

Opinion No. 165.**Justice of the Peace—Attachments—
Executions—Garnishments, Service of
—Mail, Service By—State Auditor.**

HELD: 1. That part of Section 9661, R. C. M. 1921, which authorizes a justice of the peace to issue a writ of attachment and direct the same to the sheriff of a county other than his own for service, is in conflict with the Constitution and is therefore invalid.

2. Attachments and garnishments, and executions and garnishments may be issued by a justice of the peace of any township in Lewis and Clark County and served upon the State Auditor by the sheriff of, or a constable of any township in, said county. Service cannot be made by a private individual or by mail.

September 5, 1935.

Hon. John J. Holmes
State Auditor
The Capitol

Your letter to us of recent date is as follows:

"Your opinion is respectfully requested as to whether or not garnishments, run in aid of execution or attachment as issued out of a justice court other than the township in which the State Capitol building is located, may be served upon the State Auditor and, by so being served, impound moneys due and owing to state employees."

The information sought involves a consideration of certain constitutional and statutory provisions. Section 20, Article VIII of the Constitution declares that "justices' courts shall have such original jurisdiction within their respective counties as may be prescribed by law." Section 8836, Revised Codes of 1921, is as follows: "The civil jurisdiction of justices' courts extends to the limits of the county in which they are held, and mesne and final process of any justice court in a county may be issued to and served in any part of the county."

Section 9661 provides that a writ of attachment issuing out of the justice court "may be directed to the sheriff or any constable of the county, or the sheriff of any other county, and must require him to attach and safely keep all the property of the defendant in his county not exempt from execution." Section 9694 provides that a writ of execution issuing out of the justice court "must be directed to the sheriff or a constable of the county" and requires him to do the things specified therein. Section 9711 provides that "justices of the peace may issue subpoenas in any action or proceedings in the courts held by them, and final process on any judgment recovered therein, to any part of the county." The law relating to attachments, so far as district court practice is concerned, is found in Sections 9256-9300, Revised Codes 1921. Section 9294 is as follows: "Money, credits, or other property belonging to or due and owing to another, in the possession of or under the control of a public officer or board, including all officers or boards of a county municipal corporation, and school district, or state board or state government, may be attached or garnished while in such possession or under such control, by making service, as provided in Section 9262, upon the clerk of the county or chairman of the board of county commissioners, the city clerk or mayor of a municipal corporation, or upon the clerk of the board of school trustees or chairman of such board, as the case may be."

The law relating to executions, so far as the district court practice is concerned, is found in Sections 9416-9453, Revised Codes 1921. Section 9452 is as follows: "The provisions of Section 9294 of this code, relating to the garnishment of public officers, apply to the levy of an execution."

By Section 9662 "Sections 9261 to 9293, both inclusive, are made applicable to attachments issued in justice's courts," and by Section 9694 an execution issued by the justice "must contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of Sections 9416 to 9453 of the code, in an execution to the sheriff, except

that it shall not direct the officer to in any manner levy upon or satisfy the judgment, or any interest thereon, from any real property." Section 9696 is as follows: "The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of Sections 9416 to 9453 of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff."

The word "process" signifies a writ or summons issued in the course of judicial proceedings. (Section 16, R. C. M. 1921; 50 C. J. 441.) A writ of attachment is mesne process (6 C. J. 32; 50 C. J. 445; Fletcher v. Morrell, 44 N. W. 133; Birmingham Dry Goods Co. v. Bledsoe, 21 South. 403), and a writ of execution is final process. (23 C. J. 305; 50 C. J. 445; Crowell v. Kopp, 189 Pac. 652.)

Since Section 20, Article VIII, of the Constitution confines the territorial jurisdiction of justices' courts to their respective counties, it would seem that so much of Section 9661, supra, as authorizes a justice to issue a writ of attachment and direct the same to the sheriff of a county other than his own for service is in conflict with the fundamental law and therefore invalid. The provisions of the Constitution are mandatory and prohibitory. (Section 29, Article III, Authorities more or less in point are: 15 C. J. 728; 35 C. J. 536; 16 Ruling Case Law, page 363, Sec. 42; 17 Standard Proc. 981; Bank of Gassaway v. Stalnaker, 71 S. E. 183; American Historical Soc. v. Glenn, 227 N. Y. S. 174, aff. 162 N. E. 481; White v. Deegan, 141 S. E. 396; People v. City Court of East St. Louis, 170 N. E. 210; State v. Magney, 72 N. W. 1006; Wilcox v. Conklin, 99 N. E. 669; State v. Nixon, 134 S. W. 538; Mott Store Co. v. St. Louis & S. F. R. Co., 158 S. W. 108; Konold v. Rio Grande W. Ry. Co., 51 Pac. 256; Canadian Valley Bank v. Cook, 247 Pac. 370; Stuart State Bank v. Waters, 232 Pac. 70; Searl v. Shanks Bank of Grandin, 82 N. W. 734; State v. Brayman, 12 Pac. 111; Limerick v. Gorham, 15 Pac. 909; Conor Agt. Hilton, 66 Howard

144; *Mallet v. Uncle Sam Gold Mining Co.*, 1 Nev. 188; *McCullough v. Scott*, 109 S. E. 789.

It will be observed that Section 9662 does not expressly make Section 9294 applicable to justice court practice but that Sections 9694 and 9696 do expressly make Section 9452 applicable to justice court practice. Section 9717, Revised Codes 1921, is as follows: "Justices' courts, being courts of peculiar and limited jurisdiction, only those provisions of this code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in Sections 9619 to 9728 of this code, are applicable to justices' courts and the proceedings therein." In view of all the circumstances and the language of the section just quoted there can be little doubt that the provisions of Section 9294 are applicable to justices' courts. (*Ex parte Latimer*, 47 Cal. 131; *Classroom Teacher v. Superior Court*, 18 Pac. (2d) 746; *Teel v. Justice's Court*, 24 Pac. (2d) 899.)

It is our conclusion, therefore, that attachments and garnishments and executions and garnishments may be issued by a justice of the peace of any township in Lewis and Clark County and served upon the State Auditor by the sheriff of, or a constable of any township in, Lewis and Clark County. Service cannot be made by a private individual, as such, or by mail, as investigation discloses has occasionally been attempted. (6 C. J. 213-216.)

Note: The same conclusion is reached by different reasoning in 3 Report and Official Opinions of Attorney General, page 350.