stitution for the feeble-minded, is transferred or removed, as provided by law by said board of administration from such institution to an institution for the feeble-minded, the county from which said person was committed shall be liable for the support of such person while in said institution for the feeble-minded, as hereinabove provided, and to the same extent as if such person had been originally committed from said county to said institution for the feeble-minded."

In view of the section last quoted, it could be argued that the county is liable for the support of a person committed to an institution for the feeble-minded in the absence of other sections. In other words, it can be claimed that theoretically, a person is an inmate when committed, even though he has not actually reached the institution. It has also been held that as a matter of law, one is in the penitentiary even though he is actually permitted outside the institution on parole. (*Morton v. Thomas,* 27 O. A., 486.) However, I am not inclined to the view last above mentioned. It would appear that it was the intent of the legislature in the enactment of Sections 1895 and 1815-12, supra, to provide for the charging of the support back to the county only when such persons have actually become inmates. Section 1895, supra, which you quote, expressly grants power to the probate court to make such order as he may deem necessary and advisable to provide for the supervision, care and maintenance of a person committed to an institution for the feeble-minded and who can not be received. In my opinion, a probate court may properly designate the Board of State Charities to look after such a child pending its admission to an institution for the feeble-minded, irrespective of its former status, and in view of the circumstances, it would be a commendable thing to do. Of course, such designation is pursuant to the broad authority in Section 1895 of the Code, and the arrangements made are entirely within the discretion of the Probate Judge. As a practical matter, the proper course would be for the Probate Judge to recite in the journal entry making the designation that the expense of the child's care in the meantime shall continue to be paid in accordance with the provisions of law applicable to dependent children. The acceptance of the child by the Department of Public Welfare following such an order would constitute an agreement between the department and the Probate Court justifying a continuance of the payment.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3213.

JUSTICE OF THE PEACE—FINAL JURISDICTION IN FISH AND GAME CASES—ERROR PROCEEDINGS BY STATE DENIED WHERE DEFENDANT VIOLATING GAME LAW, ERRONEOUSLY BOUND OVER TO GRAND JURY.

SYLLABUS:

1. *A justice of the peace has jurisdiction to hear, determine and enter final judgment in prosecutions charging violations of the fish and game laws and the decision of the Supreme Court of the United States in the case of Tumey* vs. *State,* 273 *U. S.* 510, *does not apply in such prosecutions, since a justice of the peace, by virtue of section* 1452, *General Code, has no financial interest in the outcome of such a trial.*

2. *Error proceedings can not be instituted by the state of Ohio where a defendant has been erroneously bound over to the grand jury by a justice of the peace who, by law, had final jurisdiction to hear, determine and sentence such defendant.*

COLUMBUS, OHIO, May 11, 1931.

HON. I. S. GUTHERY, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date, which reads as follows:

> "I am attaching herewith correspondence relative to the case of the State of Ohio versus John Smith.
>
> It appears that the defendant was arrested for 'unlawfully and willfully hunting wild rabbits without first applying for and receiving a hunting license,' was found guilty and bound over to the grand jury where no indictment was made and the defendant freed of the charge.
>
> The question, therefore, arises:
>
> 1. Does the Justice of the Peace have final jurisdiction in Fish and Game cases?
>
> 2. Should error be prosecuted so that a final determination of game violations can be had in Justice of the Peace Courts?
>
> I respectfully request that you render an opinion at your earliest convenience."

It has been held in many cases in Ohio and in the opinions of my predecessor that a justice of the peace has final jurisdiction to hear and determine prosecutions charging violations of the fish and game laws of this state and that the decision of the Supreme Court of the United States in the case of *Tumey* vs. *the State,* 273 U. S. 510, has no application to such type of cases. See *Newland* vs. *the State,* 29 O. App. Rep. 135; *Testa* vs. *the State,* 8 O. L. Abs. 333; Opinions of the Attorney General, 1927, page 342; Opinions of the Attorney General, 1928, page 194.

Section 1452, General Code, eliminates the question of a justice of the peace having a financial interest in securing a conviction for the violation of the fish and game laws of this state, since it is provided therein that the costs of such prosecution shall be paid by the state, regardless of whether there is a conviction or an acquittal of the defendant. Costs in the case of an acquittal are to be paid out of the state treasury on a warrant or voucher drawn on the state auditor by the secretary of agriculture. The same procedure is provided for when the defendant, on conviction, fails to pay the costs.

The justice of the peace, in binding the defendant over to the grand jury, evidently followed the procedure set forth in section 13433-9, General Code, which provides in part as follows:

> "If the complaint is not made by the party injured and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear before the proper court as provided when there is no plea of guilty."

Section 13433-9, requiring a defendant to enter into a recognizance to appear before the proper court when a plea of guilty has been entered to a complaint filed

by a party other than one injured by the accused, applies only in cases where the justice of the peace does not have final jurisdiction to hear and determine a proceeding tried before him. Inasmuch as the justice of the peace was empowered by law to hear and finally determine the complaint before him, he could not and did not have authority to bind the defendant over to the grand jury.

In the case of *Sprague* vs. *the State of Ohio, ex rel. Staples,* 34 O. App. Rep. 354, it was held that a judge of the municipal court could not avoid the performance of the larger duty incumbent upon him, by his possession of the jurisdiction of a police judge, by exercising the inferior jurisdiction of a justice of the peace as an examining magistrate only. That case is analogous to the situation presented by your inquiry, in that the justice of the peace, by virtue of section 1448, General Code, could not avoid the performance of his greater duty of finally determining the complaint before him, by assuming the role of an examining magistrate only. The role of an examining magistrate was inferior to the duty imposed upon the justice of the peace by section 1448, to hear and finally dispose of a charge for violating the fish and game laws, and the greater duty imposed upon the court could not and can not be avoided by exercising the inferior jurisdiction of a justice of the peace provided for by section 13433-9. When the defendant entered his plea of guilty to the charge before the justice of the peace, it was and still is the duty of the court to impose sentence upon him as required by section 1454.

I am further of the opinion that error proceedings can not be predicated on the fact that the justice of the peace erroneously bound the defendant over to the grand jury. There is no statutory provision in Ohio giving the state of Ohio, in a criminal proceeding, the right to institute error proceedings from any trial court wherein a verdict has been returned in favor of the defendant. Sections 13445-1, 13459-1 and 13459-2, General Code, provide, in substance, that a defendant, upon conviction, may institute error proceedings to a court superior to the trial court. There is no provision in the aforesaid sections that gives the state of Ohio this same privilege. The only time the state of Ohio may seek a review by means of error proceedings, is when a court superior to the trial court renders a judgment reversing a decision of the trial court which had been in favor of the state. See section 13459-14, General Code. Sections 13446-1, 13446-2, 13446-3 and 13446-4, General Code, which provide that in case of an acquittal of a defendant a bill of exceptions may be presented to the Supreme Court by a prosecuting attorney or the attorney general, apparently apply only in criminal cases tried in the common pleas courts, and do not apply to criminal cases tried in courts inferior to the court of common pleas. The discussion relative to the right of the state of Ohio to institute error proceedings or to file a prosecutor's bill of exceptions to an adverse decision of the trial court, does not apply in the case presented by your inquiry, inasmuch as the defendant had entered a plea of guilty to the charge and therefore the decision was favorable to the state.

Therefore, it is my opinion that:

1. A justice of the peace has jurisdiction to hear, determine and enter final judgment in prosecutions charging violations of the fish and game laws and that the decision of the Supreme Court of the United States in the case of *Tumey* vs. *State,* 273 U. S. 510, does not apply in such prosecutions, since a justice of the peace, by virtue of section 1452, General Code, has no financial interest in the outcome of such a trial.

2. Error proceedings can not be instituted by the state of Ohio where a de-

fendant has been erroneously bound over to the grand jury by a justice of the peace who, by law, had final jurisdiction to hear, determine and sentence such defendant.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3214.

COUNTY COMMISSIONERS—UNAUTHORIZED TO DONATE COUNTY REALTY TO STATE FOR ARMORY SITE.

SYLLABUS:

County commissioners have no authority to donate and convey county real estate to the state for the site of an armory.

COLUMBUS, OHIO, May 11, 1931.

HON. LEE D. ANDREWS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I wish to acknowledge receipt of your letter, inquiring whether county commissioners can convey to the State of Ohio for the site of an armory, real estate which had been purchased in fee simple by the commissioners in 1878 and which had been used as the site of a county children's home until about three years ago when the State Welfare Department and public building inspectors condemned the building thereon for the reasons that it was old, worn out, unsanitary, and unsafe to be occupied. Though you do not state it expressly, the tenor of your letter indicates, and I therefore assume, that the commissioners contemplate a *donation* of said real estate to the state for the purpose mentioned.

Having in mind the orthodox criterion which is determinative of matters of this nature—that is, that county commissioners have only such powers as are, by law, given to them expressly and such as are necessarily implied in order to effectuate those express powers—I fail to discover, after an examination of the statutes and judicial decisions, any authority for the commissioners to do that about which you inquire. In fact, an opinion rendered by former Attorney General Denman (1910-1911 Annual Report of the Attorney General, p. 1077) negatives it by analogy. There, it appeared that the county commissioners proposed, for a consideration of one dollar, to convey county land to the state of Ohio to be used as a site for a state normal school. The opinion held:

> "Such a proceeding amounts to a mere donation. Commissioners are given no power to donate land. * * *
>
> For the foregoing reasons I do not believe that the proceedings proposed to be followed by the county commissioners of Cuyahoga County would be legal."

Believing that, for the purposes of this opinion, there is no difference between a donation of land for the site of a state armory and one for the site of a state normal school, and that no change has been made in the law since the time of