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EXPENSES—BOARD AND LODGING IN ADDITION TO FEES AND MILEAGE — TRIAL, CRIMINAL CASE — CHANGE OF VENUE—WHERE NECESSARY TO HOLD WITNESSES FOR STATE TOGETHER, NECESSARY EXPENSES MAY BE PAID BY PROSECUTING ATTORNEY OUT OF FUNDS PROVIDED FOR, SECTION 3004 G. C.

SYLLABUS:

Where the trial of a criminal case has been transferred by change of venue to another county and the prosecuting attorney deems it necessary for the proper preparation and presentation of the case to hold the witnesses for the state together during the trial at the place of trial, he may pay out of the funds placed at his disposal under Section 3004, General Code, the necessary expense of their board and lodging over and above the amount of their fees and mileage allowed by law.

Columbus, Ohio, October 21, 1946

Honorable Earl Henry, Prosecuting Attorney  
Cambridge, Ohio

Dear Sir :

I have before me your communication requesting my opinion and reading as follows :

"I have some criminal cases for trial before the Common Pleas Court of Franklin County at Columbus, Ohio, commencing November 12, 1946. We were unable to obtain a jury for the trial of these cases here and our Common Pleas Court granted the Defendants' motion for a change of venue and changed the same to Franklin County.

These cases are for assault with intent to kill, assault and riot and there are several of them. It may take several days to try them in the City of Columbus.

There would be great advantage to the State in the trial of the cases to have all the State's witnesses together during the trial.

There are about a dozen of these witnesses and I can arrange for their board and room during the trial at the Great Southern Hotel near the Court House in the City of Columbus, if I am permitted to pay for such board and lodging out of the fund provided by Section No. 3004, G. C.

Will you please render to me your opinion some time before November 12th, and as promptly as convenient, as to whether or not I can pay such expenses for board and lodging out of said fund under G. C. 3004, and greatly oblige."

Section 3004, General Code, to which you refer, in so far as pertinent, reads as follows :

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred *by him in the performance of his official duties and in the furtherance of justice*, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county." (Emphasis supplied.)

It will be observed that this provision gives the prosecuting attorney wide latitude in the use of this special fund. By its terms it would appear that he may use it for "any expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice," in so far as these expenses are not otherwise provided for. Evidently the principal object intended to be accomplished in providing for this fund is the "furtherance of justice." This fund is subject to expenditure upon the order of the prosecuting attorney alone. It was held in an opinion of the attorney general found in 1915 Opinions Attorney General, page 16, that the expenditure of this fund lies wholly in the discretion of the prosecuting attorney and that the court has no authority to limit the amount or time of expenditure. In a further opinion found in 1915 Opinions Attorney General, page 549, it was held that the prosecuting attorney is authorized to pay from such fund the expense of exhuming a dead body for the purpose of examination by the coroner. He may use the fund for payment for secret service work when a regular secret service officer provided by Section 2915-1, General Code, is not serving, or in addition to such service, 1917 Opinions Attorney General, page 1589. He may hire an automobile for use of the secret service officer; 1917 Opinions Attorney General, page 1917. He may be reimbursed for oil and gasoline used in the operation of his own automobile on official business; 1918 Opinions Attorney General, page 998. He may employ an attorney to procure necessary evidence to be used in the prosecution of criminal offenses; 1919 Opinions Attorney General, page 1238. See also 1920 Opinions Attorney General, page 977.

In an opinion found in 1915 Opinions Attorney General, page 491, it was held:

"Attendance and mileage of foreign witness from state line may be taxed in costs in criminal cases by order of the court. Deficiency in actual mileage from place of residence of foreign witness may be made up out of prosecuting attorney's 3004, General Code, fund."

In that opinion it appears that witnesses living outside of the state and therefore not subject to legal process, were regarded by the prosecuting attorney as very important for the prosecution. The then attorney general in reaching the conclusion above stated, said:

"If you will have the subpoenas issued and you mail them to the witnesses you may then have their attendance, and mileage from the state line, paid by order of the court, showing that the witnesses came upon the call of the prosecuting attorney, and taxed as costs in the case. Any deficiency in the amount of their actual mileage is a proper charge against your 'in furtherance of justice fund,' under section 3004, G. C."

In a further opinion in 1927 Opinions Attorney General, page 212, it was held:

"There being no jurisdiction to compel a witness who is without the State of Ohio to appear in a court of this state to testify in a criminal case, such witness, who voluntarily reports to the court at the request of the prosecuting attorney, and is there subpoenaed, is entitled to one dollar and no more.

The prosecuting attorney may in his discretion pay such witness an amount equal to the mileage out of funds in his hands by virtue of Section 3004, General Code, such item being one of expense in furtherance of justice."

In the course of the opinion the then attorney general said:

"The case that you present is an expense in furtherance of justice and may be properly paid by you out of said allowance."

An examination of the several opinions above referred to shows that Section 3004 supra has always been construed liberally, in order to give the prosecuting attorney wide latitude in its use. In 1920 Opinions Attorney General, page 977, it was said:

"The history and evident purpose of section 3004, G. C., suggest that the legislature intended for it a rather broad scope. It is noticeable that words of general description, rather than words of particular enumeration, have been employed to indicate the 'expenses' which may be provided for out of the fund. The inference is that any expense is proper under this section which relates to any usual and reasonable method employed by the prosecuting attorney to secure evidence."

Section 13427-1, et seq., of the General Code relate to a change of venue of the trial of a criminal case. Section 13427-1 provides in part:

"The prosecuting attorney of the county in which the cause originated shall take charge of and try said cause, and the court

to which said cause is sent may on application appoint one or more attorneys to assist the prosecuting attorney in such trial, and allow such attorney such compensation as it deems reasonable.”

Section 13427-3 provides:

“The reasonable expenses of the prosecuting attorney incurred in consequence of such change of venue, the fees of the clerk and the sheriff and of the jury shall be allowed and paid out of the treasury of the county in which said cause originated, as in other cases provided.”

This section, it will be noted, covers specifically the fees of the sheriff and jury, but makes no reference to the fees and mileage of witnesses. I must assume that your witnesses would receive the fees and mileage prescribed by the statutes for attendance at the trial. Section 3014, General Code, provides for the payment of fees and mileage to witnesses in a criminal case in the same amount as is provided by law for civil cases, and that such fees shall be paid in state cases out of the county treasury. The provisions as to civil cases is found in Section 3012, General Code, where it is provided that a witness shall receive one dollar for each day's attendance and five cents per mile for each mile necessarily traveled from his place of residence to the place of trial and return.

Inasmuch as the expenses incident to holding together the witnesses as suggested in your letter, would doubtless exceed the fees and mileage allowed such witnesses, and in view of your statement that the retention of such witnesses at the place of trial would be of great advantage to the state in the trial of your cases, it appears to me that whatever expense is involved over and above the fees and mileage which these witnesses are entitled to receive would be strictly “in furtherance of justice” and would be a legitimate charge against the fund provided for the prosecuting attorney under Section 3004 of the General Code.

Respectfully,

HUGH S. JENKINS  
Attorney General