1655.

APPROVAL, REFUNDING BONDS OF JACKSON TOWNSHIP RURAL SCHOOL DISTRICT IN AMOUNT OF $2,100.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 17, 1920.

1656.

MISDEMEANORS—PUNISHABLE BY FINE ONLY, ACCUSED NOT ENTITLED TO TRIAL BY JURY—EXCEPTION—EFFECT OF WAIVER OF TRIAL BY JURY IN MISDEMEANOR CASE—WHEN SECTION 13432 G. C. IS AND IS NOT APPLICABLE IN CERTAIN CASES—WHEN AFFIDAVIT CONSTITUTES TORTURE—OFFICES, CONSTABLE AND HUMANE AGENT NOT INCOMPATIBLE—WHAT IS NECESSARY UNDER STATUTES BEFORE COSTS CAN BE CLAIMED UNDER SECTION 3019 G. C.—BILLIES, BADGES AND GUNS MAY NOT LEGALLY BE FURNISHED SPECIAL DEPUTY SHERIFFS APPOINTED AS GUARDS FOR PROPERTY OF PRIVATE CORPORATIONS.

1. *In a misdemeanor case punishable by a fine only, the accused is not entitled to a trial by jury unless the law specifically gives such right in such case.*

2. *An affidavit filed by one not the party injured, in a misdemeanor case under section* 13511 *G. C., when the accused in a writing filed before trial waives trial by jury and submits himself to be tried by the magistrate, will give the magistrate the right to hear and determine such case.*

3. *Section* 13432 *G. C. applies to other cases than those catalogued under section* 13423 *G. C. e. g.* 871-52*b*, 896-14, 5808, 5814, 1448 *and some others; but not to cases governed by sections* 13510 *and* 13511 *G. C.*

4. *Striking and kicking a person unlawfully is an assault and battery. If the affidavit alleges other acts, with a description of the effects of the acts alleged upon the person injured, it may constitute torture under section* 12428 *G. C. If the accused make no objection to the complaint, a magistrate is required to hear the case upon the law invoked in the affidavit.*

5. *Constable and humane agent or officer are offices not incompatible where a physical impossibility to perform the duties of each by one person is not apparent.*

6. *Before claiming costs under section* 3019 *G. C., the provisions of law for securing costs to be paid by the one against whom they are adjudged must be complied with. Where, after conviction the conditions of the parole omit to require the costs to be paid by the prisoner or such conditions of parole remit costs, the magistrate may not ask payment by the county of costs so remitted by him.*

7. *Billies, badges and guns to arm special deputy sheriffs appointed as guards for the property of private corporations in the county may not legally be furnished at the expense of the county. Of course, deputy sheriffs may be legally appointed for this work.*

COLUMBUS, OHIO, November 18, 1920.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter enclosing a form of an affidavit and of a judgment and parole. The letter is as follows:

"Kindly let us have your written opinion on the following proposition:

1. Is a defendant, in a misdemeanor case pending before a justice of the peace, entitled to a jury trial if imprisonment is no part of the penalty prescribed by law?

2. Does section 13511 G. C. give a justice of the peace any jurisdiction to impose a penalty if the injured party does not file the complaint even though the defendant waives a trial by jury?

3. Is section 13432 G. C. applicable to any cases except those enumerated in section 13423, and if so what other class of cases?

4. Does striking or kicking a wife come under the provision of section 12428, or is it simply assault and battery?

5. May a humane officer also be a constable, either by election or appointment?

6. May a justice of the peace and his constable legally collect fees from the county under section 13439 G. C., if he suspend sentence without making provision for the payment of costs or issuing execution for the same under the provisions of section 13718 G. C.? (See copy of suspended sentence herewith.)

7. May a justice of the peace and his constable legally collect fees from the county under section 13439 G. C., if he parole the prisoner under the provisions of section 13711 G. C., et seq., without making provision for the payment of costs or issuing execution therefor under the provisions of section 13718 G. C.? (See copy of entry herewith.)

The practice seems to be to depend entirely upon the county for the payment of such costs without making any effort to collect from the defendant.

The last two questions have reference to the law previous to the amendment of section 13439, effective May 20, 1920.

8. May a sheriff legally appoint deputies to be used by steel and other corporations in guarding their property, and furnish them with guns, badges and billies?"

"Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors."

(Section 12372 G. C.)

"Misdemeanors are those crimes punishable by fine or imprisonment in the county jail."

(*Picket* vs. *State*. 22 O. S., 405.)

Concerning the right of trial by jury in misdemeanor cases, in the syllabus in Inwood vs. State, 42 O. S., 186, is found the following:

"A statute, which authorizes a penalty by fine only, upon a summary conviction under a police regulation or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine is authorized, is not in conflict with the constitution, on the ground that no provision is made for a trial by jury in such cases."

Also, in Ames vs. State, 11 O. N. P. (N. S.) 385; 22 O. D. N. P. 92, the court says:

"In a case which involves a violation of a statute or of an ordinance, the penalty for which is only a fine, a jury is not an inalienable right of the accused, and it accordingly may be refused if the statute so provides."

Again, from the opinion in Kubach vs. State, 2 O. C. C. (N. S.) 133; 15 O. C. D. 488:

> "In cases of misdemeanors, where the acts complained of are not strictly criminal or infamous, and where imprisonment is not part of the punishment prescribed, the prosecution is not directly criminal but is only *quasi* criminal. In such cases defendants are not entitled to a jury trial, no information need be filed, and the trial should be had on the affidavit filed for the arrest of the defendant."

In Motor Truck Company vs. Dengenhart, 10 O. App., 100, the court says:

> "There can be no abridgment of the right of trial by jury in the constitutional courts, but in the inferior courts, which the legislature is authorized to create, there may be trials without jury at all or trials by jury of less than twelve."

Clearly, in a misdemeanor case 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.

In answering your second question, the following is quoted from Hanaghan vs. State, 51 O. S., 24:

> "The claim made under this section is, that a plea of guilty, filed by the accused, in writing, is, in effect, a waiver of a jury, and submission to be tried by the magistrate, within the purview of the section, and authorizes him to render final judgment. Sections 7146 and 7147 are consistent with each other. The former prescribes, specifically, the proceedings of the magistrate upon a plea of guilty, and the latter those where there is not such a plea. It is obvious, that if a plea of guilty were given the effect claimed for it under this section, the preceding section would be superseded, and its operation defeated; for then, in all cases of misdemeanor, whether the complaint was filed by the party injured or other person, the magistrate, upon such a plea, could render final judgment on the ground that the plea was a final submission of the case to him; while the last clause of section 7146, makes it the duty of the magistrate to require the accused to enter into a recognizance for his appearance before the proper court, in all cases of misdemeanor, notwithstanding his plea of guilty, unless the complaint against him was filed by the party injured. The accused might choose to enter such a plea, and be recognized to the proper court for trial, in order to avoid the expense and vexation of the examination, or for other cause deemed sufficient by him, but be unwilling to submit his case to the magistrate for final judgment. True, the plea may be used against him on the trial, but it is not conclusive evidence of his guilt. At all events, to authorize the magistrate to render final judgment under section 7147, the case before him must be one which comes within its terms; that is, the accused must in writing, subscribed by him, waive a jury and submit to be tried by the magistrate, which is essentially a different thing from a plea of guilty. Such a plea may dispense with the necessity of an examination into the truth of the complaint against the accused, but it does not take away his right of trial by jury. The statute has required his express waiver in writing to deprive him of that, and like other penal statutes, cannot be enlarged by construction. The magistrate therefore exceeded his authority when he passed sentence upon the plaintiff in error; he should have recognized him to the proper court for trial."

In the decision just quoted the affidvait was filed by one not the party injured, and to give the magistrate final jurisdiction, a waiver of a trial by jury and a submission to be tried by the magistrate, made in writing and filed with such magistrate, is a condition precedent to his final jurisdiction.

In State vs. Borham, 72 O. S., 358, the jurisdiction of the mayor, as given under section 4528 G. C., is distinguished from that of the justice of the peace in Hanaghan vs. State, supra. See also DeMuth vs. State ex rel., 7 O. App., 245, the last paragraph of the syllabus of which says:

> "A waiver of a jury trial in the prosecution of a misdemeanor before a mayor need not be in writing and a plea of guilty entered by the defendant in such prosecution amounts to such waiver."

The statutes herein referred to, especially 13510 and 13511 G. C., well illustrate the dual functions of justices of the peace, mayors and police judges. They act in certain matters as examining magistrates to dismiss the action or to require the accused to give bond for appearance in the proper court at the proper time, or be committed to jail in lieu thereof, to answer to the charges set out in the affidavit; in other matters they sit as judges and hear and determine the guilt or innocence of the accused, being by law given final jurisdiction therein or the right to acquire such jurisdiction by act of the accused. And, as has been before stated herein, a jury may or may not be had, depending upon the statutory provisions touching the case in hand. Sections 7146 and 7147 R. S., mentioned in Hanaghan vs. State, supra, now are sections 13510 and 13511 G. C.

Regarding your third question, the case of State ex rel., vs. Renz, 26 O. C. C. (N. S.) 391, is cited. This case overrules State vs. Pohlman, reported in 13 N. P. (N. S.) 254, and quoting section 13432, the court says:

> "'Sec. 13432. In prosecutions before a justice, 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.'
>
> The section above quoted does not bestow, nor does it purport to bestow, any jurisdiction upon justices of the peace, police judges or mayors, but simply provides the method of procedure for obtaining a jury in cases in which such magistrates have final jurisdiction. Unless, in the case under consideration, the justice of the peace has final jurisdiction, he has no occasion to require the services of a jury and no authority exists for causing the names of persons to serve as jurors to be drawn from the wheel; and by final jurisdiction, I mean, of course, 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. The final jurisdiction given by statute to justices of the peace in criminal cases is specifically set forth in other sections of the statutes, particularly sections 13423, 1153, 4414, 4416, 4417, 12519, 12520, General Code, and many others.. Under section 13423, General Code, a large number of offenses are named over which justices of the peace, police judges and mayors are given final jurisdiction, and in numerous other instances throughout the statutes these magistrates are given jurisdiction over additional offenses, but nowhere is such final jurisdiction given to a justice of the peace to try a defendant and impose a penalty in a case where the charge is under section 12475, General Code, unless the accused in writing duly waive a jury and

submit to be tried by the magistrate, as provided by section 13511, General Code.

It is perfectly clear, therefore, that section 13432, General Code, can only apply to a case where the officials therein named are given by appropriate statutory enactment final jurisdiction to try the accused, and that said section can have no application to a prosecution under section 12475, General Code. Manifestly the purpose of section 13432, General Code, was to make operative all the statutory provisions conferring final jurisdiction of offenses upon the officials named in the section, where imprisonment may be a part of the punishment, and the section can only relate to that character of cases."

Other sections not mentioned above are 871-52b, 896-14, 5808, 5814, 1448 and some others. Prosecutions under section 13432 G. C. are tried summarily and by jury. If imprisonment is a part of the punishment in such prosecutions, a jury must be waived to give the officials named therein final jurisdiction. Cases coming under sections 13510 and 13511 G. C. are not governed by section 13432 G. C. Section 13510 G. C. prescribes how cases may be disposed of upon a plea of guilty; section 13511 G. C., cases where there is no such plea. Under the latter section, if the case is a misdemeanor, waiver of a jury and submission to be tried by the magistrate, in writing, filed before or during the examination, gives the magistrate power to hear and determine such case whether imprisonment is or is not a part of the punishment.

Coming to your fourth question: In Martin vs. State, 11 O. N. P. (N. S.) 183, there was filed an affidavit which recited the following:

"That one ——— did unlawfully, wilfully and cruelly torture a certain person, ——— by beating and striking said person with a stick."

This affidavit was held to be insufficient, not charging an offense, because

"the means by which the suffering was inflicted were not averred, and they must be such as will enable the court to see that they resulted in torture as forbidden by the statute.

Certain particulars are set out in this affidavit, to-wit, 'beating and striking said person with a stick.' It cannot be said that these particulars charge or imply torture. The charge made in the affidavit nowhere describes the effect produced by the striking or beating, or that it caused unjustifiable pain or suffering."

The form of the affidavit which you submit with your letter is as follows:

"Before me, ———, one of the justices of the peace in and for said county, personally came M. C., who, being duly sworn according to law, deposeth and saith that on or about the 6th day of January, A. D., 1917, and from that date until June 11, 1917, at the county of ———, aforesaid, one H. C. being then and there the husband of her the said M. C., has wilfully and maliciously cruelly tormented and punished her the said M. C. by striking her with his fists, kicking her, driving her from her home with a knife and by continually calling her and their children vile and indecent names, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Ohio. And further, deponent saith not."

Depending upon the evidence, the facts stated in this affidavit will support a case either of assault and battery under section 12423 or of torture under section 12428 G. C.

In view of what is said in Martin vs. State, supra, it is believed that this affidavit is sufficient to state a cause of action under the torture section, and that it alleges facts that are sufficiently descriptive of distressing acts continued for so considerable a period of time to support an inquiry into the guilt of the accused as alleged in said affidavit, depending, of course, upon the facts and the evidence adduced at the trial as to whether or not the accused is guilty of inflicting torture.

The offices of humane agent or officer and constable are neither one a check upon the other, nor is the one subordinate to the other, and the same person may exercise all of the functions of each and perform all of the duties required by each without conflict with the other. It may not always be physically possible for the same person to officiate in both capacities in the same community, and in a community where the duties of either office may make for such physical impossibility they should not of course be held by the same person. But such condition should be taken into consideration by the appointive power. In some instances it may be said that for one person to exercise both of these offices might make for efficiency in discharge of the duties of the same. However, they are not incompatible under the rule of law applied in such cases although in the appointment of the same person to act in both capacities the sound discretion of the appointive power should be exercised.

Your sixth and seventh questions may be answered together. The entry of judgment and parole which you furnish is as follows:

> "Thereupon the defendant was inquired of whether he had anything to say why the judgment of the law upon his said plea should not be pronounced upon him and having heard his statement it is the judgment of the law that he be committed to jail of this county and there confined for a period of thirty (30) days from and including this date and that he pay the costs of this prosecution taxed at ——— dollars, and that in default of the payment of said costs that he be further confined in said county jail, until at the rate of sixty cents per diem an amount equal to said costs shall accrue to his credit or he shall otherwise be legally discharged.
>
> On motion of the defendant and it being made to appear to the satisfaction of the court that the defendant has never been imprisoned for crime in this or any other state nor does the public good demand or require that he should suffer the penalty imposed by law, it is therefore by me considered and ordered that the defendant be and he hereby is paroled in the custody of ———, constable appointed probation officer in this case. The condition of defendant's parole is that he pay into the court each and every month the sum of twelve ($12.00) dollars for the support of said minor child.
>
> Failure on the part of the defendant to observe the term of his parole shall result in a forfeiture thereof and he shall be rearrested and dealt with in accordance with the law relating to parole."

Section 13711 G. C.:

> "When the sentence of the court or magistrate is that the defendant be imprisoned in a workhouse, jail, or other institution, except the penitentiary or the reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:

1. In case of sentence to a workhouse, jail or other correctional institution, the court or magistrate may suspend the execution of the sentence and direct that such suspension continue for some time, not exceeding two years, and upon such terms and conditions, as it shall determine;

2. In case of a judgment of imprisonment until a fine is paid, the court may direct that the execution of the sentence be suspended on such terms as it may determine and shall place the defendant on probation to the end that said defendant may be given the opportunity to pay such fine within a reasonable time; provided, that upon payment of such fine, judgment shall be satisfied and the probation cease."

Sections 3016 G. C., et seq., provide for payment of costs in misdemeanor cases. From Opinions of the Attorney General, 1918, Vol, I, page 300, it is quoted:

"It has frequently been held by this department that in misdemeanor cases, before officers may be allowed fees under section 3019, there must be, first, a conviction and, second, the defendant must prove insolvent. This is the view recently taken by the common pleas court of Carroll county in an opinion rendered December 3, 1917, in the case of State ex rel. vs. Marshall, Auditor."

No provision of law which specifically directs a different procedure as to the payment of costs in a case where the court exercises its authority to parole the prisoner is to be found, and it is believed none exists.

Section 13,173 G. C. provides for the costs due the probation officer in charge of the paroled prisoner. In the case presented by you the punishment adjudged is confinement in the county jail for thirty days and until the costs in said case, at the rate of sixty cents per day, are paid. Thereupon, the court paroles the prisoner without making provision for the payment of his costs a condition of the parole. Surely the court intended to, and did impliedly, remit such costs, and the payment of them by the county should be refused because, by reason of his own act, the justice has estopped himself from securing payment of them from the prisoner. In good conscience he should not be afterwards found claiming such costs.

In rendering a judgment exercising the parole powers given him under the law, a justice of the peace should carefully follow all of the provisions of the parole law. But in view of the indulgence with which courts of record look upon the act of the inferior tribunals, a faulty judgment, free from material as opposed to mere technical errors, will be excused or passed over.

While it is believed that the claiming of costs from the county in the case in hand is not, perhaps, illegal, yet in a strict sense and in the application of the rules of common honesty the same should not be asked by a court, who, being able, not only avoids but enters judgment against the collection of his costs from the prisoner in the conditions prescribed in his parole.

Touching the matter inquired about in your eighth question, it will be observed that section 2832 G. C. provides that the commissioners shall furnish the sheriff with office furniture, etc., and section 2997 G. C. provides for the payment of certain other expenses of the sheriff, but the personal equipment of deputies is not among the expenses named therein. No law can be found specifically applying to your question, and it is believed that there is no law permitting deputies created for the express purpose of guarding property of steel and other corporations to be furnished at the county expense, with guns, badges and billies, and therefore this

question is answered in the negative. Of course, deputy sheriffs may be legally appointed to perform this duty.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1657.

APPROVAL, BONDS OF SPRINGFIELD CITY SCHOOL DISTRICT IN AMOUNT OF $90,000 FOR ERECTING NEW BUILDINGS.

COLUMBUS, OHIO, November 18, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1658.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT, PORTAGE COUNTY, OHIO.

COLUMBUS, OHIO, November 22, 1920.

HON. A. A. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

1659.

APPROVAL, BONDS OF WEST LIBERTY VILLAGE SCHOOL DISTRICT IN AMOUNT OF $75,000.

COLUMBUS, OHIO, November 22, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1660.

APPROVAL, BONDS OF GRANDVIEW HEIGHTS VILLAGE SCHOOL DISTRICT, IN AMOUNT OF $20,000.

COLUMBUS, OHIO, November 23, 1920.

Industrial Commission of Ohio, Columbus, Ohio.