Justice Courts—Complaints—Criminal Action—County Attorneys, Duties Of.

A justice of the peace is not prohibited by Section 3 of Senate Bill 82, p. 92, Session Laws 1901, from drafting a complaint in a criminal case.

A justice who drafts a complaint in a criminal case is not thereby disqualified from trying the case.

The county attorney is not obliged to attend cases in the justice court not instituted by himself when he is "otherwise officially engaged."

Helena, Montana, Oct. 27, 1905.

Hon. James E. Healy, County Attorney, Butte, Montana.

Dear Sir:—I am in receipt of your letter of the 14th instant, in which you submit for opinion from this office the question "as to whether or no, under Section 3 of Senate Bill 82, page 92, Session Laws of 1901, and Penal Code, Secs. 1590 to 1594, inclusive, a Justice of the Peace, in Silver Bow County, has the legal right to make out and draft a complaint in a criminal case, either on a misdemeanor or felony charge? Also whether or not in case he does so make and draft a complaint filed with him, has he jurisdiction of the said case?" Also whether it is the duty of the county attorney to attend upon the justice in all cases of arrest or only in such cases as are instituted by the county attorney.

After a careful examination of the statute cited by you, as well as the provisions of sections 1370, 1380, 1400 and 2680, Penal Code, and considering the general powers and duties of justice courts, I have not been able to find any authority for prohibiting a justice of the peace from making out and drafting a complaint in a criminal case.

It appears from said section 1370 that the complaint must be made before a court or magistrate. This, of course, does not say that the court or magistrate must himself reduce the complaint to writing; neither does it prohibit the court or magistrate from performing this function if he so desires. He certainly must examine the complaint before a warrant is issued thereon, and the authorities seem to be quite unanimous, that in the absence of a statute to the contrary, the complaint must be subscribed and sworn to before the justice. 12 "Cyc." 292, lays down this general rule: "Generally the complaint must be made and verified before a magistrate or court," and the following cases hold that it is a judicial act: Lloyd v. State, 70 Ala. 32; People v. Colleton, 59 Mich. 573, 36 N. W. 771; U. S. v. Smith, 17 Fed. 510; State v. Lauvier, 26 Neb. 757, 42 N. W. 762.

In People v. Ward, 80 Cal. 585, the court holds that the district attorney has no authority to compel a justice to dismiss a case. See also People v. Nowark, 5 N. Y. Supp. 239; People v. Leroy, 65 Cal. 613, 4 Pac. 649. None of these cases are strictly in point, nor have I been able to find any case which is directly in point, nor have I been able to find any law or authority which declares a justice disqualified from acting in a

case where he has himself drafted the form of complaint. In other words, there is no law prohibiting a justice from drafting a complaint, nor disqualifying him from trying a case in which he has drafted the complaint.

The provisions of the act of February 20, 1899, laws 1899, p. 76, do not require a county attorney to neglect one kind of official business for the purpose of attending to another, and where the county attorney does not have time, by reason of being "otherwise officially engaged," to attend to all cases commenced in the justice court, he can, if he so desires, give his first attention to those instituted by himself and leave the others to be taken care of by the parties who instituted them; nor does the law require a county attorney to make inquiry of justices whether or not cases have been instituted by them in their courts. While there appears to be no positive law on the subject, yet the proper discharge of official duty would seem to dictate that when a criminal action is commenced in a justice court that the justice should immediately notify the county attorney.

In some counties a rule has been adopted by the board of county commissioners that they will not allow any bill of a justice of the peace for fees in a case where the justice himself drafted the complaint without first consulting the county attorney if the complaint so drafted is so defective as not to sustain a judgment or where the facts of the case do not justify the commencement of an action. Whether this rule can be sustained in law or not, it frequently has a salutary effect. Of course, we must keep in view the fact that in very remote districts it is sometimes impossible for a justice to have the benefit of consultation with the county attorney.

If I should hereafter find any further authorities on any of the questions submitted, aside from those herein stated, I shall be pleased to so inform you.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.