CRIMINAL LAW:
ACCESSORY BEFORE
THE FACT:

One who procures others to commit a crime is guilty as a principal although he was not bodily present at the time and place where the crime was committed.

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57

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This department is in receipt of your recent request for an official opinion.

The fact situation which you present appears to be that one O. H. had some type of ownership in an eighty acre tract of land in Morgan County; that at a distance of from ½ to ¼ mile south of this tract was land owned jointly by two other persons; that upon this latter tract there was certain oak timber; that O. H. hired timber cutters to cut oak timber, allegedly upon land owned by him, and directed them, by means of various locations and descriptions, to go and cut oak timber upon this latter tract of land which he, O.H., did not own; that the cutters did so, cutting, hauling away, and selling timber to the value of $500, of which sum they gave O. H. one-half; that the cutters did not know that the land from which they cut the timber was not owned by O. H.

Your question is whether O. H. is guilty of a crime; if so, of what crime; and if guilty how he should be charged?

It is the opinion of this department that O. H. is guilty of a crime, to-wit, larceny of timber, and that he should be charged under Section 4468 Mo. R. S. A. 1939. This section reads:

> "Every person who shall sever from the soil of another any produce, standing or growing thereon, or shall sever from any building, bridge or causeway, or from any gate, fence or other railing or enclosure, or any part thereof, any materials of which the same is composed, and shall take and convert the

> same to his own use with intent to steal the same, or who shall steal, take and carry away any timber, rails or wood, standing, being or growing on the land of another, or who shall steal, take and carry away any coal or mineral ore or stone belonging to and being in or on the land of another, or who shall steal, take and carry away any roots, plants, melons, garden vegetables, grain, corn, flax, hemp, or any cultivated grass or fruit, in which he has no right or interest, standing, lying or being on the land of another, shall be deemed guilty of larceny in the same manner and in the same degree, according to the value of the property, article or thing so taken, as if the same had been severed at some different and previous time."

It is true that O. H. did not personally go upon this tract of land and cut or assist in cutting this timber, nor is it necessary that he do so in order to be guilty under Section 4468 where, as in the instant case, he procured others to do this. Section 4839 Mo. R. S. A. 1939, states:

> "Every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall, upon conviction, be adjudged guilty of the offense in the same degree, and may be charged , tried, convicted and punished in the same manner, as the principal in the first degree."

In the case of State v. Mintz, 189 Mo. 268, l. c. 293 and 294, the court stated:

> "This brings us to the only remaining proposition presented to our consideration, that is, the refusal of the court to instruct the jury that if 'they believe and find from the evidence that the witness Rector had no intention to take, steal and carry away the property when he obtained it, then he was not guilty of larceny, nor was the defendant guilty of larceny.'

"Upon the facts developed at the trial of this case we have reached the conclusion that there was no error in the refusal of this request. The testimony as introduced by the State is undisputed that the witness Rector was the instrument selected by the defendant to accomplish his fraudulent and felonious intent of stealing the property as charged in the information and permanently depriving the owner of it. He furnished the wagon; directed Rector how to proceed in order to obtain this property and upon the testimony, as disclosed by the record, the felonious intent and design entertained by the defendant in this case is made too clear for discussion. Whatever was done by Rector must be treated as the act of this defendant, and even though Rector's mind was inactive and he was ignorant of the purposes of his act, if defendant Mintz directed the act to be done, and had the felonious intent of stealing the property and converting it to his own use, through the act of his instrument, Rector, then the act of Rector and the intention of the defendant Mintz should be brought together, and the commission of the act must be treated as though it was executed by defendant, who directed it. In other words, if defendant Mintz entertained the felonious intent and design of stealing this property and directed Rector to do such acts as would result in obtaining the property, without informing Rector as to his intent, and by reason of the commission of the act by Rector the property is obtained and converted by the defendant Mintz, to his own use, we are unwilling to say that this would not constitute larceny on the part of the defendant Mintz. If Rector had no design or intent to steal the property obtained by him, at the time of taking such property, and he was simply, as claimed by appellant carrying out the purposes of the defendant Mintz, without any information as to what Mintz's purposes were, then there is no difference in principle in the use of Rector by the defendant as an instrument to remove the property from the possession of the owner, and in using any inanimate instrument in reaching out, such as tongs, pinchers or other instruments to remove the property sought to be stolen from its location. The defendant

> Mintz having directed Rector in the commission of the act of taking the property, it must be held that the intent of defendant Mintz accompanied Rector in the commission of such act."

In the case of State v. Kramer, 226 S. W. 643, l. c. 645, the defendant was a liquor dealer living in St. Louis, Missouri. At that time the City of Kirksville, located in Adair County, Missouri, was a "dry" city, having elected to be so under the local option law. The defendant, from this office in St. Louis, wrote to numerous residents of Kirksville, offering to sell them intoxicating liquor, stating therein that he had obtained an order of the court compelling the American Railway Express Company to accept shipments of intoxicating liquor and to deliver them in dry territory, which statement was untrue. A number of the persons so solicited ordered liquor from the defendant by letter, had their order verified by defendant, sent the purchase price to defendant in St. Louis and received the liquor which was delivered to them by the American Railway Express Company in Kirksville. Subsequently defendant was tried in Adair County and was convicted of the violation of the local option law in Adair County. During this entire transaction the defendant was 201 miles away from Kirksville. The Kansas City Court of Appeals, in affirming the conviction of the defendant, stated:

> "One can commit an offense and complete it through an agent; and the actual bodily presence of the defendant in the venue of the commission thereof is unnecessary. 16 C. J. 124; State v. Mispagel, 207 Mo. 557, 577, 106 S. W. 513. The record does not disclose that any court issued an order compelling the express company to deliver liquor in dry territory. Pasted on each of the cartons in which the liquor was sent was printed matter, purporting to be a copy of the concluding portion of a court order to that effect, and it seems that one of these was introduced in evidence, but there is nothing to show that any court issued the same. However, even if the defendant did obtain such an order compelling the express company to deliver liquor in dry territory, this would be no defense for the defendant, whatever it might avail the express company, if it were being prosecuted.

> By the very terms of this purported order, the carrier became the agent of the shipper to transport and deliver the liquor. Hence the defendant made the delivery in Kirksville, and the place of the sale was made there where it was completed by the delivery. Dick Bros. v. Quincy, etc., R. Co., 199 Mo. App. 668, 204 S.W. 584."

In the above case the American Railway Express Company was the innocent agent of the defendant, as were the woodcutters in the instant case; and, as here, the defendant was never personally present at the place where the crime was committed.

In the case of State v. Hayes, 262 S.W. 1034, l. c. 1037, the court stated:

> "The appellant is guilty, if at all, because he was an accessory before the fact. An accessory before the fact is one who is not present, either actively or constructively, at the place of the commission of the crime, but who counseled, procured, or commended it. 29 C.J. 1066. That is alleged, and the evidence tends to prove the appellant's participation in the offense in that way.* * *"

In the case of State v. Parker, 24 S.W. (2d) 1023, l. c. 1026, the court stated:

> "The proof did not show that the defendant broke into the Kroger store, but that he was accessory before the fact; that he hired other men to do the breaking in and to steal the sugar. Appellant complains that the defendant was not charged as an accessory but as a principal, and the proof did not sustain the charge. Section 3687, Revised Statutes 1919, provides that an accessory before the fact in the commission of a felony 'may be charged, tried, convicted and punished in the same manner, as the principal in the first degree.' This statute has been construed to cover just such cases as this. State v. Rennison, 306 Mo. loc. cit. 484, 267 S.W. 850; State v. Millsap, 310 Mo. loc. cit. 513, 514, 276 S.W. 625."

Mr. G. Logan Marr

In the case of State v. Layton, 202 S.W. (2d) 898, l. c. 899, the court stated:

> "The foregoing outline of the facts is sufficient to demonstrate that there is no merit in contention that the court should have directed a verdict of not guilty. 'Uttering a forged instrument may be effected by means of an agent * * *. One who procures another to utter a forged instrument is as culpable as if he had perpetrated the act himself.' 37 C. J. S., Forgery, Sec. 42 sub. sec. b. pp. 63, 64. While defendant was not present when the check was cashed, he consented to, aided in, and procured it to be done, and hence punishable as a principal. Sec. 4839, R. S. '39 and Mo. R. S. A."

Therefore, it is our opinion, as we stated above, that O. H. is guilty of being an accessory before the fact of larceny of timber and should be charged therewith under Section 4468.

CONCLUSION

It is the conclusion of this department that one who procures others to commit a crime is guilty as a principal although he was not bodily present at the time and place where the crime was committed, and although he employs innocent agents; and that, under the facts presented by you, O. H. is guilty of larceny of timber and should be charged under Section 4468 R. S. Mo. 1939.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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