CRIMINAL LAW: Agent of the corporation can be prosecuted even though money obtained by fraud is paid into the corporation.

April 25, 1941

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Honorable Jos. L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

In reference to your request for an opinion dated April 8, 1941, will say that you are right when you say "that Carder cannot hide behind the name of the corporation."

In your request you state that Clyde Carder, his wife, Mrs. Kapfer, and another person own all of the stock in the Kahoka Motor Company, a corporation. You also state in your request that Clyde Carder, as manager of said corporation, sold cars to Clark Bennett, Charles Foster and other persons but did not deliver the title to any of the cars. You also state that the Kahoka Motor Company went into the hands of a receiver and it was discovered that the reason why titles to the cars were not delivered was that the St. Clair Loan Company of St. Louis had mortgages on each of the cars.

Your question then is - Since the Mortgage Company has received its money from the owners of the cars and will not prosecute Clyde Carder, can the owners of the cars prosecute Clyde Carder and under what charge?

The proper charge to be filed against this man would be obtaining money under false pretenses as set out in Section 4487, Revised Statutes of Missouri, 1939. The approved form of information on this charge is set out in the case of State v. Loesche, 180 S. W. 875, Par. 5.

Clyde Carder, although a stockholder in the Kahoka Motor Company, cannot hide behind the corporation for the commission of the crime in which he committed the overt act.

In the case of State v. Chauvin, 231 Mo. 31, an agent of the Modern Horseshoe Club, which was a gambling club, set up as a defense to operating a gambling device that he was merely an employee of the club. He was found guilty, and in affirming the case the court said at page 38:

> "The organization, as such, cannot be guilty of a felony, and it would not do to say that because the club owned the table and received the profits, the defendant, who in fact set up, kept and had actual control of the table, who represented the organization and acted for it, was guilty of no offense. Such doctrine would lead to such serious consequences in attempting to enforce this statute that its unreasonableness is shown in the bare statement. The law does not recognize the doctrine of agency as a defense to a criminal charge. It deals with the person who commits the overt act, and while others may be guilty as accessories, the party committing the prohibited act is not permitted to interpose the defense that he acted only as an agent or employee. (1 Bishop's New Crim. Law, sec. 355.)"

In the case of State v. Miller, 237 S. W. 498, the defendant was charged with the larceny of an automobile and was convicted on circumstantial evidence. The main link in the circumstantial evidence was that the car was found in the possession of the Blue Auto Livery Company whose president was the defendant. He was found guilty, and the court in affirming the verdict said at page 501:

> "It is insisted by appellant that the court erred in refusing to give his instruction numbered 1, which reads as follows:

"'The court instructs the jury that, if you believe and find from the evidence that the automobile mentioned in evidence was at the time of the arrest of defendant in the possession of the Blue Auto Livery Company, a corporation, the owner of the Blue cabs, then such possession in the corporation cannot be imputed to the defendant herein because of his being a stockholder of said corporation, and it is your duty to acquit the defendant.'

"This instruction announces a startling proposition of law. In legal effect, it said to the jurors, Notwithstanding you may believe and find from the evidence that defendant participated in the stealing of Bundy's car, or that he pretended to buy and pay for same, with knowledge of the fact that it had been stolen, still you cannot convict him, if he had the car delivered to the Blue Auto Livery Company, of which he was president and manager, and it was thereafter found in the possession of said company's chauffeur when recovered by the police officer and turned over to Bundy. As heretofore stated, the corporation could only act through its officers, agents, or employees. The jurors were justified in finding from the facts heretofore stated that, whatever possession the Blue Auto Livery Company may have had in respect to said stolen car, it acquired through the personal efforts of the defendant himself. If, therefore, the jury believed from the evidence he participated in the theft of said car, or pretended to buy the same with knowledge of the fact that it had been stolen, and turned it over

> to his corporation under such circumstances, he was not entitled to an acquittal in this case. State v. Baker, 264 Mo. loc. cit. 354, 355, 175 S. W. 64; State v. Jenkins (Sup.) 213 S. W. loc. cit. 799; State v. Kehoe (Sup.) 220 S. W. loc. cit. 963, 964; State v. English (Sup.) 228 S. W. loc. cit. 751. We are of the opinion that the court committed no error in refusing above instruction."

Also in the case of Timell v. United States, 5 Fed. (2d) 901, l. c. 902, Par. 2, the court said:

> "Error is also assigned upon the refusal of the court to charge that, if the jury believed Timell acted as the agent of Armstrong, and simply as a messenger in the purchase of the whisky, and was not pecuniarily interested, then Timell was a purchaser, and not a seller, and should be acquitted. Whatever might have been said of the request, if it had been limited to the evidence under the count which charged a sale, it was clearly erroneous in assuming that one who has liquor in his possession must be acquitted of the charge of unlawful possession, if he can prove that possession was merely as the agent of another. The doctrine of agency is not applicable to such a case. State v. Caswell, 2 Humph. (Tenn.) 399; State v. Chauvin, 231 Mo. 31, 132 S. W. 243, Ann. Cas. 1912A, 992; State v. Bugbee, 22 Vt. 32."

In a supplemental letter addressed to this office on June 2, 1941, you state:

> "Now I dont think Carder told him the car was not mortgaged, and I dont believe Bennett asked him that question, the transaction was all made on the idea that the car was not mortgaged and that

> Bennett would get a clear title, just as any ordinary transaction. At the time of the transaction and at the time the Corporation went into the hands of receiver the car was mortgaged to the St. Clair Loan Co of St. Louis Mo and since that time Bennet paid $100.00 as a compromise to keep the St. Clair Loan Co from taking the car (the real amount of mortgage being about $160.00. During all the time of the sale to Bennett and after, the loan company was holding the title and that was the reason Carder could not deliver the title to Bennett. Of course the mortgage was on record in this county during all this time.
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> "I think that therefore I can prove all the facts necessary for prosecution as set forth in Par. 5 of State v. Loesche, except possibly that Carder did not expressly state that there was no mortgage of the used car."

The charge of obtaining money under false pretenses is a very difficult charge to prove even if under sufficient facts. The fact that nothing was said about the mortgage on the car can be inferred as a false representation but the courts are very reluctant to convict a defendant upon an inference. In the case of State v. Bowdry, 145 S. W. (2d) 127, par. 8, the court said:

> "Appellant questions the sufficiency of the evidence. He concedes it was necessary for the State to prove the falsity of only one of the alleged representations constituting an offense. State v. Montgomery, Mo. Sup., 116 S. W. 2d 72, 74 (7). He argues there was no evidence establishing that he represented the bonds to be genuine, or that he knew the bonds were counterfeit, or that Soffer relied upon any representation of appellant in consummating the

> transaction. Without developing these issues in detail, we are of opinion the State made a submissible case. By presenting the bonds for sale appellant inferentially represented they were genuine. Considering the record as a whole, it was sufficient to authorize a finding that appellant knew the bonds were not genuine. Notwithstanding Soffer's wire to the New York office and his action based in part thereon, Soffer must have relied upon appellant's inferential representation as to the genuineness of the bonds and not solely upon the telegram from the New York office (as appellant argues), which had not had possession of the purported bonds. From our reading of the record, however, we are of the opinion the State may be able to adduce additional facts with respect to the above matters and suggest this be done if the facts are available."

In the above case railroad bonds were sold which later developed were counterfeit bonds and the court held that the defendant by offering them for sale by inference represented they were genuine, but in your case it is very doubtful if the courts would hold that there was an inference that the car sold was free of mortgage. The fact that the purchaser of the car paid a difference in cash between the value of the car purchased and the car traded in would possibly leave an inference that there was a misrepresentation that the car purchased was clear of any mortgage. This charge could possibly be brought, but, of course, there is that chance that all elements as set out in State v. Loesche were not proven.

I would suggest that you, as prosecutor, on your own initiative, file a charge of disposing of mortgaged property. The records and the representatives of the loan company in St. Louis could be used as proper evidence. There is also a misdemeanor charge as set out under Section 8382, R. S. Missouri 1939, which states that it is unlawful to sell a car without a certificate of title.

CONCLUSION

In view of the above authorities it is the opinion of this department that Clyde Carder, although acting as manager

of the Kahoka Motor Company, can be prosecuted on the charge of obtaining money under false pretenses, even though the money obtained was turned into the corporation.

It is further the opinion of this department that Clyde Carder should be charged with disposing of mortgaged property for the reason that the proof is more accessable and can be proven more easily than under the charge of obtaining money under false pretenses. Clyde Carder could also be prosecuted on a charge of selling a car without a certificate of title which is a misdemeanor.

Respectfully submitted

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APPROVED:

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