1446.

FEES—CONSTABLE FEES IN CRIMINAL CASES—SECTION 3347, GENERAL CODE, CONSTRUED.

SYLLABUS:

By the terms of Section 3347, General Code, in criminal cases, a regularly elected and qualified constable is entitled to receive two dollars and fifty cents for attending each case in the following instances:

1. *Those cases in which the justice of the peace has final jurisdiction to hear and determine the issues and the defendant either pleads guilty or stands trial and is found guilty.*

2. *Those cases in which the accused by virtue of the provisions of Section 13511, General Code, permits the justice to exercise final jurisdiction and the defendant either pleads guilty or stands trial and is found guilty.*

3. *Those cases in which the justice of the peace, acting as an examining magistrate, after hearing, binds the accused over to the proper court; however, if the accused waives a hearing and pleads not guilty and is bound over to the proper court, no such fees shall be allowed.*

COLUMBUS, OHIO, December 24, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your letter requesting my opinion upon the question submitted in a letter from one of your state examiners which you enclose, the enclosure reading as follows:

> "1. Section 3347, G. C., provides in part as follows:
>
> 'Attending a criminal case during trial or hearing and including having charge of the prisoner, each case, $2.50; but when so acting shall not be entitled to a witness fee is called upon to testify.'
>
> Is a constable entitled to a fee of $2.50 for attendance in all criminal proceedings before a justice of the peace in which he has charge of the prisoner?
>
> If it is held that he is not entitled to charge this fee in all cases, just what cases is he unauthorized by law to tax this fee?
>
> 2. If a person is arrested on a charge of violating the motor vehicle laws, Sections 12603 to 12628-1, G. C., and is taken before a justice of the peace and enters a plea of 'guilty,' may the justice of the peace assess a fine?
>
> If, as above, the plea is 'Not Guilty' and the defendant signs a waiver of trial by jury and submits to be tried by the justice of the peace, may the justice proceed to try him and render judgment?
>
> If the person pleads 'Guilty' and signs a waiver, would this give the justice jurisdiction to render final judgment in the case?"

1. In answer to the first question therein, your attention is directed to Section 3347, General Code, which provides a schedule of fees of constables and so far as pertinent to your inquiry provides:

> "For services actually rendered and expenses incurred, regularly elected and qualified constables shall be entitled to receive the following fees and expenses to be taxed as costs and collected from the judgment debtor, except as

otherwise provided by law; * * * *attending criminal case during trial or hearing and including having charge of prisoner or prisoners, each case, two dollars and fifty cents,* but when so acting, shall not be entitled to a witness fee if called upon to testify; * * * " (Italics the writer's.)

By the provisions of this section, regularly elected and qualified constables, in criminal cases, are entitled to receive two dollars and fifty cents for attendance during the trial or hearing of each case, such amount including having charge of a prisoner or prisoners. When so acting, if called upon to testify, they shall not be entitled to a witness fee.

Section 3347, supra, was enacted in its present form on April 29, 1921, (109 v. 303). It had previously been amended on February 4, 1920, (108 v. Pt. 2, 1203). So far as the provisions above quoted are concerned, however, the section as enacted on April 29, 1921, is the same as the section as enacted on February 4, 1920, except that the amendment of 1921 increased the amount of the fees to be allowed for the services performed.

Prior to the amendment of February 4, 1920, (108 v. Pt. 2, 1203), this statute, which was Section 622 of the Revised Statutes, as enacted on April 6, 1865, (62 v. 89) read in part as follows:

"That all constables in this state, duly elected and qualified, shall, for services rendered as hereinafter specified, be entitled to receive the following fees, to-wit:

* * * *For every day's attendance before justices of the peace, on criminal trial, one* dollar, * * * " (Italics the writer's.)

At the same time and in the same act in which Section 3347, supra, was amended on February 4, 1920, (108 v. Pt. 2, 1203), Section 3010, General Code, was repealed. This section read as follows:

"When required by an examining court to take charge of the defendant or defendants, during the examination of such defendant or defendants upon any charge for the commission of a crime or offense against the laws of the state, sheriffs, marshals and their deputies, constables, and watchmen shall be allowed seventy-five cents for rendering such service, to be taxed as other fees of such officers in like cases. When acting as the officer of such examining courts, such officer shall not receive fees for testifying upon such examination."

This section of the General Code has been construed by this department in several different opinions, most of which, however, were rendered prior to the amendment of Section 3347 in 1920, (108 v. Pt. 2, 1203). In an opinion dated July 28, 1913, Annual Report of the Attorney General, 1913, at page 307, the then Attorney General said:

" * * * in order to properly answer your question it is necessary to decide what a trial is, and in said opinion I cited the Supreme Court case of *Palmer* vs. *State,* 42 O. S. 596, in which it was held that:

'A trial is a judicial examination of the issues, whether of law or of facts, in an action or proceeding.'

* * * * * * * * *

In reply to your second question I desire to say that Section 3347, General Code, provides as to the fees of a constable in part as follows:

'For each day's attendance before a justice of the peace on criminal trial, one dollar.'

Under the authority above set forth there has been no trial where a prisoner is arraigned before a justice of the peace and pleads guilty, and the constable, therefore, would not be entitled to the fee of one dollar under said Section 3347, General Code.

In answer to your third question relative to the same questions being applicable to cases mentioned in Section 13423, I am of the opinion that the same sections of the code apply as to the fees to which justices of the peace, police judges and mayors of cities and villages and constables serving the writs of said courts in the cases specified in said Section 13423, and that the same rule would apply as in the first two cases as to whether or not the fee of one dollar should be paid to a justice of the peace, police judge, mayor of a city or village and constables for sitting in trial as set forth in the rules laid down in the answer to your first two questions, and that unless there was a defense interposed they would not be entitled to said fee of one dollar referred to in your inquiry."

This opinion was, however, subsequently modified by the same Attorney General in an opinion dated November 6, 1914, reported in the Annual Report of the Attorney General for 1914, Vol. II, p. 1403, in which it was held:

"Under Section 3347, General Code, however, providing the fee of one dollar for a constable for attendance at criminal trials, it is held that where defendant pleads guilty, and the justice enters into a judicial examination for the purpose of determining the amount of fine as based upon the gravity of the offense, the constable may receive his one dollar for attendance upon such hearing. Trial is defined by statute as a judicial examination of the issues, and it is held in the opinion that the question of the amount of fines and gravity of offense is a material issue in a criminal proceeding."

In the opinion it was said as follows:

"In the former opinions referred to in your request attention was not paid to the phase of the matter which I understand is entertained by the party desiring a solution of the questions presented. In the particular view entertained reference is had especially to occasions wherein it is necessary, after plea of guilty is entered, for the justice to consider matters pertaining to gravity of the offense. In brief, where a defendant pleads guilty to an offense punishable by a fine the question of the proper amount of a variable fine which may be assessed, becomes a very material issue, and it is essential to have facts introduced in evidence which may tend to mitigate or aggravate the nature of the case. The question at hand, therefore, is whether or not such an examination of facts by a magistrate amounts to a judicial examination of an issue in a proceeding.

* * * * * * * *

The plea of not guilty, or of guilty, in a criminal proceeding takes the place of pleadings in a civil proceeding, and all issues of the trial are raised by the trial of such a case. It is true the primary issue is of presence or absence of guilt, but the question of gravity and the problem of mitigation or aggravation will surely be viewed as an issue, even though it must be considered more or less of a secondary nature. In this connection Section 13696 of the General Code is of interest. This statute is as follows:

'When a person is convicted of an offense punishable, either in whole or in part, by a fine, the court, by motion, may hear testimony in mitigation of the sentence. The court shall hear such testimony at the term at which the motion is made, or may continue the case to the next term on like terms as the case might have been continued before verdict or confession. The prosecuting attorney shall attend such proceedings on behalf of the state, and offer testimony necessary to give the court a true understanding of such case.'

Here by express authorization of statute the court is authorized to make a judicial examination and to hear testimony for the purposes in mind. I am of the opinion that such an examination partakes just as much of the nature of a trial as is the main trial for the purpose of determining the question of presence or absence of guilt. In brief, the determination of the amount of the fine is quite as important as far as issues are concerned as is the question of whether or not any fine at all should justly be assessed.

Having this view, therefore, of the issues in a trial, the distinction between the provision for payment of one dollar to the justice for sitting in a trial where *a defense is interposed,* and the provision for $1.00 for the constable for each attendance before a justice on trial, is of interest. In brief, the former provides for payment only where a defense is interposed, and the latter makes no mention whatever of the interposition of a defense. When a defendant pleads guilty it is clear that there is no defense interposed, and yet if the justice is required to examine into the material fact of gravity of the offense, there takes place what is clearly to be classed as a trial, in accordance with the reasoning of the above.

* * * * * * * *

In the case of a constable, since the justice when investigating for the purpose of determining gravity and hearing both sides, is engaged in the trial of material issues, he is conducting a trial within the meaning of the statute, and the constable should be entitled in such case, under Section 3347 of the General Code, to $1.00 for attendance.

In coming to this conclusion it will be understood that the holding in no wise changes the conclusion of the former opinion of this department rendered under date of July 28, 1913, which opinion has reference solely to a plea of guilty when no examination is made for the purpose of determining degree of guilt."

While I have some doubt as to the correctness of the conclusion that no *trial* is had when a justice has final jurisdiction and a plea of guilty is entered, unless the court takes evidence to determine the degree of punishment to be imposed, in view of the amendment of the statute under consideration by the addition of the words "or hearing," it is unnecessary further to discuss this question.

Section 3347, supra, as amended in 1921, was construed by my immediate predecessor in office in the letter referred to in your communication, addressed to the prosecuting attorney of Medina County under date of February 21, 1923. This letter reads in part as follows:

"This will acknowledge receipt of your request for opinion of February 19th, as to construction to be placed on that part of Section 3347 of the General Code as amended in 109 Laws of Ohio, page 305, and reading as follows:

'Attending a criminal case during trial or hearing and including having charge of a prisoner, each case, $2.50, but when so acting shall not be entitled to a witness fee if called upon to testify.'

In order to arrive at the true intent of this part of this statute we must consider the whole statute, taking into consideration the steps taken by a constable in a criminal case.

* * * * * * * *

After the filing of an affidavit, a warrant is issued which commands the constable to arrest the defendant named and take him forthwith before some court having jurisdiction of the offense, for which service he is entitled to receive eighty cents and mileage as set forth in said section. The defendant is then *arraigned* and enters his plea."

The letter then quoted a number of definitions of "arraignment," "hearing" and "trial," and concluded:

"After a careful consideration of this statute and the definitions and decisions cited, we are led to believe that the entering of a plea of guilty on the arraignment, is not a 'hearing' or 'trial' within the meaning of the statute, therefore, the constable is not entitled to receive the $2.50 fee set forth in the statute when a plea of guilty is entered at the time the prisoner is *arraigned.*"

This letter did not refer to any of the former opinions of this department, nor did it consider what effect, if any, the amendments of February 4, 1920, (108 v. Pt. 2, 1203), and April 29, 1921, (109 v. 303), had in the premises. I cannot agree with the conclusions therein reached.

The answer to the first question propounded in the above inquiry turns upon the meaning of the words "during trial or hearing" as they appear in Section 3347, supra.

Section 11376, General Code, defines "trial" as follows:

"A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding."

Webster's New International Dictionary (1927) defines "trial" as:

"The formal examination of the matter in issue in a cause before a competent tribunal for the purpose of determining such issue; the mode of determining a question of fact in a court of law. A trial may be of an issue of law, when it is before a judge alone; or of fact, when it is usually before a judge and jury. In a general sense *trial* includes all proceedings from the time when issue is joined, or more usually, when the parties are called to try their case in court, to the time of its final determination."

Bouvier's Law Dictionary defines "trial:"

"Undoubtedly the word *'trial'* in the common law meant the examination and determination of the case upon the facts, and the word was usually applied to a trial by jury; *'hearing'* was used with respect to cases in equity. The word 'trial' is now used not only colloquially but by courts, with a more comprehensive signification, and it has been defined to be 'the examination before a competent tribunal,' according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. The precise meaning of the word 'trial' has become material in the construction of statutes regulating appeal or error costs, criminal procedure, voluntary non-suits, the removal of causes and official fees. The trial was held to

be used, not in its limited and restricted, but in its general sense, including all the steps of a criminal case from its submission to the court or jury to the rendering of the judgment."

Bouvier defines "hearing" as:

"The examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused."

Webster defines "hearing" as:

"A listening to facts and evidence, for the sake of adjudication; a session of a court for considering proofs and determining issues."

As stated in 29 Corpus Juris at page 285:

"A 'hearing' has been defined as a judicial examination of the issue between parties, whether of law or of fact, implying the right to adduce testimony; the trial of a chancery suit; also the session of any court, or of an adjunct thereof, for considering the proofs in a case. In a broader and more popular signification, it is used to describe whatever takes place before magistrates clothed with, and exercising, judicial functions and sitting without jury at any stage of a proceeding subsequent to its inception. In criminal law, the term may relate to the trial of the cause upon final hearing or a preliminary hearing before the committing magistrate."

In the case of *Palmer* vs. *State,* 42 O. S. 596, it was held that the impaneling of a jury is embraced in the "trial" of a cause, and in the case of *State* vs. *Borham,* 72 O. S. 358, at page 362, Judge Spear said:

" * * * It is sought to make the point that the mayor does not 'hear' if there is a plea of guilty. Why not? The prisoner hears the charge; the court hears the plea. Must the mayor go on and listen to testimony after such plea in order to give to the proceeding the element of a hearing? Surely not. And why may he not as certainly and as lawfully 'determine' upon the confession, as he could upon the testimony of witnesses? * * * "

In view of the foregoing and answering your question specifically, it is my opinion that, in criminal cases, a regularly elected and qualified constable is entitled to receive two dollars and fifty cents for attending each case in the following instances:

1. Those cases in which the justice of the peace has final jurisdiction to hear and determine the issues and the defendant either pleads guilty or stands trial and is found guilty.

2. Those cases in which the accused by virtue of the provisions of Section 13511, General Code, permits the justice to exercise final jurisdiction and the defendant either pleads guilty or stands trial and is found guilty.

3. Those cases in which the justice of the peace, acting as an examining magistrate, after hearing, binds the accused over to the proper court; however, if the accused waives a hearing and pleads not guilty and is bound over to the proper court, no such fees shall be allowed.

In this connection your attention is directed to Section 1452, General Code, which provides for the payment of costs in fish and game cases regardless of whether the accused be found guilty or not guilty.

An answer to your second question will be found in an opinion rendered by this department on the 6th day of June, 1927, Opinion No. 577, Opinions, Attorney General, 1927, a copy of which I am enclosing herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1447.

BANKS—DIRECTORS—IMPAIRED CAPITAL—METHODS OF RESTORING CAPITAL, DISCUSSED.

SYLLABUS:

1. *A director's note given to make good impaired capital is without valuable consideration unless said impairment was due to lack of proper care on part of director.*

2. *In case of insolvency, director estopped from setting up defense of want of consideration or failure of consideration of note given to make good impaired capital.*

3. *Where director borrows money from outside source to make good impaired capital, bank whose capital was restored would not thereafter be justified in loaning said director funds to take up said note.*

4. *Advancements by directors to make good impairment of capital of bank ordinarily create no legal obligation of bank to repay.*

5. *With approval of stockholders, directors may create contingent liability of bank to repay directors' advances.*

6. *Directors' advances may be paid out of any monies available for dividends upon unanimous approval of stockholders.*

7. *When Superintendent of Banks permits substitution of method prescribed in Section 710-30, G. C., he assumes a personal responsibility.*

COLUMBUS, OHIO, December 24, 1927.

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

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

> "Occasionally it becomes necessary for me to advise the board of directors of an incorporated bank or the managing body of an unincorporated bank that losses sustained by said bank must be taken care of.
>
> In such instances these parties are advised of the provisions of Section 710-30 of the General Code of Ohio. It sometimes develops that I am told for me to make an official order for an assessment upon the stockholders or owners of the bank would result in serious difficulties and possible disaster to the institution. When the case is stated in this way it usually follows that the individuals constituting the board of directors of the bank, or, if an unincorporated one, the managing body, volunteer to raise the amount of the deficiency among themselves.
>
> It has always been taken for granted that such individuals may, if they so elect, pay into the bank the amount determined upon to be raised. Where this plan is followed there are some incidental questions regarding which I would like to have you give me your opinion, viz.:
>
> *One.* May a director or an owner legally place in the assets of a bank his individual promissory note in lieu of cash for his respective contribution to the payment of such a fund?