changed, contains not less than three and one-half per cent of milk fats and twelve per cent solids.

2. The only offenses provided in Section 12719 of the General Code are for selling or offering for sale, etc., milk from which the cream, or part thereof, has been removed when the same contains less than three and one-half per cent of milk fats and less than twelve per cent total solids: or when the container of such milk is not properly labeled as required by said section.

In view of these conclusions in specific answer to your first inquiry, you are advised that Section 12719, supra, undertakes to require a distributer, who mixes milk when some of same which becomes a part of the mixture contains more fat content than that to which it is added, to label the same "standardized milk" and further designate on the label the fat content of the milk which is the result of said mixture. However, there is no penalty provided for one who does not comply with said requirement.

In answer to your second inquiry, you are advised that the penalty provisions of the first paragraph of Section 12719, supra, do not apply to the second paragraph of said section. In order words, one failing to comply with the provisions of the second paragraph of said section may not be prosecuted under said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3115.

JURISDICTION—JUSTICE OF PEACE, PROBATE AND COMMON PLEAS COURT—MISDEMEANORS AND FELONIES—INDICTMENT NECESSARY—EXCEPTION—EFFECT OF TUMEY CASE DISCUSSED.

SYLLABUS:

1. *Courts of Common Pleas do not have jurisdiction in misdemeanor cases unless indictments are first procured by a grand jury, excepting in those instances wherein the Legislature has specifically given jurisdiction to said courts to try criminal cases upon affidavits.*

2. *In cases of felony a Justice has jurisdiction only as an examining magistrate, and such jurisdiction is not affected by the Tumey decision.*

3. *A Justice of the Peace, or Mayor is without jurisdiction to render final judgment in misdemeanors even though such final jurisdiction is attempted to be conferred by statute, except in those instances wherein the costs may be, and properly are secured as provided in Section* 13499 *of the General Code, or in cases wherein the statutes provide for the payment of the magistrate's costs irrespective of the outcome of the case, as in prosecutions under Section* 1442 *of the General Code which relates to violations of the Fish and Game Laws. However, if the defendant desires to take advantage of the question of jurisdiction in such a case, such objections must be made at the time of, or before trial.*

4. *In other cases of misdemeanors, such as traffic law violation, a Justice is without jurisdiction to render a final judgment unless as provided in Section* 13511, *General Code, the defendant waives in writing the right of trial by jury and submits to be tried by said Justice. A Mayor of course has final jurisdiction in such cases within the limitations of the Tumey decision.*

5. *The Probate Court under the provisions of Sections* 13441 *et seq., has jurisdiction to hear such criminal cases as it has jurisdiction to try upon the filing of an information by the Prosecuting Attorney. Such Courts, however, have jurisdiction to hear cases arising under the Crabbe Act upon affidavit.*

COLUMBUS, OHIO, January 8, 1929.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Acknowledgement is made of your communication which reads:

> "This office is in some doubt as to whether misdemeanor cases, aside from violations of the Crabbe Act, viz., 6212-15, et seq., may be instituted in the Court of Common Pleas by filing an affidavit therein and heard directly by the Common Pleas Judge. This was the practice heretofore by this court, but we can find no authority in law for such procedure. This is especially true of charges of intoxication and kindred misdemeanors.
>
> Conversely, is it necessary to procure an indictment in this class of misdemeanors before they may be tried in the Common Pleas Court?
>
> You will readily understand that the Justice Courts in the rural counties deem themselves without authority to finally adjudicate this class of law infractions and are now binding all of these cases over to the grand jury, which has the effect of both clogging the grand jury work and also many cases, which should be disposed of summarily and against the defendant, are turned loose simply because it happens to be a minor case and the grand jury is unwilling to act in this class of cases.
>
> Further, since the Tumey decision, do you believe that a Justice of the Peace or Mayor, not on a salary basis, has final jurisdiction in such instances as traffic law violations, especially, or would such cases necessitate grand jury action? You may readily see that a grand jury is apt to ignore this class of cases, in many instances wherein the violator should be punished.
>
> I would be very pleased to learn your ideas along this line as it has been a source of constant worry to this office."

Section 1, Article IV, of the Ohio Constitution, as amended in 1912, mentions the Court of Common Pleas as being one of the courts in which the judicial power of the state is vested.

Section 4 of Article IV of the Ohio Constitution provides:

> "The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law."

It has been judicially determined that Courts of Common Pleas, in view of the provisions of the Constitution hereinbefore mentioned, have no jurisdiction excepting such as is fixed by statute. *Allen* vs. *Smith,* 84 O. S. 283. It therefore conclusively appears that the Common Pleas Court cannot legally take jurisdiction of a criminal case excepting in pursuance of specific statutory authority fixing such jurisdiction.

In prosecutions under the Crabbe Act, viz., Sections 6212-15, et seq., the Court of Common Pleas has jurisdiction to hear and determine a case instituted by the filing of an affidavit because of the specific provision of Section 6212-17f and Section 6212-18, General Code.

With the exception above noted, the Court of Common Pleas does not have jurisdiction to try misdemeanor cases except upon an indictment returned by a duly constituted grand jury.

Section 13425, General Code, which relates to the jurisdiction of courts of Common Pleas in criminal proceedings, provides:

> "The Court of Common Pleas shall have original jurisdiction of all crimes and offenses, except in cases of minor offenses, the exclusive jurisdiction of which is vested in justices of the peace or in other courts inferior to the common pleas. In all criminal cases where a person is indicted and tried in the court of common pleas for an offense properly cognizable therein and found guilty of a minor offense embraced within the terms of the indictment, the jury shall so return in their verdict and the court shall thereupon proceed to pass the sentence prescribed by law in such case."

In this connection, it may be noted that Section 10 of Article 1 of the Ohio Constitution, among other things, provides in substance that felonies generally may not be prosecuted except in pursuance of a presentment or indictment of a grand jury. Said constitutional provision expressly excepts from such provision offenses for which the penalty is less than imprisonment in the penitentiary. In other words, it is not essential that indictments be procured in the case of misdemeanors, in those instances of course where specific statutory provision is made for the institution of such prosecution upon affidavits. However, as heretofore indicated, the Court of Common Pleas has jurisdiction in criminal cases as provided by statute and in cases where it has not otherwise been specifically authorized the jurisdiction in cases of misdemeanors depends upon an indictment having been procured from the grand jury. Section 13559, General Code, which relates to the duties of the grand jury, provides:

> "After the charge of the court, the grand jury shall retire, with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county in and for which it was impaneled and sworn."

This section clearly makes it the duty of the grand jury to render indictments for offenses found to have been committed within the county. Section 13575, General Code, relates to the procedure when indictments have been found, and, among other things, requires the court to assign such indictments for trial, etc. It therefore appearing that the statutes have specifically authorized the Court of Common Pleas to try misdemeanor cases when indictments are procured, it may try cases upon affidavit only when there is specific authority provided by statute.

You further inquire in reference to the jurisdiction of justices of the peace and mayors in view of the Tumey decision, especially with reference to final jurisdiction in instances such as traffic law violations. In this connection you are referred to an opinion of this department found in Opinions of the Attorney General for 1927, at page 672, in which the effect of the Tumey case is discussed. The offenses considered in that opinion were those arising under the violations of the pharmacy laws in which cases final jurisdiction is given to justices of the peace. The following is quoted from said opinion:

> "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 of 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."

It is believed that the foregoing will dispose of your inquiry in so far as the effect of the Tumey case is concerned. It may be further mentioned that in my opinion found in the Opinions of the Attorney General for 1927, at page 976 it is held:

"A justice of the peace is without jurisdiction to render a final judgment in cases involving a violation of Sections 7246, et seq., and 12603, et seq., General Code, unless as provided in Section 13511, General Code, the defendant in a writing subscribed by him waives the right of trial by jury and submits to be tried by said justice. If no such waiver be filed and a plea of not guilty be entered, the justice shall inquire into the complaint in the presence of the accused and if it appear that there is probable cause to believe the accused guilty, order the accused to enter into a recognizance to appear before a proper court of the county, viz., the probate court or the common pleas court. If no such waiver be filed and a plea of guilty be entered, the justice of the peace shall likewise bind the defendant over to the proper court."

In this connection you are referred to an opinion of this department found in Opinions of the Attorney General for 1927, at page 43, wherein it was pointed out that in prosecutions under Section 1442, General Code, which relates to the Fish and Game Law violations, the magistrates' costs are to be paid irrespective of the outcome of the case. The syllabus of said opinion reads:

"The decision of the Supreme Court of the United States in the case of *Tumey* vs. *State of Ohio,* decided March 7, 1927, does not affect the jurisdiction of a justice of the peace in prosecutions for violation of any provision of the laws relating to the protection, preservation or propagation of birds, fish, game and fur-bearing animals, so far as pecuniary interest is concerned. However, it must be borne in mind at all times that the defendant is entitled to a fair and impartial trial and pecuniary interest is not the only interest which will disqualify a magistrate."

Of course if there are similar provisions in other cases, the same rule would apply.

While mayors have final jurisdiction in misdemeanor cases, when not upon a salary they are limited by the Tumey decision in the same manner that justices are limited.

Based upon the foregoing citations and discussion, you are specifically advised that:

1. Courts of Common Pleas do not have jurisdiction in misdemeanor cases unless indictments are first returned by a grand jury, excepting in those instances wherein the Legislature has specifically given jurisdiction to said courts to try criminal cases upon affidavits.

2. In cases of felony a Justice has jurisdiction only as an examining magistrate, and such jurisdiction is not affected by the Tumey decision.

3. A Justice of the Peace, or Mayor is without jurisdiction to render final judgment in misdemeanors even though such final jurisdiction is attempted to be conferred by statute, except in those instances wherein the costs may be, and properly are secured as provided in Section 13499 of the General Code, or in cases wherein the statutes provide for the payment of the magistrate's costs irrespective of the outcome of the case, as in prosecutions under Section 1442 of the General Code which relates to violations of the Fish and Game Laws. However, if the defendant desires to take advantage of the question of jurisdiction in such a case, such objections must be made at the time of, or before trial.

4. In other cases of misdemeanors, such as traffic law violation, a Justice is without jurisdiction to render a final judgment unless as provided in Section 13511, General Code, the defendant waives in writing the right of trial by jury and submits to be tried by said Justice. A Mayor of course has final jurisdiction in such cases within the limitations of the Tumey decision.

5. The Probate Court under the provisions of Sections 13441 et seq., has jurisdiction to hear such criminal cases as it has jurisdiction to try upon the filing of an information by the Prosecuting Attorney. Such courts, however, have jurisdiction to hear cases arising under the Crabbe Act upon affidavit.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3116.

CORPORATION—FOREIGN—UNLAWFUL TO USE WORDS "BANKER" OR "BANKERS".

SYLLABUS:

It is unlawful for a foreign corporation to do business in this state where such corporation uses, as a part of its name or designation, the words "banker" or "bankers."

COLUMBUS, OHIO, January 8, 1929.

HON. E. H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

> "The provisions of Section 710-3 of the General Code of Ohio restrict the use of the word 'bank', 'banker' or 'banking' or 'trust' to banks as defined in Section 710-2 of the General Code of Ohio.
>
> Stockholders of a certain bank organized and existing under the laws of this state are desirous of incorporating a separate company, its purpose being to engage in the security business. Said stockholders are desirous of using the word 'bankers' as a part of the name of the contemplated company.