CORONERS:
PROSECUTING ATTORNEYS:
CRIMINAL LAW:

No discretion vested in coroner as to report required by Section 58.370. It is not necessary for report to be made by sworn affidavit. Report must be based upon the verdict of the coroner's jury. Judge has no discretion other than to issue warrant required by Section 58.370. The prosecuting attorney may enter state's nolle prosequi.

December 20, 1957

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri

Dear Mr. Garnholz:

This office is in receipt of a request from you for an opinion. The request is as follows:

> "Some question has arisen concerning the interpretation of RSMo, Sec. 58.370--Death by Felony - Duty of Coroner. We would appreciate your opinion as to the following questions:
>
> 1. Does the Coroner have any discretion as to whether he must inform a Magistrate Judge of information made known to him at a Coroner's Inquest; and must such information by necessity consist of a sworn affidavit by the Coroner before the Magistrate Judge?
>
> 2. Must a Coroner make such sworn affidavit before a Magistrate when the affidavit is based purely upon the verdict of his Coroner's Jury at the inquest?
>
> 3. Does the Magistrate receiving such information have any discretion as to the issuing of a warrant for apprehension of the individual involved in the case?
>
> 4. In the event such a sworn affidavit by a Coroner is made before a Magistrate, and is based solely on the verdict of homicide by the Coroner's Jury, must the Prosecuting Attorney proceed with the matter or may he dismiss the charge where, in his opinion, there is insufficient evidence to sustain a criminal charge?"

It is thought best here to quote the section of the statute concerned. Section 58.370, RSMo 1949, is as follows:

> "The coroner, upon an inquisition found before him of the death of any person by the felony of another, shall speedily inform one or more magistrates of the proper county, or some judge or justice of some court of record, and it shall be the duty of such officer forthwith to issue his process for the apprehension and securing for trial of such person."

The word "shall" as used in the above section does not appear to need any clarification. This is a duty required of the coroner, believed to be in furtherance of the cardinal purpose of the existence of the office. Compliance with this law is obligatory, if it were not there could be no purpose in its enactment.

The question here, however, is as to whether the coroner shall inform the magistrate judge. It is believed that full compliance can be had by the informing of "some judge or justice of some court of record," as well as by informing a magistrate of the county. By inference it must be added here that the court of record should be a Missouri Court with jurisdiction of the county concerned. Since an affidavit is not mentioned in the statutory requirement, it is not deemed that an affidavit is necessary. The coroner in forwarding the information is completing what is deemed to be a ministerial task prescribed as an official duty.

Again, absent direction as to how the task shall be completed, it appears from Section 58,370 that the information of the signing of the inquisition in such form as to apprise the magistrate or judge or justice of the necessary facts would be sufficient.

Since it is not prescribed in the statute that a sworn affidavit of the report of the inquisition is necessary, the second question which you ask must be modified accordingly. The question then is whether the information from the coroner to be given to a magistrate or judge or justice, should be based purely upon the verdict of the coroner's jury. This, it is felt, can be answered in the affirmative.

It is believed that the particular information required by Section 58.370 should be fully contained in the verdict required by Sections 58.310, 58.350 and 58.360, RSMo 1949. Each of these sections apply to the requirements of the composition of the coroner's jury verdict. The jury is to be charged to find whether or not the death occurred by felony or accident. If the death occurred by felony the jury is charged to declare the principals and the accessories and all the material circumstances relating thereto. The foregoing is in accordance with the charge to be given by the coroner in accordance with Section 58.310, mentioned supra.

Section 58.350 requires that the evidence of witnesses be taken down and if it relates to the trial of any person concerned in the death, the witnesses are to be bound by recognizance for appearance in the next term of court. The coroner is required to return to the same court the inquisition, written record and recognizance taken by him.

Section 58.360 requires the coroner's jury to view the body, hear the evidence, and draw up and give to the coroner their verdict in writing. The section further requires that the verdict be signed by the coroner. It may be seen from the text of the foregoing sections that it is not expressly required that all of the above be made in the information required by Section 58.370. For that latter section, the clear letter of the statute would meet compliance by a report to some judge or justice or some court of record of the context of the verdict as signed by the coroner.

It will be noted that although there is definite instruction in chapter 58 in regard to the binding of witnesses by recognizance, no other provision is made than that in 58.370 for the arrest and detention of the principal or accessories found by the inquisition. In order to meet the requirements of Section 58.370, the information furnished thereunder must be based upon the verdict of the coroner's jury at the inquisition. This is in accordance with the direction of the statute.

In answer to the third question which you ask in your letter, it is believed that the issuance of a warrant for the apprehension of the individual alleged to be involved is a mandatory duty upon the court receiving the coroner's report. The statute reads that it shall be the duty of such officer forthwith to issue his process for the apprehension and securing for trial of such person.

The Missouri Supreme Court stated in State Ex Rel. Taylor v. Wade et al, 231 SW2d 179, 360 Mo. 895 at l.c. 899 as follows:

> "* * * * Certainly statutes that use the word 'shall', and then provide a penalty for failure to do what is required, are mandatory statutes. (See 50 Am. Jur. 47-57, Sec's. 24-35.) As shown by this discussion in American Jurisprudence, this question usually arises in determining whether failure to comply with a statutory provision makes an act or proceeding void. (The cases cited by respondents are such cases, namely, State ex inf. McAllister v. Bird, 295 Mo. 344, 244 SW 938; Hudgins v. Mooresville Consolidated School District, 312 Mo. 1, 278 SW 769; Cantley v. Village of Mt. Moriah, 226 Mo. App. 1230, 49 SW (2d) 275. See also State ex rel. City of Berkeley v. Holmes, 358 Mo. 1237, 219 SW (2d) 650.) When the statute [182] creates an official duty in

> the interest of the public it is a different matter; and when the General Assembly imposes such a duty upon a public officer, he has no discretion as to whether or not it should be performed."

In further regard to the meaning of the word "shall" in the matter of State Ex Rel. Moore et al v. Julian et al, 222 SW (2d) 720, l.c. 726, it was held by the Missouri Supreme Court as follows in regard to the discretion of the Labor Mediation Board: "It has no discretion to withhold its mediation facilities in any labor dispute between parties subject to the act, as here."

It is believed that the prosecuting attorney may dismiss a murder charge where, in his opinion, there is insufficient evidence to sustain it.

In the case of State v. Smith, 258 SW (2d) 590 at l.c. 595, the Supreme Court of Missouri stated as follows:

> "We have discussed and ruled the only issue raised by the pleadings. Having determined that the prosecuting attorney has the discretion and authority, without the consent or permission of the circuit court or anyone else, to enter the State's nolle prosequi or dismissal in a pending criminal cause, it follows that respondent has no jurisdiction to further proceed in the case of State of Missouri v. George Robert Fitzgerald, now in the Circuit Court of Andrew County, Missouri."

CONCLUSION

It is therefore the opinion of this office that there is no discretion vested in the coroner by Section 58.370 as to whether or not he shall inform the magistrate of the county or some judge or justice or a court of record of an inquisition found before him of the death of any person by the felony of another. There is no necessity for such information to be made by sworn affidavit of the coroner. The information required by law must be based upon the verdict of the coroner's jury at the inquest. Upon receipt of information transmitted in accordance with Section 57.370, RSMo 1949, it is the duty of the magistrate, judge, or justice to issue a warrant for the apprehension of the person or persons designated in the information. The prosecuting attorney may enter a nolle prosequi or dismissal in a pending criminal cause.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF:db