

1603.

APPROVAL, BONDS OF THE VILLAGE OF CRIDERSVILLE, AUGLAIZE COUNTY—\$5,679.11.

COLUMBUS, OHIO, January 19, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

1604.

JUSTICE OF THE PEACE—JURISDICTION IN MISDEMEANOR CASES—
EFFECT OF FILING WAIVER OF TRIAL BY JURY DISCUSSED.

SYLLABUS:

In misdemeanor cases, when the accused, under the provisions of Section 13511, General Code, in a writing subscribed by him and filed before or during the examination, waives a trial by jury and submits himself to be tried by the magistrate, a justice of the peace may proceed with the trial and render final judgment, even though the offense charged be not one included in those classes of cases, in which final jurisdiction is specifically given to a justice of the peace, by Section 13423 or other sections of the General Code. By the terms of Section 13510, General Code, however, this rule would not apply, where the crime is one on which there may be a "party injured," and the complaint is made by one other than such party.

COLUMBUS, OHIO, January 19, 1928.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—This will acknowledge your letter dated January 6, 1928, which reads as follows:

"Will you please give us your opinion as to whether or not the signing of the following statement by the defendant, which is printed on the back of the warrant, gives the justice of the peace final jurisdiction to try misdemeanors?"

"I hereby waive the right to trial by jury, and submit the within case to the justice of the peace for a final hearing."

The question that you present involves consideration of that part of Section 13511, General Code, which reads:

"* * * 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 a final judgment."

Your attention is directed to Opinions No. 392, dated April 27, 1927, and No. 577, dated June 6, 1927, each of which construes Section 13511, supra, and discusses the jurisdiction of justices of the peace in misdemeanor cases.

The syllabus of Opinion No. 392 reads :

"1. Justices of the peace have final jurisdiction in cases involving those classes of offenses enumerated in Section 13423, General Code, except where a felony is charged.

2. In cases involving violations of Sections 12705, 12706, and 12710, General Code, where it is the duty of the State Board of Pharmacy to cause such sections to be enforced, if no security for costs be demanded from complainant under the provisions of Section 13499, General Code, and the defendant raises seasonable objection to the qualification of the justice of the peace because of his direct, substantial, pecuniary interest in the outcome, such objection should be sustained and the complaint withdrawn and filed in a proper court where such disqualification does not exist. If, as provided in Section 13499, General Code, the costs are secured, no such interest exists and therefore such an objection may be properly overruled and final judgment rendered.

3. Since crimes defined by Section 12709, General Code, are felonies, and since the recent decision of the Supreme Court of the United States in the case of *Tunney vs. State of Ohio*, decided March 7, 1927, and reported in the Ohio Law Bulletin and Reporter, Vol. XXV, March 14, 1927, does not affect the jurisdiction of justices of the peace to act as examining magistrates, the jurisdiction of a justice of the peace over the crimes denounced in said section is not affected."

The syllabus of Opinion No. 577 is as follows :

"A justice of the peace is without jurisdiction to render a final judgment in cases involving a violation of Sections 7246, et seq. and 12603, et seq., General Code, unless as provided in Section 13511, General Code, the defendant in a writing subscribed by him waives the right of trial by jury and submits to be tried by said justice. If no such waiver be filed and a plea of not guilty be entered, the justice shall inquire into the complaint in the presence of the accused and if it appear that there is probable cause to believe the accused guilty, order the accused to enter into a recognizance to appear before a proper court of the county, viz., the probate court or the common pleas court. If no such waiver be filed and a plea of guilty be entered, the justice of the peace shall likewise bind the defendant over to the proper court."

Your attention is directed to the following opinions of this office in which like conclusions were reached :

Opinion No. 1865, Vol. II, Opinions, Attorney General for 1916, page 1437 ;
Opinion No. 217, Vol. I, Opinions, Attorney General for 1919, page 380 ;
Opinion No. 1656, Vol. II, Opinions, Attorney General for 1920, page 1083 ;
Opinion No. 2243, Vol. I, Opinions, Attorney General for 1921, page 622 ;
Opinion No. 2883, Opinions, Attorney General for 1925, page 681.

I am not unfamiliar with the decision of Judge Routzohn of the probate court of Montgomery County, Ohio, in the case of *State, ex rel., Overholser vs. Wolf, et al.*,

decided February 28, 1927, reported in Vol.°XXV, The Ohio Law Bulletin and Reporter of December 26, 1927.

In that case Overholser was arrested by a constable, and taken before a justice of the peace where he was charged with unlawfully operating a motor vehicle in violation of Section 12603-1, General Code. Upon arraignment defendant pleaded not guilty, signed and filed a "waiver" as provided by Section 13511, General Code, and upon trial being had, was found guilty and fined \$10.00 and costs and committed to jail for non-payment thereof. The defendant sought release on habeas corpus contending that the justice of the peace was without jurisdiction finally to hear and determine the case, assess the fine or commit in default of payment thereof. Judge Routsohn granted his release, his reasons therefore being contained in the opinion above referred to.

In his opinion Judge Routsohn correctly states the law, as laid down by the Supreme Court of Ohio, to the effect

"* * * that a justice's court is one of limited jurisdiction and that by no implication or construction can its jurisdiction be extended beyond the plain language of the statutory law as contained in the General Code.

The general jurisdiction of justices of the peace in criminal cases is provided for in Section 13422, General Code, and in Section 13423 and other sections of the General Code, which later sections enumerate those classes of offenses over which justices of the peace, police judges and mayors have final jurisdiction within their respective counties. Section 13432 of the General Code directs the method of procedure for obtaining a jury in those cases in which such magistrates have final jurisdiction, but does not confer jurisdiction upon justices of the peace. To this effect see *State, ex rel. Hilt vs. Renz*, 5 Ohio App. 421, in which case the conclusions of the court of common pleas in the case of *State vs. Pohlman*, 13 O. N. P. (n. s.) 254, were referred to and disapproved. Your attention is directed to that portion of Judge Richard's opinion in the *Renz* case, *supra*, which appears on page 423, and which Judge Routsohn failed to quote in his opinion in the *Overholser* case, *supra*, viz.:

"The final jurisdiction given by statute to justices of the peace in criminal cases is specifically set forth in other sections of the statutes, particularly in Sections 13423, 1153, 4414, 4416, 4417, 12519, 12520, and others of the General Code. Under Section 13423, General Code, a large number of offenses are named over which justices of the peace, police judges and mayors are given final jurisdiction, and in numerous other instances throughout the statutes these magistrates are given jurisdiction over additional offenses, but nowhere is final jurisdiction given to a justice of the peace to try a defendant and impose a penalty in a case where the charge is under Section 12475, General Code, unless the accused in writing duly waives a jury and submits to be tried by the magistrate, as provided by Section 13511, General Code."

It is of course true, as said by Judge Routsohn in his opinion:

"* * * that the motor vehicle act does not confer final jurisdiction on justices of the peace in prosecutions for the violation of its provisions, and that the justice of the peace was without jurisdiction to fine or imprison relator Overholser by virtue of Section 13432."

and his statement that :

“It is obvious that the magistrate had no right to assume final jurisdiction over relator, Overholser, by virtue of this section for the reason that the complaint was not filed by the ‘party injured.’”

naturally follows.

The learned judge then quotes Section 13511, General Code, and uses the following language :

“The first part of this section applies to both felonies and misdemeanors, charging the examining magistrate with the duty to examine into the complaint and to bind the accused over to the common pleas or probate court as the nature of the violation and the law requires, or dismiss the complaint. The latter paragraph (last sentence) applies solely to misdemeanors. This statute must be taken literally and must be strictly construed. By no implication can a justice of the peace assume jurisdiction except within the specific authority granted by the statutes.”

The legislative history of Sections 13510, 13511, 13423 and 13432, General Code, was considered and construed in Opinion No. 392, dated April 27, 1927, Opinions, Attorney General for 1927, and I deem it unnecessary to set forth the same in detail herein. In that opinion the following language was used :

“From the legislative history above outlined it seems clear that in all cases involving the kinds of offenses other than felonies specified in Section 13423, supra, the justice of the peace does have final jurisdiction and can hear and determine the case without a jury if the penalty be only a fine and with a jury if imprisonment be part of the penalty, and that the provisions of Sections 13510 and 13511, supra, have no application to cases enumerated in Section 13423.”

Your attention is directed to the case of *Foster vs. State of Ohio*, being case No. 60241, Court of Common Pleas of Montgomery County, Ohio, decided June 27, 1927. The facts, as stated by Judge Snedicker in his opinion, were as follows :

“This case is on error to the judgment of justice of the peace of Butler township this county. The plaintiff in error was charged in the court below with the violation of Section 12603-1 of the General Code of the State of Ohio. * * * The transcript of the docket of the justice of the peace shows that ‘The plaintiff in error pleaded not guilty upon his arraignment’ in that court; that subsequently ‘defendant signed a jury waiver and had a trial.’ That thereupon witnesses were sworn and the court after hearing the testimony found the defendant guilty. * * *”

Judge Snedicker, in his opinion, used the following language :

“The petition in error, among other things, complains ‘That Charles H. Borchers as justice of the peace had no jurisdiction over the subject matter of said action.’ In support of this, counsel for plaintiff in error contended that a waiver of trial by jury filed with a justice of the peace did not have

the effect to give him the right to try, convict and sentence the plaintiff in error. * * * It is urged that this last sentence of Section 13511, does not warrant a justice of the peace after the waiver of a jury trial in taking testimony and administering a fine to a defendant found guilty of a misdemeanor for which there is not by law a penalty of imprisonment, because there is no provision for a jury in a magistrate's court in such a cause. Section 13432 which requires a jury before a justice of the peace is only effective 'when imprisonment is part of the punishment.' But we do not understand that a jury which a defendant waives under Section 13511 is a jury in a magistrate's court.

The duty of the justice of the peace under this section is, unless a jury is waived, if he finds probable cause to believe that a defendant is guilty, to bind him over to the proper court; and if that with which he is charged is a misdemeanor, to bind him over to the probate court. In the probate court a defendant by Section 13452 of the General Code, may, if he so demands, have a trial by jury; and the probate judge can only try the case himself 'if a defendant does not demand trial by jury.' When a defendant before a magistrate, files as did this defendant here, a writing subscribed by him waiving a jury, he then waives the right on being bound over to the probate court to demand a jury in that court; and that being all the right he had to a jury, the legislature gives the justice of the peace power to proceed with his case. So that we find as did the Attorney General in his opinion that a jury waiver under the provisions of 13511 is effective to entitle the justice of the peace to proceed; and if there were no other question in the case, Squire Borchers was within the law when, after a waiver of trial by jury, he heard the testimony and made his finding and rendered his judgment."

The opinion of the court of common pleas of Montgomery County, Ohio, in the Foster case, *supra*, is contrary to the opinion of the probate court of Montgomery County, Ohio. I am of the opinion that the opinion of the court of common pleas correctly states the law.

Laning in his work on Arrest and Prosecution at page 548 and 549, says:

"The statute (Section 13511, General Code) provides that if the offense charged is a misdemeanor, and the accused, in a writing, waive a jury, and submit to be tried by the magistrate, he may turn from being a committing magistrate, become a trying court, and render final judgment. The waiver must be subscribed by the accused, and may be filed, before or during the examination. This enables the accused, after the evidence is in, to allow the magistrate to sentence him, rather than to take the risk, trouble and expense of an investigation by the grand jury, and possibly develop a stronger case against him, and he incur a severer penalty in a trial in the common pleas. But it should be borne in mind, that the authority extends only to misdemeanors."

The case of *Hanaghan vs. State*, 51 O. S. 24, is pertinent in determining this question. Judge Williams, on page 27, after quoting Revised Statutes, Section 7147 (now Section 13511 General Code), used the following language:

"The claim made under this section is, that a plea of guilty, filed by the accused, in writing is, in effect, a waiver of a jury, and submission to be tried by the magistrate, within the purview of the section, and authorizes

him to render final judgment. Sections 7146 and 7147 (now Sections 13510 and 13511, General Code) are consistent with each other. The former prescribes, specifically, the proceedings of the magistrate upon a plea of guilty, and the latter those where there is not such a plea. It is obvious, that if a plea of guilty were given the effect claimed for it under this section, the preceding section would be superseded, and its operation defeated; for then, in all cases of misdemeanor, whether the complaint was filed by the party injured or other person, the magistrate, upon such a plea, could render final judgment on the ground that the plea was a final submission of the case to him; while the last clause of Section 7146 (now Section 13510, General Code) makes it the duty of the magistrate to require the accused to enter into a recognizance for his appearance before the proper court, in all cases of misdemeanor, notwithstanding his plea of guilty, unless the complaint against him was filed by the party injured. The accused might choose to enter such a plea, and be recognized to the proper court for trial, in order to avoid the expense and vexation of the examination, or for other cause deemed sufficient by him, but be unwilling to submit his case to the magistrate for final judgment. True, the plea may be used against him on the trial, but is not conclusive evidence of his guilt. At all events, to authorize the magistrate to render final judgment under Section 7447 (now Section 13511, General Code), the case before him must be one which comes within its terms; that is, the accused must in writing, subscribed by him, waive a jury and submit to be tried by the magistrate, which is essentially a different thing from a plea of guilty. Such a plea may dispense with the necessity of an examination into the truth of the complaint against the accused, but it does not take away his right of trial by jury."

I am of the opinion that Judge Routzohn in the Overholser case erroneously construed the last sentence of Section 13511, General Code. It must be borne in mind that what the defendant waives is not a jury trial in the justice's court, but a jury trial in probate court as provided by Section 13452, General Code, or a jury trial in the court of common pleas as provided by Section 13651, General Code. The subscribing and filing of a "waiver," under the provisions of Section 13511, General Code, brings into existence a set of facts by reason of which the jurisdiction of a justice of the peace attaches by operation of law.

I see no objection to the printing of such a "waiver" on the back of the warrant, as appears on the form which you enclosed with your letter. The substance thereof complies with that portion of Section 13511, General Code, which reads:

"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 a final judgment."

The better practice, however, would be for the accused to subscribe a separate writing in which he waives a jury and submits to be tried by the magistrate, which writing should be filed before or during the examination.

In view of the foregoing it is my opinion that in misdemeanor cases, when the accused, as provided by Section 13511, General Code, in a writing subscribed by him and filed before or during the examination, waives a trial by jury and submits himself to be tried by the magistrate, a justice of the peace may proceed with the trial and render final judgment, even though the offense charged be not one included in

those classes of cases, in which final jurisdiction is specifically given to a justice of the peace, by Section 13423 or other sections of the General Code. By the terms of Section 13510, General Code, however, this rule would not apply, where the crime is one in which there may be a "party injured," and the complaint is made by one other than such party.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1605.

STOCK OF FOREIGN CORPORATION—EXEMPTION FROM LISTING
UNDER SECTION 192, GENERAL CODE, DISCUSSED.

SYLLABUS:

When stock of a foreign corporation had been exempted from listing by Ohio stockholders in 1926, by the action of the foreign corporation making the election provided for in Section 192, General Code, those stockholders would be justified in omitting the listing of such stock in 1927, notwithstanding the corporation had until June 11, 1927, to indicate whether it would so elect for the year 1927. The foreign corporation having so elected in June, 1927, the stock was exempt from listing and taxation in the hands of Ohio stockholders for the year 1927.

COLUMBUS, OHIO, January 20, 1928.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication, in which the following questions are submitted for my opinion:

"1. In 1926 but prior to April 11th, a foreign corporation under Section 192 filed with this commission its report and election to pay the Ohio franchise tax on the full value of its stock. In accordance with this election it paid full franchise tax for 1926. No further or other report or election so to pay was filed by it until June, 1927.

Is or is not the stock of such company exempt from listing and taxation in this state in the year 1927,

- (a) when held by an Ohio corporation on January 1st,
- (b) when held by an individual on April 10th.

2. In 1926 but subsequent to April 11th, a foreign corporation filed a similar report and election and in like manner paid the resulting franchise tax for the year 1926. No further report or election was filed by it until June of the present year.

Is or is not its stock exempt from listing and taxation in this state in the year 1927,

- (a) when held by an Ohio corporation on January 1st,
- (b) when held by an individual on April 10th."

Your questions require consideration of the following statutes:
Section 5404-1, General Code, which provides: