elective franchise. The argument was made that a voter must be personally present when he 'offers to vote' and that the provisions of the Absent Voters' Act failed to safeguard the elective franchise, but the court dismissed the contention, saying that in view of the unanimity of the decisions of other states where the same arguments were presented, upholding the constitutionality of such laws, they had no hesitancy in declaring the act constitutional. The court also commented upon the laudable purpose of the act in that it permitted and encouraged the exercise of the elective franchise by registered voters absent from their county or too ill to attend the polls and said that the fact that the legislature had provided sufficient conditions to be performed by the voters was an adequate

> compliance with the constitutional provision relating to the purity of elections and the protection against abuses of the elective franchise.
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> "Again, an Absent Voters' Law was held not violative of a provision of the Kansas Constitution that 'every citizen of the United States of the age of twenty-one years and upwards - who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he or she offers to vote, at least thirty days next preceding such election - shall be deemed a qualified elector,' since the words 'in which he or she offers to vote' did not require the personal presence of the voter at the polling place, and that it was within the constitutional power of the legislature to provide that an offer to vote in the township or ward in which the elector resided could be made by subscribing to the affidavit prescribed in the statutes with reference to absentee voters. Lemons v. Noller (1936) 144 Kan. 813, 63 P. (2d) 177."
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> (Emphasis ours.)

The underlined part of the Kansas decision indicates very strongly that the affidavit, being one of the acts required of the voter, would be construed as having been made in the county in which said voter offers to vote even though not personally present in said county when the offer (by affidavit) is made.

For the purpose of further argument to support our conclusion, we cite the annotation under Section 11480, Mo. R.S.A., supra, which is as follows:

> "Where it appeared that fraud and irregularities on a wide scale existed in connection with 1936 election of both federal and state officers, violations in regard to election of federal officers were within jurisdiction of federal courts, while those which affected election of state officers were within jurisdiction of state. State on inf. of McKittrick v. Graves, 144 S.W. (2d) 91, 346 Mo. 990."

Upon examination of the Graves case we find that it does not specifically contain any reference to false affidavits, but if there were any false affidavits that the prosecuting attorney of Jackson County should have investigated or proceeded upon, they would necessarily have to be ones prepared elsewhere and received in Jackson County because it could hardly be a duty of a prosecuting attorney to investigate and prosecute cases wherein the affidavit was made in his county and sent elsewhere, for the reason he would have no way of knowing about their existence. We are aware that this annotation is not authority, holding the prosecuting attorney should proceed against persons sending false affidavits into Jackson County, but it does indicate that the learned lawyers who compiled the Missouri Revised Statutes Annotated were of the opinion that it would apply, and if that were true the venue of the prosecution of offense for making a false affidavit would be in the county where same was received.

Conclusion.

It is therefore the opinion of this department that, under the facts stated in your request, the defendant could be prosecuted for violating either Section 4355 or Section 11480, R.S. Mo. 1939, and that the venue of either would be in Iron County, Missouri.

Respectfully submitted,

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APPROVED:

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