

CRIMINAL PROCEDURE;
RECOGNIZANCE OF WITNESS:
JUSTICE OF THE PEACE

Recognizance of witnesses taken by justice of the peace in a felony case should be for appearance of witness in circuit court and in case such witness refuses to give such recognizance and is committed, he should only be held under such order of commitment of the justice until the day he is required to appear in circuit court after June 3, 1938 which time the recognizance for appearance should be required by the circuit court.

Mr. Ernest Binnicker,
Assistant Prosecuting Attorney,
Buchanan County,
St. Joseph, Missouri.

Dear Sir:

This is in reply to yours of June 1, 1938 requesting an official opinion based upon the following letter:

"Following is a statement of facts relating to a certain criminal case now pending in the Circuit Court of Buchanan County, Missouri:

Virginia Homan and Fred Mead were charged by a felony complaint, filed in the justice court, with murder in the 1st degree. The preliminary hearing was held sometime during the month of February, 1938. Upon completion of the testimony the case of Virginia Homan was certified to the May, 1938 term and Mead was discharged. At the request of Mr. Hoffman, prosecuting attorney, Mead was placed under bond of \$5,000 to appear on the first day of the May, 1938 term as a material witness. During the present May term the case of Virginia Homan was continued to the October term upon the instance of the state because of the absence of a very material witness. I might say that Mead is confined in jail upon a failure to furnish said bond.



I would like to know if bond for Mead as a material witness should be set by the Circuit Judge, or if the bond set by the Justice is a continuing bond, and if he can be held in jail upon his failure to furnish said bond."

From your request it appears that Fred Mead, who was a material witness for the state in the case of State v. Homan, was committed to jail by the justice who held the preliminary examination because the witness refused to enter into a recognizance for his appearance as a witness to the May, 1938 term of your circuit court.

Section 3483, R.S. Mo. 1929 provides as follows:

"If it appear that a felony has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutor, and all material witnesses against such prisoner, to appear and testify before the court having cognizance of the offense, on such day as the prosecuting attorney shall designate in writing duly filed with the magistrate at the time, and not to depart such court without leave."

And Section 3485, R.S. Mo. 1929 provides as follows:

"If any witness so required to enter into a recognizance refuse to comply with such order, the magistrate may commit him or her to prison until he or she comply with such order or be otherwise discharged according to law."

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We are assuming that the justice of the peace in committing Mead for refusing to enter into a recognizance for his appearance at the May term, executed the proper commitment papers and delivered them to the sheriff whose duty it was then to hold the witness until the May term of your circuit court unless the witness entered into the recognizance for his appearance as required by the order of the justice.

These acts of the statute insofar as they deprive the person of his liberty should have a strict construction.

Volume 70, Corpus Juris, page 65, section 59, provides as follows:

"* * * * * Except where the statute requires, or permits the court to require, sureties to be furnished, the personal recognizance of the witness must be accepted. The recognizance must acknowledge an indebtedness to the state, or people, mention the offense charged and as to which the witness is to testify, and designate the time at which the witness is to appear."* * * * *

At section 60, page 66 of said Volume Corpus Juris, it is provided as follows:

"Where a witness in a criminal case is lawfully directed to give a recognizance or bail for his appearance at the trial, and fails or refuses so to do, he may ordinarily, under the statutes providing for recognizances or security, be committed to jail, and held in custody, for not more than a reasonable time, to insure that he will be present to testify,"* * * * *

If the prosecuting attorney desired that this witness be required to appear in the circuit court at the time the case was to be called at the next term, it was his duty to designate in writing the day he desires the

appearance of the witness, and the justice of the peace should take the recognizance of the witness for his appearance on that day and that he would not depart without leave of court. When that day came and the witness, being in the custody of the sheriff for failure to enter the recognizance required by the justice of the peace, is taken into court, then the requirement of the justice as to the appearance of the witness has been met. If the case is not tried on that date or is continued, if the presence of the witness is desired at a later date the judge of the circuit court may require him to enter into a recognizance as is provided by Section 3656, R.S. Mo. 1929 which is as follows:

"Whenever a criminal case shall be continued, all the witnesses in attendance shall be called by the court, and as many of them as the parties may desire shall be required to enter into recognizance for their appearance on the day of the next term on which such case shall be set for trial, which day shall be fixed and designated by the court at the time the continuance is granted; and if any such witness shall fail to appear in said court when so called, for the purpose of being recognized, such witness shall forfeit all his fees as witness in such cause, and may be compelled to appear by attachment."

Said Sections 3483, 3485 and 3656, very clearly set out the procedure to be followed to enforce the appearance of witnesses in criminal cases.

Said Section 3483 by the words at the end of the section, "and not to depart such court without leave", seems to indicate that it was the intention of the lawmakers that the recognizance provided for is a continuing obligation and we would so hold, were it not for the provisions of said Section 3656. This section specifically provides for a recognizance of a witness in the circuit court if the

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case is continued and the order of the justice court is then no longer binding upon the witness.

CONCLUSION

It is, therefore, the opinion of this department that a justice of the peace who requires witnesses in a criminal case to enter into a recognizance for their appearance in circuit court, can only require that the witness appear in the circuit court on the day that the prosecuting attorney designates in writing, and if said witness appears on that date, the requirements of the justice of the peace recognizance have been met and the witness is thereby discharged from the recognizance and should be released if confined.

We are further of the opinion that any recognizance required after the date fixed by the justice when he binds the defendant over to the circuit court should be fixed by the circuit court.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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