

2884.

JUSTICE OF THE PEACE—JURISDICTION IN CRIMINAL CASES LIMITED—AUTHORITY OF BUREAU OF INSPECTION TO MAKE FINDINGS DISCUSSED.

SYLLABUS:

1. If a person is taken before a justice of the peace and pleads guilty to a violation of sections 12603 to 12628-1, General Code, the justice cannot assess a fine but must bind the accused over to a court of competent jurisdiction, except where the party injured files the affidavit as provided in section 13510, General Code.

2. If a person is taken before a justice of the peace for a violation of sections 12602 to 12628-1, General Code, pleads not guilty, waives a jury and submits to be tried by the justice, the justice has final jurisdiction in cases where the accused is entitled to a jury trial.

3. If a justice assesses a fine and costs, under sections 12602 to 12628-1, General Code, and collects same, the Bureau of Inspection and Supervision of Public Offices cannot make an enforceable finding against the justice and constable, as error proceedings are necessary to settle questions of jurisdiction, even though the court has no jurisdiction whatsoever.

4. A justice or constable may accept a deposit of cash as bail for appearance for violation of sections 12603 to 12628-1, General Code, but are not authorized to accept less than the maximum fine provided for the offense. If, however, they do accept less, they cannot be held liable for the difference between the amount accepted and said maximum fine.

COLUMBUS, OHIO, October 21, 1925.

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

GENTLEMEN :—I am in receipt of your letter of September 8th, as follows:

"You are respectfully requested to furnish this department your written opinion upon the following questions:

"Question 1: When a person is arrested by a constable or sheriff, charged with a violation of the laws relating to the operation of motor vehicles upon the public highways, sections 12603 to 12628-1, inclusive, General Code, and such person is taken by the arresting officer before a justice of the peace and pleads guilty to the charge, may the justice assess a fine or is he required to bind such person over to the common pleas court?

"Question 2: If such person pleads not guilty, waives a trial by jury and submits to be tried by the justice of the peace, may such justice proceed to try him and assess the penalty provided by law if found guilty, or dismiss him if found not guilty?

"Question 3: If it is your opinion that a justice of the peace has no jurisdiction to try a person upon a waiver of the trial by jury, may the examiners of this department legally make a finding against the justice of the peace and constable, requiring them to pay all costs received into the township treasury to be refunded to the persons paying the same, and may a finding be made against the county for all fines assessed in such cases and paid into the county treasury to be refunded to the persons paying the same?

"Question 4: In the event of the arrest of a person as above indicated by a constable, may such constable take a deposit of cash to secure the ap-

pearance of such person before a justice of the peace at a subsequent date, and, if so, what is the minimum amount which may be deposited in such case, and is the constable in any way liable if he accepts an amount less than the minimum fixed by law.

"Question 5: If such person is taken before a justice of the peace and a future date is fixed for a hearing, may the justice of the peace accept a deposit of cash to secure the appearance of such person at the time fixed; if so, what is the minimum amount which may be legally received by a justice of the peace as such deposit, and is the justice of the peace in any way liable if he accepts an amount less than the minimum provided by law?"

Your first and second questions are partly answered by an opinion of this department, found on page 622 of the Opinions of the Attorney General for 1921, and by the case of *George Burns vs. The State of Ohio*, in the court of common pleas of Mahoning county. In the Burns case the court said:

"First—A justice of the peace court in criminal cases can only act within the specific authority granted by the legislative enactment.

"Second—A justice of the peace court, being a statutory court of special and limited jurisdiction in criminal cases, no jurisdiction can be extended to it by implication.

"Third—No final jurisdiction is granted to justices of the peace by the legislature in criminal cases arising under chapter designated as 'Motor Vehicles,' from sections 12603 to 12628-1, both inclusive, of the General Code of Ohio, excepting those cases coming within sections 13510 and 13511 of the General Code.

"Fourth—Under section 13510 of the General Code, one of the general public cannot be said to be 'the party injured'."

11 CYC, 697:

"Jurisdiction itself * * * if there is an absolute want of jurisdiction in the premises, that which is without existence cannot be brought into being by a waiver, for a nullity cannot be waived."

11 CYC, 661:

"Jurisdiction in the general sense as applied to the subject matter of a suit at law or equity is always conferred by law."

11 CYC, 673:

"Parties cannot by consent or stipulation invest a court with jurisdiction or power not authorized by law or conferred upon it by the constitution."

Swan, on page 863, says:

"When offense charged is a misdemeanor *punishable by imprisonment*, and the accused, in a writing subscribed by him, and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

The accused is only entitled to a jury trial when the penalty is imprisonment, and the justice only has final jurisdiction when specifically given him by statute. Therefore, section 13511, General Code, only refers to those cases wherein the justice has not been given final jurisdiction by statute and imprisonment is part of the penalty, and to section 13510, General Code, where the party injured files the affi-

davit. It must be read in connection with these other statutes and does not of itself give the justice final jurisdiction in all misdemeanors.

Section 13510, General Code, says even in a plea of guilty the justice can only bind over or discharge, and it would be absurd to say that and yet say if the accused waived a jury that action would give him jurisdiction in misdemeanors where imprisonment was not a part of the penalty.

This is contrary to a former opinion of this department, found in the 1921 Opinions, page 622, as to misdemeanors generally.

If, however, the party injured files the affidavit or if the misdemeanor charged carries a penalty of imprisonment, as a second or third offense under these motor vehicle sections does, then the accused is protected by a right to a jury trial, and if he waives that right, as provided by section 13511, General Code, he gives the justice final jurisdiction. In other words, section 13511, General Code, only applies when the accused is entitled to a jury, and when the affidavit filed under sections 12603 to 12628-1, General Code charges a first offense the justice can only bind over or discharge.

It is my opinion, in view of above case and opinion, that a waiver of a trial by jury in such a case does not give the court jurisdiction to impose or collect a fine, except as provided by section 13511, General Code. The collection of costs in such cases, not coming within sections 13510 and 13511, is illegal; but findings should not be made by your department as suggested by your third question.

2 Ohio St. 21:

"Adversary parties to a suit cannot, by contract, require the court to try their cause contrary to the established rules of judicial proceedings, and all contracts made to effect such a purpose, are absolutely void."

The fine and costs assessed is, by statute, a judgment of the court, and the question of jurisdiction on such judgment would have to be decided by error proceedings. Until so raised and decided, it could not be questioned by your department, even though the court had not legal right to assume jurisdiction and collect a fine and costs.

Section 12626, General Code, reads:

"A person taken into custody, because of the violation of any provision of this subdivision of this chapter, shall forthwith be taken before a magistrate or justice of the peace in a city, village or county, and be entitled to an immediate hearing. If such hearing cannot be had, he shall be released from custody on giving his personal undertaking to appear in answer for such violation at such time or place as shall then be indicated, secured by a deposit of a sum equal to the maximum fine for the offense with which he is charged; or, in lieu thereof, if he be the owner, by leaving the motor vehicle. If the person so taken is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner, who must be present, with such judicial officer."

Section 12627, General Code, reads:

"If a judicial officer is not accessible, the accused under the next preceding section shall forthwith be released from custody by giving his name and address to the officer making the arrest and depositing with such officer a sum equal to the maximum fine for the offense for which such arrest is made or instead, if he is the owner, by leaving the motor vehicle. If the ac-

cused is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner, who must be present."

It is plainly provided in the above sections that either the arresting officer or court may accept cash bail as set forth in said sections, but if they do so must set such bail at the maximum fine for the offense.

In the Opinions of the Attorney General for 1921, page 581, we find the following statement:

"While the action taken is obviously without authority of law, yet it is an order made by a judicial tribunal, and it is believed that the action of a court cannot be questioned, excepting in a procedure which would authorize a higher authority to review the same.

"Notwithstanding the apparent erroneous orders made in the cases described, no law has come to my attention which will authorize your bureau to hold such a magistrate financially liable for errors of judgment as to the extent of his powers. It is suggested that your bureau can properly point out to such officials the irregularity and make suggestions in connection therewith. If such an official should wantonly refuse to comply with the instructions given, it may be that such wanton disregard for the duties imposed by law would constitute a cause of removal by the governor. However, as above indicated, notwithstanding that the action taken causes a financial loss to the city, there seems to be no authority whereby such a court can be held financially liable for errors of judgment."

While the court or constable could not be held liable for a loss sustained by their error of judgment in following the statutes, they could probably be removed for neglect of duty or compelled by mandamus to perform their legal duties.

Their attention should, at least, be called to the law in such matters and they should be admonished to follow it as set forth in said two sections of the Code.

Respectfully,

C. C. CRABBE,
Attorney General.

2885.

TERM OF OFFICE OF MEMBER OF DISTRICT BOARD OF HEALTH IS
UNTIL SUCCESSOR IS APPOINTED AND QUALIFIED.

SYLLABUS:

The term of office of a member of the District Board of Health, under section 4406 of the General Code, is until his successor is appointed and qualified.

COLUMBUS, OHIO, October 21, 1925.

HON. JOHN E. MONGER, *Director of Health, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication as follows:

"In some of the general health districts provided for in 1261-16 G. C., the advisory council, provided for in 1261-18 G. C. have not met or in some