BAIL BOND - Sheriff to take and approve when amount is fixed by Justice; otherwise, a court of record fixes amount and approves bond.

March 15, 1935

Honorable Will H. Hargus
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

We have your request of February 18, 1935 for an opinion as follows:

> "Will you please give me the office's opinion as to whether or not under Section 3495, Revised Statutes of Missouri, 1929, the Circuit Judge has the same power to take and approve the defendant's bond that the sheriff has under Section 3576, Revised Statutes of Missouri, 1929? That is, under Section 3495 if the defendant is committed to jail by a Justice of the Peace for failure to make bond and the transcript is then filed in Circuit Court can the defendant before the return term of the Circuit Court go directly to the Circuit Judge to make bond or must he first go to the sheriff under Section 3576?"

Where defendant is given a preliminary hearing and is bound over by the Justice, it is the duty of said Justice to fix the bond. This duty is plainly set out in Section 3488, which reads as follows:

> "Whenever any person shall be committed to jail for a bailable offense, it shall

> be the duty of the magistrate to indorse on the warrant of commitment the sum in which bail was required."

If the defendant is unable to give bond, it is the duty of the Justice to issue a commitment, committing the defendant to jail pending the giving of a bond, and when the defendant is able to procure bond, the sheriff may take and approve it under Section 3576, R. S. Mo. 1929. This section reads in part as follows:

> "When any sheriff * shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, * such officer may take bail, which in no case shall be less than one hundred dollars, and discharge the person so held from actual custody."

This statute has heretofore been construed in State v. Grant, (1913) 252 Mo. 602, l.c. 607, wherein it was held that the fixing of the amount of bond by a Justice of the Peace in his justice docket, was sufficient fixing of the amount of bond, even though the amount was not actually endorsed or written upon the warrant.

If the Justice, in binding a prisoner over, fails to fix the amount of bond, then the sheriff is without authority to take and approve a bond, and the taking of any such bond by the sheriff would be void. State v. Crosswhite (1905) 195 Mo. 1. A bond of a prisoner, when the amount is not determined by a Justice of the Peace after a preliminary hearing, must be fixed by a court of record. After a Justice of the Peace, having in charge the examination of a person under arrest, issues a warrant of commitment and delivers the same to the sheriff, the prisoner can be discharged from custody on bail or otherwise only by a court authorized to issue writs of habeas corpus. State v. Randolph, 24 Mo. 213. However,

it is not necessary for an actual writ of habeas corpus to issue as a condition precedent to a court admitting a prisoner to bail when confined under a commitment from the Justice Court for failure to give bond. State v. McElhaney, 20 Mo. App. 584.

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

> "Whenever any person shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense, the recognizance * 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 * from the county, such recognizance may be taken by * any judge of a court of record."

Thus, under both the court decisions and the statute, a circuit judge would have authority to fix bond and approve bond when offered by a person in jail under a commitment from a Justice of the Peace court.

It is, therefore, the opinion of this office that where the amount of bail is fixed by the committing magistrate, the bond should be tendered to and approved by the sheriff. It was the intention of the lawmakers, when such was done by the committing magistrate, to relieve the circuit judges of the duty and responsibility of fixing and approving bonds in such cases, except upon an application to the circuit judge under the habeas corpus act, guaranteed by the Constituion. Article II, Section 26, Missouri Constitution.

It is the opinion of this office that when the committing magistrate fails to perform the duties imposed upon him by failing or omitting to fix the amount of bond, the defendant or prisoner may apply directly to the circuit judge to fix the amount of his bond and to pass upon the sufficiency of any bond tendered. In the event the cir-

cuit judge is not in the county at the time such prisoner desires to make bond, where the same has not been fixed by the committing magistrate, the amount of the bond and the security therefor may be taken and approved by any judge of a court of record in the county.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE