MOTOR VEHICLES: A jury, judge, or prosecuting attorney
PROSECUTING ATTORNEYS: cannot assess or recommend a fine of less than Five Dollars for careless driving under Section 8383, R. S. Missouri 1939.

August 28, 1941

8-28

Honorable Michael W. O'Hern
Prosecuting Attorney
Jackson County
Kansas City, Missouri

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Dear Sir:

We are in receipt of your request for an opinion from this department under date of August 27, 1941, which reads as follows:

> "There has been a large number of cases filed in the justice courts in our county for traffic violations on the highway. One of the most troublesome one has to do with careless driving; that is, speeding, failure to stop at stop signs and driving at a rate of speed that endangers the property of another and the life and limb of a person.
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> "The only section of the statutes that I can find that covers cases of this kind is Section 8383, Revised Statutes of Missouri 1939, and as I understand it the penalty for violating this section of the statutes is provided for in Section 8404 Subdivision (d). I would like to know if Section 8383 is the section that covers the class of cases above mentioned and if so, does Section 8404 Sub-division (d) provide for the penalty.
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> "I have been asked another question and that is, assuming that Section 8404 Sub-division (d) provides for the penalty of not less than $5.00, could I tell a justice of the peace or a court that while the minimum

fine is $5.00 that he could make it less. I have advised that I have no such authority to change this law, that is a matter for the Legislature.

"Would you be kind enough to give me an opinion on the three questions above set forth, namely, does the class of cases that I have specified fall under Section 8383 and if so, is the penalty section found under Section 8404 Sub-division (d) and lastly, would I be justified in asking the justice to reduce the fine from $5.00 to a lesser amount. You will note that Sub-division (d) of the penalty Section 8404 has a rather peculiar ending, in that, it states 'or by imprisonment in the county jail for a term not exceeding two year'."

Section 8383, R. S. Missouri 1939, reads as follows:

"Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, provided that a rate of speed in excess of twenty-five miles an hour for a distance of one-half mile shall be considered as evidence, presumptive but not conclusive, of driving at a rate of speed which is not careful and prudent, but the burden of proof shall continue to be on the prosecution to show by competent evidence that at the time and place charged the operator was driving at a rate of speed which was not careful and prudent, considering the time of day, the amount of vehicular and pedestrian traffic, condition of the highway and the location with reference to intersecting highways, curves, residences or schools: Provided, however, that no person shall operate a

> solid tire commercial motor vehicle having a rated live load capacity of two (2) tons and less at a rate of speed exceeding twenty miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than two (2) tons and not more than five (5) tons at a rate of speed exceeding fifteen miles per hour, or a solid tire commercial motor vehicle having a rated live load capacity of more than five (5) tons at a rate of speed exceeding ten miles per hour; and provided further, that no person shall operate a motor vehicle equipped with iron or other metal tires at a greater rate of speed than six miles per hour."

The above section is applicable to the charge of careless driving and is part of Article 1, Chapter 45, R. S. Missouri 1939, which article and chapter pertain exclusively to motor vehicles.

Section 8404, paragraph (d) of Article 1, Chapter 45, R. S. Missouri 1939, reads as follows:

> "(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two year, or by both such fine and imprisonment."

Under the above paragraph (d) the minimum fine on a charge of careless driving is set out as Five Dollars ($5.00). It is a very extraordinary and special statute which applies to the punishment under Article 1, Chapter 45, pertaining to motor vehicles. It is very noticeable it sets out specifically "* * not less than five dollars ($5.00) * * or by imprisonment in the county jail for a term not exceeding two year, * * " Section 8404, supra, is a section that sets out the penalties for the punish-

ment for violating the laws in regard to motor vehicles as set out in Article 1, Chapter 45. Paragraph (a) of said section provides for the punishment for the theft of a motor vehicle or parts from a motor vehicle of the value of Thirty Dollars ($30.00) or more. Paragraph (b) provides a punishment for the theft of any motor vehicle, tire or any part or equipment of a motor vehicle under the value of Thirty Dollars ($30.00). Paragraph (c) provides a punishment for the violation of paragraph (a), Section 8396, paragraph (a), Section 8398 or paragraph (f) or (g) of Section 8401. All of the penalties above set out in paragraphs (a), (b) and (c) do not set out the punishment of a person charged with careless driving. The Legislature saw fit to enact paragraph (d), supra, which provided for the punishment of any of the other provisions of Article 1, Chapter 45, R. S. Missouri 1939. Paragraph (d) is a special law for the punishment of any of the other provisions except paragraphs (a), (b) and (c) of Section 8404, Article 1, Chapter 45, R. S. Missouri 1939, which applies specifically to motor vehicles.

Under the general criminal law, in reference to the punishment of a misdemeanor, where the penalty is not fixed by law, the Legislature saw fit to enact Section 4853, R. S. Missouri 1939, which reads as follows:

> "Whenever any offense is declared by statute to be a misdemeanor, and no punishment is prescribed by that or any other statute, the offender shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

Under the above section no minimum fine, such as Five Dollars, has been set out, and this section applies only generally to the punishment upon a conviction of a misdemeanor where no punishment is prescribed for the commission of that misdemeanor although an act declares a certain act as a misdemeanor. The courts of this state have held continually that where there is a special statute and a general statute regarding any subject, the special statute controls. It was so held in State v. Harris, 87 S. W. (2d) 1026, 337 Mo. 1052. We find no section where any court can assess a punishment of any crime, including misdemeanors,

that would be less than that prescribed by statute.

Section 4094, R. S. Missouri 1939, states that it is mandatory that where a jury assesses a punishment whether of imprisonment or fine below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence and render judgment according to the lowest limit prescribed by law in such case. This section was upheld in a very early opinion of the Supreme Court in the case of State v. McGuaig, 22 Mo. 318, l. c. 320, where the court said:

> "* * The defendant pleaded 'not guilty,' was tried and found guilty in manner and form as charged in the third count of the indictment, and the jury assessed his punishment to a fine of $300.
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> "The defendant moved for a new trial, 'because the verdict was against law, against evidence, and against the weight of evidence; because the verdict is against the instructions of the court, and is against the provisions of the statute regulating the punishment for the offence charged in the third count of the indictment.'
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> "The court overruled this motion, and sentenced the defendant to pay the lowest fine allowed by law for the offence charged in the third count, which is the sum of $500. The fine assessed by the jury being lower than the lowest amount allowed by the statute for such an offense, viz., $300, the court disregarded so much of the verdict and put the fine to the lowest sum which the statute allows. The defendant prayed an appeal to this court.
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> "The statute regulating practice and proceedings in criminal cases, art. 7, section 5, says: 'If the jury assess a punishment, whether

> of imprisonment or fine, below the limit prescribed by law for the offence of which the defendant is convicted, the court shall pronounce sentence and render judgment according to lowest limit prescribed by law in such case.' This section of the statute sanctions the act of the court, and makes it the duty of the court to treat the illegal fine as a blank, and fill it with the punishment at the lowest limit prescribed by the act for the offence. * "

This case has been followed in State v. Julin, 235 S. W. 818, paragraph 5, where the court said:

> "Sixth. The next question earnestly urged here by appellant is the action of the court in raising the punishment from one year to two years in the penitentiary. The jury returned a verdict finding appellant guilty and assessing his punishment at one year in the penitentiary. Section 4049, R. S. 1919, provides as follows:
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> "'If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall pronounce sentence, and render judgment according to the lowest limit prescribed by law in such case.'
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> "The constitutional rights of appellant were not invaded or imposed upon by the action of the court in following the plain letter of the statute. Appellant had been regularly charged with crime by a grand jury, had been arraigned, was confronted by the witnesses against him, was afforded every opportunity to make his defense, and enjoyed in the trial of the case such protection and safeguards as were vouchsafed by the

> Constitution, both state and federal, and this statute is but a sequence of and supplementary to section 4048, R. S. 1919. Section 3698, R. S. 1919, is as follows:
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> "'Whenever any offender is declared by law punishable, upon conviction, by imprisonment in the penitentiary for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the offender may be sentenced to imprisonment during his natural life, or for any number of years not less than such as are prescribed; but no person shall in any case be sentenced to imprisonment in the penitentiary for any term less than two years.'
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> "From the foregoing it is apparent that it became the duty of the trial court to change the punishment fixed by the jury to that of the minimum punishment fixed by statute, and in doing so there was no violation of the constitutional rights of appellant. The punishment, upon conviction, of a number of offenses under our law, is fixed by the court, and not by the jury; e. g., section 3248, R. S. 1919. At the common law the verdict of the jury was guilty or not guilty, and the court fixed the punishment according to the laws in force, and the sections above quoted are not therefore in contravention of the constitutional rights of appellant and are constitutional. State v. Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; State v. Mathews, 202 Mo. 143, 100 S. W. 420."

The court of appeals in the case of Ex Parte Snyder, 29 Mo. App. 256, l. c. 261, in commenting upon this matter, said:

> "The trial court had no authority in a criminal trial to substitute its opinion

> for that of the jury, either as to the guilt or innocence of the accused, or as to the measure of punishment assessed by the jury, provided, such assessment was within the limits prescribed by the statute creating the offence. Had the jury in their verdict exceeded the limit of the law in the punishment awarded, or assessed punishment less than the law prescribes, the court could have proceeded to judgment as provided in sections 1931, 1932, Revised Statutes. The court, however, received the verdict of the jury, as it was compelled to do; and then, sua sponte, set it aside, continued the cause, and peremptorily discharged the jury, with a pronunciamento of perpetual disqualification as jurors in that court. Such a proceeding is, or ought to be, without precedent, and is certainly without warrant of law. * * * * * * * "

Also, in an early case the Supreme Court of this state in State v. Daniels, 32 Mo. 558, l. c. 560, said:

> "This case will have to be remanded for error in the judgment of the court below. The penalty fixed by law for an offence of this kind is imprisonment in the penitentiary not less than ten years. The jury assessed the punishment at ten years, the minimum. The court, however, in giving judgment upon the finding of the jury, reduced the time to two years. The statute which gives power to the court, in cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in its opinion, the conviction is proper, but the punishment assessed is greater than under the circumstances of the case ought to be inflicted, never contemplated that the court should have power to reduce it below the minimum. The judgment of the court is therefore illegal and unauthorized."

All of the above cases, without dissension, hold that even where a jury brings in a verdict assessing a punishment by imprisonment or by fine less than the minimum set out in the statutes, it is mandatory upon the court to assessa larger sentence of imprisonment or larger fine to the amount of the minimum set out in the penal statute. Paragraph (d) of Section 8404, supra, sets out "any person who violates any of the other provisions of this article shall * * " The punishment set out in paragraph (d) is mandatory. The word "shall", when used in its ordinary meaning, is mandatory. In the case of State ex inf. McKittrick, Attorney General, v. Wymore, Prosecuting Attorney, 119 S. W. (2d) 941, pars. 7-10, said:

> "It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."

Since a jury cannot bring in a verdict assessing a punishment less than the minimum set out for the punishment in any case and it has been held by many cases and under the statute that it is mandatory upon the court to assess the proper minimum sentence, it goes without saying that the minimum punishment cannot be changed upon a recommendation made by a prosecuting attorney.

In your request you mention the fact that Paragraph (d) of Section 8404, supra, provides for a sentence in the county jail for a term not exceeding two years. This is a very extraordinary sentence in the county jail and was probably caused by a mistake in drawing the original bill, but since it is the law, it must be so read. It is the only section that we know of that provides for a punishment which limits a sentence to two years in the county jail. You merely mention the above, but as it is not necessary for an opinion as to the penalty of not less than Five Dollars ($5.00), yet we call your attention to Section 4852, R. S. Missouri 1939, which reads as follows:

> "Whenever any offender is declared by law punishable upon conviction by imprisonment in the penitentiary, or by imprisonment in a county jail, or by fine, or by both such fine and imprisonment, and no limit is fixed by law to the duration of imprisonment in the jail or to

> the fine in such cases, the convict shall, in no instance, be sentenced to a longer term of imprisonment in the county jail than twelve months, nor shall the fine in any such case exceed one thousand dollars."

It is very noticeable under the above section that it states "and no limit is fixed by law to the duration of imprisonment in the jail or to the fine in such cases, * " The convict shall not be sentenced to a longer term of imprisonment in the county jail than twelve months. This section is not applicable to the special punishment section of paragraph (d), Section 8404, supra, for the reason that paragraph (d) specifically sets out that the imprisonment in the county jail shall not exceed two years.

CONCLUSION

It is our opinion that Section 8383, R. S. Missouri 1939, is the proper section to be invoked on cases of traffic violations on the highway, such as careless driving.

It is further the opinion of this department that paragraph (d) of Section 8404, supra, is the only section that provides a punishment for the violation of Section 8383 as to careless driving.

It is further the opinion of this department that a jury, judge or prosecuting attorney cannot assess or recommend a fine of less than Five Dollars ($5.00) for careless driving, the punishment for which is set out in Section 8404, paragraph (d), Article 1, Chapter 45, R. S. Missouri 1939.

Respectfully submitted

APPROVED:

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