

Opinion No. 24

Justice of the Peace—Executor's Fee—Contempt—Constables—Issuance of Summons—Oral Confession of Judgment—Fees Paid in Advance

- Held:**
- 1. A Justice of the Peace cannot charge a fee for issuing a Writ of Execution.**
 - 2. A Justice of the Peace may hold a person in contempt when the latter violates an order directing the debtor to pay an agreed sum each week.**
 - 3. Constables must attend the Justices within their township when required and may also serve other Justices within the same county.**
 - 4. A Justice of the Peace cannot charge a fee when a complaint is filed but only if summons is subsequently issued based on the complaint.**
 - 5. A Justice of the Peace may charge a fee of \$2.50 when a confession of judgment is entered. The confession of judgment may be oral and need not be in writing.**
 - 6. A constable need not perform any official service unless the fees prescribed for such service are paid in advance.**

July 22, 1957

Mr. John L. McKeon
Deer Lodge County Attorney
Anaconda, Montana

Dear Mr. McKeon:

You have requested my opinion on several questions relating to Justices of the Peace and Constables. The following are in answer to your inquiries.

Your first inquiry is whether a justice may charge a fee for issuing a writ of execution. Section 25-301, RCM, 1947, provides the fee schedule which must be charged by a justice in civil proceedings. The section states:

"The following is the schedule of fees which must be collected by justices of the peace in every civil action introduced in a justice court:

Two dollars and fifty cents when summons is issued, to be paid by the plaintiff.

Two dollars and fifty cents when issue is joined, to be paid by the defendant.

Two dollars and fifty cents of the prevailing party when judgment is rendered. In cases where judgment is entered by default, no charge except the two dollars and fifty cents for the issuance of summons shall be made for any services, including issuing and return of execution.

Two dollars and fifty cents for all services in an action where judgment is rendered by confession.

Two dollars and fifty cents for filing notice of appeal and transcript on appeal, justifying and approving undertaking on appeal, and transmitting papers to the district court with certificate."

There is no provision in the above section for a writ of execution fee. Section 25-309, RCM, 1947, as amended by Chapter 160, Laws of 1957, provides an execution fee for constables and Section 25-232, RCM, 1947, provides execution fees for the clerk of court. The legislature specifically provided execution fees for the latter officers but did not grant such a fee to the justices. A justice may only charge those fees which are set forth in the statute regulating his fees. See, 8 Opinions of the Attorney General 112; 15 Opinions of the Attorney General 125; *San Diego County v. Bryan*, 18 Cal. App. 460, 123 Pac. 347. Therefore, a justice may not charge an execution fee since there is no statutory authorization for the fee.

Your second inquiry is whether an individual who has had his wages garnished may be cited for contempt by a justice if he fails to pay a weekly amount ordered by the court.

Section 93-7501 (3), RCM, 1947, provides a justice may punish, as for contempt, persons guilty of the following acts, and no others:

"3. Disobedience or resistance to the execution of a lawful order or process made or issued by him."

Section 93-8401, RCM, 1947, defines a court order to be:

"Every direction of a court or judge, made or entered in writing and not included in a judgment, is denominated an order. An application for an order is a motion."

The entry in a justice court docket directing the defendant to pay an agreed sum is in aid of executing the judgment and is an order of the court. See, *First Nat. Bank of Pocatello v. Poling*, 42 Idaho 636, 248 Pac. 19; 60 C.J.S., 5, Sec. 1. The order is issued for the benefit of a party in a civil action and failure to comply is a civil contempt. See, *Pelletier v. Glacier County*, 107 Mont. 221, 226, 82 Pac. (2d) 595. Section 93-7504, RCM, 1947, provides that if the defendant is adjudged guilty of contempt, he may be punished by a fine of not more than one hundred dollars and/or imprisonment of one day. Therefore, a defendant may be punished for contempt for failure to comply with an order of the court issued in aid of executing a judgment.

Your third inquiry is whether a constable may serve other justices when there are no available constables in the other townships. Section 16-3601, RCM, 1947, provides:

"Constables must attend the courts of justices of the peace within their townships whenever so required, and within their counties execute, serve, and return all process and notices directed or delivered to them by a justice of the peace of such county, or by any competent authority."

In 17 Opinions of the Attorney General 361, 362, the above section was interpreted and the Attorney General stated:

". . . Constables and their Deputies can serve all process from the Court of a Justice of the Peace within their county . . ."

The statute commands a constable to attend the justices of his township when his services are required. It does not prohibit the constable from serving process and notices from justices located in other townships within his county. The constable is not limited to delivery of process solely from a justice of his township but is empowered to act on all process delivered to him by a "justice of the county". Nor is there any provision in the statute suggesting a constable may serve process in another township only when a constable from that township is unavailable. Therefore, a constable may serve process for justices located within his county and may do so even though a constable is available in the other township.

Your fourth inquiry is whether a justice may charge a fee when a complaint is filed. Section 25-301, RCM, 1947, (*supra*), established

the fee schedule for justices in civil actions. The section specifically states that the fee of \$2.50 must be paid "when summons is issued". The Section further provides that if judgment is by default, the \$2.50 fee for issuance of summons shall be the only fee charged. Section 93-6702, RCM, 1947, provides that summons may be issued one year after a complaint is filed in justice court.

Section 25-232, RCM, 1947, established the fee schedule for the clerks of the district court and provided in part:

"At the commencement of each action or proceeding, the clerk must collect from the plaintiff the sum of five dollars . . ."

Section 93-3001, RCM, 1947, provides that a civil action is commenced in a court of record by the filing of a complaint. It appears incongruous that a justice may only charge a fee of \$2.50 when a "summons is issued" and the clerk of the district court may exact a \$5.00 fee with the filing of the complaint. However, Section 25-301, *supra*, is unequivocal in its language and must be followed until the legislature provides otherwise. Therefore, a justice can exact a fee of \$2.50 when summons is issued and not with the filing of the complaint.

Your fifth inquiry is whether there must be a written confession of judgment filed with a justice before he is entitled to collect a filing fee of \$2.50 when judgment is entered by confession. Section 93-9402, RCM, 1947, requires that a confession of judgment be in writing and Section 93-9404, RCM, 1947, refers to filing "the statement" with the justice. However, in *Kennedy v. Hubbard*, 77 Mont. 170, 253 Pac. 271, Section 93-9402 was construed when a defendant in justice court orally admitted the allegations of the complaint and the justice entered a confession of judgment on the docket. The defendant contended that the confession must be a written statement. The court stated:

". . . The defendant was personally present and assented to the entry of judgment, which was, in effect and in fact, a judgment on the pleadings. . . Great liberality should be exercised in construing statutory requirements under which the action of the justice affects the substantial rights of the litigants."

I conclude that the fee of \$2.50 may be charged by the justice when an oral confession of judgment is made by the defendant.

Your sixth inquiry is whether the fees of a constable must be paid before the constable is required to act. Section 25-208, RCM, 1947, provides in part:

"The officers mentioned in this chapter must not, in any case, perform any official services unless the fees prescribed for such services are paid in advance, and on such payment the officers must perform the services required. . ."

Section 25-202, 25-208, and 25-309, RCM, 1947, were all part of Chapter IV of the Political Code of 1895. Section 25-202, RCM, 1947, lists constables as "officers" which brings them within the provisions of the above cited section. The statute is express in its requirement that officers, including constables, need be paid in advance before they are obligated to perform any official acts.

It is therefore my opinion that a justice of the peace cannot charge a fee for issuing a writ of execution; that a justice of the peace may hold a person in contempt when the latter violates an order directing him to pay an agreed sum each week; that constables must attend the justices within their township when required and may also serve other justices within the same county; that a justice of the peace cannot charge a fee when a complaint is filed, but only if summons is subsequently issued based on the complaint; that a justice of the peace may charge a fee of \$2.50 when an oral confession of judgment is entered and that a constable need not perform any official service unless the fees prescribed for such service are paid in advance.

Very truly yours,
FORREST H. ANDERSON
Attorney General