

INFANTS: Jurisdiction sentence delinquent boys under 17-circuit courts, Cape Girardeau Common Pleas; such boys between 17 and 21, same courts, also St. Louis Ct. Crim. Correction.  
MO. TRAIN. For certain felonies, circuit courts may sentence boys under 17 to pen., or Train. School; for other felonies  
SCHOOL BOYS: may sentence only to Train. School. Remedy to correct sentence to wrong place is habeas corpus.  
JURISDICTION:

December 17, 1941

Honorable Loyd I. Miller, Director  
Department of Penal Institutions  
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is in the following terms:

"We would like to have an opinion from your office clarifying the question as to who may be sentenced to the Missouri Training School for Boys, and, more particularly, an explanation of the following questions:

"1. What distinction is made between boys under the age of seventeen years and boys between the ages of seventeen and twenty-one years, insofar as sentence to the Missouri Training School is concerned?

"2. What courts may sentence boys to the Missouri Training School?"

This opinion also will answer the request for our opinion by the recent letter of Mr. Paul E. Kaiser, which is in the following terms:

"Re: Coy (Virgil) Sauls, #55469.

"On August 2, 1941, in the Circuit Court of New Madrid County, the subject named above entered a plea of guilty to the crime of Burglary 2nd. degree and was sentenced to serve two years in this institution.

"The prisoner was received at the penitentiary on August 7. He is only 16 years of age, and he had never before been arrested. Because of his youthfulness we deemed it advisable to isolate him in quarantine, thus hoping to reduce to a minimum his association with older inmates, but to continue this arrangement indefinitely would be inhumane.

"This institution cannot properly rehabilitate this type of inmate, and he is below the statutory age limit for admission to the Intermediate Reformatory. We believe the State Training School for Boys at Boonville is the proper place to continue his incarceration.

"Will you please, therefore, advise us if it is not within the jurisdiction of the Circuit Court of Cole County to order his transfer to Boonville, and also help us arrange to bring this case before the Court?

Respectfully,

PAUL E. KAISER  
Paul E. Kaiser, Warden."

I. Your second question is answered first, namely, What courts may sentence boys to the Missouri Training School for Boys at Boonville, Missouri?

Juvenile laws and laws providing for the treatment and correction of delinquent and other minors are in Chapter 56, R. S. Mo. 1939; Article IX, Sections 9673 to 9695, inclusive, apply to counties having a population of 50,000 inhabitants or more, and Article X, Sections 9696 to 9718 apply to counties having a population of less than 50,000. Under the law applicable to counties of less than 50,000 population, Section 9698 in part provides:

"This article shall apply to children under the age of seventeen years, in counties of less than 50,000 population, who are not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children. \* \* \* "

Section 9699 in part provides:

"The Cape Girardeau court of common pleas and all circuit courts in counties less than 50,000 population shall have original jurisdiction of all cases coming within the terms of this article. The proceedings of the court in such cases shall be entered in a book or books kept for that purpose, and known as the juvenile records, and the court shall be known as the Cape Girardeau court of common pleas and the circuit court, and may for convenience be called the juvenile court. \* \* \* "

In those counties the circuit courts and the Cape Girardeau court of common pleas have jurisdiction of proceedings conducted under the juvenile law, and there is no juvenile court. Properly speaking, the term "juvenile court" is applied to the circuit court merely as a matter of convenience. It was so ruled under the same statutes in State ex rel. Wells v. Walker, 34 S. W. (2d) 124, 326 Mo. 1233, and the court said, at l. c. 128, 129 of 34 S. W. (2d):

"There are no separate juvenile courts nor juvenile divisions of the circuit courts in counties of less than 50,000."

\* \* \* \* \*

"That does not mean a separate court. It merely means that 'for convenience'

separate records of the different methods shall be kept, but it is the circuit court in its capacity as such while entertaining juvenile cases and 'for convenience' is called the juvenile court."

\* \* \* \* \*

"It is the circuit judge who sits and tries the case whether it is tried under the general law or under the juvenile law. As judge of the circuit court, he must determine whether the relator may be prosecuted under the general law. The distinctions which are made are not in the different courts which may have jurisdiction of one prosecuted as a delinquent or as a criminal but in the application of a law in the same court."

As to counties having a population of 50,000 or more, Article IX, Section 9673, in part provides:

"This article shall apply to children under the age of seventeen (17) years, not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children:  
\* \* \* "

And Section 9674 in part provides:

"The circuit courts exercising jurisdiction in counties now or hereafter having a population of fifty thousand (50,000) inhabitants or more shall have original jurisdiction of all cases coming within the terms of this article: Provided,

that in counties containing a city of the first class the criminal court shall have such original jurisdiction. For the purpose of this article, the city of St. Louis shall be considered a county within the meaning of this article.

\* \* \* \* \*

" \* \* \* and the proceedings of the court in such cases shall be entered in a book or books to be kept for that purpose, and known as the juvenile records, and the court may for convenience be called the juvenile court. The clerk of the circuit court in such county shall act as the clerk of the juvenile court."

In those counties the circuit court has jurisdiction, and there is no such thing as a juvenile court; the term "juvenile court" is used merely as a matter of convenience. It was so ruled under the same statutes in State ex rel. MacNish v. Landwehr, 60 S. W. (2d) 4, 1. c. 6, 8, 332 Mo. 622, and the court said:

"Relator is wrong in his contention that the complaint against Opal Brown was filed in the juvenile court because there is no such court. The statute does not create a juvenile court. The Juvenile Law, so called, vests original jurisdiction of all cases arising under that law in the circuit court."

\* \* \* \* \*

"Evidently the writers of these opinions referred to the court as the 'juvenile court' for convenience only, because the statute provides that the circuit court

shall have original jurisdiction of all cases arising under the Juvenile Law, and the court may for convenience be called the juvenile court. Section 14137, R. S. 1929 (Mo. St. Ann., Sec. 14137). Neither of these cases hold that there is, in fact, a juvenile court."

The circuit courts may proceed under either the juvenile delinquent law, or under the general criminal law. Section 9700 in Article X applies both to counties of less than 50,000 and to counties having a population of more than 50,000 (State ex rel. MacNish v. Landwehr, 60 S. W. (2d) 1. c. 8 (10)), and it provides:

"In the discretion of the judge of any court having jurisdiction of delinquent children under the provisions of articles 9 or 10, chapter 56, R. S. 1939, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law, and any motion, petition or application, made to any court or judge having general jurisdiction of criminal causes, to transfer the case of or charge against any delinquent child to a court having jurisdiction of delinquent children under the provisions of said articles 9 and 10, may be denied in the discretion of the judge, when in the judgment of the judge such child is not a proper subject to be dealt with under the reformatory provisions of either said article 9 or said article 10."

The power of the circuit judge to make that election was recognized in the last portion of the above quotation from State ex rel. Wells v. Walker, supra.

II. Your first question is, What distinction is made between boys under the age of seventeen years and boys between the ages of seventeen and twenty-one years, insofar as sentence to the Missouri Training School is concerned?

(A) The question is first considered with reference to cases conducted under the juvenile law. In the law applicable to counties of less than 50,000, a delinquent child is defined in Section 9698 as any child under seventeen years of age who violates any state law, or who is incorrigible, or who commits any one of several other actions which are not crimes, and Section 9704 in part provides:

"In case of a delinquent child the court may commit such child, if a boy, to a training school for boys, or to the Missouri reformatory, or, if a girl, to the state industrial home for girls, or, if a colored girl, to the state industrial home for negro girls." The references to the "Missouri reformatory" mean the Missouri Training School for Boys at Boonville (Section 8993, R. S. Mo. 1939).

• With reference to counties having a population of more than 50,000 inhabitants, a delinquent child is defined in Article IX, Section 9673, substantially as above stated, and Section 9688 in part provides:

"In the case of a delinquent child \* \* \* the court may commit the child, if a boy, to the Missouri training school for boys, or, if a girl, to the state industrial school for girls; \* \* \* "

The foregoing applies to boys under seventeen. Both Article IX, Section 9673, and Article X, Section 9698, contain a provision that when jurisdiction has been acquired

under the juvenile law over the person of a child under seventeen, such jurisdiction shall continue until the child shall have attained the age of twenty-one years. Under those provisions, in order to have jurisdiction over a child over seventeen years of age, the court must have by some process brought the child within its jurisdiction while he or she was under seventeen. But another statutory provision is broader, Section 9696, Article X.

Proceeding under the juvenile law either in counties having a population over or under 50,000, circuit courts may sentence to the Missouri Training School for Boys any boy under twenty-one years of age, if he is charged and tried as a delinquent child, instead of being charged and tried under the general criminal law, because Section 9696 provides:

"Whenever in the State of Missouri any minor of the age of seventeen years or over shall commit any of the acts constituting a delinquent child as defined in the statutes of this state, applicable to children under seventeen years, such minor may be caused to be brought by his or her parents or lawful guardian or by the probation officer or by any person interested in said minor, before a court of record having jurisdiction over misdemeanors, and tried in the same manner, as a person charged with the commission of a misdemeanor. Upon the finding of delinquency, the court may proceed to make such order in the case as may seem to be for the best interests of said minor, either by commitment to any public institution, or to any private institution willing to receive such minor, or to the care and custody of any individual willing to care for said minor or said minor may be left in the care of his or her parents or guardian, subject to the supervision of the court under suspended sentence; or the court may proceed to make any other lawful disposition of the case." (Italics ours)

Other sections refer specifically to counties having a population either over or under 50,000. Section 9696 applies to both such counties. It is of general application, and applies "in the State of Missouri." It refers not only to Article X, in which it is found, but refers to all "statutes of this state." Under that section a court other than the circuit court may also have jurisdiction of boys between the ages of seventeen and twenty-one. Said Section 9696 confers jurisdiction on "a court of record having jurisdiction over misdemeanors." For example, in the City of St. Louis exclusive jurisdiction over certain classes of misdemeanors is vested in the St. Louis Court of Criminal Correction. Section 2253, R. S. Mo. 1939; State ex rel. MacNish v. Landwehr, supra, 60 S. W. (2d) 1. c. 6 (2, 3). It is noted that the Landwehr case, supra, recognized the application of another section in Article X to counties otherwise falling within the application of Article IX, because of the use of general terms.

(B) Cases conducted under the general criminal law. This portion of the opinion answers the questions contained in Mr. Kaiser's letter above quoted. It has been seen above that a person under seventeen years of age may be prosecuted in the circuit court under the general criminal law. In State v. Flores, 55 S. W. (2d) 953, 1. c. 955, 332 Mo. 74, the court said:

"These statutes were construed in State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124. It was held that, in a prosecution against a juvenile commenced under the general law, the circuit court had a right to proceed under that law. It was pointed out that since no petition was filed alleging the defendant to be a delinquent child, it was not necessary for the court to exercise the discretion provided under that section. That ruling was approved by this court in Ex parte Bass, 328 Mo. 195, 40 S. W. (2d) 457." Also see State v. Naylor, 40 S. W. (2d) 1079, 1082 (6), 328 Mo. 335.

The offense committed by a boy under seventeen may be a misdemeanor. As to that, Section 8998 in part provides:

" \* \* \* Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. \* \* "

A boy over seventeen convicted of a misdemeanor by a court of record may be sentenced to the county jail the same as other persons under the general criminal law. A justice of the peace court is not a court of record. Of course, the circuit courts (Section 1990, R. S. Mo. 1939), the Cape Girardeau Court of Common Pleas (Section 2329, R. S. Mo. 1939), and the St. Louis Court of Criminal Correction (Section 2238, R. S. Mo. 1939) are courts of record.

With reference to persons under seventeen convicted of felonies, Section 8998 further provides in part:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri

Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. \* \* \* " (Italics ours)

That section prescribes the place of confinement for cases where the defendant was under seventeen years of age on the date that judgment was rendered and sentence pronounced by the court, rather than upon the date when the offense was committed or the plea of guilty received by the court, or the date of the return of a verdict by the jury. It was so ruled in *State v. Townley*, 147 Mo. 205, 48 S. W. 833, under Laws of Missouri, 1897, page 123, Section 5, which in part provided: "Any boy under the age of eighteen years convicted of a crime ..... may be punished in the same manner ..... of persons over the age of eighteen, or he may be imprisoned in the penitentiary or committed to the state reform school .....; and any boy under the age of eighteen years convicted of any other felony ..... shall be committed to the said reform school \* \* \* ." In that case the defendant was under eighteen when he committed the offense, and when he pleaded guilty, but was over eighteen when he was sentenced to the penitentiary for an offense other than one punishable by not less than ten years in the penitentiary. The court said, at l. c. 208, 209, of 147 Mo:

"In note 2, page 139, volume 4, *American and English Encyclopedia of Law*, it is said: 'It has generally be held that the word "convicted" includes the final judgment, and that one who has been found guilty by the jury, but has not yet been sentenced, is not a "convicted" person.'

"In *Gallagher v. State*, 10 Tex. App. loc. cit. 472, it was said that the word 'convicted' ..... has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused.

\* \* \* \* \*

"We think there is no question but what the legislature used the word 'convicted' in its broadest and most comprehensive sense, as one judgment, and as the judgment was not rendered until after defendant arrived at the age of eighteen years that it should be affirmed."

Under the provisions of Section 8998 last above quoted, the court may sentence a boy under seventeen to the penitentiary if he has been convicted of an offense punishable by imprisonment in the penitentiary for not less than ten years. For example, murder in the second degree is punishable by imprisonment in the penitentiary for not less than ten years (Section 4378, R. S. Mo. 1939), and for that offense a court may sentence a boy under seventeen to the penitentiary. Also under Section 8998, for the same offense, the court may in its own discretion sentence the boy to imprisonment in the Missouri Training School for Boys. But, as held in *State v. Townley*, supra, any boy under the age of seventeen years convicted of any felony other than one punishable by imprisonment in the penitentiary for not less than ten years cannot legally be sentenced to the penitentiary, but must be sentenced to the Missouri Training School for Boys. Mr. Kaiser's letter states that a sixteen year old boy named Sauls was convicted of the crime of burglary in the second degree, and sentenced by a circuit court to imprisonment in the penitentiary for two years. That offense is punishable by "imprisonment in the state penitentiary for a term not less than two nor more than ten years." Section 4445, R. S. Mo. 1939. Under the above discussed authority, for that offense, assuming Sauls was sixteen years old when convicted, he could not legally be sentenced to the penitentiary, but could only be sentenced to the Missouri Training School for Boys.

Where the court has erroneously sentenced a boy under seventeen to the penitentiary for an offense other than one punishable by imprisonment for not less than ten years,

the remedy is a habeas corpus proceeding in the Circuit Court of Cole County, in which the court has a right to sentence the boy to the proper place of confinement. In the habeas corpus statute, Article VI, Chapter 8, R. S. Mo. 1939, Section 1660, it is provided that:

"No person shall be entitled to the benefit of the provisions of this article for the reason that the judgment by virtue of which such person is confined was erroneous as to time or place of imprisonment; but in such cases it shall be the duty of the court or officer before whom such relief is sought to sentence such person to the proper place of confinement and for the correct length of time from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment."

That is the same as Section 1996 and Section 2659, R. S. Mo. 1879, which were applied by the Supreme Court in Ex Parte Cohen, 159 Mo. 662. In that case a sixteen year old boy had been sentenced to imprisonment in the penitentiary. The court said:

"The statute governing this case at the time the defendant entered his several pleas of guilty was section 3961, Revised Statutes 1889, which provided: 'Whenever any person shall be convicted of any felony committed while under sixteen years of age, he shall be sentenced to confinement in the reformatory school \* \* \* .' Proceeding then in obedience to the statute, it is considered, ordered and adjudged

that the petitioner Samuel Cohen, \* \* \*  
be and he is hereby ordered released  
from his imprisonment in the state peni-  
tentiary \* \* \* and he is hereby sentenced  
to the reformatory school at Boonville,  
Missouri, \* \* \* "

We shall institute a habeas corpus case in the Circuit Court of Cole County in order to have Sauls sentenced to the proper place of confinement as soon as we obtain proper evidence of his age. Having been informed that Sauls was born in Arizona on a certain date, we wrote to the Arizona State Department of Health, which advised us that they have no record of his birth. We have written to the prosecuting attorney of the county where Sauls was convicted in order to obtain some evidence of Sauls' age other than his own testimony.

Certain persons convicted of felonies for the first time, between the ages of seventeen and twenty-five may be sentenced to the Intermediate Reformatory for Young Men at Algoa (Section 9117, R. S. Mo. 1939). A boy under seventeen on date of sentence for a felony cannot be sentenced to the institution at Algoa, but must be sentenced either to the institution at Boonville, or to the penitentiary, under the statutes discussed above.

#### CONCLUSION

In our opinion, jurisdiction to sentence boys under seventeen on date of sentence, adjudged to be delinquent children, to the Missouri Training School for Boys, is vested in the circuit courts and the Cape Girardeau Court of Common Pleas. Jurisdiction to sentence boys between the ages of seventeen and twenty-one on date of sentence, adjudged guilty on the same charge, is vested in the circuit courts, the Cape Girardeau Court of Common Pleas, and other courts of record having jurisdiction of misdemeanors, such as, for example, the St. Louis Court of Criminal Correction. There is no juvenile court in

Missouri. Jurisdiction to sentence boys under seventeen on date of sentence, convicted of a felony under the general law, is vested in the circuit courts.

A boy so convicted of a felony punishable by imprisonment in the penitentiary for a term of not less than ten years, may be sentenced either to the penitentiary or to the Missouri Training School for Boys. One so convicted of any other felony cannot legally be sentenced to the penitentiary, but must be sentenced to the Missouri Training School for Boys. Where a boy has been erroneously sentenced to the penitentiary, the Circuit Court of Cole County has jurisdiction in a habeas corpus case to sentence the boy to the proper place of confinement, the Missouri Training School for Boys, at Boonville.

Respectfully submitted,

ERNEST HUBBELL  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
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EH:VC