

no such application was made and that the improvement comes within the terms of Section 1224, General Code.

I am of the opinion that any proceedings had under Section 1224 of the Code cannot provide for an assessment in a greater amount than ten per cent; for this reason, the present assessment being fifteen per cent in each instance, the bonds must be rejected.

Respectfully,
EDWARD C TURNER,
Attorney General.

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JUSTICES OF THE PEACE—JURISDICTION IN CASES INVOLVING
CLASSES OF OFFENSES ENUMERATED IN SECTION 13423, GEN-
ERAL CODE—JURISDICTION IN STATE BOARD OF PHARMACY
CASES—TUMEY CASE DISCUSSED.

SYLLABUS:

1. *Justices of the peace have final jurisdiction in cases involving those classes of offenses enumerated in Section 13423, General Code, except where a felony is charged.*

2. *In cases involving violations of Sections 12705, 12706 and 12710, General Code where it is the duty of the State Board of Pharmacy to cause such sections to be enforced if no security for costs be demanded from complainant under the provisions of Section 13499, General Code, and the defendant raises seasonable objection to the qualification of the justice of the peace because of his direct, substantial, pecuniary interest in the outcome such objection should be sustained and the complaint withdrawn and filed in a proper court where such disqualification does not exist. If, as provided in Section 13499, General Code, the costs are secured, no such interest exists and therefore such an objection may be properly overruled and final judgment rendered.*

3. *Since crimes defined by Section 12709, General Code, are felonies and since the recent decision of the Supreme Court of the United States in the case of Tumey vs. State of Ohio, decided March 7, 1927, and reported in the Ohio Law Bulletin and Reporter, Vol. XXV, March 14, 1927, does not affect the jurisdiction of justices of the peace to act as examining magistrates, the jurisdiction of a justice of the peace over the crimes denounced in said section is not affected.*

COLUMBUS, OHIO, April 27, 1927.

HON. W. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 21st, which reads as follows:

“Since the ruling of the Supreme Court concerning the jurisdiction of Justices of the Peace we have been confronted with the statement that a Justice of the Peace does not have jurisdiction in pharmacy cases.

You will note that Section 13423, of the General Code of Ohio, provides that the Justice of the Peace shall have jurisdiction in pharmacy cases.”

Section 1313, General Code, provides that:

“The state board of pharmacy shall enforce, or cause to be enforced, the laws relating to the practice of pharmacy. If it has information that any provision of the law has been violated, it shall investigate the matter, and

upon probable cause appearing, file a complaint and prosecute the offender. Fines assessed and collected under prosecutions commenced or caused to be commenced by the state board of pharmacy shall be paid into the state treasury to the credit of the general revenue fund. It is the intention that the state board of pharmacy shall enforce or cause to be enforced the provisions of Sections 12705, 12706, 12707, 12708, 12709 and 12710 of the General Code."

Sections 12705 and 12706, General Code, are penal sections . Section 12705 relates to the managing and conducting of a retail drug store without having a legally registered pharmacist in charge thereof, and provides that a violation of the offenses defined by this section shall be punishable by a fine of not less than fifty dollars, nor more than two hundred dollars. Section 12706, has to do with the dispensing or selling of a drug, etc., by one not being a legally registered pharmacist or assistant pharmacist, a violation of which is punishable by a fine of not less than fifty dollars, nor more than two hundred dollars.

Sections 12707 and 12708, General Code, state certain exceptions to the application of the two preceding sections.

Section 12709, General Code, is also a penal section and relates to the filing of a false or forged affidavit with the state board of pharmacy, and prescribed a punishment thereof of imprisonment in the penitentiary of not less than one year nor more than three years, and Section 12710, General Code, provides a fine of not less than five dollars, nor more than twenty dollars for failure to display certificate of registration as required by law.

In addition to the general jurisdiction given a justice of the peace by the provisions of Section 13422, General Code, certain statutes specifically give such a magistrate final jurisdiction in certain classes of cases. By the provisions of Section 13423, General Code, a large number of offenses are specified over which justices of the peace, police judges, and mayors are given final jurisdiction. This section provides in part as follows:

"Justices of the peace * * * shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to.

* * * * *

12. The conducting of a pharmacy, or retail drug or chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein.

* * * * *

Other sections of the General Code relating to the jurisdiction of justices of the peace, are Sections 13432, 13506, 13510 and 13511. These sections read as follows:

"Sec. 13432. In prosecutions before a justice of the peace, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

"Sec. 13506. When the officer holding the warrant arrests the accused, he shall take him before the proper magistrate, and, having indorsed and signed a proper return on the warrant, shall deliver it to the magistrate."

"Sec. 13510. When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured and pleads guilty thereto, such magistrate shall sentence him to such punishment as he may deem proper, according to law, and order the payment of costs. If the complaint is not made by the party injured, and the accused pleads guilty, the

magistrate shall require the accused to enter into a recognizance to appear at the proper court as is provided when there is no plea of guilty."

"Sec. 13511. When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

An examination of the legislative history of these various sections shows that in an act contained in 66 O. L. 287, a code of criminal procedure was adopted. Section 30 of that Act (now 13506, *supra*), required that any person arrested under a warrant for any crime should be taken by the officer before the proper magistrate.

Section 34 of that Act (now Section 13510, *supra*), provided that when any person was thus brought before a magistrate *accused of a misdemeanor on the complaint of the party injured* and should plead guilty to the charge the magistrate might, at his discretion, sentence the person to such punishment as he might deem proper within the limits of the provision defining the offense and order the payment of costs, or require him to enter into a recognizance to appear at the proper court for trial.

This section also provided that if the arrest was on the complaint by anyone other than the party injured the defendant should be recognized to so appear.

Section 35 of that Act (now a part of Section 13511, *supra*), provided that when the accused was brought before the magistrate and there was no plea of guilty, the magistrate should, in the presence of the accused, inquire into the complaint and recognize the defendant for appearance before the proper court if he found sufficient cause.

In an act contained in 82 O. L. 149, the further provisions now contained in Section 13511, *supra*, were added to the effect that if the offense charged was a misdemeanor and the accused in writing subscribed by him and filed before or during the examination waived a jury and submitted to be tried by the magistrate, then the magistrate might render final judgment.

By an act passed April 2, 1889 (86 O. L. 171), the provisions of Section 13510, *supra*, were amended and it was made mandatory upon the justice of the peace when the accused was charged with a misdemeanor and complaint was filed by the party injured, upon a plea of guilty to sentence him and the alternative permitting the justice in that case to recognize the defendant to another court was removed.

In an act passed April 14, 1884 (81 O. L. 181) supplemental Section 3718a, Revised Statutes, was adopted giving justices of the peace jurisdiction to hear any prosecution under the laws for the prevention of cruelty to animals, and the employment of "or cruelty to children." This was the beginning of what is now Section 13423, General Code. In the same act provision was made for the trial and it was provided that when imprisonment was a part of the punishment if a trial by jury was not waived the magistrate was required to impanel a jury for the trial of the case. Provision was made for the impaneling of the jury and these provisions now appear in the General Code as Sections 13432, et seq.

By subsequent amendments various other offenses have been added to Section 13423 so that it covers sixteen different classes of offenses.

From the legislative history above outlined it seems clear that in all cases involving the kinds of offenses other than felonies specified in Section 13423, *supra*, the justice of the peace does have final jurisdiction and can hear and determine the case without

a jury if the penalty be only a fine and with a jury if imprisonment be part of the penalty, and that the provisions of Sections 13510 and 13511, supra, have no application to cases enumerated in Section 13423.

In the case of *State of Ohio vs. Peters*, 67 O. S. 494, the final jurisdiction of the court in cases brought under what is now Section 13423, General Code, was recognized. In that case the court said:

"Construing together revised statutes Sections 1824 and 3718a, as amended April 3, 1888, so as to give effect to all the language in these sections, we are of the opinion that the true intent and meaning of the two sections is that the mayor or police judge of any city or village shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is entitled by the constitution to a trial by jury, and his jurisdiction in such cases shall be co-extensive with the county, except that in cases of violation of the laws to prevent adulteration of food and drink, the adulteration and deception in sale of dairy products, and drugs, and medicines, and any violation of the law for prevention of cruelty to animals, or under Section 6984, revised statutes, or Section 6984a thereof, as enacted in Section 3718a, revised statutes, his jurisdiction shall be only as to offenses committed within his city or village."

The distinction which the court was making here was as to the extent of the territory covered by the jurisdiction of a mayor or police judge and the distinction was necessary because Section 13423, supra, provides that:

"Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to: (then follows the list of cases in which the jurisdiction is conferred).

The court, however, did recognize that the jurisdiction there conferred was *final*. In the case of *Simmons vs. State of Ohio*, 75 O. S. 346, the first syllabus is as follows:

"In a prosecution under Section 3718a revised statutes, upon a plea of not guilty, before the justice can acquire jurisdiction to hear the complaint and render final judgment in the case without the intervention of the jury, the accused must waive his right to a jury trial."

The court thus recognized that the provisions of Section 13432, General Code, applied to prosecutions under Section 13423, supra, and that such prosecutions were not controlled by Sections 13510 and 13511 above quoted.

The distinction between cases filed under Section 13423, General Code, and other cases brought before the magistrate was recognized and pointed out by the Circuit Court of Lake County, Ohio, in the case of *Martindale vs. The State of Ohio*, 2 O. C. C. 2. As stated above, Section 13423 coupled with Sections 13432, et seq., were originally Section 3718 of the Revised Statutes. Section 13511 was originally Section 7147 Revised Statutes.

In this case the Circuit Court said that Sections 7147 and 3718a of the Revised Statutes were *not in pari materia*. The case was a prosecution for cruelty to animals brought under Section 3718a R. S. (now Section 13423, General Code), and the court said:

"But the prosecution in the present case is under a special statute, which gives the justice jurisdiction, not to examine into the offense, but to hear the

prosecution' and, 'if a trial by jury be not waived, said justice shall proceed to impanel a jury. * * * This was a prosecution and not merely an examination."

The court specifically points out that provisions which are now Sections 13432, et seq., apply to such a prosecution and that the justice had final jurisdiction to hear and determine the cases with or without a jury, depending upon whether imprisonment was a part of the penalty.

It will be noted that all the offenses denounced in the sections of the General Code enumerated in Section 1313, supra, with the exception of Section 12709, the provisions of which sections it is the duty of the state board of pharmacy to cause to be enforced, are misdemeanors.

It is a well established principle that in misdemeanor cases where imprisonment is not a part of the punishment, unless the law provides a trial by jury the right to be so tried is not given the accused, and his demand may be refused. To this effect see *Ames vs. State*, 11 O. N. P. (N. S.) 385; *Kubach vs. State*, 2 O. C. C. (N. S.) 133, and *Inwood vs. State*, 42 O. S. 186; *State vs. Smith*, 69 O. S. 196.

Therefore, in all violations of law which it is the duty of the state board of pharmacy to prosecute, except for a violation of Section 12709, a justice of the peace, by the provisions of Section 13423, supra, is given final jurisdiction. By that I mean, the authority to try the defendant on the charge made against him, and to impose a penalty or acquit him, and not the mere authority to inquire into whether an offense has been committed, and discharge the defendant or bind him over to another court. Under Section 13423, supra, the justice of the peace is not an examining magistrate. He is a trial court.

The question you present is what, if any, effect the decision in the case of *Tumey vs The State of Ohio* has in these classes of cases?

As regards a violation of Section 12709 the decision in the *Tumey* case has no effect. The crime therein defined, the penalty for which may be imprisonment in the penitentiary, is a felony. In such a case the justice of the peace can only act as an examining magistrate and if it appear that an offense has been committed and that there is probable cause to believe the accused guilty, bind the accused over to the proper court. Opinion No. 174, dated March 11, 1927, Opinions of the Attorney General for 1927, answers your inquiry as to this section of the General Code. The syllabus of this opinion reads:

"Recent decision of the United States Supreme Court does not affect jurisdiction or eligibility of a justice of the peace as an examining magistrate."

The following language is used in said opinion:

"The decision of the Supreme Court of the United States in the case of *Ed. Tumey vs. The State of Ohio*, No. 527, on the October Term 1926 Docket in no way affects the eligibility of a justice of the peace as an examining magistrate. In other words, the power of justices of the peace throughout the state of Ohio to bind accused persons over to the grand jury is in no way affected by said decision."

Regarding a prosecution for violation of any of the other sections enumerated in Section 1313, supra, your attention is directed to Section 13499 of the General Code, which provides:

"When the offense charged is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers the complainant irresponsible, may require that he procure a person to become liable for the costs if the complaint be dismissed, and the complainant or

other person shall acknowledge himself so liable and such magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman, or police officer, when in the discharge of his official duty."

By the provisions of this section a justice of the peace may require the complainant, unless he be a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, in the discharge of his official duties, to secure the costs in the event the accused be found not guilty. By requiring complainant to secure the costs it cannot then be said that the magistrate has such a pecuniary interest in the outcome of the case as would disqualify him from hearing and determining the cause.

It is therefore my opinion that if the justice of the peace, in compliance with the provisions of Section 13499, supra, requires the complainant to secure the costs, in the event the complaint be dismissed, the decision in the case of *Tumey vs. State of Ohio* has no application or effect.

If the justice of the peace does not require the complainant to secure the costs, as above stated, or if the affidavit is filed by a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer in the discharge of his official duty, no provision is made by law whereby the magistrate may recover fees and costs if the complaint be dismissed. Only upon a finding of guilty can the costs be taxed against the defendant. It follows, therefore, that under these circumstances the justice of the peace has a direct, personal, pecuniary interest in the outcome of the case. Only if he finds a defendant guilty may he tax the fees and costs. A defendant may properly raise an objection to his qualification to hear and determine the cause because of his interest in the outcome of the case.

It is my opinion, therefore, that if, under such circumstances, such an objection be made to the qualification of the justice of the peace to hear and determine the cause such an objection should be sustained. To overrule such an objection duly and seasonably made would come squarely within the decision of the case of *Tumey vs The State of Ohio*. If such an objection be so raised the complaint should be withdrawn and filed in a proper court where such an objection could not be made. However, if defendant, fails to raise such an objection to the disqualification of the magistrate, he in effect waives any such right to object that he might have had and thereby submits himself to the judgment of the court, and in such event the justice of the peace may hear and determine the cause and render final judgment.

Summarizing, it is my opinion that for a violation of Section 12709, General Code, the status of a justice of the peace is not affected by the decision in the *Tumey* case. Neither is his status affected in the event the justice of the peace, as provided by Section 13499, requires complainant to secure the costs in the event the complaint be dismissed. But if no security for costs is provided, and defendant raises an objection to the justice of the peace hearing and determining the cause because of any disqualification on the ground of his interest in the outcome, such an objection would be well taken and the complaint should be withdrawn and filed in a proper court where such an objection would not lie.

In the event the defendant raises no objection to the justice of the peace hearing and determining the cause, or if he voluntarily pleads guilty, then the justice of the peace may render final judgment and the *Tumey* case has no application.

Respectfully,

EDWARD C. TURNER,

Attorney General.