HABITUAL CRIMINAL ACT: Sections 4461 and 4462, R. S. 1929. Principal charge may be based on a "mixed felony" and be punished under "Habitual Criminal Act."

March 27, 1937.

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Honorable Claude T. Wood
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 19th, relating to facts with reference to the prosecution of one Curtis Locke for various felonies committed in Pulaski County, Missouri.

In the last paragraph of your letter you request the opinion of this Department on a question which, if we understand you correctly, is this: Whether or not you may prosecute Locke under the "habitual criminal act," Sections 4461 and 4462, R. S. Mo. 1929, in an information or indictment in which the principal charge is for the prosecution of stealing a motor vehicle under the provisions of subdivision "(a)", Section 7786, R. S. Mo. 1929, wherein the penalty is provided that the offender shall be punished by imprisonment in the Penitentiary for a term not exceeding twenty-five years, or by confinement in the county jail not exceeding one year, or by fine not exceeding $1,000.00, or by both such fine and imprisonment, wherein the principal offense is what might be termed "a mixed felony."

Your inquiry evidently turns on the question as to the construction to be given the following language, in Section 4461, supra, viz.:

> "* * second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; * * *"

There is no question but that a prosecution under sub-division "(a)", Section 7786, supra, is a felony under many decided cases, and, in the event of the conviction and appeal, the appeal would be to the Supreme Court of Missouri, notwithstanding the penalty inflicted might run down to a fine or jail sentence. We do not find that the point raised by the court in your case has been definitely passed on by our Supreme Court, but we do find cases wherein prosecutions have been had under the "habitual criminal act," where the principal offense is what might be termed "a mixed felony."

In the case of State v. Lorg, 22 S. W. (2d) 809, the prosecution was under the provisions of Section 4066, R. S. Mo. 1929, stealing chickens in the night time, wherein the penalty runs down to a jail sentence and a fine, and the conviction in this case under the "habitual criminal act" was affirmed by the Supreme Court. We find that State v. Compton, 61 S. W. (2d) 967, was a case which was a prosecution under the provisions of Section 4500, R. S. Mo. 1929, for selling intoxicating liquors, commonly called, "moonshine," "corn whiskey" and "hooch," wherein the punishment may be for not less than two years in the Penitentiary or by a fine of $500.00 or imprisonment in the county jail for a term of not less than three months nor more than twelve months, or both, and wherein the defendant was prosecuted under the "habitual criminal act" and received the punishment as therein provided.

In view of these cases, we must conclude that a prosecution may be had under the "habitual criminal act," notwithstanding the fact that under the principal charge the punishment might be graded down to a fine or a jail sentence. From the peculiar wording of Section 4461, supra, in the "habitual criminal act" there may be some merit in your court's construction of this statute. It is, however, our opinion that a prosecution may be maintained under the "habitual criminal act", based on the main charge of larceny of a motor vehicle, under the provisions of sub-division "(a)", Section 7786, supra.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

CRH:EG

APPROVED:

J. E. TAYLOR
(Acting)