

Opinion No. 246.

**Sheriffs and Constables—Process,
Service of—Justices' Courts.**

HELD: It is mandatory upon the constable to serve process issued out of Justices' courts, but all other qualified persons, including Sheriffs, have discretionary authority to serve such process.

February 11, 1938.

Mr. Harold K. Anderson
County Attorney
Helena, Montana

Dear Sir:

You have asked,

"Is it incumbent upon the sheriff to serve Justice Court process, when the same is directed to him, when the township in which the Justice Court is located has two constables under salary? In other words, would the sheriff be liable for failure to serve Justice Court process, or would he have discretionary authority to serve or not serve such process?"

"Process" includes all "writs, warrants, summons and orders of courts of justice or judicial officers." (Section 4773, Revised Codes of Montana, 1935) and inasmuch as summons are one form of process, an inspection of the requirements as to summons is enlightening.

Section 9636, relating to the service of summons from justice court, says:

"The summons may be served by a sheriff or constable of any of the

counties of this state; * * * or the summons may be served by any male person resident in the state, over the age of eighteen years, not a party to the suit, * * *"

The statute uses the word "may," which according to its natural and usual significance is "enabling and permissive only, and so it must be interpreted where no right of or benefit to the public, nor right of persons other than the one upon whom the permission is conferred, depends upon giving to it the obligatory meaning; * * *" (Durland v. Prickett, 98 Mont. 399, 407; State v. Holmes, 100 Mont. 256, 284; Goodroads Machinery Company v. Broadwater County, 94 Mont. 68, 71.) As used here the word must be given its usual meaning; that is, meaning permissive, and therefore Section 9636 only permits constables, sheriffs, or male persons over eighteen years of age to serve the summons issued from Justice Court, and the service so made will be valid. But, it does not require any of the persons named to serve the summons if one of them should object. Then, nothing else appearing, it would seem to be discretionary for any of these named persons to serve a summons.

However, Section 4859 says:

"Constables must attend the courts of justices of the peace within their townships whenever so required, and within their counties execute, serve, and return all process and notices directed or delivered to them by a justice of the peace of such county, or by any competent authority."

The constable is the appropriate executive and ministerial officer of the justice's court and his duties with reference to that court are in general identical with those performed by the sheriff for and in obedience to courts of record. (Murfree Jurisdiction of Justice Courts, Sec. 281; Woods v. Wood, 122 So. 835.)

The duties of the sheriff are set forth in Sections 4774 and 4794. Subdivision (5) of Section 4774 requires that "The sheriff **must**: (5) Attend all courts, except justices and police courts, at their respective terms or sessions held within his county, and obey their lawful orders and directions." It will be noted that justices and police courts are specifically excluded.

Again, fees are collectible by both constables and sheriffs. The sheriff's fees are all collected for the sole use of the county and paid to the county treasurer (Sections 4864, 4887). Constables are permitted to keep their fees for the services they render, except

"That constables in townships having a population of twelve thousand (12,000) people and not exceeding twenty thousand (20,000) people, shall each receive a salary of \$900.00 per annum, payable monthly from the county treasury. Constables in townships having a population of more than twenty thousand (20,000) people shall each receive a salary of \$1,500.00 per annum, payable monthly from the county treasury, and constables in such townships where the population is twelve thousand (12,000) people and not more than thirty-five thousand (35,000) people shall receive no other fees for civil suits or criminal actions except mileage in the performance of their duties. Any such fees received by the constables shall be turned over to the county treasurer."

In the case of paid constables it is contemplated that in cities of the population mentioned the work to be done shall be compensable by the salary set, and in turn it is estimated that the constable will do approximately as much work for the salary as he would if he received fees only.

The law has obviously designated the sheriff as the officer of the district court, and the constable as the officer of the justice court. In order that other persons might be available to serve the court in case of emergency, provision has been made for special constables (Section 9719), and it is permissive that sheriffs or other qualified individuals serve the process of the court, but the only one who **must** serve the process of the justice court is the constable, just as the sheriff **must** serve the process of the district court. Many contingencies may be imagined wherein the prompt and effective administration of justice may suggest the process be turned over to one officer rather than another. This office would not set such bounds upon the discretion given by law in such cases as to defeat the purpose of such discretion. But, in this case all the contingencies are amply cared for and

there is no reason why the justice court should not call upon its own court officers to serve the processes of the court. This is especially true in instances where the constable is on a salary. Therefore, it is my opinion that the sheriff may, in his discretion, refuse to serve processes issued out of a justice court.