for the last half of the year 1926, amounting to $3.08, and taxes for the year 1927, then undetermined as to amount. Since this time the taxes for the year 1928, undetermined as to amount, have become a lien upon said premises.

Inasmuch as, for the reasons hereinafter stated, the deed submitted with said abstract is disapproved and a new deed will have to be executed by said E. W. Long and wife, it is suggested you call upon said E. W. Long to furnish you an additional abstract of the title to said premises from July 2, 1927, down to date, which will be submitted to this department for examination and approval.

An examination of the warranty deed executed by said E. W. Long and Alberta B. Long, his wife, shows that the same is made to "The Division of Highways of the State of Ohio," as the named grantee therein. This form of deed is incorrect and the deed should be made to "The State of Ohio," its successors and assigns forever, without addition or qualification of any sort.

The encumbrance estimate and certificate of the action of the Controlling Board with respect to the purchase of the above described property are in proper form and the same, together with said abstract, deed and other files, are herewith returned.

When you receive the corrected deed and additional abstract above requested, you will please again submit the corrected abstract, deed and other files to this department for approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2065.

MORTGAGE AND NOTE—GIVEN TO SECURE FINE—MORTGAGEE ESTOPPED FROM DENYING VALIDITY.

SYLLABUS:

1. *Where a defendant in a criminal case has been found guilty and sentenced to pay a fine, and such defendant executes a note and mortgage to secure such fine, if the collection of the fine were postponed, and the benefit thereof accrued to one bound to pay the fine or go to jail in lieu of payment, such note and mortgage would be enforcible, on the ground that those signing such note and mortgage, after securing the benefits thereof, were estopped from denying the validity of the note and mortgage given by them, even though it should be held that a magistrate is without authority to accept security of this nature to secure the payment of a fine.*

2. *Opinion No.* 1349, *dated December* 12, 1927, *considered and discussed in light of opinion of the Court of Appeals of the Third Appellate District in the case of Williams, Mayor,* vs. *Shiveley,* 22 O. App. 52.

COLUMBUS, OHIO, May 7, 1928.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

> "The Court of Common Pleas, Pike County, Ohio, assessed a fine of three hundred ($300.00) dollars and costs against a person upon a plea of guilty, for possessing articles designed to be used in the illegal manufacture of intoxicating liquors.

The Clerk of Courts took from the defendant his promissory note in the sum of three hundred six and 40/100 ($306.40) dollars, which includes fine and costs and took a mortgage on some real estate in the name of the State of Ohio, to secure the payment of the note.

In view of the case of *Williams, Mayor,* vs. *Shively,* 22 O. App. 52, are the note and mortgage valid, and can they be collected?

I note your Opinion No. 1349, rendered December 12, 1927."

Section 13717, General Code, provides:

"When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of one dollar and a half per day for each day's imprisonment."

This section was construed in Opinion No. 1349, rendered to you under date of December 12, 1927, the syllabus of which reads:

"1. Magistrate is authorized to take either chattels or choses in action, including a mortgage, as security for the payment of a fine and costs. In case of default of payment of fine, mayor has right to sell chattels and foreclose mortgage.

2. Where security for fine and costs fails, execution may be levied upon the property of the defendant, or, in default thereof, upon the body of the defendant."

You call my attention to the case of *Williams, Mayor,* vs. *Shiveley,* 22 Ohio App. 52, the headnote of which reads as follows:

"1. In suit on note it is a good defense that note was taken by mayor of municipality, as substitute for fine in criminal case.

2. Allegation in answer that signature to note sued on was obtained by fraudulently representing that it was bond requiring principal to remain constructively in charge of court held good as against demurrer."

The issues in this case, as stated in the opinion of the court, were as follows:

"E. E. Williams filed his petition in the Common Pleas alleging that he is the mayor of the village of West Union and is the owner and holder of a promissory note of which the following is a copy:

'$520.00

West Union, Ohio, December 9, 1924.

Ten days after date we or either of us promise to pay to E. E. Williams, mayor of West Union, Ohio, for the benefit of the State of Ohio and West Union, the sum of five hundred and twenty dollars for value received.

Henry Shiveley,
Sarah Shiveley.'

It is averred that there are credits on the note in the amount of $120, and that there is due and unpaid from defendants the sum of $400, with interest, for which the plaintiff asks judgment.

Sarah Shiveley filed an answer setting up among other matters these two defenses:

'First defense: That the note herein sued on represents a fine imposed by said E. E. Williams as mayor of the incorporated village of West Union, Ohio, upon the codefendant, Henry Shiveley, upon his conviction before said mayor for the violation of a state law, that there was no other consideration for the giving of said note, and that said mayor had no authority or power to exact said note and that it is void.

Second defense: That the signature of this answering defendant to said note was obtained by fraudulently representing that it was a bond requiring the defendant, Henry Shiveley, to remain constructively in charge of the court, and for no other purpose.'

The plaintiff filed a demurrer 'to the first and second grounds of defense in the answer, for the reason that the same do not state facts sufficient to constitute a defense.' The court, finding this demurrer not well taken, overruled same 'as to each of said defenses Nos. 1 and 2,' to which ruling and finding as to each of said defenses plaintiff excepted and asked that 'his exception be entered of record.' Judgment was thereupon entered in favor of Sarah Shiveley, and to that judgment error is prosecuted to this court."

You will note that the judgment in this case was rendered upon the pleadings, that is, the Court of Appeals affirmed the judgment of the Court of Common Pleas in overruling the demurrer to the answer filed in said cause. In other words, the Court held that an answer, such as was filed in the instant case, was "good as against the demurrer." In this connection, Judge Mauck, speaking for the Court said:

"The demurrer in this case admits that the note is a substitute for the judgment in the criminal case. No statute gives the mayor authority to substitute a note for a judgment. If a mayor can substitute a note with good security for a judgment he can likewise substitute one with insufficient or no security. He could under such a state of the law surrender, for a simple promise to pay, a judgment behind which stands the power to imprison for nonpayment. It would be equivalent to an exercise of the pardoning power. It was early held in this state that a public officer has no power to change the form of credit owing to a public body unless some statute authorizes him so to do. *Hunter* vs. *Field,* 20 Ohio St. 340."

As above pointed out, the case was decided upon the pleadings. That the note and mortgage might (in so far as the first defense was concerned) have been collected, had a reply been filed and trial had on the merits, is indicated by the language of the court underscored in the following excerpt from the opinion:

"The first of these defenses is somewhat obscure. The defense is that the note sued on 'represents a fine imposed' by the mayor of the village of West Union upon another defendant in the case 'for violation of a state law.' We take it that this plea that the note represents the fine means that the judgment in the criminal case referred to was deemed paid by the giving of the note. If the note represents the fine it must be that the note takes the place of the fine. *It might be, if the collection of a fine were postponed, and the*

benefit thereof accrued to one bound to pay the fine or go to jail in lieu of payment, that a contract to pay the fine might be enforcible on the ground that those signing the contract, after securing the benefits thereof, were estopped from denying the validity of the agreement. That is not the case pleaded here, however." (Italics the writer's.)

Moreover, you will note from the opinion that it was pleaded that the note sued on "represented" a fine imposed, and the entire discussion proceeds on the theory that an attempt had been made to *substitute* a note and mortgage for the fine and not merely to secure the payment of the fine. Section 13717, supra, was not referred to in the opinion and the meaning of the words of that section, "are secured to be paid," was not determined.

While it is true that the opinion would seem to indicate that the views of this department, as set forth in Opinion No. 1349, with reference to the legality of accepting security other than a bond to secure the payment of a fine, were not correct, yet that question was not specifically passed upon or decided. In either event however, that is, whether or not it is lawful for a magistrate to permit a fine to be secured by the giving of a note or mortgage, or in any way other than the taking of a recognizance, as indicated by Judge Mauck if the collection of a fine were postponed, and the benefit thereof accrued to one bound to pay the fine or go to jail in lieu of payment, the note and mortgage would be collectible on the ground that those signing the same, after securing the benefits thereof, were estopped from denying the validity of such instruments.

You ask in your letter:

"In view of the case of *Williams, Mayor,* vs. *Shiveley,* 22 O. App. 52, are the note and mortgage valid, and can they be collected?"

Whether or not the note and mortgage given under the circumstances described in your letter are valid legal obligations, of course depends upon the power of a magistrate to take security of this nature. The views of this department on this question were set forth in Opinion No. 1349. And, as hereinbefore stated, while the opinion of the Court of Appeals in the Shiveley case would seem to indicate a contrary view, yet the question passed upon by the court in that case was different from the question presented to this department for determination in the opinion referred to. It is, of course, unnecessary to say that the opinion of the Court of Appeals of the Third Appellate District, in which Pike County is located, is binding authority in that district.

In answer to your second part of your question, viz., can a note and mortgage given under the circumstances described be collected, it is my opinion that, if the collection of the fine imposed were postponed, and the benefit thereof accrued to one bound to pay the fine or go to jail in lieu of payment, such note and mortgage would be enforcible, on the ground that those signing the same, after securing the benefits thereof, were estopped from denying the validity of the note and mortgage by them executed and delivered, even though it were to be held that a magistrate was without authority to take such note and mortgage.

Respectfully,
EDWARD C. TURNER,
Attorney General.