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Comment

CHANGE OF VENUE IN CALIFORNIA CRIMINAL TRIALS

Under what circumstances may a defendant in a criminal action in a California superior court obtain a change of venue?¹

¹ This comment does not purport to deal with change of venue in justice's courts. The superior court has original trial jurisdiction over all felony cases, over lesser but included offenses, and over the crime of contributing to the delinquency of a minor where a "not guilty" plea is interposed. CAL. CONST. art. VI, § 5; CAL. PEN. CODE § 1159; and CAL. WELF. & INST. CODE § 702.

CAL. PEN. CODE § 1033 makes it clear that the provisions of that section, relating to change of venue, are not applicable to courts other than superior courts. CAL. PEN. CODE § 1431 pro-

California Penal Code sections 1033 through 1039.1² authorize and provide the procedure for change of venue. The essential elements of these provisions are:

- (1) The defendant must make an application³ (with two exceptions),⁴ and
- (2) The application must be on the ground that a fair and impartial trial cannot be had in the county where the action is pending,⁵ and
- (3) The application must be made in writing, in open court, and must be verified by the affidavit of the defendant,⁶ and
- (4) The prosecution must receive a copy of the application at least one day prior to the hearing of the application,⁷ and
- (5) The granting of a change of venue is discretionary with the trial court.⁸

Most cases involving these sections find the appellate courts reviewing a denial of a motion to change venue on appeal from conviction of the defendant. There have been no cases which directly deal with the question of whether mandamus will lie to force the trial court to order a change of venue,⁹ although the trial court may be forced by mandamus to pass on the merits of the application.¹⁰ It is important to note that the trial court has

vides the right and procedure with respect to change of venue in justice's courts. Cases decided under this section include *Ex parte Wright*, 119 Cal. 401, 51 Pac. 639 (1897) and *Lowrey v. Hogue*, 85 Cal. 600, 24 Pac. 995 (1890). See SULLIVAN, CALIFORNIA CRIMINAL PROCEDURE § 107 (2d ed. 1954), and Annot., 38 A.L.R.2d 738 (1954), for cases from other states concerning right of accused in misdemeanor prosecutions to change of venue. See also *People v. Chapman*, 93 Cal. App.2d 365, 209 P.2d 121 (1949), *cert. denied*, 338 U.S. 943 (1950).

For federal rules, see FED. R. CRIM. P. 21; 4 F.R.D. 419 (1946); 4 BARRON, FEDERAL PRACTICE AND PROCEDURE 149-52 (1951).

² Sections 1033-1035 are set forth in the APPENDIX. Sections 1036-1039.1 pertain to the procedure to be followed with respect to transfer of papers and records and payment of costs, and are not considered in any detail in this comment. For cases dealing with § 1036, see *People v. Bush*, 71 Cal. 602, 12 Pac. 781 (1887); *Needham v. Thresher*, 49 Cal. 392 (1874); and *Sargent v. Cavis*, 36 Cal. 552 (1869).

³ CAL. PEN. CODE §§ 1033, 1034 (see APPENDIX).

⁴ CAL. PEN. CODE § 1033.5 (see APPENDIX) provides the first exception. This section is discussed in the text at note 26 *infra*. The other exception is provided by § 1034 (see APPENDIX). Section 1034 permits the defendant's attorney to make an application, when it appears that defendant cannot safely appear himself because of popular prejudice. This application must be supported by defendant's affidavit and by other testimony. See text at note 35 *infra*.

⁵ CAL. PEN. CODE § 1033.

⁶ CAL. PEN. CODE § 1034.

⁷ *Ibid.*

⁸ CAL. PEN. CODE § 1035 (see APPENDIX).

⁹ While no case has been found which squarely faces the problem, a few cases by implication shed light on the issue. *Smith v. Judge of the Twelfth District*, 17 Cal. 547 (1861), involved an action for a writ of mandate to compel a trial court to order a change of venue in accordance with a special act of the legislature ordering such a change with respect to the particular defendant involved. While holding the act to be constitutional, the court indicated that mandamus was not the proper remedy and denied the motion. And see *People v. Fisher*, 6 Cal. 154 (1856). In *Miles v. Justice's Court of Pasadena*, 13 Cal. App. 454, 110 Pac. 349 (1910), defendant sought review of a trial court's denial of a motion for change of venue, made under § 1431, by writ of review. The court held that appeal was the proper remedy (as opposed to a writ of review). Also see *Ex parte Wright*, 119 Cal. 401, 51 Pac. 639 (1897) (appeal held proper remedy as opposed to habeas corpus) and *In re Casas*, 9 Cal. App.2d 122, 48 P.2d 990 (1935). For the rule in civil cases, see 1 WITKIN, CALIFORNIA PROCEDURE 764-74 (1954).

¹⁰ Although no cases were found squarely holding that mandamus will lie to compel the exercise of discretion with respect to change of venue sections, *Older v. Superior Court*, 157

discretion with respect to change of venue orders.¹¹ Whether mandamus is available may also turn in part on whether appeal from conviction is or is not a plain, speedy and adequate remedy.¹² In the one hundred and six years in which California's criminal change of venue provisions have been in force,¹³ only four (out of nearly sixty) reported cases have been found which resulted in reversal by appellate courts on the ground that a change of venue should have been ordered by the trial court.¹⁴ It is at least an open question, therefore, whether appeal is in fact an "adequate remedy."

Assuming that the trial court has once granted a change of venue, it is apparently not within the power of the court to vacate its order.¹⁵ And since the trial court has discretion in the matter, its order directing a change of venue will not be reversed except in a case of gross abuse of discretion¹⁶ or in a case where the trial court exceeds its jurisdiction in ordering the change.¹⁷

Application of Defendant

As previously indicated,¹⁸ sections 1033 and 1034 require that the defendant make an application.

As originally enacted, no provision was made for change of venue on application of the prosecution.¹⁹ In 1887, section 1033 was amended in an attempt to give the prosecution this right.²⁰ However, the amendment was

Cal. 770, 109 Pac. 478 (1910) (dealing with venue for criminal libel under CAL. CONST. art I, § 9), assumed without deciding that mandamus might lie in such a case. It is clear that ordinarily mandamus will not lie to compel the exercise of discretion in a particular manner. FRICKE, CALIFORNIA CRIMINAL PROCEDURE 486-87 (4th ed. 1955).

¹¹ CAL. PEN. CODE § 1034.

¹² CAL. CODE CIV. PROC. §§ 1085 and 1086. See *Andrews v. Police Court*, 21 Cal.2d 479, 133 P.2d 398 (1943) (not a change of venue case).

¹³ Cal. Stat. 1850, c. 119, § 330, and Cal. Stat. 1851, c. 18; codified in 1872 as CAL. PEN. CODE § 1033.

¹⁴ *People v. McKay*, 37 Cal.2d 792, 236 P.2d 145 (1951); *People v. Suesser*, 132 Cal. 631, 64 Pac. 1095 (1901); *People v. Yoakum*, 53 Cal. 566 (1879); *The People of the State of California, Respondents, v. William B. Lee, Appellant*, 5 Cal. 353 (1855).

¹⁵ Although dictum in *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093 (1904), indicated that a court might have power to revoke a change of venue order, in *Chase v. Superior Court*, 154 Cal. 789, 99 Pac. 355 (1908), it was squarely held that in civil cases under CAL. CODE CIV. PROC. § 399, the trial court had no power to revoke its change of venue order, once made. *People v. Suesser* was cited and considered by the court, but without express approval or disapproval of the dictum in question. However, *Chase v. Superior Court* would seem to be strong authority for the proposition that even in criminal cases, once change of venue is unconditionally granted the order cannot be revoked. See Annot., 132 A.L.R. 14, 72 (1941). However, *Badella v. Miller*, 44 Cal.2d 81, 279 P.2d 729 (1955), held that the trial court had the power in a civil case to revoke a venue order to "correct its errors."

¹⁶ No case was found reversing a trial court change of venue order on this ground, but *People v. Fisher*, 6 Cal. 154 (1856), states as a general proposition that the trial court's power is discretionary, subject to review in case of gross abuse of discretion.

¹⁷ *People v. McGarvey*, 56 Cal. 327 (1880) (order of trial court changing venue reversed as void, because order was based on reasons other than those specified in § 1033).

¹⁸ See text at note 3 *supra*.

¹⁹ Cal. Stat. 1850, c. 119, § 330; codified in 1872 as CAL. PEN. CODE § 1033.

²⁰ Cal. Stat. 1887, c. 54: "A criminal action may be removed from the Court in which it is pending . . . *Second*. On the application of the District Attorney, on the ground that from any cause no jury can be obtained for the trial of the defendant in the county where the action is pending."

declared unconstitutional in *People v. Powell*,²¹ and was repealed in 1901.²² The reasoning of the court in *People v. Powell* was that the California constitution guaranteed the right of trial by jury, and that jury trial must be the same as that which existed at common law. It was held that at common law the jury itself must come from the vicinage or the place where the crime was alleged to have been committed.²³ Therefore, insofar as the statute authorized a change of venue on application of the district attorney without the consent of the defendant,²⁴ the statute was void.²⁵

In 1951 the legislature added section 1033.5,²⁶ which provides that whenever it appears as a result of the exhaustion of all jury panels called that it will be impossible to secure a jury, the court on its own motion, or on petition of *any* of the parties, may order a change of venue to an adjoining county. It is not likely that this provision could be subject to any serious constitutional objection, based as it is on practical necessities. In any event, the constitutional doctrine of *People v. Powell*²⁷ has been said by later cases to be limited,²⁸ or even considered as repudiated.²⁹

The requirement that the defendant's application be made in open court and in writing³⁰ has apparently been strictly enforced,³¹ and in at least one case, an application in writing for a change of venue was denied on the ground that the district attorney did not receive a copy at least one day in advance of the hearing of the application.³²

Although there is no statutory provision governing the time when the application *must* be made, it would appear that the motion must first be made prior to the examination of prospective jurors on voir dire, or at least before the jury has been completely selected.³³ When is the *earliest* time at which an application for change of venue may be made? Penal Code section 976³⁴ apparently contemplates a change of venue prior to arraign-

²¹ 87 Cal. 348, 25 Pac. 481 (1891).

²² Cal. Stat. 1901, c. 158, § 239.

²³ Cf. Note, 10 So. CALIF. L. REV. 506 (1937).

²⁴ See Annot., 137 A.L.R. 686 (1942) (waiver of right by defendant).

²⁵ For cases from other jurisdictions dealing with the state's right to change of venue in criminal cases, see Annots., 80 A.L.R. 355 (1932), and 161 A.L.R. 949 (1946). See also Annot., 109 A.L.R. 793, 796 (1937) (right of prosecution to immediate appeal from an order denying its application for change of venue).

²⁶ Cal. Stat. 1951, c. 1404, § 1. See APPENDIX for text of this section.

²⁷ 87 Cal. 348, 25 Pac. 481 (1891). See Note, U.C.L.A. INTRA. L. REV. 50 (June 1952).

²⁸ *People v. Martin*, 188 Cal. 281, 205 Pac. 121 (1922). This was not a change of venue case.

²⁹ *People v. Richardson*, 138 Cal. App. 404, 32 P.2d 433 (1934), and cases cited. It is to be noted that some states provide a procedure whereby in case the jurors of the county in which the action is brought are prejudiced, the jury may be obtained from another county. See Annots., 136 A.L.R. 1405 (1942), and 102 A.L.R. 1038 (1936).

³⁰ CAL. PEN. CODE § 1034 (see APPENDIX).

³¹ *People v. Chessman*, 38 Cal.2d 166, 238 P.2d 1001 (1951), cert. denied, 343 U.S. 915 (1952); *People v. Singh*, 78 Cal. App. 476, 248 Pac. 981 (1926); *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642 (1917). See *People v. Cook*, 39 Cal.2d 496, 247 P.2d 567 (1952).

³² *People v. Lesse*, 52 Cal. App. 280, 199 Pac. 46 (1921).

³³ See *People v. Chessman*, 38 Cal.2d 166, 238 P.2d 1001 (1951), cert. denied, 343 U.S. 915 (1952); *People v. Cotta*, 49 Cal. 166 (1874). For a general discussion, see Note, 54 HARV. L. REV. 679, 681 (1941).

³⁴ CAL. PEN. CODE § 976: "When the accusatory pleading is filed, the defendant must be arraigned thereon before the court in which it is filed, *unless the action is transferred to some other court for trial.*" (Emphasis added.)

ment, and section 1034³⁵ purports to authorize a request for a change of venue prior to arrest, the granting of bail, the arraignment, or the plea, in the limited situation where the defendant cannot safely appear in person to make an application "because popular prejudice is so great as to endanger his personal safety."³⁶ In the only reported case found in which an application for change of venue was made prior to commencement of trial, the district court of appeal upheld the justice's court's refusal to grant a change of venue at the preliminary hearing, stating that there was no abuse of discretion, "particularly where the defendant was not on trial before the justice's court."³⁷

While section 1034 originally provided only that the written application for transfer be verified by the affidavit of the defendant,³⁸ early cases³⁹ held and a later amendment⁴⁰ made it clear that the prosecution may serve and file counter-affidavits. However, even if the prosecution files no counter-affidavits, the defendant is not entitled to an automatic change of venue.⁴¹

As to the substance of the defendant's affidavit, it is clear that an affidavit which alleges only on information and belief that the defendant cannot have a fair trial will be deemed insufficient.⁴² The specific facts and circumstances indicating that a fair trial cannot be obtained must be alleged,⁴³ and the defendant's affidavit should state specific instances and names of persons with whom he had talked.⁴⁴ Furthermore, the affidavit will not be deemed sufficient where it refers to another defendant being tried on a similar charge, and not in terms to the defendant making the application; there is no presumption that bias or prejudice shown to exist against one of two or more persons jointly charged exists against any of the others.⁴⁵

In general, it is safe to state that ordinarily the affidavit of the defendant alone will not be enough,⁴⁶ nor will it ordinarily be enough to bolster defendant's affidavit with the affidavit of his attorney⁴⁷ or of strangers in the county.⁴⁸

³⁵ See APPENDIX.

³⁶ Under these circumstances, the requirement of CAL. PEN. CODE §§ 977 and 1043 that defendant be personally present at arraignment and trial is waived by § 1034.

³⁷ *People v. Chapman*, 93 Cal. App.2d 365, 371, 209 P.2d 121, 124 (1949), *cert. denied*, 338 U.S. 943 (1950).

³⁸ Cal. Stat. 1850, c. 119, § 331; codified in 1872 as CAL. PEN. CODE § 1034.

³⁹ *E.g.*, *People v. Majors*, 65 Cal. 138, 3 Pac. 597 (1884).

⁴⁰ Cal. Stat. 1901, c. 158, § 240.

⁴¹ *People v. Wallace*, 6 Cal.2d 759, 59 P.2d 115 (1936); *People v. Mahoney*, 18 Cal. 180 (1861).

⁴² *People v. Congleton*, 44 Cal. 92 (1872); *The People v. McCauley*, 1 Cal. 379 (1851).

⁴³ *People v. Yoakum*, 53 Cal. 566 (1879); *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642 (1917).

⁴⁴ *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044 (1917).

⁴⁵ *People v. Lesse*, 52 Cal. App. 280, 199 Pac. 46 (1921).

⁴⁶ See *People v. Yoakum*, 53 Cal. 566 (1879).

⁴⁷ *People v. Grace*, 87 Cal. App. 629, 262 Pac. 56 (1927). *But see* *People v. McKay*, 37 Cal.2d 792, 236 P.2d 145 (1951).

⁴⁸ *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599 (1916).

Fair and Impartial Trial

A California district court of appeal has indicated that for an appellate court to be warranted in overruling the trial court,

the crime charged and the facts averred in support of the motion must be of such a nature as would have aroused that state of feeling which becomes a contagion upon a mere recital of the circumstances of the crime and makes it apparent that a fair trial would have been impossible in the county by reason of an inflamed public mind.⁴⁹

While this may be an overstatement, in only four cases,⁵⁰ as previously noted, have appellate courts reversed trial court convictions on the ground that a change of venue should have been ordered. Therefore, in discussing the problem it is more meaningful to discuss the cases first in terms of what factors may exist in a given case without the defendant's being deprived of a "fair and impartial trial."

The provision of section 1033 requiring that the application be made on the ground that a fair and impartial trial cannot be obtained in the county was apparently initially accepted without question as applying to the nature of the *jury* to be obtained.⁵¹ Later cases reaffirmed the view that the section applies only to the nature of the jury,⁵² so that bias of the judge,⁵³ sheriff,⁵⁴ district attorney,⁵⁵ or public defender⁵⁶ will not be a sufficient ground to warrant a change of venue. Nor is it enough to allege that convenience of witnesses and the ends of justice require a change of venue.⁵⁷

⁴⁹ *People v. Agnew*, 77 Cal. App.2d 748, 176 P.2d 724 (1947), *cert. denied*, 337 U.S. 909 (1949).

⁵⁰ See note 14 *supra*. Those four cases involved homicides. While most cases involve appeals from conviction of murder, change of venue has been requested and denied in cases involving convictions for *assault with intent to commit murder* [*People v. Congleton*, 44 Cal. 92 (1872)]; *assault with intent to commit rape* [*People v. Graham*, 21 Cal. 261 (1862)]; *burglary* [*People v. Chapman*, 93 Cal. App.2d 365, 209 P.2d 121 (1949), *cert. denied*, 338 U.S. 943 (1950), and *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379 (1907)]; *cattle stealing* [*People v. Fisher*, 6 Cal. 154 (1856)]; *criminal syndicalism* [*People v. Lesse*, 52 Cal. App. 280, 199 Pac. 46 (1921)]; *extortion* [*People v. Beggs*, 178 Cal. 79, 172 Pac. 152 (1918)]; *kidnapping* [*People v. Chessman*, 38 Cal.2d 166, 238 P.2d 1001 (1951), *cert. denied*, 343 U.S. 915 (1952)]; *larceny* [*People v. Mahoney*, 18 Cal. 180 (1861)]; *operating place where alcoholic beverages are sold without a license* [*People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642 (1917), and see *In re Guerrero*, 69 Cal. 88, 10 Pac. 261 (1886)]; *perjury* [*People v. Agnew*, 77 Cal. App.2d 748, 176 P.2d 724 (1947), *cert. denied*, 337 U.S. 909 (1949)]; *pimping* [*People v. Fuski*, 49 Cal. App. 4, 192 Pac. 552 (1920)]; *rape* [e.g., *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044 (1917)]; *rioting* [*People v. Yuen*, 32 Cal. App.2d 151, 89 P.2d 438 (1939)]; *robbery* [*People v. Grace*, 87 Cal. App. 629, 262 Pac. 56 (1927)].

⁵¹ E.g., *People v. Graham*, 21 Cal. 261 (1862); *The People v. McCauley*, 1 Cal. 379 (1851).

⁵² E.g., *People v. McGarvey*, 56 Cal. 327 (1880).

⁵³ *The People v. Wm. Williams*, 24 Cal. 31 (1864); *People v. Mahoney*, 18 Cal. 180 (1861); *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379 (1907); *McDowell v. Levy*, 2 Cal. Unrep. 590, 8 Pac. 857 (1885).

⁵⁴ *People v. Shuler*, 28 Cal. 490 (1865).

⁵⁵ *People v. Chapman*, 93 Cal. App.2d 365, 209 P.2d 121 (1949), *cert. denied*, 338 U.S. 943 (1950).

⁵⁶ *Ibid.*

⁵⁷ *Older v. Superior Court*, 157 Cal. 770, 109 Pac. 478 (1910). This case involved the criminal libel provisions of CAL. CONST. art. I, § 9. The court held that this provision was not self-executing, and that therefore § 1033 governed with respect to grounds for granting a change of venue in criminal libel cases.

Since it must appear that an impartial jury could not be selected from the whole county, it does not suffice to allege that citizens of a certain city or locality within a county could not give the defendant a fair trial.⁵⁸

The most frequent claim made is that because of newspaper accounts of the crime there is such hostility and prejudice in the community that a fair and impartial jury cannot be obtained.⁵⁹ This assertion is frequently dismissed for the stated reason that because of the time elapsed between the crime and the trial,⁶⁰ or between newspaper reports and the trial,⁶¹ public hostility has subsided. In cases where the time elapsed is fairly long⁶² this argument may have real validity, but where a relatively short time has elapsed and the crime is considered as a particularly obnoxious one,⁶³ a statement that public hostility has subsided can hardly be taken at face value. Of course, if the court considers the newspaper reports to be substantially unbiased and factual,⁶⁴ the matter is easily disposed of. In any event, the California Supreme Court has stated that the mere fact that jurors have read newspaper accounts does not render them disqualified where they swear that they can act impartially on the evidence presented.⁶⁵

It should be noted that in many of these cases the court will place weight on the failure of the defense to exercise all its peremptory challenges.⁶⁶ However, in several cases the fact that the defense had exhausted its peremptories was held to make no difference.⁶⁷ It would appear that there is little chance of reversal of a conviction on the ground that a fair and impartial trial could not be obtained unless the defense had exhausted all its peremptories, and either requested additional peremptories or other-

⁵⁸ *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924); *The People v. Baker*, 1 Cal. 403 (1851). Cf. *People v. Grace*, 87 Cal. App. 629, 262 Pac. 56 (1927).

⁵⁹ E.g., *People v. Gomez*, 41 Cal.2d 150, 258 P.2d 825 (1953) (murder of two San Quentin guards); *People v. Walker*, 112 Cal. App.2d 462, 246 P.2d 1009 (1952) (murder of two persons, kidnapping, and rape); *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952) (sexual attack on ten year old girl, followed by murder); *People v. Potigian*, 69 Cal. App. 257, 231 Pac. 593 (1924) (woman charged with triple murder by poison); *The People v. McCauley*, 1 Cal. 379 (1851) (murder); *People v. Burwell*, 44 Cal.2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955); *People v. Mendes*, 35 Cal.2d 537, 219 P.2d 1 (1950); *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924).

⁶⁰ *People v. Burwell*, 44 Cal.2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955); *People v. Mendes*, 35 Cal.2d 537, 219 P.2d 1 (1950); *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924).

⁶¹ *People v. Walker*, 112 Cal. App.2d 462, 246 P.2d 1009 (1952).

⁶² *People v. Burwell*, 44 Cal.2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955) (four months between killings and trial); *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1 (1951) (sixteen months between crime and trial); *People v. Walker*, 112 Cal. App.2d 462, 246 P.2d 1009 (1952) (three months between newspaper accounts and trial).

⁶³ *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924) (twenty-four days between killing and commencement of trial); *People v. Suniga*, 128 Cal. App.2d 738, 275 P.2d 914 (1954) (between three and six weeks between article and trial, in a rape case).

⁶⁴ *People v. Gomez*, 41 Cal.2d 150, 258 P.2d 825 (1953).

⁶⁵ *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952).

⁶⁶ *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1 (1951); *People v. Mendes*, 35 Cal.2d 537, 219 P.2d 1 (1950); *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924); *People v. Mata*, 131 Cal. App.2d 205, 280 P.2d 175 (1955), *manslaughter conviction reversed on other grounds* in 133 Cal. App.2d 18, 283 P.2d 372 (1955); *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075 (1914).

⁶⁷ *People v. MacDonald*, 53 Cal. App. 488, 200 Pac. 491 (1921); *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044 (1917).

wise made it clear in the record that the defense was not satisfied with the jury.⁶⁸

The trial court is entitled to deny a motion for change of venue with leave to renew the motion after voir dire.⁶⁹ A failure to renew the motion at such later time will be considered a waiver and abandonment of the whole question.⁷⁰ Also, if no particular difficulty was encountered in selecting the jury,⁷¹ considering such factors as the number of eligible jurymen,⁷² the number called,⁷³ the number challenged for cause,⁷⁴ and whether the defense exercised all its peremptories,⁷⁵ then the appellate court will be reluctant to interfere with the trial court's exercise of discretion.

The fact that the trial court has discretion in the matter,⁷⁶ coupled with a court-created presumption that the trial judge can accurately and fairly gauge the attitude of the people of the county,⁷⁷ is frequently relied on by appellate courts reluctant to reverse a case where it appears that the defendant had in other respects a fair trial.

Theories unsuccessfully advanced by defendants in support of a claim that a fair and impartial jury could not be obtained in the county have been based on threats of lynching⁷⁸ or other manifestations of possible violence;⁷⁹ existence of vigilante committees;⁸⁰ existence of race prejudice;⁸¹ popularity of the victim of a homicide;⁸² familiarity of victim, prosecution,

⁶⁸ *People v. MacDonald*, 53 Cal. App. 488, 200 Pac. 491 (1921). *Cf. People v. Wallace*, 6 Cal.2d 759, 59 P.2d 115 (1936).

⁶⁹ *People v. Plummer*, 9 Cal. 298 (1858) (reversing trial court conviction on other grounds).

⁷⁰ *People v. Staples*, 149 Cal. 405, 86 Pac. 886 (1906); *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944 (1895) (court states that had motion been renewed, a change of venue would have been in order); *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161 (1888).

⁷¹ *People v. Coen*, 205 Cal. 596, 271 Pac. 1074 (1928) (defendant renewed motion, but made no further showing as to reasons why motion should be granted; court noted that no great difficulty was encountered in securing a jury).

⁷² *People v. Wallace*, 6 Cal.2d 759, 59 P.2d 115 (1936).

⁷³ *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1 (1951) (only thirty-one veniremen called in order to get jury for murder trial, after first jury had disagreed); *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044 (1917) (only thirty-nine examined).

⁷⁴ *People v. Walker*, 112 Cal. App.2d 462, 246 P.2d 1009 (1952). In *People v. Yuen*, 32 Cal. App.2d 151, 89 P.2d 438 (1939), the court reasoned that many of the jurors voluntarily disqualified themselves, quite possibly to avoid jury duty, and if they had been interested in convicting the defendant, they would not have voluntarily disqualified themselves; therefore, the voluntary disqualification indicated defendant could get a fair trial, instead of indicating a general bias against the defendant.

⁷⁵ See note 65 *supra*.

⁷⁶ CAL. PEN. CODE § 1035 (see APPENDIX); *People v. Elliott*, 80 Cal. 296, 22 Pac. 207 (1889).

⁷⁷ *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913 (1952); *People v. Brite*, 9 Cal.2d 666, 72 P.2d 122 (1937); *People v. Hall*, 220 Cal. 166, 30 P.2d 23, *appeal dismissed*, 292 U.S. 614 (1934).

⁷⁸ *People v. Hall*, 220 Cal. 166, 30 P.2d 23 (1934), *cert. denied*, 296 U.S. 656 (1936); *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924).

⁷⁹ *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599 (1916).

⁸⁰ *People v. Mahoney*, 18 Cal. 180 (1861); *People v. Yuen*, 32 Cal. App.2d 151, 89 P.2d 438 (1939).

⁸¹ *People v. Mendes*, 35 Cal.2d 537, 219 P.2d 1 (1950); *People v. Suniga*, 128 Cal. App.2d 738, 275 P.2d 914 (1954); *People v. Walker*, 112 Cal. App.2d 462, 246 P.2d 1009 (1952).

⁸² *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924); *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075 (1914).

and jury with one another;⁸³ employment⁸⁴ or attempted employment⁸⁵ of special counsel to aid the prosecution; refusal of citizens to subscribe to affidavits alleging that a fair and impartial jury could not be obtained;⁸⁶ intimidation of a juror by the prosecution;⁸⁷ and widespread use of collection boxes throughout a county coupled with a charity dance to raise money for the families of the deceased.⁸⁸

It may be of interest to discuss briefly the specific facts of the only California case in fifty years in which a conviction was reversed for failure of the trial court to order a change of venue.⁸⁹

In *People v. McKay*,⁹⁰ two youths, aged 18 and 19, appealed from convictions in Shasta County of first degree murder.⁹¹ The defendants had escaped from the state Youth Authority camp in Shasta County and were

⁸³ *People v. Mendes*, 35 Cal.2d 537, 219 P.2d 1 (1950).

⁸⁴ *People v. Vincent*, 95 Cal. 425, 30 Pac. 581 (1892), *appeal dismissed*, 149 U.S. 648 (1893); *People v. Graham*, 21 Cal. 261 (1862) [disapproving, in effect, *The People of the State of California, Respondents, v. William B. Lee, Appellant*, 5 Cal. 353 (1855)].

⁸⁵ *People v. Perdue*, 49 Cal. 425 (1874).

⁸⁶ *People v. Elliott*, 80 Cal. 296, 22 Pac. 207 (1889).

⁸⁷ *People v. Mabrier*, 33 Cal. App. 598, 165 Pac. 1044 (1917). The prosecutor, speaking of a juror who voted for acquittal in the first trial, was reported to have stated: "The case of this juror [is] under advisement and an example may be made of him." *Id.* at 600, 165 Pac. at 1045 (1917).

⁸⁸ *People v. Burwell*, 44 Cal.2d 16, 279 P.2d 744, *cert. denied*, 349 U.S. 936 (1955).

⁸⁹ The other three cases in which convictions were reversed for failure of the trial court to order a change of venue are summarized in this footnote.

In *The People of the State of California, Respondents, v. William B. Lee, Appellant*, 5 Cal. 353 (1855), defendant's affidavit alleged that over 100 citizens of Los Angeles County had united in employing special counsel to assist the prosecution, defendant being charged with murder. There were no counter-affidavits filed. On the facts as stated, the supreme court reversed the conviction. However, this case may no longer be used as an authority, since, as was pointed out in *People v. Fisher*, 6 Cal. 154, 155 (1856), the court in *People v. Lee* "was led into an error . . . by adopting the provisions of the civil instead of the criminal Practice Act . . ." Furthermore, *People v. Lee* was limited in *People v. Graham*, 21 Cal. 261 (1862) to its particular facts.

The supreme court, in *People v. Yoakum*, 53 Cal. 566 (1879), on an appeal from a conviction of the murder of a police officer in Kern County, reversed on the ground that Yoakum's motion for a change of venue should have been granted. Distinguishing previous cases, the court pointed out that in *Yoakum* there were twenty-two affidavits filed by respectable people to the effect that there was a general feeling of hostility toward Yoakum, as evidenced by lynching threats. A panel of 100 jurors was set aside because of bias of the sheriff and his deputies. At the trial, rulings of the court which were adverse to the defendant were openly applauded, with some indication that some of the applause was coming from the jury box. The prosecution filed no counter-affidavits.

In *People v. Suesser*, 132 Cal. 631, 64 Pac. 1095 (1901), defendant was appealing from a conviction of the first degree murder of a Monterey County sheriff, reputedly the most popular man in the county. Affidavits showed repeated threats by lynch mobs and denunciations in the newspapers and from the pulpit. Of the first panel of 68 jurors called, 60 of them were excused because of bias against the defendant and three others were excused for other reasons. Most of defendant's twenty peremptory challenges were exercised by defendant in getting rid of jurors who said they had a strong opinion against defendant which would require evidence to remove. On these facts the court reversed the conviction, stating that the change of venue should have been granted.

⁹⁰ 37 Cal.2d 792, 236 P.2d 145 (1951).

⁹¹ In California, if the jury returns a verdict of guilty of murder in the first degree and makes no recommendation as to punishment, the death penalty is automatically imposed. CAL. PEN. CODE § 190; *People v. Bollinger*, 196 Cal. 191, 237 Pac. 25 (1925).

apprehended in Seattle. Two deputy sheriffs were sent to Seattle to bring them back to Shasta County. Apparently after arriving back within the boundaries of Shasta County, defendants managed to seize the officers' guns, kill them, and escape. It appeared that the deputy sheriffs were well-known and popular officers of a small county, whereas the two boys were strangers with bad reputations. Newspaper accounts played up their confessions. For fear of lynching, defendants were taken to a state prison for safekeeping, pending trial. The trial judge was prohibited from proceeding with the trial by reason of disqualification,⁹² and at the time of trial, no Shasta County attorneys were sufficiently free from bias to represent the defendants. The attorneys called in from another county to carry on the defense attempted without success to secure affidavits showing prejudice from more than twenty persons, all of whom refused on the ground that they considered the boys guilty, and that to sign the affidavits would engender criticism of the affiants in the county.

A very prejudicial letter written by the disqualified judge was printed in the local paper both two weeks before and during jury selection, in which the judge stated in part that defense counsel conceded the guilt of their clients. The selection of the jury required examination of 251 veniremen over a period of ten trial days. When the jury was selected, all of the defense peremptories had been exercised, and many of the jurors remaining would appear to have been unqualified to act fairly and impartially.⁹³

In reversing the conviction, Justice Traynor stated:⁹⁴

It is unnecessary to determine which, if any, of the facts and circumstances of this case standing alone would require the granting of a motion for change of venue. When local feeling is so intense that the presentation of the defendants' case is impeded, members of the jury are familiar with the facts in advance of the trial and are aware of the intense antagonism of the community toward defendants, and the regular trial judge has forcefully presented his opinions as to the merits of the case and attacked the good faith of defense counsel, a change of venue should be ordered. However conscientious the members of the jury may have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial could be had.

The remittitur directed the trial court to grant motions for change of venue. The case was tried in Tehama County, the jury returning a verdict of guilty of murder in the first degree, with a recommendation of mercy. Defendants are currently serving a term of imprisonment at San Quentin.⁹⁵

⁹² *McKay v. Superior Court*, 98 Cal. App.2d 770, 220 P.2d 945 (1950).

⁹³ *People v. McKay*, 37 Cal.2d 792, 798, 236 P.2d 145, 149 (1951).

⁹⁴ *Id.* at 800, 236 P.2d at 150-51.

⁹⁵ Letter to the writer from C. A. Stromsness, former District Attorney of Tehama County, dated December 29, 1955.

Change of Venue and Due Process

The policy behind the statutes permitting a change of venue in criminal cases was summed up in an early California case as follows:⁹⁶

The prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which Government is organized and Courts of Justice established will have definitely failed.

That this right to a fair and impartial trial has at the present time a federal constitutional basis was recently re-emphasized in *Shepherd v. Florida*.⁹⁷ That case involved the trial of two Negroes for the rape of a white girl. The majority of the court, in a per curiam opinion, reversed the conviction on the ground that the method of selection of the grand jury discriminated against the Negro race. Justices Jackson and Frankfurter, concurring in the result, noted the inflammatory nature of the contemporary newspaper accounts ("trial by newspaper"⁹⁸), the gathering of a lynch mob, the burning by mobs of the home of Shepherd's father and mother and the burning of two other Negro homes, and the calling out of the National Guard to prevent violence. On the basis of such facts as these, Justices Jackson and Frankfurter were of the opinion that the defendants had been deprived of due process of law under the fourteenth amendment⁹⁹ and that the request for a change of venue (or delay in trial) should have been granted by the trial court.

While the California courts continue to be reluctant to order a change of venue, it would seem that the present California Supreme Court may be inclined to grant a change of venue in a particularly "hard" case, even though the facts of that case might not induce the United States Supreme Court to rule that there had been a denial of due process.¹⁰⁰

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⁹⁶ *People v. Yoakum*, 53 Cal. 566, 571 (1879).

⁹⁷ 341 U.S. 50 (1951). See *Due Process for Whom—Newspaper or Defendant?*, 4 STAN. L. REV. 101 (1951). For a discussion of the admissibility of public opinion surveys tending to show local prejudice, see Walton, *Change of Venue in Criminal Cases*, 1 So. TEXAS L.J. 131 (1954).

⁹⁸ Otterbourg, *Fair Trial and Free Press: A Subject Vital to the Existence of Democracy*, 39 A.B.A.J. 978 (1953). See *Stroble v. California*, 343 U.S. 181 (1952).

⁹⁹ "The situation presented by this record is not different, in essentials, from that which was found a denial of due process in *Moore v. Dempsey*, 261 U.S. 86 . . . ?" *Shepherd v. Florida*, 341 U.S. 50, 54 (1951).

¹⁰⁰ Compare *People v. McKay*, 37 Cal.2d 792, 236 P.2d 145 (1951), with *Shepherd v. Florida*, 341 U.S. 50 (1951). But see *Moore v. Dempsey*, 261 U.S. 86 (1923).

APPENDIX

CAL. PEN. CODE § 1033: A criminal action pending in a superior court may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county. This chapter does not apply to actions pending in other courts.

CAL. PEN. CODE § 1033.5: The court may of its own motion, or on petition of any of the parties to the proceeding, order a change of venue to an adjoining county, whenever it appears as a result of the exhaustion of all the jury panels called that it will be impossible to secure a jury to try the cause in the original county.

CAL. PEN. CODE § 1034: The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant, a copy of which application must be served upon the district attorney at least one day prior to the hearing of the application. At the hearing the district attorney may serve and file such counter-affidavits as he may deem advisable. Whenever the affidavit of the defendant shows that he cannot safely appear in person to make such application because popular prejudice is so great as to endanger his personal safety, and such statement is sustained by other testimony, such application may be made by his attorney, and must be heard and determined in the absence of the defendant, notwithstanding the charge then pending against him be a felony, and he has not at the time of such application been arrested or given bail, or been arraigned, or pleaded or demurred to the indictment or information.

CAL. PEN. CODE § 1035: If the court be satisfied that the representations of the applicant are true, an order must be made transferring the action to the proper court of some convenient county free from a like objection.