County Attorney—Must File Information Within What Time—Excuse for Failure to File—Effect of Failure of Magistrate to Certify Transcript to the District Court.

An information must be filed by the County Attorney within thirty days as provided for under Section 12223 of the Revised Codes of 1921, and the fact that he forgot to file the information within that time is no excuse and does not constitute a showing of good cause for excusing the delay.

The County Attorney must file the information within thirty days, even though the committing magistrate has not transmitted the transcript to the Clerk of the District Court as required by Section 11801 of the Revised Codes of 1921.

I. S. Crawford, Esq.,
County Attorney,
Forsyth, Montana.

My dear Mr. Crawford:

You have submitted to this office the following question:

1. Within what time must the County Attorney file an information in the District Court after the defendant is committed, for a felony, by the Justice of the Peace, in order to avoid a defendant's motion for dismissal under section 12223, Revised Codes of 1921? If a County Attorney is able to show that he simply forgot to file the information within thirty days after the preliminary hearing, must the case be dismissed on motion of the defendant?

In the case of Ex parte Fowler (Cal.) 90 Pac. 958, 960, the court, in speaking of the provisions of Section 809 of the California Penal Code, which is identical with Section 12223 of the Revised Codes of Montana of 1921, said:

> "It has been held that this provision is mandatory, and that default by the district attorney in filing an information within the time limit prescribed therein, unless good cause therefor be shown, forfeits his right as such officer to do so at all upon the commitment returned by the magistrate, and that the superior court cannot, under an information filed after such time, acquire jurisdiction to try the prisoner for the offense therein charged. In re Begerow, 133 Cal. 349, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178. At least, the court held in that case that subdivision 2 of section 1382 of the Penal Code, which provides that the prosecution against a defendant must be dismissed, the trial not having been postponed upon the application of defendant, unless good cause be shown therefor, if the defendant is not brought to trial within 60 days after the finding of the indictment, or filing of the information, is imperative and mandatory. We can see no reason why the same may not be said of subdivision 1 of that section, prescribing the time limit of 30 days within which the information must be filed."

I am of the opinion that the fact that the County Attorney forgot to file the information within the 30 days does not constitute a showing of good cause, as required by this section, in order to excuse the delay. To hold otherwise would nullify the plain intent of this provision.

The second question submitted by you is as follows:

2. Assuming that the committing magistrate fails to file his transcript in the office of the District Clerk until a month or six weeks have elapsed since the preliminary hearing, is it the duty of the County Attorney to file his information within thirty days after the preliminary hearing or within thirty days after the transcript has been filed by the committing magistrate?

In the case of People v. Wickham (Cal.) 48 Pac. 123, the court said:

> "It was the duty of the magistrate to return to the clerk of the court the papers in the case 'without delay' (Pen. Code, Sec. 883); and if no cause existed, other than appears in the record, for his failure to return them earlier than he did, he was guilty of inexcusable negligence. It was not, however, necessary, that the papers be returned before an information could be filed. People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Ah Sing, 95 Cal. 657, 30 Pac. 797. If there was any good cause for not filing the information sooner, the burden was on the prosecution to show it; but the mere fact that the papers were not returned by the magistrate did not constitute such cause. In People v. Morino, 85 Cal. 515, 24 Pac. 892, the motion to dismiss the prosecution was made under the second subdivision of section 1382 of the Penal Code. It was said: 'The statute is imperative: The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed." Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it. The court could not presume it. Under the facts as shown, the case should have been dismissed, and it was error to deny the motion.' The decision in that case is applicable to this, and it follows that, upon the showing made, the court below should have granted the defendant's motion, and dismissed the prosecution against him."

In the case of People v. Farrington, 140 Cal. 656, 658, 74 Pac. 288, it was held that a mistake of a stenographer in stating that preliminary examination had taken place one day later than was the fact was sufficient excuse for delay of one day in filing the information.

See, also, the case of In re Jay, 10 Idaho 540, 79 Pac. 202, where it was held that where information of the loss of a complaint was not communicated to the prosecuting attorney until about two weeks before the beginning of the term of court, because of press of business on the part of the prosecuting attorney, it was not "good cause to the contrary," within the meaning of that term, as used in Section 8212, Rev. St. of Idaho.

Section 12223, Revised Codes of 1921, provides that, unless good cause to the contrary is shown, the prosecution must be dismissed after a preliminary hearing, if an information is not filed against the defendant within 30 days, while Section 11801, Revised Codes of 1921, provides that after a defendant has been committed, and within 30 days after the delivery of the complaint, warrant, and testimony to the

proper District Court, the County Attorney must file an information; and further provides that the County Attorney will be guilty of contempt if he fails to do so.

You suggest that it might be contended that these sections are in conflict, and that Section 12223 cannot come into operation until the lapse of 30 days after the complaint, warrant, and testimony have been transmitted. I do not believe that this section was intended in any way to modify the provisions of Section 12223. I believe it was the intent of the Legislature in Section 11801 to provide for a time after which the County Attorney would be in contempt of the court if he failed to act.

It is, therefore, my opinion that the provisions of Section 12223 are mandatory, unless good cause is shown, and the burden of showing this is upon the prosecuting officer; that mere forgetfulness on the part of the prosecuting officer in filing an information does not constitute good cause; that the officer is bound to file the information within the time provided for therein even though the committing magistrate has not transmitted to the Clerk of the Court the complaint, warrant, and testimony as required by Section 11801, and that the provisions of Sections 11801 and 12223 are not in conflict.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.