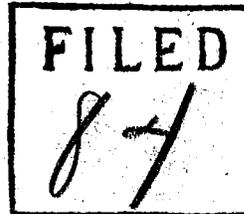


CRIMINAL PROCEDURE

INDICTMENT AND INFORMATION

) Information drawn in language of Section
) 4456, R. S. Mo. 1939, charging larceny of
) money in excess of \$30, will support conviction
) thereunder, if only special rather
) than general ownership of property is proved.
If property subject to larceny be located
in a place properly designated as a dwelling
house, the charge may be laid under Section
March 1, 1950 4459, R. S. Missouri, 1939.

Honorable Edward W. Speiser
Prosecuting Attorney
Chariton County
Keytesville, Missouri



Dear Sir:

The following opinion is in answer to your recent request,
reading as follows:

"I would like to have your opinion on the
following matter.

"During the month of October, 1949, gold
coins having a face value of approximately
\$1500.00 were stolen by the defendant from
a dwelling located in this county. The
evidence shows that these gold coins, con-
sisting of \$5.00, \$10.00 and \$20.00 denomi-
nations, had been accumulated by Mr. and
Mrs. John Taylor, now deceased, during
their lifetime and were concealed in the
basement of their home in this county.
They both died intestate, leaving as their
heirs three children. Immediately after
the death of the survivor, Mrs. Taylor,
the children made a search about the
premises for the gold, but were unable to
locate it. In October, 1949, the defendant,
with several other workmen, was engaged to
make some repairs in the basement. It
seems that a wall of the basement had caved
in and needed restoring. This defendant,
in the process of carrying out the debris
from the basement, discovered about \$1500.00
in gold coins, which presumably are the same
gold coins accumulated and hidden by the
parents. The defendant converted the coins
to his own use and later disposed of them

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by sale to unidentified parties, except for a few single coins which were sold to certain known parties. Defendant admits taking the gold coins and disposing of them, claiming he sold the bulk of it for \$1000.00. He delivered the \$1000.00 to the Missouri State Highway Patrol, stating to them that it belonged to the said Taylor children.

"On the basis of this information a charge of grand larceny was filed, and at the present time, defendant is under a \$1000.00 bond for his appearance for arraignment in Circuit Court on February 9. After full consideration of this case and after consulting the Federal laws dealing with gold coins, it appears that perhaps ownership of this gold cannot be alleged to be in these children, but that ownership was in the United States Government at the time of the taking of the gold. Under this statement of facts, assuming that the corpus delicto can be established, is there a basis for a charge of grand larceny from the children of Mr. and Mrs. John Taylor, or perhaps should the information state that it was the property of the United States Government, or further still, should the indictment state that the owners of the property are unknown? Of course, if it had been any other personal property there would be no question but that the property taken belonged to the Taylor children, but since the property taken was gold coins, then whom should we allege as having ownership?

"I am enclosing a copy of the information I have filed. I would appreciate it if your office would redraft the information so that it would contain the properly stated charge, if the present information does not properly state the charge. This case is set for trial March 16, therefore, I would particularly like to have your opinion not later than March 1, if at all possible."

Under the facts submitted in your opinion request the evidence will clearly establish a larceny of over thirty dollars, and hence the information may be drawn in the language of Section 4456, R. S. Missouri, 1939, and no allegation need be made that the larceny was from a dwelling house. In the case of State v. Martin, 208 S.W. (2d) 203, 357 Mo. 368, the Supreme Court of Missouri decided this point in the following language found at 357 Mo. 368, 1. c. 372:

" * * * The information here is based on Section 4456, which does require stolen personal property, outside of livestock, to be of a

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minimum value of \$30. to constitute the crime of grand larceny. A dwelling house has nothing to do with the case."

Section 3943, R. S. Missouri, 1939, provides as follows:

"When any offense shall be committed upon or in relation to any property belonging to several partners or owners, the indictment or information for such offense shall be deemed sufficient if it allege such property to belong to any one or more of such partners or owners, without naming all of them."

For the purpose of drafting the information in the case at hand it is not necessary to determine that the United States Government is the general owner of the property which was the subject of the larceny. It is enough for us to establish a special ownership in named parties as against the person committing the larceny. In *State v. Lackey*, 132 S.W. 602, 230 Mo. 707, the Supreme Court of Missouri spoke as follows at 230 Mo. 707, l. c. 715:

"As stated in the preceding excerpt from *Greenleaf*, the ownership necessary to support a charge of larceny may be either general or special and the possession of such owner may be actual or constructive. If the property stolen is in the actual possession of a person other than the general owner, the latter has a constructive possession, and the ownership in such case may be properly alleged and proven either in the special owner, having the actual possession, or in the general owner having a constructive possession by reason of such ownership."

The principle enunciated in *State v. Lackey*, supra, was restated in *State v. Nicoletti*, 344 Mo. 86, 125 S.W. (2d) 33. The purpose behind the requirement that ownership, of property which has been the subject of larceny, must be alleged in the information, is clearly stated in the following language found in *State v. Flowers and Jones*, 278 S.W. 1040, 311 Mo. 510, l. c. 518:

" * * * While it is essential to a charge of larceny that the ownership of property stolen

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must be averred, this requirement is made, as above stated, in order that it may be shown that such ownership was in another than the thief; the exact title, therefore, of the property stolen is of no concern to the latter in making his defense and proof of same need not be of the cogent character to sustain a conviction."

Section 3951, R. S. Missouri, 1939, a curative statute in our criminal code, provides as follows:

"Whenever on the trial of any felony or misdemeanor, there shall appear to be any variance between the statement in the indictment or information and the evidence offered in proof thereof, in the christian name or surname, or both christian name or surname, or other description whatsoever, or any person whomsoever therein named as or described, or in the ownership of any property named or described therein, such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case and prejudicial to the defense of the defendant."

The opinion request does not disclose that the estates of Mr. John Taylor, or his wife, are in the process of administration. If such fact is the case, ownership of the stolen property should be alleged to be in their acting administrators or executors. Otherwise, ownership may be alleged to be in named persons, their heirs-at-law, devisees or legatees.

In determining what language should be used in the information charging larceny of money, the Supreme Court of Missouri, in *State v. Darby*, 165 S.W. (2d) 419, held an information good under Section 4456, R. S. Missouri, 1939, which merely described the money as "Three Hundred Dollars in good and lawful currency of the United States of America."

We submit the following suggested form of information, omitting caption and oath, to be used under the facts stated in your opinion

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request, if you decide to charge the offense under Section 4456, R. S. Missouri, 1939:

Edward W. Speiser, Prosecuting Attorney within and for the County of Chariton, State of Missouri, on his oath of office informs the Court that Hubert Anspaugh, on or about the ___ day of October, 1949, in the County of Chariton and State of Missouri, did then and there wilfully, unlawfully and feloniously, steal, take and carry away Fifteen Hundred Dollars in good and lawful gold coin of the United States of America, the joint property of C. W. Taylor, D. A. Taylor and Gertrude Thorne, then and there being, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Missouri.

Since receiving your opinion request this office has communicated with you by telephone and you have supplemented the facts appearing in the opinion request by informing us that the house from which the money was taken was, at the time of such taking, the actual dwelling house of C. W. Taylor. This additional fact will enable us to broaden the scope of our opinion.

Since C. W. Taylor was residing in the dwelling house at the time the money was taken, we now will discuss the alternative procedure which is available to you under Section 4459, R. S. Missouri, 1939, which reads as follows:

"If any larceny be committed in a dwelling house, or in any boat or vessel, or in any railroad car, or street car or interurban car, or by stealing from the person, if the value of the property taken is thirty dollars or upwards, the offender shall be punished by imprisonment in the penitentiary not exceeding seven years."

In the case of State v. Flowers and Jones, 278 S.W. 1040, 311 Mo. 510, the Supreme Court of Missouri was passing on the sufficiency of evidence to sustain a charge of larceny from a dwelling house

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under Section 3315, R. S. Missouri, 1919, now Section 4459, R. S. Missouri, 1939. The following language was used at 311 Mo. 510, l. c. 516:

" * * * In whatever place, therefore, it may be located at the time it is stolen, if such place can properly be designated a dwelling house, the offense of a larceny therein is committed, as defined in the statutes under which the information was drawn. * * *"

In preparing your information under Section 4459, R. S. Missouri, 1939, ownership of the property should be alleged to be in C. W. Taylor, D. A. Taylor and Gertrude Thorne, and the dwelling house should be referred to as the dwelling house of C. W. Taylor.

CONCLUSION

It is the opinion of this office that an information alleging larceny of money described as gold coin of the United States of America of a value in excess of thirty dollars, under Section 4456, R. S. Missouri, 1939, is sufficient if phrased in the language of the statute; and that an allegation of ownership of such property which proves to be special in character is sufficient to sustain a conviction obtained thereon. If property which is the subject of larceny is located in a place which can properly be designated as a dwelling house, such larceny may be charged under Section 4459, R. S. Missouri, 1939.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JLO'M/feh