MORTGAGED PROPERTY--removing or concealing with intent to defraud:

VENUE:

:The venue in the prosecution of any :person for removing or concealing :mortgaged property with intent to de-:fraud the mortgagee or others, in viola-:tion of Sec. 561.570, RSMo 1949, lies in :the county in Missouri from which the :mortgaged property was removed with the :intent to hinder, delay or defraud the :mortgagee.

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April 28, 1955

Honorable Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Bone:

This opinion is issued by this office in response to your request for an opinion on the question of which county would have jurisdiction or be possessed of the venue in the prosecution of an individual for the removal and concealment of mortgaged property with intent to hinder, delay or defraud the mortgagee, under the facts the request recites, in violation of Section 561.570, RSMo 1949. Your request for an opinion on this subject reads as follows:

> "I would like to have the opinion of your office on a question of venue under the provisions of Section 561.570 Revised Statutes of Missouri for 1949 relative to the removal and concealment of mortgaged property, with the intent to hinder, delay and defraud the mortgagee. One Lewis Alber 'Tex' Morton while living in Mexico, Missouri executed a note and chattel mortgage dated January 14, 1954 to the Keeton Motor Sales of Mexico, Missouri, giving as security on said mortgage a 1949 Pontiac Chieftain '8' Sedan. Subsequently to the giving of the mortgage he lived around Sturgeon, Missouri in the edge of Randolph County, Missouri near the intersection of State Highway No. 22 and United States Highway No. 63. Around December 17, 1954 Morton apparently left his home in Randolph County with this automobile and the information seems to be that he is somewhere in the State of Texas.
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> "The question as to venue on which I wish your opinion is whether or not Audrain County would have any jurisdiction to prosecute under this

removal and concealment statute, or whether the venue would have to lie solely in Randolph County.

"It is my opinion under the above facts and under this statute that the venue would have to be in Randolph County, and I so advised Mr. Keeton to see the Prosecuting Attorney of Randolph County, but he returned to my office and stated that the Prosecuting Attorney of Randolph County stated he would have to prosecute in the County of Audrain. It seems to me factually from the case, it is not a question of where the mortgage was executed, but in what county the defendant was located at the time of the actual act of removing and concealing this property."

Section 561.570, RSMo 1949, defining as a graded felony the removal or concealment of mortgaged property of the value of $50.00 or more with intent to hinder, delay or defraud the mortgagee, trustee or beneficiary, his heirs or assigns, reads as follows:

"1. Every mortgagor or grantor in any chattel mortgage or trust deed of personal property who shall sell, convey or dispose of the property mentioned in said mortgage or trust deed or any part thereof, without the written consent of the mortgagee or beneficiary and without informing the person to whom the same is sold or conveyed that the property is mortgaged or conveyed by such deed of trust or who shall injure or destroy such property or any part thereof or aid or abet the same, for the purpose of defrauding the mortgagee, trustee or beneficiary or his heirs or assigns or shall remove or conceal or aid or abet in removing or concealing such property or any part thereof, with intent to hinder, delay or defraud such mortgagee, trustee or beneficiary, his heirs or assigns, shall, if the property be of the value of fifty dollars or more, be deemed guilty of a felony and upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county

> jail not exceeding six months, or by a fine of not less than one hundred dollars, or by both such fine and imprisonment."

The authorities of every jurisdiction, both text and decision, hold that for a criminal offense the defendant must be both charged and tried in the county where the crime was committed. That is the law of this State. In ex parte Slater, 72 Mo. 102, Habeas Corpus, the Supreme Court of this State construing the Constitution of 1875 on the question of venue, l.c. 107, said:

> "Reading section 12, article 2, of the constitution, in the light of the well understood meaning of the word indictment at common law as modified by section 28, article 2, of the bill of rights, and it would read thus: 'No person shall, for a felony, be proceeded against criminally otherwise than by an indictment, that is, otherwise than by an accusation at the suit of the State, by the oath of nine men (at least, and not more than twelve), in the same county wherein the offense was committed, returned to inquire of all offenses, in general, in the county determinable by the court in which they are returned, and finding a bill brought before them to be true.'
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> "If this is the true reading of section 12, supra, (and we cannot perceive how it is susceptible of any other,) it guarantees to every person the right to be exempt from criminal prosecution for a felony except upon an accusation or indictment preferred by a grand jury of the county where the offense was committed, * * *."

The question of where the venue lies in the case noted here arises, as it is disclosed in your request, from the removal of mortgaged property from Audrain County to Randolph County, both in this State, and thence from Randolph County, it is said, to some unknown place in the State of Texas by the mortgagor of such property which, in the request, is said to be an automobile.

The statute makes the removal or concealment of mortgaged property with intent to hinder, delay or defraud the mortgagee, trustee or beneficiary, his heirs or assigns the gravamen of the offense denounced by this section. The St. Louis Court of Appeals

so held in State vs. Klick, 282 S.W. 161. The court, so holding, there said:

> "The instructions given on behalf of the state direct a verdict of guilty without requiring the jury to find that defendant removed the mortgaged property with intent to hinder, delay, or defraud the mortgagees. This specific intent is an essential element of the offense charged in the information and denounced by the statute, and it was error to direct a verdict without requiring a finding by the jury of such intent. * * *."

The statute does not make the physical act alone of removing mortgaged property from one county to another, or from a county in this State to another State, an offense. The Springfield Court of Appeals in United Iron Works Co. vs. Sleepy Hollow Mining and Development Co., et al., 198 S.W. 443, in effect, so held, saying, l.c. 444:

> "The property mortgaged, being personal property, could be moved at will by the mortgagor, such removal at most subjecting him to having the mortgage foreclosed, so that, the lien of the mortgage having once attached, the subsequent removal of the property to another locality and county would in no wise destroy the mortgage lien or subordinate it to a subsequent lien. * * *."

The removal of such property from one place to another in order to constitute a criminal offense must be with the intent to hinder, delay or defraud as provided by the statute. That is, the intent to defraud some person named in the statute or in the chattel mortgage contract. The intent to hinder, delay or defraud the mortgagee may be proven in satisfaction of the requirement of the statute by direct testimony or it may be inferred from all the facts connected with the act of removing such property, as shown by the evidence in the case, but such intent in the removal or concealment of the mortgaged property with the intent to hinder, delay or defraud the mortgagee must be proved in the trial before the jury. An instruction to that

effect was approved by our Supreme Court in State vs. Griffin, 228 S.W. 800. That instruction appears at page 804. It reads as follows:

> "'The intent with which an act is done may be proved by direct and positive testimony, or the intent may be inferred from all the facts and circumstances surrounding and attending the act as shown by the evidence in the case, and the intent in this case must be determined from the evidence given in this case.'"

The court in any case will declare the law of the case, and will do so in this situation, if it reaches the courts, but the jury must pass upon all the issues of fact in the prosecution of an individual charged with a criminal offense. 11 C.J. 646, states pertinent text on this principle at page 646. That text reads as follows:

> "It is for the jury to pass on all issues of fraudulent intent accompanying the sale or removal of the mortgaged goods, and such intent is an inferential fact to be drawn by the jury, and must be gathered from all of the attendant facts and circumstances. Thus, it has been held that a proof of the sale or removal of the mortgaged property with a knowledge of the lien will authorize a jury to infer a fraudulent intent, unless there are attending circumstances to repel the inference. Where a statute makes it an offense for one to do certain acts with an intent to 'hinder, delay or defraud the mortgagee,' is is for the jury to determine whether or not the act complained of will produce the result specified in the statute."

CONCLUSION

Considering the premises, it is the opinion of this office that the venue in the prosecution of the mortgagor in this case for violation of the terms of Section 561.570, RSMo 1949, for removing and concealing, if the facts disclose he has committed these acts, mortgaged property of the value of $50.00 or more,

Honorable Joseph M. Bone:

belongs in the county in Missouri from which the mortgaged property was removed with the intent to hinder, delay or defraud the mortgagee.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

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