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ARSON--Burning of unoccupied dwelling house by owner, is criminal offense.

August 30th, 1933



Hon. Dan M. Nee,
Prosecuting Attorney,
Greene County,
Springfield, Missouri.

Dear Sir:

We received your request of August 16th, 1933 for an opinion as to whether or not any criminal offense has been committed under the following statement of facts:

"Defendant was the owner of a dwelling house which was covered by insurance. This property was burned and completely destroyed. Defendant was arrested and charged with arson. Previous to his arrest defendant had made no claim for damages as a result of said fire. The state has evidence to prove that he set fire to and burned said dwelling by pouring gasoline on the premises and igniting same. There were no persons in the house at the time of the fire."

In the beginning, we find no adjudicated cases directly in point. We assume from the above facts that the insured has made no effort at any time to file a proof of loss, or to take any steps indicating an intention on his part to collect the insurance on the building destroyed by fire, and thereby avoiding prosecution under Section 4040, R. S. of Mo. 1929, making it a criminal offense to burn a building with intent to defraud an insurance company.

It also appears that the provision of Section 4039 is not violated by the above statement of facts because this Section covers the burning of the house which is the property of another, as was charged in the recent case of State v. Falco, 51 S. W. (2d) 1030.

Section 4036 provides,

"Every person who shall wilfully set fire to or burn any dwelling house * * * whether the property of himself or of another shall be adjudged guilty of arson * * *."

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Prior to the amendment of this law in 1929, it was necessary that a human being be in some part of the house before it came within the statutory term of "dwelling house", and this view is sustained by the Supreme Court in State v. Rudman, 37 S. W. (2d) 409 and State v. Witham 281 S. W. 32.

It now appears that this requirement of the 1919 statute, under which the Rudman and Witham cases were tried, has been changed by omitting therefrom the phrase,

"in which there shall be at the time some human being."

Under Section 3282, R. S. of Mo. 1919, and prior to its amendment in 1929, it was necessary to prove that the house burned was a "dwelling house", and in addition thereto it was necessary to prove that at the time of the burning of the dwelling house, that it contained some human being. It was necessary to prove that the "dwelling house" came within the definition of Section 3283 R. S. of Mo. 1919 and in addition thereto at the time of the fire must have contained some human being within the mandatory language of Section 3282 R. S. of Mo. 1919.

After the amendment of Section 3282 R. S. of Mo. 1919, (now 4036 R. S. of Mo. 1929) it was only necessary to prove that the building burned was a "dwelling house". As to what constitutes a "dwelling house", we find it specifically described in Section 4037, R. S. of Mo. 1929 in the following language:

"Every house, * * * which shall have been usually occupied by persons lodged therein, shall be deemed a dwelling house of any person having charge thereof or so lodging therein; * * *"

We call your attention to the wording of this Section which is in the past tense. It does not require that the house be occupied, and it is not necessary to allege or prove that the house is occupied by some human being at the time of the fire; all that is necessary under this statute is to show that it is the type of house which has been occupied by human beings and "which shall have been usually occupied by persons lodging therein."

It is therefore the opinion of this office that the facts contained in your letter constitute a crime under Sections 4026 and 4037 R. S. of Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

FER/mh
APPROVED:

ROY MCKITTRICK
Attorney-General