

Opinion No. 226

**Justice of the Peace—Attorney for
Indigent Defendant, Appointment of.**

HELD: The right of a court to ap-
point counsel for an indigent defendant

is purely statutory. As no provision has been made for such appointment by a justice of the peace, he is without authority to make such an appointment.

May 31, 1933.

You request my opinion on the authority of a justice court to make an order appointing counsel for an indigent defendant and providing payment of counsel fee by the state.

The right of an indigent in district court to have the court appoint counsel and to have same paid by the state is fixed by statute. (R. C. 11886-11887.) A defendant is guaranteed the right to counsel by the Constitution, Sec. 16, Art. 3. There is no statute authorizing the appointment of an attorney by a justice of the peace or magistrate.

"At common law a prisoner was not entitled to appear by counsel at all; and the provision in our constitution, which gave him permission to be assisted by counsel in his defense, was only intended to abrogate that established doctrine of the common law, or, at farthest, to no more than lay a predicate for rightful legislation as to compensation in such cases, and indeed, in some States, the legislature has not only made it the duty of the court to assign counsel for indigent prisoners, but have fixed either the mode or amount of compensation for their services."—*Johnston v. Lewis and Clark County*, 2 Mont. 159, 161. It has been held that the right to have counsel appointed by the court is dependant on statute. "The court of Sessions was not bound to assign counsel for the prisoner. He seems, however, to have had counsel to defend him in the District Court."—*People v. Moice*, 15 Cal. 330, 331. "Probably everywhere in capital cases, and in some of the States in cases not capital, counsel will be assigned even to poor persons unable to pay."—*Bishop*, "Criminal Procedure," 304.

This matter was discussed in the case of *Houk v. Board of Commissioners*, 41 N. E. 1068, from which case we would quote as follows:

"It is also true that it is the right of a person accused of a crime to be heard by counsel, and this right is guaranteed by the federal and state constitutions. (Const. U. S., Amend. 6; Const. Indiana, art 1, sec. 21). But the

accused has no right guaranteed to him by the constitution that his counsel shall be furnished at the expense of the public or of the county."

"The general rule is that where a power is granted to do a particular thing, the grant carries with it the power to do all the incidental matters necessary to attain the ends sought. The power to appoint carries with it the power to make the allowances. As a justice of the peace has no power to make allowance, he ought not to have the power to make the appointment."

I therefore conclude that the right of a court to appoint counsel for an indigent defendant is purely statutory and that, as no provision has been made for such appointment by a justice of the peace in our statutes, he is without authority to make such an appointment.