OFFICIAL OPINION NO. 70

November 29, 1948.

Mr. R. D. Moore,
General Superintendent,
Indiana Reformatory,
Pendleton, Indiana.

Dear Mr. Moore:

You state in your letter of October 11, 1948, that it has been the common practice for a period of years to transfer inmates past the age of sixteen years from the Indiana Boys' School to the Indiana Reformatory to serve out a reasonable part of their commitment to the Indiana Boys' School. You further state that when a boy past the age of sixteen years become uncontrollable that a request was made through the Department of Public Welfare for a transfer to the Indiana Reformatory; that upon being transferred to the Indiana Reformatory, the boy was eligible for release at the end of one year if his behavior was good. You now request an official opinion as to whether or not such transfers are legal.

By statute the Department of Public Welfare is charged with the administration or supervision of all the public welfare activities of the State.

Section 52-1104 of Burns' 1947 Pocket Supplement; Acts 1936 (Spec. Sess.), CH. 3, Sec. 5, p. 12; 1937, Ch. 41, Sec. 1, p. 235; 1941, Ch. 179, Sec. 3, p. 536; 1945, Ch. 349, Sec. 3, p. 1677.

Subsection (n) of said section of the statute provides that the Department of Public Welfare:

> "May classify the patients and inmates of the respective institutions of the state and transfer patients and inmated (inmates) from one state institution to another, at will, when, in its discretion, it is deemed advisable for the welfare of the patient or inmate, but no patient or inmate of a benevolent institution shall be transferred to a penal or correctional institution except in carrying out a previous commitment of a court of competent jurisdiction."

I assume that the inmates of your institution have been committed there by the Juvenile Court. It is to be particularly noted that the Juvenile Court does not deal with crime. Its

jurisdiction is limited to delinquent, neglected or dependent minors.

The Legislature has conferred upon the juvenile courts' original and exclusive jurisdiction in all cases of delinquent children.

> Section 9-3103 of Burns' 1947 Pocket Supplement.

Formal jurisdiction is acquired by the filing of a petition. The proceeding shall be entitled "In the matter of ————, a child under eighteen (18) years of age."

> Section 9-3208 of Burns' 1947 Pocket Supplement.

The Juvenile Act, Section 9-3204 of Burns' 1947 Pocket Supplement, states that any boy under the full age of 18 years and any girl under the full age of 18 years who commits an act which, if committed by an adult, would be a crime not punishable by death or life imprisonment, is a delinquent child.

The act further provides that if the court finds the child comes within the provisions of the act it may, by order duly entered, commit the child to any suitable public institution. Likewise, it is provided in Section 9-3215 of Burns' 1947 Pocket Supplement, that:

> "No adjudication upon the status of any child in the jurisdiction of the court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of a crime in any court, except as provided in section 14 (Section 9-3214) and section 23 (Section 9-3223) of this act. The disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any other court, nor shall such disposition or evidence operate to disqualify a child in any future civil service examination, appointment or application.
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> "Whenever the court shall commit a child to any institution or agency it shall transmit with the order

> of commitment a summary of its information concerning such child."

It is apparent, therefore, from a reading of the statute above quoted that it was the intention of the Legislature to get away from the technical criminal proceedings in all things relating solely to juveniles.

As was said by the Appellate Court in the case of Freestone et al. v. State ex rel. Advance-Rumely Co. (1931), 98 Ind. App. 523, 176 N. E. 877, 878:

> "All of the statutory enactments from the beginning to 1917 lead one to the inevitable conclusion that the sponsors and the legislators intended to get away from the highly technical criminal proceedings in all things relating solely to juveniles.
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> " 'It has been generally though not universally held that statutes creating courts having jurisdiction of juvenile offenders are in no sense criminal, and are not intended to provide punishment, but to save the child from becoming a criminal, and hence not unconstitutional, though they do not provide for trial by jury, or arraignment, or plea, or for notice to the person or a warrant of arrest, and do require the child to be a witness against himself.' * * *"

The Appellate Court has also held in the case of Dinson v. Drosta (1907), 39 Ind. App. 432, at page 434, in speaking of proceedings before a Juvenile Court that such "is not a criminal action." The defendant was not entitled to a trial by jury and the judgment does not attach a stigma to her, and that:

> "The power conferred upon the juvenile court under this act is of the same character as the jurisdiction exercised by courts of chancery over the person and property of infants, and flows from the general power and duty of the state *parens patriae* to protect those who have no other lawful protector."

In Official Opinion No. 29, March 29, 1946, 1946 Ind. O.A.G. 95, which dealt with the proper legal procedure to be followed in attempting to return escapees from both the Indiana Boys'

School and the Indiana Girls' School who escaped to another state, it is said:

> "For the purpose of your problem, the fundamental point is that the proceeding by which said children were committed to our institutions was not a criminal one. The State was not seeking to punish a malefactor. It was seeking to salvage a boy or girl who was in danger of becoming one. * * *
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> "* * *
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> "Since the proceeding by which these youngsters were committed to an institution was not a criminal one, they cannot, in my opinion, be extradited."

In Official Opinion dated May 23, 1938, 1938 Ind. O.A.G. 208, which dealt with the following question, Upon what charges may a boy under the age of 16 be legally committed to the Indiana Boys' School?, it is said:

> "Answering your question specifically, in all cases where the offense committed does not carry with it a sentence of death or life imprisonment, the boy should be tried by the Juvenile Court under charges of delinquency and committed to your institution as such."

It is my opinion, therefore, that a child committed by the Juvenile Court to the Boys' School cannot be considered a criminal. He has simply been adjudicated as being a delinquent child.

Section 13-914 (a) of Burns' 1947 Pocket Supplement, same being the Acts of 1883, Chapter 18, Section 8½, as amended by the Acts of 1945, Chapter 262, Section 2, page 1190, provides that any boy over the age of ten years and under the age of 17 years be arraigned for trial in any court having criminal jurisdiction, on a charge of any violation of any criminal law of this state, the court or jury trying the same may commit said boy to this institution (Indiana Boys' School) instead of the jail of the county or state prison. It is my opinion that this section has been superseded by the passage of the Juvenile Act.

In an Official Opinion of the Attorney General, dated December 27, 1939, 1939 Ind. O.A.G. 363, it was said that if

the passage of the Juvenile Act did not supersede this section in toto, it did to the extent of limiting this particular section to only boys between the ages of 16 and 17.

Section 13-401 of Burns' 1942 Replacement, same being the Acts of 1897, Chapter 53, Section 1, page 69, provides as follows:

> "The office of director of the state prison south at Jeffersonville is hereby abolished on April 1, 1897, and the Indiana State Prison South, from and after the first day of April, 1897, is hereby made and shall thereafter be known as 'The Indiana Reformatory,' for the incarceration of those therein confined, except as hereinafter provided, and of male prisoners found guilty by any of the courts of this state of a felony other than treason or murder in the first or second degree and who are more than sixteen (16) years of age and less than thirty (30) years of age or who may be transferred thereto under the provisions of this act."

It is to be noted here that the Indiana Reformatory is a penal institution, a prison for the incarceration of male prisoners found guilty by any of the courts of this state of a felony other than treason or murder in the first or second degree, who are more than sixteen years of age and less than thirty years of age.

A "penitentiary" is a place of imprisonment in which convicts sentenced to hard labor are confined by authority of law.

41 Am. Jur., Sec. 2, page 885; 27 L. R. A. 597.

The purpose and basic principle of the Juvenile Act, set out in Section 9-3201 of Burns' 1947 Pocket Supplement, same being the Acts of 1945, Chapter 356, Section 1, page 1724, are as follows:

> "The purpose of this act (Sections 9-3201—9-3224) is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for his custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

> "The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them."

If there be pending a criminal charge against any person under the age of 18 years in any court having criminal jurisdiction, it is by statute (Section 9-3213 of Burns' 1947 Pocket Supplement, Juvenile Court Act) mandatory that said court transfer said criminal case to the Juvenile Court.

The Juvenile Court Act (Section 9-3214 of Burns 1947 Pocket Supplement) provides in part that:

> "If a child sixteen (16) years of age or older is charged with an offense which would amount to a crime if committed by an adult, the judge, after full investigation, may waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; * * *."

It is apparent, therefore, that the Juvenile Judge would waive jurisdiction only in those cases where he thought the penitentiary was the proper place of confinement for the defendant and not the Boys' School. So, again, if it can be said that Section 9-1314 (a) has not been superseded in toto by the Juvenile Act, it is difficult to say when said act would be put into operation.

The validity of statutes authorizing administrative boards under certain circumstances to transfer one originally sentenced to a reformatory to another penal institution has been sustained in a number of jurisdictions. The courts take the view that the power conferred on the board is one of administrative control or discipline as distinguished from a judicial function.

26 American Jurisprudence, Section 7, page 610.

It is to be noted, however, that the Supreme Court of Illinois has consistently held otherwise, the leading case being People ex rel. Martin v. Mallary (1902), 63 N. E. 508. It was

contended in this case that the transfer of the relators to the penitentiary because they were incorrigible and their presence in the reformatory appeared to be seriously detrimental to the general wellbeing was merely an act of necessary discipline which the board had power to exercise in the management of the reformatory. The Illinois Supreme Court said at page 510 of the opinion:

> "* * * we cannot so conclude. By the transfer to the penitentiary they surrendered all control and power of discipline over the prisoners placed in their control to another and independent administrative board or authority, which, by the judgment and process of the court, had no right of custody or control over such prisoners, and to whose custody and control the court, which had all the judicial power there was in the matter, had no power to commit such prisoners. There are material distinctions, under the laws of this state, between the penitentiary and the state reformatory. In the case cited (People v. Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76) we said * * *: 'That in the enactment of this law it was the humane and benign intention of the general assembly to afford a means for the reformation of youthful criminals is manifest from the the fact that the institution is devoted solely to the reception of minors between the ages of ten and twenty-one years.' And again, * * * (we said): 'There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors. The habits and characters of the latter are, presumably, to a large extent as yet unformed and unsettled. The distinction may be well taken into consideration by the legislative power in fixing the punishment for crime, both in determining the method of inflicting punishment and in limiting its quantity and duration. An adult convicted of burglary would be sentenced to the penitentiary and to either solitary confinement or hard labor therein, and the statutes which consigned him to such punishment must be regarded as highly penal. A minor, however, instead of being sentenced to solitary confinement or hard

labor in a penitentiary, is committed to the state reformatory. The general scope and humane and benign purpose of the statute establishing the reformatory are clearly indicated in the act. * * * It is manifest that the sentences provided for in the statute establishing the reformatory, although to be regarded as punishments for crime, are not of so purely a penal character as those imposed upon adults convicted of like offenses, but that the primary object of the statute is the reformation and amendment of those committed to the reformatory.' In Henderson v. People, 165 Ill. 607, 46 N. E. 711, we held that the Illinois State Reformatory at Pontiac is not a penitentiary, and that a person under 21 years of age, who was shown to have been previously sentenced to the state reformatory, could not, under section 12 of said act, be properly sentenced to the penitentiary, but should have been sentenced to the reformatory. '* * * The only penitentiaries in this state are the penitentiary at Joliet and the Southern Illinois Penitentiary at Chester, and the state reformatory is distinguished from them by every clause of the section, and especially by the provision that existing laws should be applicable to the reformatory so far as to enable courts to sentence prisoners to said reformatory, and not to the penitentiary. The state reformatory is nowhere designated by the legislature as a penitentiary. * * * The reformatory is different in its object and purposes from the penitentiary, and it cannot be called a penitentiary. The main object and purpose of the reformatory, although confinement there is a punishment for crime, are the reformation of those who, from immature age, are presumably proper objects of efforts at reformation.' It seems clear that there is a material difference in the grades of punishment provided for in the two institutions. The penitentiary is a state's prison; but, while those sentenced to imprisonment in the reformatory are imprisoned in a state institution, still the object, purposes, and management of the institution are so different from those of a penitentiary or a mere prison that the reformatory cannot properly be designated as a state's prison, as that term is usually understood

and used. It follows, as we think, that a sentence to the penitentiary, involving, as it does, infamous punishment, is a severer grade or degree of punishment than a sentence to the reformatory, and involves consequences to the convict of a much more serious character.

"The question, then, is, has the general assembly the power to authorize the board of managers of the reformatory—a mere executive or administrative board —to send to the penitentiary persons committed to their custody in such reformatory for a breach of discipline prescribed by such board for the government of the institution, or because the presence of such persons is detrimental to the well-being of such institution? We are of the opinion that such power is denied to the general assembly by more than one provision of the constitution. The power so attempted to be conferred is judicial, and not executive or administrative. It is not merely disciplinary, and it can only be exercised by a court vested with judicial power by the constitution. It must be observed that such transfer is not within the judgment and sentence of the court, and the act of the board is not simply a determination of the condition or circumstances under which the prisoner may be committed to the penitentiary, but it is outside of and beyond such judicial determination, and is the exercise of a judicial power which the legislature has even withheld from the courts. Doubtless, legislation might be so framed as to make the order of transfer by the board a mere determination of the conditions on which, in executing the judgment of the court, the prisoner could lawfully be transferred from the reformatory to the penitentiary; * * *. In the administration of the criminal laws of the state there is no power outside of the courts to authorize the punishment of persons for crime by confinement in the penitentiary, and the constitution expressly inhibits any person or collection of persons of one department of government from exercising any power properly belonging to either of the others, except as expressly permitted by the constitution; * * * the

> board could not commit the offenders to a state's prison to which they had not been committed by the judgment of conviction, or without trial according to the law of the land. * * *"

The final ruling of the court was to the effect that the relators should be released on their petitions of habeas corpus from the penitentiary but were not entitled to their discharge, but should be remanded to the institution that they were originally committed to by the court.

It is well to note that the cases cited in 26 American Jurisprudence, page 610, in support of the constitutionality of the statutes authorizing transfer dealt with cases wherein the individual was originally convicted of a criminal offense and that the reformatory was a penal institution for the confinement of those within a certain age bracket who were convicted of a criminal offense.

In 31 American Jurisprudence, at page 785, it is said:

> "Statutes creating courts having jurisdiction of juvenile delinquents, and providing for the procedure therein and the care and discipline of such delinquents, have been characterized by the courts as progressive, humanitarian, and beneficial, and have been referred to as paternal and benevolent. They have for their object not the punishment of juvenile offenders for misconduct, criminal or otherwise, but their removal from the path of temptation and their direction into the paths of rectitude by preventitive and corrective means. Their operation is intended to check the criminal tendency in its inception, and protect the unformed character in the facile period from improper environment and influences, to give to the weak and immature a fair fighting chance for the development of the elements of honesty, sobriety, and virtue essential to good citizenship, and to prevent them from growing up to lead idle, dissolute, or immoral lives. In other words, the welfare of the child lies at the very foundation of the statutory scheme. A statute of this nature is an assertion of the state's power as parens patriae and its right to exercise proper parental control over those of its minor citizens who are disposed to go wrong."

Again, in said volume at page 786, it is said:

> "The statutes creating juvenile courts and providing methods for dealing with delinquent, dependent, and neglected children, including their commitment to and detention in reformatory institutions, have generally, although not universally, been upheld as against various objections on constitutional grounds as salutary police measures intended for the protection and welfare of the child, upon the theory that the delinquent child is not on trial for a crime, and that the institution to which he is committed is not a prison, but a place where reformation and education and not punishment is the end sought to be obtained. Thus, the view has generally been taken that they are not unconstitutional by reason of dispensing with certain procedural steps and safeguards which are usually regarded as essential in criminal prosecutions, such as trial by jury, arraignment, or plea, or notice to the person, or a warrant of arrest, or because of a provision requiring the child to be a witness against himself. * * *
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> "* * *
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> "In several instances, however, the statutes have been held invalid because of conflict in some detail with the Constitution of the state. * * * In some instances, the proceedings under particular statutes have been regarded as criminal in their nature, by reason of provisions for punishment by fine or imprisonment, or for some other reason, and in such case the absence of the usual safeguards for the protection of the rights of the accused has been held to render them invalid. * * *"

The Juvenile Court in the first instance would not have been permitted to permit the boy to go to the reformatory as our reformatory, as above stated, is a prison. The procedure in the Juvenile Act is summary in nature and safeguards which are usually regarded as essential in criminal prosecution are not provided for. The very constitutionality of the act is at stake if it be ruled that the Juvenile Court or administrative boards are empowered by the Legislature to commit a child to a penitentiary or prison.

The Indiana State Reformatory, being a prison and a state penitentiary for the confinement of those convicted of felonies, is different in all respects from the Boys' School. The environment, the associations, the discipline, were the very causes for the creation of juvenile courts. It is my opinion, therefore, that that which the Juvenile Court itself could not do—commit the boy to the penitentiary—the administrative authorities of the state have no such power.

It is my opinion, therefore, that a transfer of an inmate of the Boys' School who has been committed there by the Juvenile Court to the Indiana State Prison, and that is what our reformatory is, is without authority of law and the inmate could obtain his release from the reformatory on a writ of habeas corpus. It is further my opinion, however, that an inmate committed to the Boys' School for the commission of a crime by a court having criminal jurisdiction may be transferred.

OFFICIAL OPINION NO. 71

December 9, 1948.

Mr. R. Cole, Secretary,
State Soil Conservation Committee,
Lafayette, Indiana.

Dear Sir:

I have your letter of November 29, 1948, as follows:

> "Please give your opinion as to the period of time which the members of the present State Soil Conservation Committee should serve.
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> "This Committee, as provided for in Chapter 232, Acts 1937, amended Chapter 164, Acts 1941, and amended Chapter 331, Acts 1945, is appointed by the governor. Section 4, Sub-section A, indicates how this Committee is to be constituted.
>
> "When the new governor takes office will the term of office of the present Committee end? If so, should the present Committee members tender their resignations to the new governor to be effective when he sees fit to appoint the new Committee?