CRIMINAL:
COSTS:

Juvenile cases and seven questions relating thereto.

March 26, 1942

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion of February 26, 1942, which is as follows:

> "We are enclosing a cost bill received from Johnson County, a cost bill received from Newton County and copies of files and record entries relating to each case. We request your official opinion as to whether the state or county is liable for these costs.
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> "We are also sending you correspondence relating to a case from Vernon County, wherein the defendant was sentenced to the Missouri Training School for Boys at Boonville, Missouri. The cost bill in this case has not been presented to us for payment. We are sending you; however, the sheriff's bill for transporting the prisoner to the Missouri Training School for Boys. We wish to call to your attention that the information in this case shows that the defendant was charged with larceny of an automobile, which crime is punishable as provided by Section 8404 R. S. Mo. 1939, that is either penitentiary sentence or by jail sentence or fine. Are the costs of this case payable by the state?
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> "We find that the various circuit judges follow different procedure in the matter of disposing of juvenile cases. In some of the circuits, the judges and prosecuting attorneys deal with most children under the age of seventeen years as delinquents and proceedings

are held under the juvenile delinquent provisions of statutes. Any costs not assessed against the petitioner or other persons are paid by the counties. In most of these cases the records are clear. A petition or information is filed charging juvenile delinquency or sentence and judgment is rendered therefore, and the question of who is liable for cost does not arise.

"In some other counties however, it is difficult to determine whether children are being tried under the general criminal law or as delinquents. We understand that any person under the age of seventeen years must be tried in juvenile court either for delinquency or as a criminal. Is this correct?

"In some counties they never have a juvenile delinquent. If they do, there is no record to show that they are being tried for juvenile delinquency. There is nothing in regard to age or other reason to show why the case is in juvenile court, The prosecuting attorney files an information charging the child with burglary, etc. The child is brought in, pleads guilty and is sentenced to the Missouri Training School for Boys. The state is billed for costs in most of these cases.

"In still other counties they do not use a juvenile division of the circuit court. If they do, the records do not so indicate, because on account of expenses or for other reasons the general court record is used to record all proceedings and nothing is recited about the age of the defendant althought sentence and judgment is assessed at confinement in the Missouri Training School for Boys.

"Can a child under the age of seventeen years being tried in juvenile court under the general criminal law be sentenced on a plea of guilty to imprisonment to the Missouri Train-

ing School for Boys, or does the sentence first have to be to the penitentiary and then commuted. Can a person over the age of seventeen be sentenced to the Missouri Training School for Boys or is the requirement, first penitentiary sentence and then commution or sentence. In this connection, please refer to the correspondence in regard to the Vernon County case. You will note there is nothing therein to show the age of this defendant other than his sentence terminates at the age of twenty-one years.

"Is it necessary for the court records to recite the ages of children under the age of seventeen years where they are being tried under the general criminal law and sentence is to the Missouri Training School for Boys? For example, the prosecuting attorney files an information in circuit court charging a boy with burglary. The boy is presumed to be fourteen years of age although no mention is made of his age in the records. The boy pleads guilty and is sentenced to the Missouri Training School for Boys. Is this sufficient record for entrance into the Missouri Training School. Is the judge presumed to have established the facts in regard to age, etc. before sentence and judgment or should the records bear out these facts?

"Where a burglary charge is filed against a child under seventeen years of age, is the judge required to enter of record the fact that he or she is being tried under the general criminal law or would the information filed by the prosecuting attorney be the determining factor, even though no information was recorded in regard to the age of the defendant?

"The state, of course, does not wish to refuse payment of costs for which it is legally entitled to pay. We have heretofore obtained an opinion in regard to juvenile cases, but

> the information requested herein involves other points not raised in the former request and which points we wish to have clarified. We request your further opinion in regard thereto."

For the purpose of this opinion we are dividing your letter into separate questions and will render the opinion accordingly.

The first question is "In some other counties however, it is difficult to determine whether children are being tried under the general criminal law or as delinquents. We understand that any person under the age of seventeen years must be tried in juvenile court either for delinquency or as a criminal. Is this correct?"

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.
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> "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.
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> "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.
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> " * * * 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, l.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."
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> "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) l.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.

Section 9704, R. S. Mo., 1939, 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 reference to the "Missouri reformatory" means 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 9596 provides:

> "Whenever in the State of Missouri any minor of the age of seventeen years or over sha[illegible]

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 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) l.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.

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, l.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 hereafterbe 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 of committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of <u>any other felony</u>, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. * * * * * * * * " (Underscoring ours)

It is, therefore, the opinion of this office that a person under the age of seventeen years must be tried in the circuit court under the juvenile law unless the circuit judge shall order that he be tried under the general law, in which latter case he would be tried as any other person charged with a crime for trial.

In answer to your second question, "We are enclosing a cost bill received from Johnson County, a cost bill received from Newton County and copies of files and record entries relating to each case. We request your official opinion as to whether the state or county is liable for these costs.", we have examined the fee bills from Johnson County and from Newton County and in regard thereto and with reference to the fact that the court has in his discretion the right to try a case either as provided under the Juvenile Delinquent Law or under the Gen-

eral Law as set out above.

Section 9004 R. S. Mo., 1939, sets out the general rule as to who shall be liable for criminal costs and that section is as follows:

> "In all cases of conviction of felony, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the Missouri training school for boys shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said Missouri training school for boys and in returning therefrom, to be paid by the state or county, as the case may be."

Section 4221 R. S. Mo., 1939, provides as follows:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the

> sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."(Underscoring ours.)

It is, therefore, the opinion of this office that the fee bills in both of these cases should be paid by the State for the reason that the court in each case elected to try the defendant under the General Law rather than under the Juvenile Delinquent Law and,in the light of the above set out Statutes,the State would be liable in any event.

With reference to your third question, ("We are also sending you correspondence relating to a case from Vernon County, wherein the defendant was sentenced to the Missouri Training School for Boys at Boonville, Missouri. The cost bill in this case has not been presented to us for payment. We are sending you; however, the sheriff's bill for transporting the prisoner to the Missouri Training School for Boys. We wish to call to your attention that the information in this case shows that the defendant was charged with larceny of an automobile, which crime is punishable as provided by Section 8404 R. S. Mo. 1939, that is by either penitentiary sentence or by jail sentence or fine. Are the costs of this case payable by the state?") we have examined the bill presented by the sheriff of Vernon County and in view of the Statutes in cases set out above it is the opinion of this office that the Superintendent of the Missouri Training School for Boys of Boonville, Missouri, was in error when he billed the sheriff's fees to the county. The record of this case shows that the Circuit Judge elected to try the defendant under the General Law, and,as set out heretofore, the State would be liable for the costs.

In answer to your fourth question,("Can a child under the age of seventeen years being tried in juvenile court under the general criminal law be sentenced on a plea of guilty to imprisonment to the Missouri Training School for Boys, or does the sentence first have to be to the penitentiary and then commuted.") we can find no statutes in this State which require a person under the age of seventeen (17) years to first be sentenced to the penitentiary and then afterwards have a commutation of sentence.

In answer to your fifth question, ("Is it necessary for the court records to recite the ages of children under the age of seventeen years where they are being tried under the general criminal law and sentence is to the Missouri Training School for Boys?"). In the case of State v. Darling, reported in 199 Mo., l.c. 197, 198, the court said as follows:

> " * * * * A point is made upon the fifth instruction which defendant insists is erroneous in that it told the jury that if they found the defendant guilty of murder in the second degree, they should assess his punishment at imprisonment in the penitentiary for any term of years not less than ten, when at the time of the trial defendant was under eighteen years of age, and, under section 7759, Revised Statutes 1899, the jury might have fixed his punishment at imprisonment in the penitentiary for a term of not less than ten years or might have committed him to the state reform school for boys for a term of not less than five years, if the jury had been so instructed. This statute does not change the mode of trial under such circumstances, nor is it found in the statute in regard to crime and punishments but under a separate and distinct chapter entitled, 'Reform School for Boys,' and while it is inartistically drawn,

> it clearly means that a boy old enough to commit and who does commit a crime the punishment for which is death or imprisonment in the penitentiary for not less than ten years, is to be tried just as any other person committing such an offense, and after conviction if the court is satisfied that he is under eighteen years of age, he may, in the discretion of the court, 'be imprisoned in the penitentiary or committed to the state reform school for boys for a term not less than five years.'* * * "

Further, we can find no Statutes in this State which require the court records to recite the age of the party being tried for a crime.

In question six you ask: "Is the judge presumed to have established the facts in regard to age, etc. before sentence and judgement or should the records bear out these facts?" The court said,in the case of State v. Walker, reported in 34 S. W. 2d, l.c. 129, the following:

> "* * *In order to set at rest any dispute as to the jurisdiction of the circuit court to entertain a proceeding under the general law where a child is charged while under seventeen years of age with the commission of a crime, the other act of 1927 (Page 129) covers any case that might be in doubt, but providing that <u>any</u> petition or application made to <u>any</u> court or judge having <u>general jurisdiction of criminal cases may deny</u> any motion, petition, or application to transfer the case to a court having jurisdiction of delinquent children. An earlier act could not nullify that provision. All these provisions, taken together, contemplate that an information like that under consideration here must first be <u>filed</u> in the circuit court, and, if the person affected desires to have the case conducted under the provisions of the juvenile law, he must file some motion or petition to transfer the case from the circuit court to

> the juvenile court, so called for 'convenience,' which would merely mean that the defendant must ask the court to conduct the case as provided for a juvenile delinquent and not prosecute him under the general law. The record shows no motion or suggestion to the trial court that the proceeding be so transferred. The court could not then be without jurisdiction to proceed in the case when no proper method has been attempted by relator to have the proceeding transferred. He has no right to have the proceeding dismissed because he is properly and lawfully in court upon the charge under the authority of the provisions quoted. 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. We could not make the preliminary rule absolute and thus compel the judge to dismiss the case. We could only order him to stop the proceeding under the criminal law.* * * * * * * "

And in the case of State v. Flores, 55 S. W. 2d, l.c. 954 and 955, the court said as follows:

> " * * * * The appellant in his motion for new trial assigned several errors not argued in his brief. He first claims that the court had no jurisdiction of the cause, and it should have been transferred to the juvenile court, because he was under the age of seventeen years, citing section 14162, R. S. 1929 (Mo. St. Ann. Sec. 14162), which section provides that circuit courts in counties of less than fifty thousand shall have original jurisdiction of cases coming within the terms of the juvenile court act.

> That section further provides that a petition alleging a child to be delinquent shall be dismissed, and such child shall be prosecuted under the general law when in the judgment of such court such child is not a proper subject to be dealt with under reformatory provisions of this article.
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> "Section 14163, R. S. 1929 (Mo. St. Ann. Sec. 14163) provides that in the discretion of the judge any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general law.
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> "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.
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> "In this case the defendant was charged by information filed in the circuit court of Pettis county by the prosecuting attorney and the cause proceeded to trial on that information. No petition nor request of any kind on the part of the defendant was made to have the cause transferred to the juvenile court. The court had jurisdiction to proceed as it did with the trial.* * * * * * * * * "

In view of the above and other cases cited and the statutes set out, it is our opinion that in the case you mentioned the record is sufficient for entrance in the Missouri Training School and the Circuit Judge is presumed to have established the facts in regard to the age, etc. before sentence and judgment.

Your seventh question reads as follows:

> "Where a burglary charge is filed against a child under seventeen years of age, is the judge required to enter of record the fact that he or she is being tried under the general law or would the information filed by the prosecuting attorney be the determining factor, even though no information was recorded in regard to the age of the defendant?"

In this question the court record would show whether or not the defendant was prosecuted under the General Law or the Juvenile Delinquent Law, the information of the prosecuting attorney would not be the determining factor in as much as it is in the discretion of the court, as we have set out above, to decide under which law the defendant will be prosecuted.

Respectfully submitted,

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Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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