"Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer."

It will be seen that the above statutory provision is specific in its nature relative to the disposition of fines and forfeitures of bonds when collected. These provisions being specific and mandatory will take precedence over a statute of a general nature, and especially is this true since it is a later statutory enactment.

Specifically referring to your inquiry will say I find no authority for the county commissioners, nor any one else, to deduct and turn over to the county the cost of feeding and keeping a prisoner for violation of liquor law during his confinement in jail from any fines collected.

On the contrary, it is my opinion that the legislature has clearly and plainly provided how the fines and forfeiture shall be paid, namely, one-half into the state treasury, credited to the general revenue fund, and one-half to the treasury of the township, municipality, or county where the prosecution is held, depending upon whether the officer hearing the case is a township, municipal or county officer.

Respectfully,
C. C. CRABBE,
Attorney General.

129.

WOMAN CANNOT BE CONFINED IN COUNTY JAIL FOR PERIOD LONGER THAN THIRTY DAYS—WHEN JUDGMENT IS VOIDABLE AND NOT VOID—IN CASE OF VOIDABLE JUDGMENT ONLY AND UPON RELEASE OF PRISONER BY HABEAS CORPUS ORIGINAL COURT MAY REASSUME JURISDICTION AND CORRECT OR MODIFY ITS JUDGMENT AND CARRY SAME INTO EFFECT.

SYLLABUS:

Under section 2148-7 G. C. a justice of the peace cannot order a woman convicted of a misdemeanor imprisoned in a county jail, if the confinement therein is for a period longer than thirty days. Where such prohibited imprisonment has been ordered and a release obtained on habeas corpus, and the original court having rendered a voidable, and not void judgment, it may reassume jurisdiction and modify or correct its judment as to the place of imprisonment and proceed to carry the same into effect.

COLUMBUS, OHIO, March 8, 1923.

HON. ALBERT H. SCHARRER, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter requesting the opinion of this department as follows:

"I should like to ask your opinion as to what advice to give to a magistrate who sentenced a woman to the jail of Montgomery County, Ohio, in default of payment of a fine of One Thousand ($1,000.00) Dollars and costs for violation of the Crabbe Act, to which said woman pleaded guilty.

Properly enough in view of section 2148-7 General Code, the woman has been released on habeas corpus proceedings. The question arises as to whether or not the same magistrate may again sentence the woman, this time to the Ohio Reformatory for Women at Marysville, or whether her erroneous commitment to said jail and her subsequent release on habeas corpus proceedings act in such a manner as to prohibit the magistrate from sentencing her again to said Reformatory."

In this case or commitment, did a valid judgment exist?

Had the magistrate jurisdiction to issue the process, render the judgment, or make the order which he did? If so, the writ should not be allowed in view of the requirements of section 12165 G. C.

Was the judgment rendered by the justice of the peace void or voidable only?

As to that part of the judgment imposing the fine, it is clear there did exist such jurisdiction, but as to the latter part of the judgment that she be committed to the county jail until the fine and costs were paid or secured to be paid, evidently there did not exist jurisdiction to make such order and the writ of habeas corpus was allowed to issue.

The particular sections of the General Code offended against under the above decision are sections 2148-1, 2148-5, 2148-6 and 2148-7, particularly the latter section, which is as follows:

"After the issuance of the first proclamation hereinbefore referred to, it shall be unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, and after the issuance of the second proclamation it shall be unlawful to sentence any female convicted of a misdemeanor or delinquency to be confined in any such place, except in both cases the reformatory herein provided for, the girls' industrial school or other institution for juvenile delinquency, unless such person is over sixteen years of age and has been sentenced for less than thirty days, or is remanded to jail in default of payment of either fine or cost or both, which will cause imprisonment for less than thirty days, provided that this section shall not apply to imprisonment for contempt of court."

Can the justice of the peace now correct his judgment as to the place of commitment after having issued a mittimus to the jailer to receive the defendant and detain her until the fine is paid or secured to be paid? Or did he *ipso facto* lose jurisdiction?

Price, Judge, in 78 O. S., p. 33, says:

"A judge in habeas corpus proceedings, where a valid judgment exists, may allow correction of the process issued thereon."

It is to be observed that the common pleas court did not remand the case to the justice of the peace, but discharged the prisoner.

I have not been able to find any adjudicated case in Ohio determinative of the exact questions involved in your inquiry.

In the case of State ex rel. Kudrick v. Meredith, Sheriff, found in Ohio Law Bulletin and Reporter for July 24, 1922, at page 120, a case that is similar to the facts in your case was found to exist.

Mrs. P. K. was convicted before the mayor of the municipal corporation for the violation of the provisions of section 6212-15 G. C. and fined one thousand dollars and costs, and in default of payment of fine and costs, remanded to the county jail until said fine and costs were paid or secured to be paid. She successfully brought habeas corpus proceedings for the purpose of obtaining her release from the county jail

> " * * * on the ground that the committing magistrate, the mayor, was without and had no authority, right or power to sentence her to imprisonment in the county jail for non-payment of either fine or costs that would cause her imprisonment for thirty days or more, because of the provisions of the General Code * * * "

mentioned above.

The last paragraph of the opinion of the court in that case uses the following significant language:

> "Whether the committing magistrate may yet impose proper sentence —to the Women's Reformatory—in default of payment of fine and costs is not here determined; that he may not sentence to workhouse or jail is attributable to the act of the legislature in limiting the power of courts to so sentence and the remedy must come through the legislature."

In Bailey on Habeas Corpus at page 180 we find this statement:

> "Notwithstanding the doctrine so emphatically expressed and consistently adhered to by the federal court, it is not followed by the courts of several of the states. We find that in some of them a sentence imposed beyond the limit prescribed by the particular statute for the offense, for the commission of which the accused was prosecuted, is absolutely void, not alone for the excess beyond the jurisdiction of the court, but as to the valid parts as well, while in others it is held that the court, having jurisdiction of the offense and the person of the accused, the imposition of excessive punishment is but error, not available by habeas corpus. *It is a matter of regret that the rule is not uniform.*"

In re George Winslow, 91 O. S., p. 330, our Supreme Court used this language:

> "If the court in sentencing him did not act under this statute, but sentenced him under another statute, which for the purposes of this case may be conceded to have been invalid, the sentence was erroneous and voidable but not void."

An earlier Ohio case and one that has been followed in Ohio and elsewhere is that of ex parte Van Hagan found in 25 O. S., p. 432. The court in concluding the case announced the law of Ohio as follows:

> "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void. It follows that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment, and not *habeas corpus,* which is not

the proper mode of redress where the relator was convicted of a criminal offense and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction."

In re Tani, 13 L. R. A. (N. S.), at page 524, the court in reviewing a decision somewhat at length states:

" * * * Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the defects complained of consist only in the judgment—in its extent, or mode, or place of punishment—the conviction being in all respects regular. In Beale v. Com. 25 Pa. 11, 22, the supreme court of Pennsylvania said: 'The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established.'

* * * From these cases it is apparent that a few courts have held that, where the sentence upon a valid conviction is excessive, or erroneous in part, the whole of the judgment must fall as being without the jurdisdiction of the court, and that the convicted criminal must be discharged, while others hold that the sentence may be corrected and the proper punishment inflicted, others that it is void only as to the excessive punishment it orders, others that the erroneous sentence will stand and be enforced against habeas corpus proceedings, and can only be attacked or corrected by the regular methods of appeal or writ of error, and still other courts, among which are notably the Supreme Courts of the United States, of Massachusetts, and Nevada, adhere to the latter rule generally, but allow some elasticity and exceptions for the correction of errors, where the petitioner is restrained under an unconstitutional act, or there is some special urgency and hardship, and the sentence was wholly or partly unauthorized."

And again at page 525 of the same decision:

"The sentence being in accordance with the law and within the discretion vested in the district court as to the amount of the fine and the time of the alternative imprisonment imposed, and being erroneous only as to a matter which is definitely fixed by the statute—*the place of confinement*—and regarding which no court has any discretion or power to change, it seems unnecessary to have the judgment of the district court modified, even if the mistake may be considered as one apparent upon the record and of the kind usually corrected by courts upon mere suggestion or of their own volition. The direction that the confinement be in the state prison *may be rejected as surplusage* and of *no force or effect, in* the face of the *statute which controls* and fixes the county jail as the place of imprisonment, without it being so designated in the judgment. * * * "

Mr. Justice Feld, announcing the opinion of the court in re Bonner, U. S. Supreme Court Reports, 151 at page 257 in a well considered and leading case says:

"A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges—perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess * * *

The laws of our country take care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief. * * *

Much complaint is made that persons are often discharged from arrest and imprisonment when their conviction, upon which such imprisonment was ordered, is perfectly correct, the excess of jurisdiction on the part of the court being in enlarging the punishment or in enforcing it in a *different mode or place* than that provided by law. *But in such cases there need not be any failure of justice, for where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposes the sentence in order that its defect may be corrected.* The judges of all courts of record are magistrates, and their object should be not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the *punishment imposed,* in the *mode, extent or place of its execution,* has *exceeded the law,* to have it *corrected* by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's right in adopting such a course. * * * But in a vast majority of cases the extent and mode and *place of punishment may be corrected* by the original *court without a new trial,* and the party punished as he should be whilst relieved from any excess committed by the court of which he complains. In such case the *original court* would only set aside what it *had no authority* to do and *substitute directions required by the law* to be done upon the conviction of the offender.

Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the *defects* complained of consist *only in the judgment*—in its *extent* or *mode,* or *place of punishment*—the *conviction being* in all respects *regular.*

In some cases, it is true that no correction can be made to the judgment, as where the court had under the law no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging on habeas corpus persons who have been duly convicted will be thus removed. * * * "

And to the same effect we find the case of U. S. v. Pridgeon, 153 U. S., 62, wherein the court states:

"Many well considered authorities, in England as well as in this country, hold that where there is jurisdiction of the person and of the offense the excess in the sentence of the court beyond the provisions of the law is only voidable."

You are advised that after a somewhat exhaustive research of the authorities, both Federal and State, it is believed there is ample authority for, and it is therefore my opinion that, the justice of the peace in this case may reassume jurisdiction, and modify his judgment or sentence, and commit to the Ohio Reformatory for Women at Marysville in default of payment of fine and costs.

Respectfully,
C. C. CRABBE,
Attorney General.

130.

APPROVAL, FINAL RESOLUTION, ROAD IMPROVEMENT, ATHENS COUNTY.

COLUMBUS, OHIO, March 8, 1923.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

131.

APPROVAL, BONDS OF AMHERST VILLAGE SCHOOL DISTRICT, LORAIN COUNTY, $10,000, TO MAKE CERTAIN ADDITIONS AND IMPROVEMENTS TO PRESENT SCHOOL BUILDING.

COLUMBUS, OHIO, March 8, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

132.

APPROVAL, BONDS OF EAST COLUMBUS VILLAGE SCHOOL DISTRICT, FRANKLIN COUNTY, $55,250.00, TO CONSTRUCT A SEMI-FIREPROOF ADDITION TO AND REPAIR PRESENT SCHOOL BUILDING.

COLUMBUS, OHIO, March 8, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.