tion to their compensation as members of the county election board.

OFFICIAL OPINION NO. 58

June 27, 1945.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and
Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of May 10th requesting an official opinion with reference to the Criminal Division of the Municipal Court of Marion County, Indiana states the following specific questions:

> "1. If a defendant deposits money with the clerk in lieu of giving an appearance bond with freehold surety thereon, is the ten days notice after forfeiture, as provided by Section 9-722 Burns' 1942 Replacement, required?
>
> "2. If a defendant deposits money with the clerk in lieu of giving an appearance bond with freehold surety thereon and the court enters an order of forfeiture of record is the clerk authorized to pay the amount thereof to the county treasurer for the school funds without further proceedings?
>
> "3. If an appearance bond is given in a case wherein the surety thereon in lieu of making the affidavit prescribed by Section 9-722 Burns' 1942 Replacement deposits with the clerk the amount of the bond, is the ten-day notice after forfeiture required?
>
> "4. If in the Municipal Court of Marion County the court enters of record an order of the forfeiture of an appearance bond does the court have authority to set aside the forfeiture on a date subsequent thereto?
>
> "5. If by the judgment of the court a defendant is given a sentence of fine and costs and time in jail or on the penal farm, and such defendant is committed

to the custody of the sheriff and begins to serve the jail sentence or is being held in jail pending delivery to the penal farm, does the court or the judge thereof have authority to suspend the sentence and place the defendant on probation for a determinate time upon a date subsequent to the judgment:

(a) By a written order?

(b) By verbal directions to the sheriff to release the defendant?"

In order not to unduly extend this opinion, your first four questions will be considered together. Chapter 132 of the Acts of 1927 amended Chapter 162 of the Acts of 1905, and provides for a uniform recognizance bond to be given in all criminal cases in all courts in Indiana. Thompson v. State (1943), 221 Ind. 164, 166, 46 N. E. (2d) 600. It changed the form of the recognizance bond, and relieved the state from bringing a separate suit on the bond against the sureties, as well as limiting the time the sureties could produce the defendant and be so relieved from the forfeiture. Sec. 9-722 Burns' Repl. 1942, Acts 1905, Ch. 169, Sec. 82, p. 584; 1927, Ch. 132, Sec. 2, p. 411. Before this amendment, the state was required to bring a separate suit on the recognizance bond against the sureties (III Watson's Works, pp. 207, 208, 209), and the sureties could prevent a judgment on the bond by producing the defendant and paying the costs. Sec. 9-1037 Burns' Repl. 1942. Before the enactment of Chapter 132 of the Acts of 1927, there were three distinct steps which must have been taken to recover on the bond: first, the calling and defaulting of the defendant in open court; second, a judgment on said default that the bond was thereupon forfeited; and third, a suit on the bond itself, pleading a copy of the bond and the judgment of forfeiture thereon. III Watson's Works, pp. 207, 208, 209.

Chapter 132 of the Acts of 1927 does not amend the existing statutes on bail except as to written recognizance bonds and the remedies thereon. The statutes concerning cash in lieu of bail follow:

"The defendant may, in the place of giving bail, deposit with the clerk of the court to which the defend-

ant is held to answer the sum of money mentioned in the order, and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody."

Sec. 9-1026 Burns' Repl. 1942, Acts 1905, Ch. 169, Sec. 146, p. 584.

"If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall give sufficient special bail, or shall surrender himself in open court, or to the sheriff, as provided in this act, or be in any manner legally discharged, the court shall order *a return of the deposit to the defendant or to the person who deposited it for him.*" (My italics.)

Sec. 9-1027 Burns' Repl. 1942, Acts 1905, Ch. 169, Sec. 147, p. 584.

"If, without sufficient excuse, the defendant neglects to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court *must* direct the fact to be entered upon its minutes, and the recognizance, *or money deposited in lieu thereof,* as the case may be, is thereupon forfeited." (My italics.)

Sec. 9-1040 Burns' Repl. 1942, Acts 1905, Ch. 159, Sec. 159, p. 584.

In the case of State v. Barron (1881), 74 Ind. 374, the defendant deposited $500 with the clerk of the court in lieu of bond. The defendant was called and defaulted, and the court ordered the $500 forfeited to the common school fund. The court held that the prosecuting attorney was entitled to a fee of $10.00 for the forfeiture, to be paid out of the funds so forfeited, thus holding such procedure on a forfeiture of a deposit by the defendant proper.

In the case of State, *ex rel.* Michener, Attorney General v. Scanlon (1891), 2 Ind. App. 320, 328, it was held that a defendant who deposited cash with the sheriff in lieu of bond

and defaulted in appearing in court had "no interest whatever in the money in question."

A surety who deposits money in lieu of bond has been held bound by the provisions of Sec. 9-1027 Burns' 1942 Repl., *supra,* and a complaint which failed to allege the conditions precedent to a return of the deposit failed to state a cause of action against the clerk of the circuit court. Cooke v. Harper, Clerk (1921), 78 Ind. App. 267.

Even under Sec. 9-722 Burns' 1942 Repl., the forfeiture is a separate judicial act from the judgment against the sureties. Therefore, under the above authorities and under the specific provisions of Sec. 9-1040 Burns' 1942 Repl., I am of the opinion that the law concerning your first four questions is as follows:

1. No ten (10) day notice to a defendant who deposits cash in lieu of bond is required before forfeiture or after forfeiture before the money is ordered paid into the common school fund.

2. The clerk is authorized to pay the money to the county treasurer for the school fund immediately after judgment of forfeiture where a defendant has deposited cash in lieu of bail, and defaulted.

3. If a third person as surety deposits cash in lieu of bail for a defendant, no ten (10) days' notice to the surety is required after a judgment or order of forfeiture is entered.

4. Under the specific provisions of Sec. 9-722 Burns' 1942 Repl., it is my opinion that the Municipal Court has authority to set aside the forfeiture for cause therein stated on a date subsequent to the forfeiture.

5. The Municipal Court of Marion County is a statutory court whose rights, powers and duties are prescribed by statute.

"The municipal court is a court of limited jurisdiction, created by statute, and has only such powers as the statute of its creation confers. * * *"

Capitol Amusement Co., *et al.* v. Washington and New Jersey Realty Co. (1929), 90 Ind. App. 389, 391.

Chapter 210 of the Acts of 1927 provides for municipal courts giving suspended sentences. (Chapter 50 of the Acts of 1945 only amended Section 1 of said Act as to the salary of the probation clerk.) The material part of Chapter 210 provides:

> "* * * and the city and municipal courts in the cities of the first and second class of this state, shall have power, in any case where any person shall have been convicted of a felony or misdemeanor, or shall have entered his plea of guilty to a charge of a felony or misdemeanor, upon the entry of judgment of conviction of such person, to suspend such sentence and parole such person, by an order of such court, duly entered of record as a part of the judgment of the court in such case, except the crimes of murder, arson, burglary, rape, treason, kidnapping, and a second conviction for robbery, whenever such court, in the exercise of its judgment and discretion, shall find and determine that such person has committed the offense for which he or she has been convicted under such circumstances as that, in the judgment of such court, such person should not suffer the penalty imposed by the law for such offense if he or she shall thereafter behave well, or whenever such court shall find and determine that by reason of the character of such person, or the facts and circumstances of such case, the interest of society does not demand or require that such person shall suffer the penalty imposed by law if he or she shall thereafter behave well: *Provided, That the court may not suspend the execution of sentence after the defendant shall have commenced to serve his sentence of imprisonment.* In case the court shall impose a fine, with a concurrent sentence of imprisonment, the court may suspend the execution of the sentence of imprisonment and may place the defendant on probation and may require that said fine be paid in one or several sums while on probation; or the court may impose a fine and may suspend the imposition of the sentence of imprisonment, and may place the defendant on probation for such period as the court may prescribe: * * *." (My italics.)

A defendant generally commences to serve his sentence of imprisonment when he is in fact in prison pursuant to the terms of the judgment. The Supreme Court of Indiana has cited with approval the Supreme Court of South Carolina as follows:

> "* * * 'The reasoning of the cases first cited we think sophistical, because it rests upon the false assumption that a sentence necessarily begins to run and to be satisfied the moment it is pronounced. The execution of a sentence may be postponed by appeal, by escape and by other causes, but the time of delay in the execution is not counted as a part of the time of imprisonment fixed by the sentence. * * * The sentence is satisfied, not by the lapse of time after it is pronounced, but by the actual suffering of the imprisonment imposed by it.' State v. Abbott (1910), 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B 1189. * * *"
>
> Egbert v. Tauer, Mayor (1922), 191 Ind. 547, 553, 554.

Therefore, in answer to your fifth question, it is my opinion that the Municipal Court of Marion County, Indiana, does not have authority to suspend the sentence and place the defendant on probation either by (a) written order, or (b) verbal directions to the sheriff to release the defendant if the defendant has in fact commenced to serve his sentence of imprisonment.

OFFICIAL OPINION NO. 59

June 28, 1945.

Hon. Otto K. Jensen,
State Examiner,
State House,
Indianapolis, Indiana.

Dear Sir:

I acknowledge receipt of your letter of May 14, 1945 asking my official opinion on the following question: