

1545.

APPROVAL — BONDS OF ELIZABETHTOWN RURAL
SCHOOL DISTRICT, HAMILTON COUNTY, OHIO,
\$4,000.00.

COLUMBUS, OHIO, November 26, 1937.

State Employes Retirement Board, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Elizabethtown Rural School Dist., Hamil-
ton County, Ohio, \$4,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of refunding bonds in the aggregate amount of \$30,000, dated August 6, 1919, bearing interest at the rate of 5½% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1546.

VIOLATION OF MOTOR VEHICLE LAWS—CASH BOND POST-
ED WITH THE JUSTICE OF THE PEACE—MANDATORY
DUTY TO DECLARE BOND FORFEITED, WHEN—MAY
NOT RENDER JUDGMENT FOR COSTS, WHEN.

SYLLABUS:

Where a person charged with a violation of the Motor Vehicle Laws, Sections 12603 to 12630-3, inclusive, General Code, posts a cash bond with the Justice of the Peace for appearance and fails to appear at the time specified in the recognizance, it is the mandatory duty of the Justice of the Peace, pursuant to the authority of Section 13433-8, General Code, to declare such recognizance forfeited and transmit a transcript of his proceedings in the case, together with the recognizance to the clerk of the

proper court, and the Justice of the Peace has no authority to render a judgment for costs and deduct the same from the forfeited cash bond.

COLUMBUS, OHIO, November 27, 1937.

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

GENTLEMEN: I wish to acknowledge the receipt of your letter of recent date in which you request my opinion on the following question:

“You are respectfully requested to furnish this department with your written opinion upon the following:

A motorist is arrested by a constable for violation of Section 12603, General Code, and deposits with the Justice of the Peace \$10.00 cash bond for appearance for hearing at a later date. At the time set for hearing the defendant fails to appear, whereupon the Justice declares the bond forfeited and applies the same to the payment of costs in the case, paying the balance, if any, into the county treasury.

QUERY: What is the proper procedure for the Justice of the Peace to follow in a case where a recognizance has been taken and declared forfeited for non-appearance of the defendant?

We are submitting herewith a typical case taken from the dockets of a justice, and call your attention to the items appearing in the cost bill.

May we also have your opinion as to what legal fees the Justice and constable have earned in this case?”

In the case you have submitted for my opinion, the defendant motorist was charged with the offense of operating a motor vehicle over a state road at an unreasonable and improper rate of speed, to-wit, seventy miles per hour, in violation of Section 12603, General Code. Immediately upon arrest, the motorist in the case under consideration was taken before the Justice of the Peace of the township in which the offense occurred; a postponement of a hearing on the charge was agreed upon and the defendant posted a cash bond as security for his appearance at the date fixed for his preliminary examination. The statutory provision for this postponement and the posting of a cash bond is found in Section 12626, General Code, which reads as follows:

“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."

In an interpretation of the Motor Vehicle Laws, including Section 12626, supra, it was held in an opinion reported in Opinions of the Attorney General for 1925, at page 681, in the fourth branch of the syllabus as follows:

"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."

From the foregoing, it seems that the term "personal undertaking" as used in Section 12626, General Code, may include a cash bail, and it appears likewise that the Justice of the Peace exceeds his authority in any case in which he accepts a cash bail in any amount less than the maximum fine provided for the offense. Therefore, the Justice had no authority to accept a \$10.00 cash bail for a violation of Section 12603, General Code, in the case under inquiry.

Further authority for a postponement of the preliminary hearing as provided for in Section 12626, General Code, is found in Section 13433-1, General Code which reads as follows:

"When the accused is taken before a court or magistrate and the warrant has been returned, such court or magistrate shall inform him of the charge against him, and of his right to have counsel, and with the consent of the accused, shall have the authority to proceed forthwith to examine into the merits of the charge; *but upon application on behalf of the prosecution or the defense, and for good cause shown, the court or magistrate shall postpone the examination for a reasonable time, not to exceed ten days, except by the consent of both parties.*

The absence of counsel or material witnesses, shall be held to be reasonable cause for such continuance. Any postponement of the examination herein provided for contrary to the provisions of this section shall have the legal effect of a dismissal of said proceeding for want of prosecution, but in event a proceeding is so dismissed it shall not have the effect of a bar to any further proceeding upon the same charge.” (Italics the writer’s).

The foregoing statute and Section 12626, General Code, are in *pari-materia* inasmuch as both sections contemplate misdemeanors and accordingly must be reasonably construed in relation to each other.

Proceeding upon the premise that the Justice of the Peace could accept a cash bail in the proper amount from the defendant motorist, pursuant to the authority of Section 12626, General Code, and grant a postponement of the preliminary examination, the fact then transpires that the defendant failed to appear on the date fixed for the preliminary examination, so the Justice of the Peace declared a forfeiture of the cash bond previously posted by the defendant motorist. The question now properly arises as to what, if any, jurisdiction did the Justice acquire under the existing facts of this case and as a consequence what, if any, judgment, may he properly render.

Looking to the jurisdiction of a Justice of the Peace for a violation of Section 12603, General Code, which is defined as a misdemeanor, I find that Section 13433-9, General Code, provides:

“When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured, and pleads guilty thereto, such magistrate shall sentence him to such punishment as he may deem proper according to law, and order the payment of costs. 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.”

Inasmuch as the defendant in the case under consideration was not brought before the magistrate on the complaint of the party injured and did not even appear for a preliminary examination, much less plead guilty to any charge, the Justice did not acquire jurisdiction to even render a judgment for the payment of costs.

In the unreported case of the *State of Ohio vs. Orville Stahl*, being Case No. 2578 and heard in the Court of Appeals of the Ninth Judicial

District, the facts were much stronger against the defendant than in the present case, but in circumscribing the jurisdiction of a Justice of the Peace for a violation of the Motor Vehicles Laws, Section 12603 to 12628-1, inclusive, General Code, the court held in the syllabus as follows:

“Where a person is accused of violating a penal section of the motor vehicle act (Sections 12603 to 12628-1, G. C. inclusive) and if brought before a justice of the peace upon a complaint which is not made by the party injured, and such accused pleads guilty, said justice is without jurisdiction to render final judgment and sentence the accused, although the accused, after pleading guilty, subscribes a writing waiving a jury and submitting to be tried by the justice. Under such circumstances, the justice has jurisdiction only to ‘require the accused to enter into a recognizance to appear before the proper court,’ as provided in Section 13433-9, G. C.”

It appears that there is only one case in which a magistrate can acquire jurisdiction to render a final judgment for a violation of Section 12603 and that is found in Section 13433-10, General Code, which reads as follows:

“When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed, and there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance with good and sufficient surety, in such amount at a proper time and before the proper court, otherwise, he shall discharge him from custody. *If the offense charged is a misdemeanor, 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.*” (Italics, the writer’s.)

It seems, however, that under the facts of the case you present, the Justice of the Peace cannot acquire jurisdiction to render any judgment whatever but is bound by the provisions of Section 13433-8, General Code, which read as follows:

“If the accused fails to appear at the time named in the recognizance, or fails to comply with the conditions thereof, the judge or magistrate shall declare such recognizance for-

feited, and *transmit a transcript of his proceedings in the case, together with the recognizance, to the clerk of the proper court.* Proceedings shall be had thereon by such court, as may be expedient, in a like manner as if the recognizance had been taken therein." (Italics, the writer's.)

I feel that the language and intention of the foregoing statute is perfectly clear and unambiguous and under the facts of the case you have submitted, it is the mandatory duty of the Justice of the Peace to transmit the forfeited cash bail, together with a transcript of his proceedings in the case, to the clerk of the proper court. Accordingly, he cannot render judgment for costs and make the proper deductions from the forfeited recognizance before transmission to the proper court but must include the cost bill in his court as part of the record of the proceedings which is transmitted to the proper court and look to the payment of these costs from the County Treasurer.

Inasmuch as it is my opinion that the Justice of the Peace cannot render any judgment under the facts of your submitted case, the only items appearing in the cost bill you have submitted that are proper charges in the Justice's court, are as follows:

Taking and certifying Affidavits, ea.	.80	.80
Indexing case		.20
Issuing warrant 1 person, each	.80	.80
Taking Bonds or recognizances, each	.80	.80
Granting Continuance, each	.50	.50
Warrant to arrest Defendants, each	1.00	1.00
Mileage, 1st mile 50c, additional mile	.15	.50

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1547.

OHIO AND ERIE CANAL LANDS ACQUIRE UNDER LEASE
BY THE AMERICAN STEEL AND WIRE COMPANY—FEE
SIMPLE TITLE, WHEN.

SYLLABUS:

Lands acquired by appropriation or otherwise in the construction of the section of the Ohio and Erie Canal now held under lease by The