

JUSTICE OF THE PEACE JURISDICTION--SHERIFFS POWERS TO RELEASE:  
(1) Have no right to fine or imprison for misdemeanors where no information by Prosecuting Attorney be filed. (2) Have no right to accept cash bonds or any bonds but a surety bond. (3) Has no right to remit the whole of fine and costs assessed, but can commute to jail sentence at one day for every \$10.00 for fine and costs. (4) Has no right to order release except as allowed by Statute.

March 19, 1935.

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Honorable G. R. Breidenstein  
Prosecuting Attorney of Clark  
County, Missouri  
Kahoka, Missouri



Dear Sir:

Your request for an opinion dated March 2, 1935, is as follows:

"I would like to have the opinion of your department in regard to the following questions:

"Does a Justice of the Peace have a right to assess a fine or jail sentence against an individual if no information has ever been filed by the Prosecuting Attorney?

"Does a Justice of the Peace have a right to accept money to be held in his custody as surety for the appearance for trial of a defendant in case the defendant could put up such cash bond but can not produce the required sureties to enter into recognizance for the appearance of the defendant for trial before the Justice?

"If a Justice upon plea of guilty or upon conviction of a defendant assesses a fine which is the minimum allowed by statute, can the justice remit all or any portion of that fine?

"If the sheriff of a county is acting as Jailer of such county may he release a prisoner without the order of the Judge who has passed the sentence?"

As to your first question:

The Missouri Constitution, Article II, Section 10, provides:

"The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

The Missouri Constitution, Article II, Section 12, provides:

"No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."

The Missouri Constitution, Article VI, Section 23, provides:

"The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits."

The Missouri Constitution, Article VI, Section 37, provides:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

In the case of *Brownfield v. Thompson*, 96 Mo. App. 340, l. c. 342, the Appellate Court said:

"A justice's court is not only a court of limited jurisdiction, but its powers are limited within its jurisdiction. It can only do such things where it has jurisdiction as the Legislature has provided it may. The manner of exercising its jurisdiction is limited by the same law that created it.\* \* \* \* The Legislature has defined the jurisdiction of justices of the peace and has provided in a very careful and specific manner their duties and their mode of procedure."

Section 3415 R. S. Mo., 1929, provides:

"Prosecutions before justices of the peace for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall

be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

Section 3418 R. S. Mo. 1929, provides:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the

county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 3420 R. S. Mo., 1929, provides:

"When any person shall be arrested upon the verbal order of the justice, or upon a warrant issued upon his own knowledge, as directed in the next preceding section, the person so arrested may be kept in custody for the space of two hours, unless he shall be sooner taken from such custody by virtue of a warrant issued upon an information or complaint under oath, as required in other cases; but the person so arrested shall not be confined in jail, nor put upon trial for any offense until he shall be charged therewith by information."

In the case of State v. Powell, 44 Mo. App. 21, 1. cl 24, the Appellate Court said:

"When the complaint was filed by Haseltine, the justice had authority to issue a warrant for Powell's arrest (sec. 4332), but he could not be placed on trial, neither could it be said that there was a prosecution against him, until there was an information filed by the proper officer."

CONCLUSION AS TO QUESTION "ONE".

It is the opinion of this office that a justice of court is a court of limited jurisdiction and that its powers are even limited within its jurisdiction. Such

was the holding in the Thompson case, supra. A justice of the peace has no power beyond the constitution and statutes, and is limited in power to act only within the constitution and statutes.

Although a justice of the peace is a constitutional officer of a constitutional court, his jurisdiction in criminal cases is yet limited to that constitutional provision which limits the prosecution for misdemeanors in any court, to persons charged by indictment or information. (We take it that your case in question "one" is but a misdemeanor for you speak of punishment by fine and jail sentences. We do not want this opinion construed that a justice cannot hear a complaint for a felony upon the affidavit of a complaining witness without an information filed before him and certify said case upon proper finding. The power of a justice of the peace at a preliminary hearing for felony and a trial for misdemeanor are altogether different.)

The jurisdiction of a justice of the peace is constitutional and statutory, and except for these acts which are expressly allowed or necessarily implied from the Constitution and Statutes, he has no other authority upon which to justify his acts, and any act beyond his authority to act is illegal and void.

Following in the wake of the constitutional limitations, misdemeanors may be prosecuted before a justice of the peace in a trial for that purpose, for the Legislature has so provided, but before proceeding to trial it is our opinion that the constitutional and statutory jurisdiction of the justice of the peace must necessarily depend on an information being duly filed before him by the proper officer. The Constitution and Statutes above set out are unequivocal. Without said information he has no jurisdiction to proceed to legally try or to legally commit to jail. Since he cannot legally try he cannot legally fine without an information being previously filed.

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As to your second question:

The Missouri Constitution, Article II, Section 24, provides:

"That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

The Missouri Constitution, Article II, Section 25, provides:

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Thus we see that the Constitution guarantees the right to appearance bonds for those charged with a crime, and these Sections apply to justice courts.

After conviction in a justice court the written form for appearance bond for a defendant who appeals to the circuit court is set out in Section 2501 R. S. Mo. 1929, which provides:

"If the appeal be taken by the defendant, the recognizance may be in the following form:

"We, H. I., as principal, and E. F., as surety, acknowledge ourselves indebted to G. H. in the sum of\*\* dollars, upon this condition: That, whereas, H. I. has appealed from the judgment of J. K., a justice of the peace of \_\_\_\_\_ county, Missouri, in an action of forcible entry and detainer (or unlawful detainer, as the case may be), between the said G. H., complainant, and the said H. I., defendant: Now, if the said H. I. shall prosecute his appeal with effect and without delay, neither commit nor suffer to be committed any waste or damage on the premises whereof restitution is adjudged, and pay all rents and profits, dam-

ages and costs that may be adjudged against him, and shall otherwise abide the judgment of the circuit court in said cause, then this recognizance shall be void. Given under our hands this \_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_. H. I.

Attest: J. K. Justice of  
the peace. E. F. ' "

Thus we see that the recognizance bond after conviction, in a justice court, must be in writing in order to comply with the Statute, and must be a surety bond to comply with the Statute. Your second question deals primarily with the essentials of a recognizance bail bond, after arrest yet before conviction, in a justice court.

Section 3401 R. S. Mo. 1929, provides:

"The following magistrates shall have power and jurisdiction to cause to be kept all laws made for the preservation of the public peace, to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: The judges of the supreme court throughout the state; judges of the courts of record within their respective jurisdictions; judges of the county courts and justices of the peace within their respective counties; the mayors and police judges of incorporated cities and towns within the limits of their respective corporations: Provided, that nothing herein contained shall be so construed as to authorize the mayors and police judges of incorporated cities and towns to exercise jurisdiction in prosecutions under the laws of this state, other than those instituted under this article for surety

to keep the peace."

Section 3495 R. S. Mo. 1929, provides:

"Whenever any person shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense, the recognizance, with proper security, may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court having criminal jurisdiction from the county, such recognizance may be taken by any judge or justice of the county court, or any judge of a court of record.

Section 3573 R. S. Mo., 1929, provides:

"When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Section 3574 R. S. Mo. 1929, provides:

"If the defendant is not arrested or in custody during the term at which an indictment for felony is returned, the court must fix the amount of bail required of the defendant, and the clerk must indorse the amount of the warrant; but if no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the court, and such judge may thereupon indorse the amount of bail required; or if the judge is not in the county, the clerk may fix the amount of bail."

Thus far we have seen that the amount of the recognizance bond is pretty much in the sound discretion of the justice of the peace before whom the case is pending.

Section 3425 R. S. Mo. 1929, provides:

"Upon good cause shown the justice may postpone the trial of a cause to a day certain; in which case he shall require the defendant to enter into a recognizance with sufficient security, conditioned that he will appear before the justice at the time and place appointed then and there to answer the charge alleged against him in the information and not to depart without leave."

Section 3428 R. S. Mo. 1929, provided:

"When a continuance is granted, the recognizance required of the defendant may be in the following form:

"We, A. B. as principal, and E. F. and G. H., as sureties acknowledge ourselves to owe and be indebted to the state of Missouri, in the sum of \_\_\_\_\_ dollars, to be void upon this condition: That said A. B. shall personally appear before O. K., a justice of the peace within and for the county of \_\_\_\_\_, and state of Missouri, at his office, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ M., then and there to answer to an information for \_\_\_\_\_ (here state the offense), and not to depart without leave; otherwise to remain in force.

"Witness our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19\_\_\_\_.

A. B., (seal)

E. F., (seal)

G. H., (seal)

"Taken and acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

O. K. justice of the peace. "

Thus we see that the justice of the peace must take a surety bond, from those arrested on a warrant from his court who ask for a continuance, with sufficient sureties for his appearance, and that said bond is to be in writing.

Section 3468 R. S. Mo. 1929, provides:

"If the offense charged is a bailable one, the magistrate who issued the warrant shall, at the request of the person arrested, take from him a recognizance in such sum as may seem to be sufficient and proper, with sufficient sureties for his appearance at the next term of the court having jurisdiction of the offense."

Section 3511 R. S. Mo. 1929, provides:

"Upon the filing of the information, a warrant shall issue for the apprehension of the person charged with the offense, unless he be in custody or voluntarily surrender himself in custody of the court; and if such warrant be issued in term, it shall be made returnable forthwith; but if issued in vacation, it shall be made returnable at the next term thereafter; and if defendant be arrested during the term he shall be brought into court, but if he be arrested in vacation of the court, the officer making the arrest shall admit him to bail in a recognizance in any sum not less than one hundred dollars nor more than five hundred dollars, with good and sufficient sureties, to be approved by such officer, conditioned for the personal appearance of the defendant in the court in which the case is pending on the first day of the next term

thereof, and not depart without leave, which recognizance shall be returned with the warrant and filed in the court; and in default of the prisoner to give such recognizance, he shall be committed to the jail of the county by the officer until the next term of court, or until he gives such recognizance, and if default be made in such recognizance, the same shall be adjudged forfeited, and shall be proceeded on as other recognizances in criminal cases."

This last section the Supreme Court has interpreted to apply only to misdemeanor cases when in State v. Schmidt, 200 S. W. 1071, 1. c. 1071, the Court said:

"While section 5064, R. S. 1909, allows the officer in certain cases to take bail, it is held to apply only to misdemeanors."

CONCLUSION AS TO QUESTION "TWO".

It is the opinion of this office that although it be the constitutional duty of a justice of the peace to take recognizance bail in certain cases, yet within his limited constitutional and statutory powers there is no provision made for the taking of a cash recognizance bail, as suggested in your query. The taking of a cash recognizance bail is beyond his jurisdiction and illegal and void.

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As to your third question:

Section 3434 R. S. Mo. 1929, provides:

"If the defendant shall plead guilty or confess the charge, the justice shall assess the punishment and enter up the proper judgment, and in order

thereto he may hear evidence touching the nature of the case, or otherwise ascertain the facts thereof; but in no case shall he accept the plea of the defendant and assess his punishment without giving the injured party notice and an opportunity to be heard. The entry following the plea of guilty, assessing the punishment, may be as follows:

And I do, for said offense, assess his punishment at a fine of \_\_\_\_\_ dollars (and imprisonment in the county jail for \_\_\_\_\_ days). It is therefore adjudged by me that the state of Missouri do recover from the defendant, for the benefit of the school fund of \_\_\_\_\_ county, the said sum of \_\_\_\_\_ dollars, the fine so assessed, together with the costs of this prosecution, taxed at \_\_\_\_\_ dollars and \_\_\_\_\_ cents, and that said defendant be imprisoned in the county jail of said \_\_\_\_\_ county, for the period of \_\_\_\_\_ days, and until said fine and costs are paid, or he be discharged according to law.

Section 12179, R. S. Mo. 1929, provides:

"It shall be the duty of each justice of the peace, at each term of the county court, when not other-

wise provided by law, to make out a list of all fines by him imposed, to the use of the county, stating therein the name of the officer who has or ought to have collected the same, which he shall certify and deliver to the clerk of the county court, who shall charge the same accordingly."

Section 12215 R. S. Mo. 1929, provides:

"It shall be the duty of every justice of the peace of such county within ten days after any judgment has been rendered in his court against any person for a fine or forfeiture to report to the auditor the name of the party against whom such judgment was rendered, the amount of the judgment, and on what account rendered"

We do not believe the above section on reporting to county auditor applies in your county, but is applicable to larger counties.

Section 3441 R. S. Mo. 1929, provides:

"When any person shall be unable to pay any fine and costs assessed against him, the justice shall have power, at the request of the defendant, to commute such fine and costs to imprisonment in the county

jail for any period of time not exceeding one day's imprisonment for every two dollars of said fine and costs, nor less than one day's imprisonment for every ten dollars of such fine and costs."

Section 2442, R. S. Mo. 1929, provides:

"The order commuting a fine and costs to imprisonment may be as follows:

'At the request of the defendant, who is unable to pay the fine and costs of \_\_\_\_\_ dollars assessed against him in this cause, I do hereby commute the same to imprisonment in the county jail for the period of \_\_\_\_\_ days. It is therefore ordered that the said defendant shall in lieu of said fine and costs be imprisoned in the county jail of \_\_\_\_\_ county for the space of \_\_\_\_\_ days.' "

In the case of State v. Griffie, 23 S. W. 878, 1. c. 882; 118 Mo. 188, the Supreme Court has said of a judgment entered in justice court docket:

"The justice had no right to change his judgment after it was written, and after the lapse of the time within which it was his duty to enter it upon his docket. Revised Statutes, 1889, sec. 4354.

"These unauthorized changes, however, would not render void what he had lawfully done at the proper time, nor would his failure to date the judgment and sign it render it void."

CONCLUSION AS TO QUESTION "THREE".

It is the opinion of this office that a justice of the peace, on a plea of guilty to a misdemeanor, must render judgment as the Legislature has provided and has no jurisdiction or authority to remit all of the minimum fines assessed. His power to commute is statutory and commutation must be limited to the provisions of the above set out commutation statute in manner, form of court order, and in substance of same. In no instance can it be for less than one day's imprisonment for every \$10.00 of said fine and costs. Once a justice renders final judgment, said judgment has the force of any other final judgment, on conviction. It is final as far as he is concerned, subject only to reprieve or pardon of the proper authorities. According to the Griffie case, commutation would not be allowable by a justice unless made in a reasonable time and before entry of final judgment on the docket.

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As to your fourth question:

Section 648 R. S. Mo. 1929, provides:

"No person's body shall be imprisoned or restrained unless by authority of law."

Section 3440 R. S. Mo. 1929, provides:

"Whenever the defendant shall be tried and found guilty, either by the justice or a jury, or shall enter a plea of guilty, and a fine shall be assessed, the justice shall enter judgment against the defendant for such fine, and if the punishment shall be imprisonment in the county jail, or shall be both a fine and imprisonment, the justice shall enter judgment according to the finding of the court or verdict of the jury, and immediately commit the defendant

to the county jail for the time designated in the judgment, and the defendant shall be adjudged to pay the costs, and may be committed to the county jail until the judgment for both fine and costs shall be paid, or until he shall be discharged therefrom under the provisions of the next succeeding section."

Section 3448 R. S. Mo. 1929, as amended by Laws of Missouri, 1931, page 202, provides:

"Any person convicted before a justice of the peace for any misdemeanor under the provisions of this article may appeal to the circuit or other court having jurisdiction in criminal cases, if he shall, immediately after judgment is rendered, file an affidavit stating that he is aggrieved by the verdict and judgment in the case, and that he does not make his appeal for vexation or delay, and shall also enter into a recognizance in such sum as the justice shall deem proper, with good and sufficient sureties to be approved by him, conditioned that the defendant shall appear at the next term and from day to day and term to term thereafter, of the said circuit court, and prosecute his appeal with due diligence to a decision, and obey every order, sentence and judgment, which shall be made in the premises and not depart the court without leave: Provided, that the justice of the peace taking such recognizance for an appeal shall not consider the judgment of the justice and costs accrued therein in fixing the amount of such recognizance, but shall only require the recognizance to be sufficient to secure his attendance at the next term of the cir-

cuit court, and such appeal shall operate as a stay of execution thereon, until trial of the case anew has been had in the circuit court: Provided further, that failure to give the recognizance shall not prevent the appeal, but the appellant shall remain in custody or be committed to jail until recognizance be given or the appeal determined. In case the defendant shall, after he has been committed, give a bond conditioned as herein required, the same shall be approved by the sheriff, and when so approved, defendant shall be released by the sheriff or marshall from custody."

Section 3458 R. S. Mo., 1929, provides:

"Any justice of the peace, clerk, county treasurer, sheriff, coroner, or constable, who shall willfully neglect or refuse to perform any duty enjoined on him by this article, shall be deemed guilty of a misdemeanor in office, and shall, moreover, pay the sum of fifty dollars; and any person who shall, when summoned to aid in arresting or securing an offender, refuse to give such assistance, shall pay five dollars."

Section 3476 R. S. Mo. 1929, provides:

"When such person fails to recognize, he may be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order, and on the day appointed he may be brought before the magistrate, by his verbal order to the officer who made the commitment, or by his order in writing to a different person."

Section 3487 R. S. Mo. 1929, provides:

"If the offense be not bailable, or sufficient bail be not offered, the prisoner shall be committed to the jail of the county in which the same is to be tried, there to remain until he be discharged by due course of law."

Section 3716 R. S. Mo, 1929, provides:

"Whenever a sentence of imprisonment in a county jail shall be pronounced upon any person convicted of any offense, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county a transcript of the entry of such conviction, and of the sentence thereupon, duly certified by such clerk, which shall be sufficient authority to such sheriff to execute such sentence, and he shall execute the same accordingly."

Section 3921 R. S. Mo. 1929, provides:

"If any sheriff or other officer shall willfully or corruptly fail or refuse to execute any lawful process which by law it is his duty to execute, requiring the apprehension or confinement of any person charged with a criminal offense, whereby such person shall escape, the officer so offending shall be punished in the same manner as persons convicted of aiding or assisting such escape."

Section 4459 R. S. Mo. 1929, provides;

"Whenever any offender is declared by law punishable upon conviction by imprisonment in the penitentiary, or by imprisonment in a county jail, or by fine, or by both such fine and imprisonment, and no limit is fixed by law to the duration of imprisonment in

the jail or to the fine in such cases, the convict shall, in no instance, be sentenced to a longer term of imprisonment in the county jail than twelve months, nor shall the fine in any such case exceed one thousand dollars."

CONCLUSION AS TO QUESTION "FOUR".

This office is of the opinion that where the form and substance of a commitment from a justice court, in the hands of a sheriff and jailor, is sufficient in form and substance, then the imprisonment of the person mentioned in the commitment, rendered within the jurisdiction of said court, is by authority of law, and the sheriff or jailor must execute it as it reads.

Of course there is a duty on the part of a sheriff or jailor to release where a prisoner has been committed without authority of law in which case, commitment or no commitment, he needs no order from the judge who passed sentence.

Where the commitment was issued after final judgment, the Statutes allow a stay of execution upon taking an appeal and giving a recognizance bond to the sheriff, in which case the sheriff does not need an order from the justice of the peace, so long as he follows the Statute in such cases.

It is true that a justice of the peace, under certain circumstances outlined in the Statutes, may change the terms of a commitment and order the sheriff or jailor to release the prisoner, but the general rule is that after final judgment and commitment the justice of the peace has no more jurisdiction to order a prisoner released from the sheriff and jailor than the sheriff has to release a prisoner contrary to the terms of the commitment.

Hon. G. R. Breidenstein

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March 19, 1935.

Where a sheriff or jailor releases a prisoner in his charge, without authority of law, he throws himself criminally liable and subject to ouster.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

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