

### **Justices of the Peace—District Judge—Search Warrant.**

A Justice of the Peace held not to have authority to issue a search warrant until after July 1, 1923. A District Judge may issue a search warrant while in one county in his district, to search premises in another county in his district.

John S. Nyquist, Esq.,  
County Attorney,  
Scobey, Montana.

My dear Mr. Nyquist:

You have requested my opinion as to the right of a Justice of the Peace to issue a search warrant under the prohibition statute.

The Supreme Court of this state, in the case of State v. Bowker, 205 Pac. 961, indicated that a Justice of the Peace has no authority to issue a search warrant in a case of this kind. (But see Chapter 116, Session Laws, 1923, effective after July 1, 1923.)

Regarding your question as to whether the District Judge can legally issue a search warrant in one county to search in another: The District Judge, no doubt, has this power, and, under Section 8872, R. C. M. 1921, "A Justice or Judge may exercise out of court all the powers expressly conferred upon a Justice or Judge, as contradistinguished from the court." This section was construed in the case of Farleigh v. Kelly, 24 Mont. 369. In that case the question presented was whether the Judge, who tried the case, had power to make an order extending the time within which the proponent might prepare and serve her statement. The Court said:

"In the discussion of the questions involved in this motion, both counsel for respondents and for appellant seem to have overlooked Section 1821 of the Code of Civil Procedure, which is as follows:

"Sec. 1821. Motions must be made in the county in which the action is brought, or in any adjoining county in the same district. In case of the absence of the Judge of the district from his district, such motion may be made before the Judge of any adjoining district. Orders made out of court may be made by the Judge of the court in any part of the state.'

"Under Section 12 of Article VIII of the Constitution, Judge Smith had the power to hold court in the Fifth judicial district, and to try said cause. While holding said court, Judge Smith had the same power, either in court or chambers, as the Judge thereof. (Code of Civil Procedure, Sec. 36.) Under Section 1173 of the Code of Civil Procedure, the power to extend the time within which the statement must be prepared and served is expressly given. The order extending the time was one which the Judge could make at chambers (Code of Civil Procedure, Secs. 170, 171, 190); and under Section 1821 of the Code of Civil Procedure, supra, Judge Smith had the power to make such order after his return to his own district. Briefly stated, these are the conclusions we have reached upon the first ground of this motion."

It is, therefore, my opinion that a Justice of the Peace has no right to issue a search warrant under the present law, and that a District Judge may issue a search warrant while in one county of his district to search premises in another county of his district.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.