CRIMINAL PROCEDURE: Preliminary for grand jury indictment must be had under Section 3774, R. S. Missouri 1939.

January 19, 1942

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FILE 48

Mr. John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of January 9, 1942, which is as follows:

> "Recently a man was charged by information with stealing a cow in Dent County, but before the trial, it appears to have been ascertained that the offense, if committed, was committed in Iron County, and the court made an order transferring the case here, and he was recognized to appear at the next term of circuit court in this county.
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> "Section 3774, R. S. 1939, provides:
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> "'When it appears at any time before verdict or judgment that the defendant is prosecuted in a county not having jurisdiction of the offense, the court may order that all the papers and proceedings be certified and transmitted to the proper court of the proper county, and recognize the defendant to appear before such court on the first day of the next term thereof, to await the action of the grand jury. The witnesses shall also be recognized to appear at such court, that the prosecution may be proceeded with as provided by law.'
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> "It is my opinion that as prosecuting

> attorney I can proceed as in other criminal cases without action of a grand jury, and it appears to me that there would be no need of filing a complaint as required in original cases, but could proceed by filing of an information, without going through the process of according the defendant a preliminary examination before a justice of the peace, yet I am not certain about that.
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> "Please let me have your opinion about the matter."

Section 12 of Article II of the Constitution of Missouri provides as follows:

> "No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."

It is very noticeable under the above section that an indictment and an information shall be concurrent remedies.

Section 28 of Article II of the Constitution of Missouri provides as follows:

> "The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law; and that a two-thirds majority of such number prescribed by law concurring may render a verdict in all civil cases. And that in the trial by

> jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict. Hereafter, a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill: Provided, however, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime."

As to the presentment of an indictment by a grand jury the rule is stated in the case of The State v. Blunt, 110 Mo. 332, l. c. 337 as follows:

> "Under the construction given by this court in Ex parte Slater, 72 Mo. 102, to sections 12 and 22 of article 2 of the constitution of 1875, an indictment cannot be found in any county but that in which the offense is committed. This ruling was followed by this court, in the subsequent case of State v. McGraw, 87 Mo. 161, holding that so much of section 1691, Revised Statutes, 1879, as authorized the crime of burglary to be prosecuted in a county other than that in which it was perpetrated, was constitutionally invalid. And in State v. Hatch, 91 Mo. 568, a similar ruling was made by this court with respect to the crime of embezzlement being prosecuted by indictment in a county other than that of its perpetration. The Kansas City court of appeals has followed the same line of ruling, by discharging on habeas corpus a person indicted, where the indictment found by the grand jury of Caldwell County showed on its face that the offense, murder, was committed in the county

> of Ray, but within five hundred yards of the boundary separating the two counties mentioned. This indictment was found upon the authority of section 1697, Revised Statutes, 1879, which permitted an indictment to be found in such circumstances in either county. But this section was pronounced unconstitutional on the authority of Ex parte Slater, supra. In the Matter of McDonald, 19 Mo. App. 370."

In the case of The State v. McGraw, 87 Mo. 161, l. c. 163, the court said:

> "It has been repeatedly held by this court that when goods are stolen in one county and are taken by the thief into another county, that he may be indicted and tried in such county. Such indictments are upheld on the distinct ground that each asportation of stolen property from one county to another is a new or fresh theft. State v. Smith, 66 Mo. 61. The grounds, however, on which indictments are sustained, found by the grand jury of a county into which stolen goods are taken by the person who steals them in another and different county, do not apply to the crime of burglary, and so much of section 1691, Revised Statutes, as authorizes a person committing burglary in one county to be indicted and tried for that offence in another county is, under the ruling of this court in the case of Ex Parte Slater, 72 Mo. 106, invalid. It follows from this that the conviction of defendant for burglary was erroneous."

Also, in the case of Ex Parte Slater, 72 Mo. 102, l. c. 107-108, the court said:

> "Reading section 12, article 2, of the constitution, in the light of the well under-

stood 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.'

"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, and as the indictment under which the petitioner is held shows upon its face that it was preferred by a grand jury of Scotland county, and charges the offense not to have been committed in said county, but in Clark county, it necessarily follows that defendant cannot be held in custody under it unless section 1804 of the Revised Statutes is effectual for that purpose and authorizes such a proceeding, as the attorney general contends it does. That section is as follows: 'Whenever a felony has been committed in any county, and the grand jury of the county has considered the matter, and failed to find an indictment against the offender, and the same is certified to the judge of the same circuit from the foreman of the grand jury or the clerk of the circuit court of such county, and the judge of such circuit is satisfied that an impartial grand jury can-

not be had in the county where the offense was committed, he shall order the examination of the offense to be had in some county adjacent to the said county, where he believes no such cause exists, but no investigation can be ordered by him, except in one county; and, where an indictment is found in such county, a trial before a petit jury shall be had in the county where found, unless removed on application of the defendant.' We are of opinion that this statutory provision is utterly null and void, for the reason that it undertakes to deprive a person of the constitutional right conferred upon him by section 12, supra, of the constitution, which section, as we have shown, gives to every person charged with a felony, before he can be tried, the right to have the charge preferred in an indictment found by a grand jury of the county where the offense was committed. While the constitution gives this right to every person, the statute in question takes it away and denies it to some persons. While the constitution declares that a person charged with a felony can only be tried after an accusation has been made upon the oaths of the grand jury of the county where the crime was committed, the statute in question declares, on the contrary, that a person charged with a felony may be tried on an accusation preferred upon the oaths of the grand jury of another and different county than the one where the crime charged was committed. The statute being thus in direct conflict with the constitution, which can in no way be reconciled, must, therefore, fall and be considered as no law."

In all of the above cases the holding was to the effect that a grand jury indictment can only be presented by a grand jury of the county in which the crime has been committed.

We are aware of Section 3769, R. S. Mo. 1939, upon which the cases of State v. Bockman, 124 S. W. (2d) 1205, and State v. Arndt, 143 S. W. (2d) 286, are based. Under the above statute and cases, a prosecution for larceny can be had either in the county where the property is stolen or in another county where the property is sold or brought into for the reason that the courts construe the possession of the stolen property in a different county other than where stolen as a fresh theft of the property.

Under the facts in your request, if the property stolen in Iron County was sold by the defendant or was in possession of the defendant in Dent County, either county would have had jurisdiction of the crime.

Since under Section 12, Article II, of the Constitution, supra, the indictment or information is a concurrent remedy, it goes without saying that the information must be filed in the county where the crime is committed, except in the case of larceny as above set out and other exceptions.

Section 3893, R. S. Mo. 1939, partially provides as follows:

> "No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * *"

Under the above partial section, it is unlawful for the prosecutor or circuit attorney to file an information upon a felony until the defendant is given a preliminary examination before some justice of the peace in the county. Under the facts in your request, you state that an information had been filed in Dent County, and it goes without saying that a preliminary was held in Dent County, but under Section 3893, an information cannot be filed in Iron County until a preliminary is held in Iron County. Of course, a grand jury in Iron County could indict the defendant.

Since no information can be filed without a preliminary examination in Iron County, and since informations and indictments are concurrent remedies, the only one who can file an information is the qualified prosecutor of the county where the crime was committed. That he must be qualified was held in State v. Jones, 268 S. W. 83, l. c. 85, where the court said:

> "However, the Constitution and the statute empower the prosecuting attorney to initiate criminal prosecutions by information, in lieu of indictments, which must be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. Section 3849. The oath of the prosecuting attorney is required as an assurance of his good faith. In this respect he performs the functions of the grand jury. The Constitution and the statute contemplate that an information may be filed only by a qualified or disinterested prosecuting attorney."

Since in your request you state that the information was first filed in Dent County, this information was not filed by a qualified prosecuting attorney of Iron County and is therefore null and void.

In your request you refer to Section 3774, R. S. Mo. 1939, which provides that when it appears at any time before verdict or judgment that the defendant is being prosecuted in the wrong county, the court may order that all the papers and proceedings be certified and transmitted to the proper court of the proper county. It also provides that the defendant give bond to appear before the proper court "to await the action of the grand jury." It also provides that the witnesses shall give bond to appear at such court, that the prosecution may be proceeded with as provided by law. In other words, the prosecution, to be continued, must be either by way of a grand jury indictment or a preliminary and the filing of an information by the prosecuting attorney.

When reading Section 3774, supra, one must also read Sections 3775, 3776, and 3777, R. S. Mo. 1939, which merely provide the procedure for the transfer of all papers filed in the wrong county, the removal of the prisoner, and that he has not been placed in jeopardy. The sections also provide that the laws relating to changes of venue shall apply when applicable, that is, the certifying and transfer of all papers, bonds of prisoners, witnesses, etc.

CONCLUSION

In view of the above authorities, it is the opinion of this department that where the defendant was charged with larceny by an information in Dent County, and the venue should have been in Iron County, the prosecution can only be brought in Iron County upon transfer by the Circuit Court of Dent County under the provisions of Section 3774, R. S. Mo. 1939. The defendant must be granted a preliminary in Iron County or be reindicted by a grand jury of Iron County.

It is further the opinion of this department that a new information cannot be filed until the defendant is granted a preliminary hearing in Iron County for the reason that the information would allege a separate and distinct crime in Iron County and the information filed in Dent County would allege the larceny in Dent County.

Respectfully submitted

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APPROVED:

VANE C. THURLO
(Acting) Attorney General

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