

covering this purchase which were passed upon in Opinion No. 218, dated March 22, 1927, and which you returned to this office with the above deed, are herewith returned.

Respectfully,

EDWARD C. TURNER,
Attorney General.

576.

BAIL BOND—FORFEITED BOND FOR OFFENSE CHARGED UNDER SECTION 13193-2, GENERAL CODE, SHOULD BE PAID INTO THE COUNTY TREASURY.

SYLLABUS:

Where a bail bond given by an accused charged with an offense under Section 13193-2, General Code, is forfeited and collected by the magistrate, the moneys so collected should be paid into the county treasury.

COLUMBUS, OHIO, June 6, 1927.

HON. W. D. LEACH, *Chief of Division, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your recent communication which reads:

“Some months ago we prosecuted a party in Mansfield for selling a mis-branded product known as ‘Covenant Oil.’ A copy of that affidavit is attached and was written from your office. The party when called in plead not guilty and was placed under \$500.00 bond. When day of trial came he did not show up and later bond was reduced to \$400.00 and forfeited. This action was before Mayor J. Earl Ports of Mansfield. Mayor Ports soon afterward returned to the County Auditor of that county the \$400.00 forfeited.

This office contends that this \$400.00 should come to the State of Ohio, to the Department of Agriculture. Will you kindly render this department your decision upon the same.”

The affidavit to which reference is made in the above communication was filed under the provisions of Section 13193-2, General Code, which reads:

“Whoever, with intent to sell, or in any wise dispose of merchandise, securities, service or anything offered by him, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, hand-bill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, or deceptive, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not exceeding twenty days or by both said fine and imprisonment.”

On being required to plead to the affidavit setting forth the offense with which the accused was charged, the accused, on entering a plea of not guilty and the magistrate continuing the case for trial, had the lawful right to have his bail bond fixed by the magistrate and to enter into a recognizance, as provided in Section 13508, General Code, which reads:

“When an adjournment is ordered the accused may enter into a recognizance before the magistrate, with good and sufficient surety approved by him, in such amount as he may deem reasonable, conditioned for the appearance of such person before the magistrate, at a place, day and hour specified in the recognizance, but such adjournment shall not be for longer than twenty days without the consent of the accused. A person shall not be admitted to bail who is charged with an offense not bailable under the constitution of the state.”

The inference is manifest from your letter that the mayor accepted, in lieu of the bail bond authorized by the statute, *supra*, a cash bond of \$500.00. As to such practice, your attention is directed to the fact that there is no statutory authority for a justice of the peace or other magistrate to receive money as a substitute for the bail bond authorized by Section 13508, General Code.

The Supreme Court of Ohio, in considering a case on that subject, *Reinhard vs. City*, 49 O. S. 257, held:

“It is illegal, unless authorized by statute, for a police officer or magistrate, to receive money in lieu of bail for the appearance of a person accused of a criminal offense.”

Judge Dickman, in the opinion in that case, at page 267, among other things, made the following pertinent observation:

“They had no authority to accept money in lieu of bail, nor would the mayor have been so authorized, as the statutes of Ohio contain no provision for taking money as a substitute. Bail may be defined as a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail. To say nothing of its liability to abuse, the deposit of money with the officer, as security for the appearance of the accused, would not be so likely to secure the end proposed as that provided by the statute.”

However, it appears from your letter that the accused failed to appear the day the case was set for trial and the mayor after reducing the amount of the bond from \$500.00 to \$400.00 forfeited the bond, and soon thereafter transmitted the cash to the county auditor, who then transmitted it to the county treasurer, the defendant never having made any claim to the money nor at any time asked to have the forfeiture set aside.

In your letter you say that your office contends that this \$400.00 should come to the state of Ohio and to the Department of Agriculture. Regardless of my observation as to the lack of authority for the magistrate to take the cash bond, in view of the fact that the accused failed to at any time appear and object to the forfeiture of the bond and make claim to the money, I am of the opinion that under the provisions of the statute the money should go to the county treasurer unless there is a specific statutory provision that it shall go to the Department of Agriculture of the state of Ohio. I am unable to find any statutory provision directing that the money from

a bail bond forfeiture that may arise from the arrest of persons under Section 13193-2, General Code, shall be paid to the state of Ohio for the use of the Department of Agriculture or otherwise. I assume that you base your contention that it does on the last sentence of Section 13193, General Code, which reads as follows:

"Fines collected under the next five preceding sections shall be paid into the state treasury."

It will be observed that by its terms Section 13193 refers to "the next five preceding sections", viz., Sections 13188, 13189, 13190, 13191 and 13192. These sections, together with Section 13193, were all enacted as Section 46 of an act "To provide for the organization, regulation and inspection of building and loan associations, and savings associations" passed on May 1, 1908, (99 v. 536). This section was divided into the six sections of the Code above enumerated by the Codifying Commission. As originally enacted the part of Section 13193 above quoted, which was the last sentence in Section 46, read:

"Such fines, when collected, to be paid into the state treasury."

Section 13193-2 is a later enactment, having been passed on February 26, 1913, as a separate section in an act entitled "An Act—To provide against fraudulent advertising." (103 v. 43). For two reasons then it is clear that the provision with reference to fines contained in Section 13193, supra, does not apply in the instant case, first, it relates only to fines and not to moneys collected from forfeited recognizances, and second, it pertains only to prosecutions under Sections 13188 and 13192, inclusive, of the General Code.

While an examination of the General Code discloses that fines and penalties recovered in certain actions involving the violations of certain sections of the Code which it is the duty of the Department of Agriculture to enforce, are to be paid into the state treasury and credited to the agricultural fund, as for example, prosecutions under Sections 1140-6, 1178-58 and 1177-68, none of these sections refer to moneys collected upon a forfeited recognizance. There is no such provision in Section 13193-2, supra, and this section does not pertain particularly to the activities of the Department of Agriculture.

In the year 1915 the Attorney General was asked for an opinion as to whether or not the money collected by the prosecuting attorney on a forfeited recognizance in a municipal court should be returned to the municipal court or be paid into the county treasury. The Attorney General ruled that such money when recovered by the prosecuting attorney should be paid into the county treasury by the prosecuting attorney under authority of Sections 289 and 2926, General Code. See Opinions, Attorney General, 1915, Vol. I, page 54.

Statutory provisions relative to the collection of moneys due on forfeited recognizances are found in Sections 13546 and 13547, General Code, respectively providing as follows:

"Sec. 13546. Probate judges, prosecuting attorneys, clerks of the court of common pleas and the police court, justices of the peace and other magistrates, shall return forthwith to the county auditor of their respective counties all forfeited recognizances in criminal cases."

"Sec. 13547. The county auditor shall make, in a book to be kept for that purpose, a memorandum of each recognizance returned to him, the court in which it was taken, the name of the case, the names of all the parties, the amount and date, the person to whom paid, the time when delivered and the

final disposition thereof. He shall deliver it to the prosecuting attorney and take his receipt forthwith therefor."

The duty of the prosecuting attorney is prescribed by Section 13548, General Code, as follows:

"The prosecuting attorney shall prosecute the recognizances by him received, for the penalty thereof. Such action shall be governed by the code of civil procedure as far as applicable."

As pointed out, *supra*, when the prosecuting attorney collects the money, he should then pay it into the county treasury.

Answering your question specifically, I am of the opinion that the money in question, as far as the state of Ohio is concerned was lawfully paid over to the county treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney General.

577.

JUSTICE OF THE PEACE—JURISDICTION TO RENDER FINAL JUDGMENT IN CASES INVOLVING VIOLATIONS OF THE MOTOR TRUCK LAWS.

SYLLABUS:

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.

COLUMBUS, OHIO, June 6, 1927.

HON. G. C. SHEFFLER, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date requesting my opinion on the questions asked in a letter which you enclose and which reads as follows:

"The sheriff of Sandusky county has requested each of the undersigned Justices of the Peace to issue warrants for the arrest of persons charged with violations of the Motor Truck Laws for overloading trucks used on the improved highways of this county. The offenses charged were misdemeanors, and under the present state of the law as interpreted by the U. S. Supreme Court in the *Tumey* case, and decisions of the courts of this state recently as to the jurisdiction of Justices of the Peace in misdemeanor cases, we have refused to issue warrants in the above mentioned cases. Were we justified, under the present state of the law as interpreted by the courts, in so refusing to act?