

Delivering them to anyone in charge of his office for the time being, with the intent of their being filed with him is no doubt sufficient.

At any rate, the president of the county board of education is not the board. He is no more than a member of the board except that as president, he presides at the sessions of the board. He is not charged by law with the custody of the records of the board or of the papers and documents belonging to the board. Delivery to the president or any member of the board when he is not in the office of the board or its secretary is not, in my opinion, a "filing" with the board. The authorities seem clear on this point.

Inasmuch as the remonstrance to which you refer in your inquiry, did not reach the office where it should have been filed, until after the expiration of the thirty day period allowed by law for its filing, I am of the opinion that it is of no effect whatever, and that the transfer of territory under Section 4692, General Code, otherwise regular, becomes effective at the end of the thirty day period allowed by law for the filing of the remonstrance, even though a remonstrance with sufficient signatures had been delivered to the president of the board of education at his residence within the thirty day period, if he failed to deliver it to the secretary of the board or to the office of the board before the thirty day period expired.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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3019.

JUROR—ENTITLED TO MILEAGE AND FEES IN TRIAL BEFORE JUSTICE OF PEACE WHO HAS FINAL JURISDICTION AND ACCUSED DEMANDS JURY TRIAL.

*SYLLABUS:*

*Where a person is tried before a justice of the peace for an offense of which the justice of peace has final jurisdiction and the accused demands a jury trial under the provisions of section 13443, General Code, the jurors are entitled to the same mileage and fees as in criminal cases in a Court of Common Pleas, which are payable from the county treasury.*

COLUMBUS, OHIO, August 10, 1934.

HON. JACOB E. DAVIS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication which reads as follows:

"Will you please give us your opinion upon the following facts and questions:

Mr. A. executed and filed an affidavit in a Justice of the Peace Court in and for Scioto Township, Pike County, Ohio, charging Mr. B. with a violation of Section 13,376, General Code of Ohio, which said statute is known as the cruelty to animals statute. Mr. B. was arrested upon a warrant issued by said Justice of the Peace court and entered

a plea of not guilty to the crime charged in the affidavit. Mr. B. agreed to submit himself for trial upon the affidavit in said Justice of the Peace Court but demanded a trial by jury by virtue of Section 13,443 of the General Code of Ohio (115 Ohio Laws Page 78). A jury was drawn in the manner prescribed by law for the selection of jurors and was served by the sheriff of Pike County, Ohio.

Said affidavit was filed and the prosecution begun at the sole instance of the prosecuting witness, Mr. A., and without the knowledge or consent of the State of Ohio. The Prosecuting Attorney has nothing whatsoever to do with the prosecution of this misdemeanor case in said Justice of the Peace Court and the prosecuting witness is represented therein by private counsel.

Question: How, when and by whom is this jury paid for its services?

Question: What are the proper jury fees for said jurors including per diem and mileage allowances?

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Section 13376, General Code, referred to in your letter, reads in part as follows:

"Whoever overworks, overdrives, overloads, tortures, deprives of necessary sustenance, unnecessarily or cruelly beats, needlessly mutilates or kills, impounds or confines an animals \* \* \* shall be fined not less than two dollars nor more than two hundred dollars for the first offense, and for each subsequent offense such person shall be fined not less than ten dollars nor more than two hundred dollars or imprisoned not more than sixty days or both. \* \* \*"

I assume that the offense in question was a first offense, and hence the accused would only be liable to a fine under the provisions of section 13376, General Code, supra. It is well established that where the penalty imposed by criminal statute is merely a fine the right of trial by jury, as guaranteed by the Constitution, does not apply. *Inwood vs. State*, 42 O. S. 186; *State vs. Smith*, 69 O. S. 196; *State vs. Berhm*, 72 O. S. 358; *Hoffrichter vs. State*, 102 O. S. 65. Prior to 1933, the accused in the instant case would not have been entitled to a trial by jury. However, last year the legislature enacted section 13443, General Code (115 O. L. 78). This section reads as follows:

"At any trial, in any court, for the violation of any statute of the state of Ohio, or of any ordinance of any municipality, except in cases where the penalty involved does not exceed a fine of fifty dollars, the accused shall be entitled to be tried by a jury drawn in the manner prescribed by law for the selection of jurors."

Consequently, by virtue of the above section, the accused had the right to demand a jury trial. In your letter you state that a jury was drawn and you inquire into the procedure of paying such jury for their services. The method of selecting a jury before a justice of the peace is covered by sections 13424-1, et seq., General Code. Sections 13424-1, 13424-2 and 13424-6, General Code, which are pertinent to your present inquiry, read as follows:

Sec. 13424-1. "In prosecutions before a magistrate, when imprisonment is a part of the punishment, if a trial by jury is demanded, 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. Failure to demand a jury as in this section provided, shall be deemed a waiver of the same."

Sec. 13424-2. "Thereupon the clerk shall draw from the jury wheel containing the names of persons selected to serve as petit jurors in the court of common pleas in such county, twenty names which shall be drawn and counted in a like manner as for jurors in the court of common pleas. The clerk shall forthwith certify the names so drawn, to the magistrate, who, thereupon shall issue to any constable, chief of police or marshal in the county, a venire containing the names of the persons to serve as jurors in the case and make due return thereof."

Sec. 13424-6. "In such prosecutions, the jurors shall be entitled to the same mileage and fees as in criminal cases in the court of common pleas, and they shall be paid from the county treasury upon the certificate of the court."

It is to be noticed that the above statutes make use of the expression "when imprisonment is a part of the punishment." Sections 13424-1, et seq., General Code, were not amended when the legislature enacted section 13443, General Code, supra.

The questions propounded in your letter raise the simple proposition of whether or not sections 13424-1, et seq., General Code, are applicable to a situation where the punishment is not imprisonment but rather a fine which exceeds fifty dollars and the accused demands a jury trial. If these sections are not applicable to the present case, there would be no possible way to secure a jury in those cases where a jury trial is now granted by virtue of the provisions of section 13443, General Code, supra.

In an opinion to be found in Opinions of the Attorney General for 1933, Volume II, page 1529, it was held as disclosed by the syllabus:

"By virtue of the express provisions of section 11419-39, General Code, the so-called Jury Code does not provide the manner of drawing jurors before magistrates' courts. In criminal cases in which the magistrate has final jurisdiction, the jury is selected in accordance with sections 13424-1, et seq., General Code."

To hold that sections 13424-1, et seq., General Code, are not applicable to the present question would be to nullify the effect of section 13443, General Code. Consequently, the right of trial by jury in cases where the fine is in excess of fifty dollars (\$50.00) would not apply and the legislature would have enacted a vain piece of legislation. While it is true section 13424-1 makes use of the expression "when imprisonment is a part of the punishment," nevertheless the language of the entire section, as well as that of succeeding sections, would indicate the legislature intended that these sections apply to all those cases where the justice of the peace has final jurisdiction and the accused has the right to demand a jury trial.

The polestar of all statutory construction is to determine the legislative intent and the conclusion herein stated seems in accord with the legislative intent.

Having reached this conclusion, it is obvious that your two inquiries are covered by section 13424-6, supra, which provides that the jurors shall be entitled to the same mileage and fees as in criminal cases in the Court of Common Pleas and which shall be paid from the county treasury upon the certificate of the court.

A more specific answer to your inquiries may not be given in view of the provisions of section 11419-43, General Code, which section refers to the fees and compensation of jurors in a Common Pleas Court. This section reads in part as follows:

“\* \* \* the compensation of each juror shall be fixed by order of the common pleas judge or judges of the county, not to exceed five dollars for each day's attendance, and in addition thereto, said juror shall be allowed three cents a mile for each mile travelled by said juror by the nearest route from said juror's place of residence to the county seat and return to home once per week, payable out of the county treasury.”

It is therefore my opinion, in specific answer to your inquiries, that where a person is tried before a justice of the peace for an offense of which the justice of peace has final jurisdiction and the accused demands a jury trial under the provisions of section 13443, General Code, the jurors are entitled to the same mileage and fees as in criminal cases in a Court of Common Pleas, which are payable from the county treasury.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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3020.

APPROVAL, NOTES OF UNION RURAL SCHOOL DISTRICT, CLERMONT COUNTY, OHIO—\$4,006.00.

COLUMBUS, OHIO, August 10, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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3021.

APPROVAL, BONDS OF EUCLID CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, August 10, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*