

the invoices plus a small profit, but if he is unable to make collection he has no recourse against the manufacturer and must personally stand the loss.

Under such circumstances it is clear that the jobber is more than merely the agent of the wholesaler for the purpose of making collection of the wholesaler's accounts. It is further clear that under such circumstances, as between the manufacturer and the jobber, there is a sale of the cigarettes to the jobber and that the title to such cigarettes passes to the jobber even though they are delivered to persons other than the jobber and never come into his actual physical possession. The salesmen who sell the cigarettes to the retailers are as a matter of law the agents of the jobber for the purpose of making such sales. It is not necessary for the purposes of this opinion to determine the exact time when title does pass to the jobber."

In view of the holdings of the opinions above referred to, your third question must be answered in the negative. You do not state whether the wholesaler in question transmits the invoices direct to the retail dealers to whom the sales are made or sends the same to some jobber or representative to make collection. I am therefore unable to render an opinion as to whether or not such jobber or representative would be liable for the cigarette tax.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2585.

FINES—SECURITY TO MAGISTRATE FOR PAYMENT OF FINE AND COSTS—REGISTERED LIBERTY BOND—AUTHORITY OF MAGISTRATE TO INSTITUTE CIVIL ACTION FOR ITS ENDORSEMENT.

*SYLLABUS:*

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.*

3. *Where a registered Liberty Bond was given by a defendant in a criminal action as security for the fine and costs imposed upon such defendant, which bond was not endorsed or assigned to such mayor, and the defendant now refuses to endorse such bond, a civil action may be commenced by the mayor in a court of competent jurisdiction to require the defendant to endorse the bond and take such other steps as may be necessary to enable the mayor to sell the bond and apply the proceeds in satisfaction of the fine and costs.*

COLUMBUS, OHIO, September 17, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge your letter dated August 17, 1928, which reads:

"The Mayor of an Ohio Village accepted a registered liberty bond for \$100.00 as security for an unpaid fine of \$100.00, assessed for violation of a statute. The Mayor failed to have the bond endorsed or assigned to himself, or the State, and the defendant refuses to endorse same at this time.

In Opinion 1029, to be found at page 824, Opinions of the Attorney General for 1923, at page 830 it is said:

'when such fine and costs are secured to be paid, defendant is released and cannot be again imprisoned at any time thereafter for the offense for which he was sentenced. The bond is a payment as far as the fine is concerned, and a new obligation is created. The state must thereafter look to the bond for payment.'

QUESTION: In view of this opinion, and the facts submitted, may the Mayor issue an execution at this time under authority of Section 13718, G. C.?"

By the terms of Section 13717, General Code,

"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."

Section 13718, General Code, provides:

"When a magistrate or court renders judgment for a fine, an execution may issue for such judgment and the costs of prosecution, to be levied on the property, or, in default thereof, upon the body of the defendant. The officer holding such writ may arrest such defendant in any county and commit him to the jail of the county in which such writ issued, until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

The views of this office on the question that you present were set forth in Opinion No. 1349, addressed to the Prosecuting Attorney of Pike County, which appears in Vol. IV, Opinions, Attorney General for 1927, at page 2455, 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."

In the opinion, after quoting Sections 13717 and 13718, General Code, it was said as follows:

"I am of the opinion that a magistrate may take either chattels or choses in action as security for the payment of a fine. There is nothing in either of the above sections which limits the words 'secured to be paid' to a bond.

I am of the opinion that the mayor should refuse to surrender the stock certificate or to cancel the mortgage.

I am of the further opinion that if the fine be not paid according to the terms of either the mortgage or the deposit of the collateral security, the mayor has the right to advertise and sell the collateral security and to proceed to foreclose the mortgage upon condition being broken.

It still remains the duty of the mayor to collect the fine and if for any reason the mayor is unable to satisfy the fine and costs out of the security now in his hands he should cause an execution to be issued in accordance with law upon the property of the defendant, or, in default thereof, upon the body of the defendant. (See Section 13718, supra.)”

You direct my attention to an opinion of my predecessor which appears in Opinions, Attorney General for 1923, at page 824, the third paragraph of the syllabus of which reads:

“3. When a court accepts security for a fine, the defendant cannot thereafter be confined for non-payment of such fine.”

After citing a number of cases the opinion concludes with the language quoted in your letter. An examination of the cases cited discloses that no one of them is authority for the conclusion reached in the opinion. The majority of these cases refer to the power of a court to suspend or modify its judgment during and after the term in which such judgment was rendered. Obviously, the principles governing the determination of the question involved in these cases would have no application to the conclusion reached and set forth in the third paragraph of the syllabus, supra. The only case cited which in any wise tends to sustain the conclusion reached is the North Carolina Case as reported in 80 N. C. 398. In that case the judgment of the court was that the defendant was “to pay a fine of \$10.00 and costs and committed to the custody of the sheriff until the same was secured.” There is nothing to indicate that North Carolina had a statute similar to Sections 13717 and 13718, supra, and in view of the meager opinion reported in this case it cannot be regarded as being authoritative. I cannot concur in the conclusion reached by my predecessor as expressed in the third paragraph of said opinion.

It is stated in 25 Corpus Juris at page 1157 that:

“Under the common-law practice, wherever a court has power to impose a fine it has power to compel the payment thereof by imprisonment of the party fined, and where the punishment for the offense is a fine and defendant is present in court at the time of sentence, it is a part of the sentence that he stand committed until the fine is paid. A direction in a sentence imposing a fine that defendant stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court.”

After a fine has been imposed it is regarded as in the nature of a debt of record due the state and may be enforced either by execution against the defendant's property or in default thereof upon his person. The giving of security is in no wise a substitution for the judgment of the court. The normal operation of giving such security is to postpone the collection of the judgment upon certain conditions granted. As stated in Opinion No. 1349, supra,

“It still remains the duty of the mayor to collect the fine and if for any reason the mayor is unable to satisfy the fine and costs out of the security now in his hands he should cause an execution to be issued in accordance with law upon the property of the defendant, or, in default thereof, upon the body of the defendant. (See Section 13718, supra.)”

Your attention is also directed to Opinion No. 2065, dated May 7, 1928, addressed to the Prosecuting Attorney of Pike County, the first paragraph of the syllabus of which reads:

"1. Where a defendant in a criminal case has been found guilty and sentenced to pay a fine, and such defendant executed 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 enforceable 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."

I am enclosing herewith a copy of this opinion.

In view of the foregoing discussion, and in specific answer to your question, it is my opinion that, upon the facts stated in your communication, the mayor may under the law issue an execution upon the property of the defendant, or, in default thereof, upon the body of the defendant. In addition thereto, I am further of the opinion that he may in his official capacity commence a civil action in a court of competent jurisdiction against the defendant to require the defendant to endorse the bond given as security and take such other steps as may be required to enable the mayor to sell the bond and apply the proceeds in satisfaction of the fine and costs imposed upon the defendant.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2586.

**COSTS—PROCEEDINGS FOR APPROPRIATION OF PRIVATE PROPERTY FOR STATE ROAD—PAYABLE BY HIGHWAY DIRECTOR WHEN NO APPEAL TAKEN—TRANSCRIPT OF PROBATE RECORD UNNECESSARY TO STATE'S TITLE.**

**SYLLABUS:**

1. *In a case where the property owner does not appeal from the finding and award of compensation and damages therefor made by the Director of Highways in the appropriation by him of property for state road purposes, under the provisions of Section 1201, General Code, such property owner is not liable for any of the fees and costs in the proceedings in the probate court relating to the appropriation of such property. In such case the lawful fees and costs incurred in such proceedings in the probate court should be paid by the Director of Highways out of the funds provided by Section 1188, General Code.*

2. *Although a transcript of the record of the proceedings in the probate court in such case is not necessary to complete the title of the State to the property appropriated by the Director of Highways, if such transcript is desired by the Director of Highways as appropriate evidence of the record title of the State to the property appropriated, he is authorized to obtain such transcript and pay for the same out of the funds provided by Section 1188, General Code.*