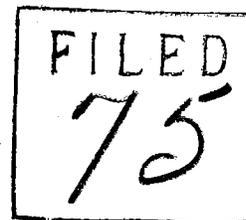


JUSTICE OF THE PEACE: Jurisdiction in preliminary hearings,
under the Constitution of Missouri, 1945.



October 25, 1945

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Honorable Allen Rolston
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following facts:

"As prosecuting attorney of Schuyler County I am confronted with this proposition. About the middle of August, 1945, Boyd Crow was arrested on the felony charge of burglary and larceny. Complaint in proper form was filed before a justice of the peace, and preliminary had, and he was bound over to the Circuit court, there formal information was filed.

"The case will be called for trial before long, and I understand that the defense is taking the position that under the new constitution the office of justice of the peace was abolished at the time of this preliminary, and therefore the proceedings in preliminary were void, and that in fact the defendant has not been accorded a preliminary hearing. One of the attorneys for the defendant has stated that some circuit judge in Missouri has so ruled.

"It is my private opinion that the office of justice of the peace still exists

and will until the magistrate court comes in to being, but it is too big a question for me, and I would like to have your opinion on this question.

"I believe the provisions to be considered will be found in Section 20, of Article V, and in Sections 2, 3, and 4 of the Schedule."

While Article 5 of Chapter 30, R. S. Mo. 1939, makes frequent mention of a magistrate, that term, as used therein, refers to justices of the peace before whom preliminary hearings are held in felony cases. While that Article does not define a magistrate as being a justice of the peace, Section 3893, R. S. Mo. 1939, makes that definition in the following language:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * " (Emphasis ours.)

It was clearly contemplated by Article V, Section 21, of the Constitution of Missouri of 1945 that legislation would be enacted setting up the magistrate courts provided in that Constitution. That section provides:

"The general assembly shall provide for the administration of magistrate courts consistent with this Constitution."

Since the provision for an examination before a justice of the peace in felony cases is clearly in conflict with the new Constitution, which abolishes the office of justice of the peace, Section 2 of the Schedule of the Constitution of 1945 must apply. That section provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Furthermore, as you intimate in your request, under Section 3 of the Schedule of the Constitution of 1945, all persons holding public office at the time the new Constitution became effective were not affected thereby.

Section 4 of the Schedule specifically refers to justices of the peace, as follows:

" * * * The justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, upon which their records shall be transferred to the magistrate courts."

Up until the present time, no legislation has been enacted by the General Assembly which provides for the establishment of magistrate courts, as described in the Constitution, and therefore the present provisions of the law providing for preliminary examinations in felony cases, contemplating hearings before justices of the peace, remain in full force and effect.

CONCLUSION

It is the opinion of this department that the various offices of justices of the peace are still in existence throughout the state, and that those officers should continue to function and conduct preliminary hearings, as required by existing statutes, until legislation is enacted providing for the opera-

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tion of magistrate courts, as set out in the 1945 Constitution, or until July 1, 1946, at which time present laws conflicting with the new Constitution become inoperative.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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RLH:HR