CRIMINAL LAW--MORTGAGED PROPERTY--VENUE: Where to place the in prosecution for sale of mortgaged property.

May 22, 1936. 5-23

FILED 35

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion dated May 9, 1936, which reads as follows:

> "I have a case pending down here that will come up at the June term of the Circuit Court of Howell County in which I have a man charged with selling mortgaged property, and the facts in the case are that he took the mortgaged property from Oregon County (where the mortgage was given and recorded) to East St. Louis and sold them. The case against him was filed here in Oregon County under Gordon Dorris the former prosecuting attorney of this county, and the defendant took a change of venue from the county and the case was sent to Howell County.
>
> "The point I am in search of is whether or not the venue in the case was properly brought in Oregon County?
>
> "My library is limited and I have exhausted the same in trying to find a case holding the venue to be in Oregon County but I have failed to find any authorities on the point.
>
> "The Court in Howell County will set in the first part of June and I would like to receive a reply from you in time to have the same ready for the court there."

We take it that the offense charged is under the provisions of Section 4100 R. S. Mo. 1929.

In Corpus Juris, Vol. 11, Sec. 384, p. 646, the law is thus stated:

> "In the absence of statutes the place of sale or other disposition of the property has been held to determine the venue irrespective of where the mortgage was executed or where the property was brought from. However, it has been held that if the property is taken to another county with the intention of disposing of it there, and is sold in the latter county, the offense may be prosecuted in either jurisdiction."

A person may be guilty of selling mortgaged property in the county of the mortgage, though the sale be made by an agent in another county, where the evidence shows that the defendant authorized and directed, and later ratified the sale in the county where the mortgage was given. In the case of State v. Ferris, 16 S. W. (2d) 96, l. c. 100; 322 Mo. 1, the Supreme Court said:

> "Instruction No. 2, given by the court, correctly hypothesized the entire case. It is not subject to tenable objection. Instruction No. 4, given by the court, told the jury in effect that, if they believed from the evidence that the defendant authorized and directed Haley to sell the mortgaged car, the act of Haley in making the sale was the act of the defendant. This instruction correctly declares the law authorized to be given under the evidence."

A defendant may be prosecuted for selling mortgaged property in the county of the mortgage, though he, himself, complete the sale in another county, where the evidence shows that the property was taken to another county with the intention of selling it there.

In the case of State v. Perry, 87 S. C. 535, l. c. 540; 70 S. E. 304, the Supreme Court of South Carolina had under consideration a statute similar to the Missouri statute, and facts similar to the facts submitted in your letter when it said:

"The remaining question discussed is whether there was error in refusing a new trial on the ground that there was no evidence to show a sale or disposition of the property in Saluda county. There was testimony that defendant admitted that he sold one bale of cotton grown upon the land described in the mortgage and there was testimony that he was seen in a wagon with two bales of cotton about two miles from his home in Saluda county going towards Batesburg in Lexington county, but there was no evidence that the sale was made outside Saluda county. The argument that a mere removal of property within the county of Saluda is not a violation of the statute is not applicable to the case presented, which involves not merely a removal but an acutal disposition of the property. If it should be conceded that the cotton was removed from the place where produced in Saluda county, with intention to dispose of it in Lexington county, and was sold or disposed of in the latter county, the statute would be violated in either county, for the act of removal is inseparably connected with the disposition, an essential part of it, and within the prohibition of the statute.

"It may be that a mere removal of property subject to a lien for the better protection of the property and the lien may be regarded as innocent and not within the purview of the statute, as suggested in Whaley v. Lawton, 57 S.C. 264, but a very different matter arises where the removal is for the purpose of sale or disposition and culminates in a disposition of the property."

CONCLUSION.

We are of the opinion that where mortgage property is sold in violation of Section 4100 R. S. Mo. 1929, the venue may be placed, according to the evidence, either in the county where the mortgage was executed or in any county where the property is taken with the intention of disposing of the same.

Respectfully submitted

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APPROVED:

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