

**OPINION
69-151**

April 28, 1969 (OPINION)

Hon. Wallace E. Warner

County Justice

Richland County

RE: Criminal Procedure - County Justice - Instruction of Jury

This is in response to your letter in which you refer to section 33-07-17 (civil procedure) which in substance provides that the justice shall not instruct the jury upon the law nor express an opinion as to the matters in controversy. You also refer to section 33-12-20 (criminal procedure) which provides that except as otherwise provided by this chapter the jury shall be drawn and the trial shall be conducted in the manner prescribed in chapter 33-07. You then ask: What is the legal effect of these statutory provisions, and specifically whether or not a county justice may instruct the jury in a criminal case?

In arriving at the intent and purpose of the foregoing sections, we believe it is necessary to recognize that the present statutes which govern the activities and procedures of county justices were originally enacted to govern the procedures and legal activities of justices of peace. Justices of peace were not required to be learned in law. We presume that the legislature in creating such judicial office was aware that the offices would be manned by persons who were not learned in law and that it would be an unreasonable demand to require such persons to give instructions to the jury. We would also presume that if such persons were required to give instructions to the jury the danger of giving erroneous instructions would be prevalent. In many instances the justice of peace was no more informed on the law than were the jurors. The inherent dangers of such situation are apparent.

However, since then the office of justice of peace has been abolished and the office of county justice has been created. For all practical purposes the county justice operates under the same laws as were enacted to govern the office of justice of peace. The substantive law has not been changed except in minor instances and as may pertain to the jurisdiction, particularly in criminal matters.

Basically we still have the same procedural statutes which applied to the justices of peace. While improvements have been made in selecting and obtaining more qualified personnel to man the office of county justice, the procedural laws and powers generally have not been modified.

The powers conferred upon the courts can be found either in the constitution or statute. Neither the constitution nor the statutes confer any authority or power upon the county justice court to instruct the jury, or to grant new trials or issue orders in arrest of judgment or other similar procedural type activities.

We have made a reasonable effort to find case law which relates to this specific question. Our research has not been too fruitful. However, we did find the case of St. Joseph Manufacturing Company v. Harrington, 5 N.W. 568, decided by the Iowa Supreme Court in 1880, which in effect held that the charging of a jury is a matter of power; and if such power is not conferred upon the court, the court is without authority to charge the jury.

As you have observed, section 33-12-20 relating to criminal procedures provides as follows:

* * * Except as otherwise prescribed by this chapter, the jury shall be drawn and the trial shall be conducted in the manner prescribed in chapter 33-07."

In examining the provisions of the code relating to justice court and procedures in criminal actions we do not find any provision which even remotely refers to a matter involving the charging of the jury. However, in referring to chapter 33-07 it is found that section 33-07-17 provides as follows:

* * * In the trial of a civil action, the justice must not instruct the jury upon the law of the case nor express an opinion as to any matters of fact in controversy therein."

By construing these two sections we observe that not only is there no power granted to charge a jury but more specifically such action is prohibited.

We also take into consideration that appeals from a justice court to the district court are heard by the district court as a trial anew. It is not an appeal which is heard on the record as is the case which appeals from the district court to the supreme court.

It is therefore our opinion that the county justice shall not instruct the jury on the issues before the court in criminal or civil cases where a jury trial is demanded. With the improvement of the personnel manning the offices of county justice, the legislature might well wish to review these provisions discussed and might now consider enacting legislation either authorizing or directing that county justices instruct the jury, particularly where the county justice is by professional standards learned in law.

HELGI JOHANNESON

Attorney General