

CITY MARSHALL CITY OF THIRD CLASS: Has power as ex officio constable to serve warrants in other counties.

January 30, 1941

Mr. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 27, 1941, asking for an opinion upon the following questions:

- "1. Can the Constable or Chief of Police, who is ex officio constable in a third class city make an arrest under a state warrant issued by the Police Judge sitting as the ex officio Justice of the Peace in a county other than that in which the city is located?
2. Where a prisoner is arrested in another county is the Chief of Police who is ex officio Constable of a city of the third class or the Constable of the township in which the third class city is located empowered under a warrant issued by the Police Judge sitting as ex officio Justice of Peace to get and return the prisoner where he has been arrested by officials in another county or is this the duty of the sheriff of the county in which said city and township is located?"

In addition to the opinion furnished you herewith upon these two questions, we are also enclosing a copy of an opinion written by Wm. Orr Sawyers, Assistant Attorney-General, to Honorable Ernest Binnicker, Assistant Prosecuting Attorney, Buchanan County, under date of March 16, 1937, treating generally of the power of



constables and sheriffs to serve warrants in counties other than the counties in which the warrants were issued.

The determination of your questions requires consideration of several sections of the statutes. Section 6766 R. S. Mo. 1929, provides as follows:

"The police judge shall be ex officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be ex officio a constable to wait upon the police judge when acting as a justice of the peace."

The following definitions of "ex officio" are taken from Words and Phrases, Permanent Edition, Volume 15, page 658:

"The term 'ex officio' denotes by virtue of the office. King v. Physicians' Casualty Ass'n of America, 150 N. W. 1010, 1011, 97 Neb. 637."

"A finding in an action against an official and the surety on his bond for a defalcation as assessor that the official collected money 'as assessor' or as 'ex officio assessor' is of the same legal import, the charter of the city under which the officer acted declaring that the auditor shall be 'ex officio assessor', and whether he styles himself 'auditor and assessor' or 'auditor and ex officio assessor' is immaterial. He is none the less assessor because he is only 'ex officio assessor,' and being styled in the bond both 'auditor and ex officio assessor' is the same in legal effect as styled both 'auditor and assessor.' City of Oakland v. Snow, 78 P. 1060, 1064, 145 Cal. 419."

In the case of State v. Chappell, 179 No. 324, the Supreme Court in discussing Section 5798 R. S. Mo. 1899, which was the same as Section 6766 R. S. Mo. 1929, at l. c. 333, said:

"It is insisted that this was error, for the reason, it is asserted, that the police judge had no jurisdiction of the case. To this insistence we can not give our consent. Section 5798, Revised Statutes 1899, clearly confers jurisdiction upon the court presided over by the police judge. It provides: 'The police judge shall be ex officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be ex officio a constable to wait upon the police judge when acting as a justice of the peace.'

"The police judge had jurisdiction of the subject-matter (which was petit larceny) by virtue of the terms of the statute. He also had jurisdiction of the person of the defendant."

Following the above definition and the case of State v. Chappell, supra, the police judge and the city marshal would be justice of the peace and constable respectively for the city, with jurisdiction conferred by Section 5766, although called such officers ex officio.

Section 11756 R. S. Mo. 1929, pertaining to constables provides as follows:

"Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Section 3481 R. S. Mo. 1929, provides for the issuance of warrants in justice of the peace courts in misdemeanor cases. This section is as follows:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged,

it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 3467 R. S. Mo. 1929, provides for the issuance of warrants by the justice of the peace upon felony complaints, and is as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

Section 3469 R. S. Mo. 1929, provides as follows:

"Warrants issued by any judge of the supreme or circuit or criminal court of any county may be executed in any part of this state; and warrants issued by any other magistrate may be executed in any part of the county within which he is such officer, and not elsewhere, unless indorsed in the manner directed in the next section."

And Section 3470 provides as follows:

"If the person against whom any warrant granted by a judge of the county court, justice of the peace, mayor or chief officer of a city or town shall be issued, escape or be in any other county, it shall be the duty of any magistrate authorized to issue a warrant in the county in which such offender may be or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant to indorse his name thereon, and thereupon the offender may be arrested in such county by the officer bringing such warrant, or any officer within the county within which the warrant is so indorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed; if the clerk of the county court of the county in which the warrant was issued shall indorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto; that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

In the case of State v. Dooley, 121 Mo. 591, the right of a constable to serve a warrant in a county other than that in which it was issued, when the warrant is properly endorsed or certified in accordance with the provisions of what is now Section 3470, and recognized at page 603, the Supreme Court said:

"The warrant was not in evidence, but it would seem plain that neither Bennett nor Evans, although officers of Lafayette county, had any right to serve a warrant in Saline county, unless it was indorsed by a magistrate of Saline

county or by the county clerk of Lafayette county, as provided by section 4024, Revised Statutes, 1889, and the warrant against Price, though properly indorsed, would not have justified them in taking the horses from the possession of defendants, if the latter were in the actual possession thereof, under a claim of right. Of course, if the jury should find as a fact that the possession of defendants was a mere sham to aid Price in retaining the possession from his wife and that defendants had not property rights in the horses by contract of purchase or hire, then they had no right to take them from Bennett and Evans, if the latter obtained possession by the consent of Price."

And in the case of *Gower v. Agee*, 128 M. A. 427, l. c. 437, the right of the marshal of a village to serve a warrant issued by the police judge in a county or village in an adjoining county when the warrant was properly endorsed or certified, was recognized in the following language:

"And, third, while the town marshal is prohibited by the terms of section 6025, supra, from serving the warrant outside of the limits of the county except by following the method provided in section 2444, supra, he is authorized, by following that method, to make the arrest in an adjoining county for an offense committed therein and within the territorial jurisdiction of the town."

CONCLUSION.

It is the conclusion of this department that the city marshal of a city of the third class, when acting in ex officio as constable, may serve a warrant in a county other than a county in which the warrant was issued, when the warrant is properly endorsed or certified in accordance with the provisions of Section 3470 R. S.

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- 7 -

January 30, 1941

Mo. 1929; that the sheriff does not have exclusive power to serve warrants in other counties.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting Attorney-General

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