

Witnesses, Number Of in Criminal Cases Before Justice of the Peace. Justices of the Peace, Number of Witnesses Subpoenaed By.

A justice of the peace in a criminal action is not restricted by the statute limiting the clerk of the district court to the issuance of subpoenas for six witnesses, only.

February 16, 1911.

Justin M. Smith, Esq.,
County Attorney,
Bozeman, Montana.

Dear Sir:

I am in receipt of your letter of February 13, 1911, wherein you ask my opinion on the question as to whether a justice of the peace in a criminal action has authority to subpoena more than six witnesses without a proper showing therefor made by counsel.

Section 9486, Revised Codes, provides that a subpoena may be signed and issued by a magistrate before whom a complaint is laid for witnesses in the state whether on behalf of the state or of the defendant. The fourth subdivision of the same section provides that a subpoena may be signed and issued by a clerk of the court in which the indictment or information is to be tried, for witnesses in the state as the defendant may require, "under the direction of the court." The provisions providing for the issuance of subpoenas in courts of record under the direction of the court is properly based upon the theory that upon a showing of counsel the court being learned in law is able to

determine the materiality of testimony sought to be produced and may thus prevent cumulative testimony or that which is entirely corroborative, and also in courts of record, juries receive instructions from the court concerning the weight of testimony and the question of preponderance, so that the number of witnesses to prove a given state of facts has little, if any, value under these instructions, whereas in courts not of record the magistrate is not required to be learned in the law, nor does he instruct the jury on the admissibility and weight of evidence. Section 3190 provides that the clerk of a court of record must not issue subpoenas for more than six witnesses and has no reference to courts not of record.

The view herein expressed seems to be supported by the supreme court in *State vs. O'Brien*, 18 Mont. 2, where it is held that it is proper for the clerk to require the defendant upon request for a subpoena for additional witnesses to disclose the materiality of the testimony.

You are therefor advised, that in my opinion Section 8486 should be so construed as to place the restriction upon clerks of the court in the number of witnesses subpoenaed especially in view of the provisions of Section 3190, but that no such restriction exists in courts not of record.

Yours very truly,

ALBERT J. GALEN,

Attorney General.