

CRIMINAL LAW: Information under Section 4014 R. S. Missouri, 1929, should contain the term "malice aforethought" and if not a part of the information upon acquittal the county should pay the costs.

March 8, 1940

Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

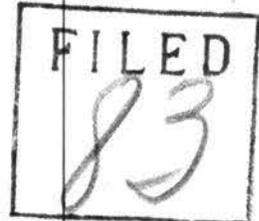
Attention: Mr. Robert K. Mutter.

Dear Sir:

In answer to your request, we are herein rendering an opinion on the following letter written to you by Melvin Englehart, Prosecuting Attorney, Madison County, Missouri:

"Your letter dated December 28, 1939 in regard to payment of cost bill in the above styled action, has been referred to me by the Circuit Clerk of this County.

"I note in the second paragraph of your letter you state, 'the information filed by the Prosecuting Attorney does not contain the words "of malice aforethought" and therefore does not meet the requirements of Section 4014 RSMO 1929. It is essential that the crime be charged as having been done "with malice aforethought" in order to be brought under Section 4014 RSMO 1929. (State vs. Baird, 271 Mo. 9; 195 SW 1010).'



"I would like to call your attention to the case of State vs. Coleman 284 SW 799, in which the Supreme Court of this State held that it was not necessary to use the words 'of malice aforethought' or 'with malice aforethought' to charge felonious assault under Section 4014 Supra. The court referred to a long line of cases of this State interpreting the section under which this information was filed, to-wit, 4014, and held the information to meet the requirements of the statute. You will note that this case is much later than the case of State vs. Baird which you quote as the source of your authority.

"I think that if you will further check the case of State vs. Coleman supra, you will find that it has never been overruled in Missouri, and is still law. Therefore, if the information in State vs. Coleman is law in Missouri, it is not necessary to use the words 'of malice aforethought' or 'with malice aforethought' to charge felonious assault under Section 4014 supra. The only possible punishment under Section 4014 is by punishment in the State penitentiary and therefore under Section 3828 RSMo 1929, this cost bill is chargeable to the State and not to Madison County. I am returning this cost bill to you and if you have any further discussion in regard to this matter, please feel free to write me at your convenience."

Section 4014 R. S. Missouri, 1929, reads as follows:

"Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years."

It will be noticed in the above section that the term "on purpose and of malice aforethought" is included. It will also be noticed that the minimum punishment is solely two years in the state penitentiary.

Section 4015 R. S. Missouri, 1929, reads as follows:

"Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars."

The distinction between Section 4014, supra, and Section 4015, supra, is the fact that Section 4015 does not in-

clude the words "on purpose and of malice aforethought" and the punishment in Section 4015 can be as low as a fine of one hundred dollars. Under Section 4014, supra, according to our previous opinions rendered to you, the state would be liable for the costs. Also, under Section 4015, supra, according to our previous opinions rendered to you, in case of an acquittal of the defendant, the county would be liable for the costs.

Section 4014, supra, has been termed the "bloody section" and since the instructions in a trial of the case under Section 4014, supra, cannot and should not contain terms not included in the information, the information should contain the term "with malice aforethought."

In the case of State v. Johnson, 33 SW (2d) 912, pars. 1,2, the court said:

"The only definite error assigned was the giving of instruction No. 3, drawn under section 3262, R. S. 1919, which makes it a felony, punishable by not less than two years in the penitentiary, to shoot at or stab one with malice aforethought with a deadly weapon or other means likely to produce death or great bodily harm with intent to kill, etc. It is called the 'bloody section.' It is urged by the defendant that the evidence did not warrant an instruction under that section, and that the court should have given an instruction under section 3263, which does not contain the language 'with malice aforethought' nor 'with a deadly weapon,' and permit a jail sentence or a fine. The instruction as given told the jury, if they found the defendant guilty of intent to kill on purpose with malice aforethought, they should assess his punishment at not less than two years' imprisonment."

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In the letter from Melvin Englehart, Prosecuting Attorney, Madison County, to you, he calls attention to the case of State v. Coleman, 284 SW 799, in that case the information did not contain the words "of malice aforethought" but did contain the words "on purpose." The court in the case did not specifically state that the information in the case met the requirements of the statute under Section 3262 R. S. Missouri, 1919, which is now Section 4014 R. S. Missouri, 1929, but mentioned also Section 3263 R. S. Missouri, 1919, which is now Section 4015 R. S. Missouri, 1929. The verdict in the case was the assessment of a punishment of two years in the penitentiary, which verdict would conform to the penalty either under Section 4014, supra, or 4015, supra. That case came to the Supreme Court on the record proper only and did not contain bill of exceptions to show the form of the instructions.

In the case of State v. Meinhardt, 82 SW (2d) 890, l.c. 893, the court said:

"Appellant was charged, by the information, that he made an assault 'on purpose and of his malice aforethought to kill and murder.' The crime, as charged, is governed by section 4014, R. S. Mo. 1929 (Mo. St. Ann. sec. 4014, p. 2817). This section prescribes a minimum punishment of two years' imprisonment in the penitentiary. The succeeding section, that is, section 4015, R. S. Mo. 1929 (Mo. St. Ann. sec. 4015, p. 2821), provides that an assault with intent to kill or do great bodily harm, etc., shall be punished by imprisonment in the penitentiary and the punishment may be as low as a fine of \$100. The two sections are very similar, except that under section 4014 'malice aforethought' is an essential element. The argument, therefore, that under the stat-

ute there are no such crimes as an assault without malice aforethought, is without merit. State v. Grant, 144 Mo. 56, 45 S. W. 1102; State v. Johnson, 318 Mo. 596, 300 S. W. 702, loc. cit. 704 (5-7)."

"\* \* \* \* \*

The gist of the crimes defined in sections 4014 and 4015 is assault. The one with malice aforethought, the other without such malice. Assaults, under section 4015, whether made with intent to kill or made to do great bodily harm stand on the same footing. The punishment prescribed is for the assault. The intent with which the assault is committed is immaterial so long as it is made with intent to do one or more of the acts mentioned in the section. Appellant, by the verdict of the jury, was found guilty of an assault upon N. R. White. This conviction can be successfully pleaded in bar in any prosecution for the same act. Under the charge of an assault to kill with malice aforethought, appellant could be properly convicted of an assault with intent to kill or do great bodily harm without malice, which is a lesser crime of the same nature. State v. Hubbs, 294 Mo. 224, 242 S. W. 675, loc. cit. 678 (10); State v. Johnson, supra. The trial court, by its instructions, submitted the case to the jury, authorizing them to convict appellant under either section 4014 or 4015, supra. The verdict in this case is in compliance with section 3701, R. S. Mo. 1929 (Mo. St. Ann. sec. 3701, p. 3257),

which requires that in cases where a jury finds a defendant guilty of a lesser offense than charged in the information or indictment the verdict shall specify of what degree of the offense they find him guilty. The verdict in this case clearly indicates that the jury found appellant guilty under section 4015, that is, an assault without malice. \* \* \*

It will be noticed in the holding in the above case that the court specifically stated that the two sections are very similar, except that under Section 4014 "malice aforethought" is an essential element.

In the case of State v. Johnson, 300 S. W. 702, l.c. 704, the court said:

"The pleader attempted to charge an offense under section 3262, R. S. 1919. While rather awkwardly drawn and not to be commended as an example of good pleading, we think the information sufficiently charged all the elements of the offense under section 3262. It charged that the assault was on purpose and of appellant's malice aforethought and by a means likely to produce death or great bodily harm, 'with his hands, fists and feet, with great force and violence.' That the assault was made 'with intent to kill' is very unartfully charged. It had previously been alleged that the assault was made on purpose and with malice aforethought. Later it was alleged that the assault was 'on purpose and of his malice aforethought(t) to kill and murder.' An allegation that an assault was made on purpose and with malice aforethought to kill

sufficiently alleges that the assault was made with intent to kill. This was at most a defective allegation, which did not tend to prejudice the substantial right of appellant upon the merits, and the information was good after verdict, under the saving grace of section 3908, R. S. 1919.

"As the information sufficiently charged an assault with intent to kill under section 3262, the trial court was authorized, if the evidence warranted it, in giving an instruction under section 3263, which defines the crime of assault with intent to kill or do great bodily harm. Section 3692, R. S. 1919. Section 3263 does not involve the elements of malice aforethought or the use of a deadly weapon or by means or force likely to produce death or great bodily harm.

"The court did not instruct under section 3262, but gave instructions upon felonious assault with intent to do great bodily harm, under section 3263, and upon common assault.

\* \* \* "

It will be noticed in the opinion in the above case that the court specifically stated Section 3263 does not involve the elements of malice aforethought or the use of a deadly weapon, or by means or force likely to produce death or great bodily harm. Section 3262 and Section 3263 R. S. Missouri, 1919, set out in the above opinion are now Sections 4014 and 4015 R. S. Missouri, 1929.

#### CONCLUSION

In view of the above authorities, it is the opinion

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of this department that the information under Section 4014 R. S. Missouri, 1929, should contain the words "on purpose and of malice aforethought" and that upon an acquittal under an information which does not contain that term the county is liable for the costs and not the state. The reason being that under Section 4014 R. S. Missouri, 1929, the punishment is a punishment solely in the penitentiary, while under Section 4015, supra, the punishment may be as low as \$100.00.

Respectfully submitted,

W. J. BURKE  
Assistant Attorney General

APPROVED:

COVELL R. HEWITT  
(Acting) Attorney General

WJB:RW