

Justices of the Peace, Jurisdiction to Imprison for Fine. Imprisonment for Fine, When May Be Made. Fine, When May Be Collected by Imprisonment. Schools, When and How Site May Be Determined. School Buildings, Site Of, How Determined. School Trustees, Authority to Determine Site of School House.

If the judgement is for fine only, the defendant is entitled to be discharged from custody as soon as the judgment is given, but if the judgment is for fine and imprisonment until paid, the defendant may be detained in custody until such fine is paid or until he shall have served one day for every two dollars of such fine; but where a judgment of imprisonment has been imposed and also a judgment of fine, there can be no additional imprisonment by reason of the fine.

The location of school houses must be determined by a vote of the district and the school trustees have no authority to select a site without first submitting the question to the voters of the district.

May 4, 1911.

Mr. John Hurly,
County Attorney, Valley County,
Glasgow, Montana.

Dear Sir:

I am in receipt of your letter of April 29th, requesting my opinion upon the following questions, viz:

1. If a justice of the peace in a misdemeanor case, in which he is authorized to impose a fine of \$500, does impose such fine, with the proviso that the defendant be imprisoned for a period not exceeding one day for every two dollars of the fine, may such imprisonment extend beyond a period of six months; or when the six months period has elapsed should the defendant be released?

2. In case the justice of the peace imposes a sentence of imprisonment for some period less than six months, and in addition imposes a fine, can the defendant be imprisoned upon the fine if the commitment recites that the defendant be imprisoned one day for each two dollars thereof?

3. In one of the school districts of the county, school has been conducted in a building furnished the district by a private individual in the same vicinity, for a number of years, though the site of the school was changed about a year ago to a point across the river from the old location to a building furnished by the same party who had previously furnished it. No vote had ever been taken to locate the school in the first instance. An election was held about a year ago for the purpose of pro-

viding bonds for the erection of a school house, but nothing was said in the election concerning the location of the building to be erected. The majority of the school board now propose erecting the school building upon a site to be selected by them at a distance of perhaps two miles or more from the temporary location formerly used. The question now is, can the board do this without submitting the matter to a vote of the electors of the district?

In reply to your first question, I will say that Section 8934, of the Revised Codes of 1907, provides that justices courts shall have jurisdiction of certain offenses named in the section, and of all "misdemeanors punishable by fine, not exceeding five hundred dollars, or imprisonment not exceeding six months, or both such fine and imprisonment."

By the provisions of Section 9611 of the Revised Codes: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every two dollars of the fine."

The imprisonment provided for by Section 9611, above quoted, is no part of the punishment, but simply provides a means by which the court may enforce the fine which it imposed. The statutory power of punishment is exhausted when the judgment of fine is pronounced.

In re Taylor, 1 Pac. 884;

In re Fil Ki, 22 Pac. 146;

In re Sullivan, 84 Pac. 781.

If the imprisonment which may be directed under the provisions of Section 9611 is no part of the punishment, but is simply a means of enforcing the fine imposed, then if a fine of five hundred dollars was imposed, and in default of payment of the fine the court should direct that the defendant be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every two dollars of the fine, and the defendant failed or refused to pay the fine, he might be kept in jail for a period of two hundred and fifty days, although the term for which the defendant might have been imprisoned for the same offense could not exceed six months.

In the case of *State ex rel Hogdon v. District Court*, reported in the 33 Mont. p. 120, the supreme court of this state used the following language: "If the judgment is for fine only, the defendant is entitled to be discharged from custody as soon as the judgment is given; but if the judgment is for fine and imprisonment until paid * * * * then the defendant may be detained in custody until such fine is paid, or until he shall have served one day for every two dollars of such fine."

In reply to your second question, you are advised that the supreme court of California has construed a statute of that state, which is identical with ours in so far as this question is concerned, that where a judgment of imprisonment has been rendered, and also a judgment of fine, there can be no imprisonment to satisfy the fine.

People v. Brown, 45 Pac. 131;

Roberts v. Howells, 62 Pac. 892;

In re Sullivan, 84 Pac. 781;
In re Wadley, 23 Pac. 190;
In re Rosenheim, 23 Pac. 372;
In re Collins, 23 Pac. 374.

This construction of these sections is further supported by the provisions of Sections 9378 and 9379 of the Revised Codes, which provide that if the judgment is for fine alone, execution may be issued thereon as on a judgment in a civil action; but if the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer and by him detained until the judgment is complied with.

You are, therefore, advised in answer to your second question that where a judgment of imprisonment has been imposed, and also a judgment of fine, there can be no additional imprisonment by reason of the fine.

In answer to your third question you are advised that subdivision 6 of Section 875 of the Revised Codes of 1907 provides that "Every school board, unless otherwise specifically provided by law, shall have power and it shall be its duty to build or remove school houses and to purchase or sell school lots, when directed by a vote of the district so to do."

In the case of *State ex rel Bean v. Lyons*, reported in 37 Mont., page 362, the supreme court of this state construed subdivision 6 of the section above referred to and held that the location of the school house must be determined by a vote of the district, and that the school trustees had no authority to select a site without first submitting the question to the voters of the district.

The same construction was followed by this office in an opinion dated June 7, 1909, addressed to Hon. R. Lee McCullough, County Attorney, Hamilton, Montana, which is reported in the *Opinions of the Attorney General*, 1908-10, p. 148.

In my opinion the fact that the district does not own a site would make no difference; the question would still have to be submitted to the district for the purpose of determining where the school building should be located.

Yours very truly,

ALBERT J. GALEN,

Attorney General.