

CRIMINAL LAW -- 'Arson' as distinguished from willful burning of property.

November 20, 1937

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Honorable Frank G. Harris, Chairman
Board of Probation and Parole
Jefferson City, Missouri

Dear Governor Harris:

We acknowledge receipt of your request for an opinion dated November 18, 1937, which reads as follows:

"Under Section 3811, Revised Statutes of Missouri, 1929, the Circuit Court is authorized to parole persons of previous good character who shall not have been previously convicted of a felony, except in cases of murder, rape, arson or robbery.

"Section 4040 of the Revised Statutes of Missouri, 1929, makes it a felony to set fire to, burn or cause to be burned any goods, wares, merchandise, etc. with the intent to injure or defraud the insurer.

"Section 4041 makes it a felony for one to attempt to set fire to or procure the burning of any buildings or property mentioned in preceding sections.

"I should like to have your opinion as to whether or not the Circuit Court is authorized to grant a parole to one of good character and who has not been previously convicted of a felony, who enters a plea of guilty either to a violation of section 4040 or section 4041 above mentioned. I should like very much to have this opinion reach me by Monday, November 22nd."

59 C. J., page 1112, Section 659, reads as follows:

"Penal statutes are to be interpreted by the aid of all the ordinary rules for the construction of statutes. The court should construe these statutes in the light of the evil to be remedied, and with the cardinal object of ascertaining and giving effect to the intention of the legislature, as the intention of the legislature, when it can be discovered, must control."

In the case of State v. Bartley, 263 S. W. 95, 1.c. 96; 304 Mo. 58, the court said:

"Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to its penalties, all others not mentioned are exonerated. *** Such statutes are not to be 'extended or enlarged by judicial construction, so as to embrace offenses or persons not plainly (written) within their terms.' 'The reason of the rule is found in the tenderness of the law for individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department'."

CONCLUSION

Your question presents a problem of statutory construction of the penal statutes. We must determine whether the crime of "arson", as the word is used in Section 3811, R. S. Mo. 1929, was intended to include other felonies the perpetration of which, having some of the cardinal elements of the common law crime of arson and the crime of arson prescribed by Missouri statutes.

The only statute in Missouri which we were able to discover where certain acts of wilfully setting fire to property is declared by the Legislature to be "arson" is Section 4036, R. S. Mo. 1929. Other acts of wilful setting of fire to property are defined by the Legislature only as felonies (see Sections 4038, 4039, 4040 and 4041, R. S. Mo. 1929).

If the Legislature intended persons who violate Sections 4040 and 4041, R. S. Mo. 1929, to be guilty of arson, they would have said so, as they did in Section 4036, R. S. Mo. 1929. These wilful burning of property crimes were passed at the same time and in the same act by the 1929 Legislature (see Laws of Mo. for 1929, page 167). At the passage of the act, the then existing arson statutes, and there were several, were repealed and the present law enacted.

Criminal statutes are generally construed in favor of the accused and against the State.

We are of the opinion that it was the intention of the Legislature that under the law the circuit court is to have power to parole from the bench one convicted of violating Sections 4040, or 4041, R. S. Mo. 1929, as said crimes are not defined as the crime of "arson."

Respectfully submitted,

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APPROVED:

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