Bail — Preliminary Hearings — Felonies—Magistrates — Prisoners—Defendants.

Only a judge with jurisdiction to issue writ of habeas corpus and the magistrate who binds over to district court one charged with felony may take bail of person committed.

Mr. Horace W. Judson, October 14, 1931.
County Attorney,
Cut Bank, Montana.

My dear Mr. Judson:

You have requested an opinion as to the following state of facts:

"On on about the 21st day of September, 1931, a complaint was filed in the justice court of Browning township, Glacier county, Montana, before M. M. Portman, justice of the peace, charging one Clarence Goss with a felony.

"On or about the 25th day of September a preliminary hearing was duly and regularly had, at the termination of which the defendant was bound over for trial before the district court. His bond was fixed by the justice of the peace at $1500.00. Bond was not furnished and the defendant was placed in the custody of the sheriff and was thereafter retained by the sheriff in the county jail at Cut Bank for some three or four days.

"On or about the 29th day of September the defendant furnished a bond with two real estate owners, which bond was taken to G. C. Madison, a justice of the peace of Cut Bank township, Glacier county, Montana, said G. C. Madison approving the bond and ordering the defendant released from custody and the defendant was released by the sheriff.

"The justice of the peace, Portman, lives at Browning, a distance of thirty-seven miles from Cut Bank. Justice of the peace, Madison, resides in Cut Bank, at which place the defendant was held in jail. Did justice of the peace, Madison, have authority to approve the bond?"

Section 12133 R.C.M. 1921 provides:

"Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail."

Section 12134 R.C.M. 1921 provides:

"The taking of bail consists in the acceptance by a competent court or magistrate, or legally authorized officer, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the state a specified sum."

The matter has not been directly passed on by the supreme court of this state but in the case of State vs. Lagoni, 30 Mont. 427 at 479 it was held:

"If defendants are correct in their contention, a magistrate might make an order committing a defendant to jail until he should give bail in a certain amount, the magistrate might forthwith make his return to the clerk of the district court (Penal Code, sec. 1693), and before the prisoner could procure the bail, and then the defendant could not be released from custody except upon the order of the district judge or a justice of the supreme court. In all of the judicial districts in the state except four, the district judge is at all times absent from some of his counties. The plight in which a prisoner might find himself in such case is apparent. No such hardship was intended by the statute in question. When the committing magistrate has made his returns to the clerk of the district court, we think he nevertheless still has power and authority to accept and approve the bail undertaking which is required by his order until the district court obtains final jurisdiction of the entire matter upon the filing of an information or the presentment of an indictment against the prisoner, or until a district judge or justice of the supreme court has fixed anew the prisoner's bail."

The inference is that unless the magistrate who binds the defendant over to the district court has power to approve his bail nobody else has except a magistrate who may issue a writ of habeas corpus which would include district court judges and justices of the supreme court.

We are not able to find a California case in point. (Our statutes on bail are taken from the California code.) However, it would appear that only the justice who bound the defendant over to the district court and the district judges themselves in the district court may take bail from the defendant as above provided. The statutes on arrest and bail are rather complicated by the provisions in various cases such as the arrest of the defendant outside of the county in which the offense is to be tried.

Section 11733 R.C.M. 1921 provides:

"A warrant of arrest is an order in writing, in the name of the state, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

"County of.....

"The State of Montana to any sheriff, constable, marshal, or policeman of said state, or of the county of.....

"Complaint on oath having been this day made before me, by A B, that the crime of.....(designating it) has been committed, and accusing C D thereof, you are therefore commanded forthwith to arrest the above named C D and bring him before me (naming the place) or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

"Dated at....., this.....day of..... nineteen....."

It would appear from this section that except in cases mentioned in the succeeding sections that the defendant must be brought before the magistrate issuing the warrant, except in his absence or inability to act, when he may be taken before the nearest or most accessible magistrate in the county. This position is supported by code section 11739 which provides as follows:

"If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county, as provided in the warrant of arrest."

The succeeding sections appear to set forth the exceptions and have to do with arrests in other counties and proceedings triable in another county in which the warrant is issued, etc., but the primary rule appears to be that the defendant must be taken before the magistrate who issued the warrant. In case the defendant is taken before a magistrate other than the one who issued the warrant it is provided in section 11745 that the complaint must be sent to that (the other) magistrate.

See also 6 C. J.—Bail, art. 198.

"Offenses beyond the trial jurisdiction of a * * * committing magistrate are generally excluded from his power to bail."

The section applicable to these facts is code section 12140 which provides as follows:

"When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus."

Section 12172 has not been overlooked but in my judgment this section of chapter 39 of the code of criminal procedure, which deals with surrender and forfeiture of bail exclusively, is intended to cover those cases where an order of re-commitment has been issued by a district court upon grounds mentioned in subdivisions 2 and 3 of said section, and it has no application in any other case.

You are advised that G. C. Madison has no authority to take bail and that his act in so doing was void. It is possible that the bondsmen would be estopped to question the power of Justice Madison but such practice should not be followed.

Very truly yours,

L. A. FOOT,
Attorney General.