CRIMINAL PROCEDURE: Continuances of indictments and information.

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July 27, 1933.

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Mr. Anderson:

This department acknowledges receipt of your letter of July 15, 1933 wherein you request an opinion as to the course of certain cases now on your docket. For convenience, your letter is quoted in full below:

> "We have a number of cases in the four divisions of our Circuit Court which were inherited from past administrations, in which the defendants were indicted or informed against and at the time were not apprehended and have not been since.
>
> These cases are carried on the docket as State vs. _____, and are called each term, and it appears in most cases that the defendants, because of the length of time that has elapsed, will never be arrested.
>
> Our thought is that a saving of this unnecessary labor might be effected if we obtained an order from each Division continuing the cases generally, with leave to reinstate on the application of the Prosecuting Attorney, and state in the memorandum that the defendant was a fugitive at the time of the return of the indictment or the filing of the information, and that he is still a fugitive.
>
> We would like the opinion of your office as to the legality of this action, with some authority, so that we may present the matter effectively to our Circuit Court Judges."

We note you are continuing these cases from term to term. No doubt, this is being done according to Sec. 3569 R.S. of Mo. 1929, which is as follows:

> "If any person indicted for a criminal offense abscond or flee from justice, or cannot be found to be served with process, or, being let to bail, shall not appear according to the condition of the recognizance, the cause may be continued from term to term, without issuing process on the indictment; and such process may be issued at any time on the application of the prosecuting attorney."

The case of State v. Sloan, 309 Mo., l.c. 507-508 bears on this question. Judge Blair in rendering his opinion, states as follows:

> '"The first assignment of error is that the indictment was not returned into court in compliance with Section 3884, Revised Statutes 1919. That section requires that indictments found by the grand jury shall be presented by the foreman in open court in the presence of the grand jurors. Defendant's contention is bottomed upon a record recital that, on November 15, 1923, and during the November term of court, the prosecuting attorney filed indictment No. C-1366, State of Missouri v. W.B. Sloan. The clerk of the Circuit Court of Jackson County has filed with this court a certified copy of a record entry made at the September 1923 term of said court, as follows: 'Now at this day, comes the Grand Jury, in a body, into open court and presents to this court the following indictments to-wit: C-1366, State of Missouri vs. _____'. It will be noted that the indictments mentioned in the two record entries bear the same number. The defendant may not have been in actual custody, when the indictment was presented to the court at the September term, although it appears that an information had previously been filed against him. The court did not permit its records, which are always open to the inspection of the public, to disclose the name of the defendant named in the indictment, until he had been brought into court to answer the same. Section 3892, Revised Statutes 1919, provides that, when a person indicted is not held in confinement or under recognizance, the

> indictment shall not be docketed or entered upon the minutes or records of the court until the defendant shall have been arrested. The practice of giving the indictment a number and leaving the name of the defendant blank in the record, sufficiently identified the indictment as having been filed under the provisions of Section 3884, without violating the provisions of Section 3892 as to secrecy. The assignment is overruled."'

In this connection we should not overlook Sec. 3547 R.S. of Mo. 1929, which is as follows:

> "When any indictment shall be found against any person for a felony or misdemeanor, not being in actual confinement, or held by recognizance to answer thereto, such indictment shall not be open to the inspection of any person except the judge and clerk of the court and the prosecuting attorney; nor shall it be docketed or entered upon the minutes or records of the court until the defendant therein shall have been arrested."

It is the opinion of this department that this section should have been followed in the first instance by the clerk. There was no necessity of placing them on the docket and carrying them merely by number. It is a very ancient case but has never been overruled, being State v. Corson, 12 Mo., l.c. 263, in which the court said:

> "'These provisions of our statute make it a misdemeanor for a grand juror, a judge, prosecuting attorney, or other officer of any court, to disclose the fact of any indictment for a felony being found, unless the defendant is in custody or on bail; and the 1st section of the 4th article above referred to, declares that such indictment shall not in such a case be open to inspection of any person, except the judge, circuit attorney and clerk, until the defendant therein shall have been arrested. The third section provides for the officers in issuing and executing the process and in the discharge of official duty.
>
> Under the provisions of the statute, I hold it to be the duty of the clerk not to enter on his docket, or minutes, or records, the fact of the grand jury finding the bill of indictment against the defendant for a felony, unless he be in custody or on bail, nor to enter the continuances

> of the cause from term to term. He should keep a private memorandum book, in which all such indictments for felonies are entered, and which, together with the indictments, should not be open to the inspection of any person except the officers mentioned in the statute; and such indictment should never be docketed nor entered on the minutes nor records of the court until the defendant is in custody; otherwise the statute is nugatory. Why require the secrecy under a penalty of a misdemeanor if the officer keeping the records is required to docket and note the case and the continuances thereof from term to term? What is the object of these statutory provisions? What evil was to be guarded against? Criminals, knowing they had been indicted, often made their escape before the officers could arrest them. It was to prevent this, and to render the administration of the criminal law more efficacious, officers were required not to disclose the findings of indictments for felonies; grand jurors were under the same requisition. Indictments were not to be open to inspection. All this was to be kept secret until the defendant should be arrested. Now establish the doctrine contended for by the defendant's counsel in this case, and you virtually repeal the sections of the statute above referred to. The last section of the fourth article of the above statute about 'continuances of the cause from term to term', should not be construed so as to render useless, if not repeal, the 1st, 2nd and 3rd sections of the same article. The clerk may very well keep a private memorandum of all such indictments for felonies, where the defendants are not in custody or on bail, and may issue capiases by the order of the court whenever he thinks the officer can apprehend the defendant.'"

In view of the foregoing opinions, it is the opinion of this department that you may continue the cases generally, as you have suggested, or you may instruct the clerk to withdraw them from the docket, and later, if the defendants are apprehended, you may request that the cases be restored to the docket.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

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