

Justice of the Peace, Right to Charge Game Warden Fee for Search Warrant.

It is proper for a justice of the peace to charge the Game Warden or one of his deputies a fee for issuing a search warrant.

Helena, Montana, Sept. 7, 1905.

Hon. W. F. Scott, State Game and Fish Warden, Helena, Montana.

Dear Sir:—Your letter of the 23rd ult., requesting an opinion of this office as to the right of a justice of the peace to charge the game and fish warden a fee of \$1.00 for issuing a search warrant, received.

Section 4592, Political Code, provides that justices of the peace may collect and receive for their own use for official services the fees and emoluments prescribed in this chapter. Section 4642, of the same chapter, provides that a justice of the peace is entitled "for all services in issuing a search warrant, to be paid by the person demanding the same, \$1.00." From these two sections it is clear that the justice of the peace is entitled to a dollar for issuing a search warrant.

However, Section 4612, of the same chapter, reads as follows:

"No fees must be charged the state, or any county, or any subdivision thereof, or any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees."

This latter section can not apply in its entirety to justices of the peace for if it did so apply a justice could not collect from the state or a county any fees whatsoever in any case and all that part of said Section 4642 providing what fees a justice is entitled to in criminal cases and limiting the aggregate amount thereof as well as all that part of Section 2910, Penal Code, authorizing a justice to retain from fees collected the amount of costs, would be wholly inoperative.

Section 16, of House Bill No. 147, laws 1901, page 133, provides that the state game and fish warden or a deputy may make complaint and cause proceedings to be commenced against any person for a violation of any laws for the protection of game and fish, and shall not be obliged to furnish security for costs. And the same section further provides, "in any court having jurisdiction of the offense, upon receiving proof of probable cause for believing in the concealment of any bird, etc. * * * shall issue a search warrant and cause a search to be made."

Inasmuch as the game and fish warden is a public officer, coming under the provisions of said Section 4612, and as said Section 16 of said House Bill No. 147 expressly provides that the game and fish warden or a deputy shall not be obliged to furnish security for costs, it is evident that a justice of the peace cannot demand of or collect from such officer

the \$1.00 for issuing a search warrant. While Section 4642 provides that where the justice issues a search warrant the \$1.00 is to be paid by the person demanding the same, yet when we consider the fact that in the case of game and fish there is no special ownership in such property, and that the only person whose duty it is to demand the search warrant is a public officer, it furnishes an additional reason why the justice should not strictly follow Section 4642 in collecting this fee. However, as it is apparent from said Section 4592 that the justice of the peace is entitled to receive his fee for performing such service, it would seem that in cases of this kind the charge would be against the state game and fish fund, for, under Section 4642, the fee for issuing a search warrant is not a charge against the county but is to be paid by the person demanding the same. On the other hand, under Section 10, of Chapter 58, laws of 1905, all fines and penalties collected for violations of the fish and game law must be paid to the state treasurer and by him placed to the credit of the fish and game fund; and, under said Section 16 of said House Bill No. 147, if the fish or game that is found upon making search under said search warrant is sold the money received from such sale must be placed to the credit of the fish and game fund.

So you are advised that the fee of \$1.00, which the justice of the peace is entitled to for issuing a search warrant, is a proper charge by him for the issuing of such warrant. Where he receives money from the sale of fish or game found in the possession of a person violating the law, in the event that such person is found guilty, he could then retain his fee of \$1.00 out of such proceeds and remit the balance to the state treasurer. If the person is not found guilty, in which event the proceeds of the sale of the game or fish must be turned over to the person from whom the same was taken, then he would have to present his bill to the state board of examiners for allowance out of the fish and game fund; or, a more simple method would be for the game and fish warden, or deputy, to pay the dollar to the justice, upon having the search warrant issued, and then include this expenditure in his items of expenses and present the same in his bill to the state board of examiners for allowance out of the game and fish fund.

Yours very truly,

ALBERT J. GALEN,

Attorney General.