

- (1) CRIMINAL LAW: A person discharged by justice on preliminary examination for felony may be brought before another justice in the county and another preliminary held.
- (2) A person may be committed to the School for Feeble Minded whether under or over age.

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Mr. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Chitwood:

This department is in receipt of your letter of February 18th containing two specific questions. The facts surrounding your first question are as follows:

I.

"The above defendants were prosecuted for killing deer out of season, a felony, under section 8236 Act of Mo., for 1931. They were given a preliminary examination before R. S. Hiltibidal one of the justices for this township, and after what appeared from the records to be a regular preliminary, the defendants were discharged.

Several interested persons here, who would like to see the wild life protected, and violations of our game laws punished, have asked me to start prosecution against these same parties on the same charge, as a number of people feel that the defendants should have been bound over to our Circuit Court. I am not personally familiar and cannot give you the details of the evidence, and having mentioned

since my predecessor, Mr. J. L. Huett, who was then prosecuting attorney filed the suit.

I would like your opinion as to whether I may legally prosecute these defendants on the same charge as mentioned after they have been discharged by the examining justice."

The purpose of a preliminary hearing is for the benefit of the defendant. In holding preliminary examination, it is the duty of the justice to determine first whether or not a crime has been committed, second, as to the probable cause for thinking that the defendant committed the crime. The question which you propound has been decided by the Supreme Court in the case of State vs. Cooley, 12 S. W. 2nd, 1. c. 468, wherein the court said:

"While it is not expressly provided in section 3848 that an information cannot be filed until the magistrate has found 'that a felony has been committed and that there is probable cause to believe the prisoner guilty thereof,' such is the clear intent of the statute. Otherwise the according of an examination before a magistrate is a useless preliminary step and affords no protection to the accused. The lawmakers are guilty of no such absurdity. The examination by a magistrate before an information can be filed by the prosecuting attorney takes the place of an examination by a grand jury before the return of an indictment and prevents an abuse of power by the prosecuting attorney. On a discharge of the accused a complaint may be filed before another magistrate, or the charge may be investigated by a grand jury."

We are, therefore, of the opinion that you may file another

complaint before any justice in the county to hold another preliminary hearing. Of course, as stated in the above decision, the matter could be brought before the grand jury and if the defendants were indicted, the fact that they were released, or discharged, at a previous preliminary hearing, would not affect the indictment.

II.

"I would also like your opinion as to whether the Superintendent of the Missouri State School for Feeble Minded and Epileptics at Marshall, Mo., in the absence of statute has any authority to fix an age limit of 25 years on applicants who are epileptic patients. All the necessary preliminary steps have been taken to commit one Arnold Davis, an epileptic person, age 27, of Reynolds County, and who is badly in need of treatment, but the Superintendent informs us that he will not take this patient into his institution since he is 'too old', please advise, in above cases, thanking you, I am * *"

We have examined statutes relative to the Missouri Colony for Feeble Minded, or known as the Missouri State School, and are unable to locate any provisions to empower the Board of Managers, or the management of the school, to fix the age limit of the inmates. The statutes cover the same in Sections 8691 to 8696, inclusive, as amended, Laws of 1931, page 218 and the pertinent part referring to your question is as follows:

"There shall be received and gratuitously supported in the Missouri state schools, feeble-minded and epileptics residing in the state who, if of age, are unable, or if under age, whose parents or guardians are unable to provide for their support therein, and who shall be designated as

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state patients. Such additional number of feeble-minded and epileptics, whether of age or under age, as can be conveniently accomodated, shall be received into the school by the managers on such terms as shall be just; and shall be designated as private patients."

The statute, itself, states that persons are to be admitted, if of age or if under age. The other statutes contain no reference to the power of the board of managers to make reasonable rules and regulations governing the receiving of inmates.

Therefore, we are of the opinion that the person which you state to be 27 years of age, if properly committed by the court, is entitled to receive treatment at the Missouri State School, if such person can be conveniently accommodated.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General