1357.

CLERK OF COURTS—FEES IN CRIMINAL CASES IN COMMON PLEAS COURT—FEES IN LIKE CASES IN COURT OF APPEALS.

The language found in section 2901 *G. C., "for making cost bill, to be taxed but once, forty cents; for the entering on cash book cost received in each cause, twenty-five cents * * *," clearly means that these fees may be charged but once in each cause. When a criminal case comes into the court of appeals from the court below it is a new cause. The clerk of the court of appeals is entitled to charge for his services when rendered the fees allowed by law in such a case.*

COLUMBUS, OHIO, June 22, 1920.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter, receipt of which is hereby acknowledged, is as follows:

> "We respectfully request your written opinion upon the following matter:
> Question When a criminal case is taken from the court of common pleas to the court of appeals may the clerk of courts under the provisions of section 2901 G. C. tax a fee of 40 cents for making cost bill and a fee of 25 cents for entering on cash book costs received in each case, in the court of appeals as well as in the court below?"

As your question only concerns fees in criminal cases the discussion which follows will be confined to fees charged for services when rendered in proceedings of that kind.

The law which directs the payment of fees is to be found in sections 2900 and 2901 G. C., pertinent parts of which are quoted herein as follows

> "Sec. 2900. For the services herinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more * * *."
> "Sec. 2901. For making cost bill to be taxed but once; * * * for entering on cash book cost received in each cause, twenty-five cents; * * *"

Many decisions of the courts of this state may be cited showing that the right to tax costs must be by statute expressly providing such authority. In the absence of express statutory provision that right does not exist; no fees are allowed by implication.

> See —
> Lewis vs. State, 57 O. S. 189;
> Strawn vs. Commissioners, 47 O. S. 408;
> Anderson vs Commissioners, 25 O.S. 13;
> Debolt vs Trustees 7 O. S. 237;
> State vs. Coats, 8 O. N. P. 662; 11 O. D. N. P. 670.

The following quotation is from Opinions of the Attorney-General 1916, Vol. 1, page 230:—

> "Answering your second inquiry more specifically, I am of the opinion that * * * the fee of twenty-five cents for entering on the cash book costs received may be charged but once in each cause."

Likewise the reasoning of the opinion quoted may be applied to the phrase "to be taxed but once" in section 2901 G. C. Clearly the language of this statute means that a fee of forty cents for making a cost bill may be taxed but once in each cause.

It is now pertinent to inquire what is a "cause" and what "each cause" means. In Clark vs Commissioners, 58 O S 107, in the court's opinion is found this statement:—

> "The claim made by counsel for plaintiff in error, to the effect that each cause means each name, whether plaintiff or defendant, is not tenable. A name is not a cause, neither is a plaintiff or a defendant a cause. The word *cause* is used in the sense of an action, or lawsuit. There may be many parties to an action, but all combined constitute but one action, one lawsuit, one cause".

This is a case concerning the payment of fees to the clerk of the court of common pleas. No language can furnish a clearer definition of a cause than is here used.

In the citation which follows the court is construing the law as now found in section 26 G. C. and defines what is the meaning of "cause of action, prosecution and proceeding." Insurance Company vs. Myers, 59 O S. 332:

> "A cause of action embraces the facts that entitle a party to relief in an original action, the facts ordinarily stated in a petition, a prosecution relates to criminal proceedings. A cause of action does not embrace within its signification a proceeding in error, the latter usually grows out of the proceedings had in a cause of action, and is distinguished from it by the name adopted."

A criminal proceeding has in the court of common pleas may be carried to the court of appeals only on a petition in error and becomes in the court of appeals a new cause.

In Wagner vs. Armstrong. 93 O. S. 443, in the syllabus the court says!

> "The jurisdiction of the court of appeals in the trial of cases on appeal is expressly limited by the constitution to chancery cases and this jurisdiction cannot be enlarged by the General Assembly."

In Levering vs. Bank, 87 O. S. 117, from the opinion of the court we quote:

> "Not only was the suing out of a writ of error regarded in this state before the Code, and is yet in other state as not a continuation of the suit to which it relates, but as the commencement of a new proceeding to review and set aside the judgment of the court below, * * * yet the distinction between the original action and the proceeding to reverse, vacate or modify was retained in the statute. The code provides that: 'The proceedings to obtain such reversal, vacation or modification shall be by petition in error, and that 'a summons shall issue and be served or publication made, as in the commencement of an action Section 12259 G. C. Of course the requirement to file a petition and that summons must be issued and served or publication made, as in the commencement of an action, would be unnecessary and discordant if the error proceeding were merely a continuation and transplanting of the original action in the reviewing court. A palpable illustration of this view is found in 'Charles vs. Fawley et al.' 71 O. S. 50, 54 where the distinction is clearly drawn between a proceeding in error and a statutory appeal. * * *"

It being the law of this state that only chancery cases are had on appeal in the court of appeals and that a criminal case in that court is heard on error, becoming a new cause therein, the conclusion follows that a clerk of the court of appeals may charge for his services when rendered the fees allowed by law in such cases.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1358.

SCHOOLS—WHEN SUPERINTENDENT OF SCHOOLS IN CITY SCHOOL DISTRICT MAY BE PAID NECESSARY EXPENSES TO SEARCH FOR TEACHERS—WHEN MEMBER OF BOARD OF EDUCATION MAY PERFORM SUCH DUTY.

When it is necessary to search for teachers to teach in the schools of the district, the superintendent of schools in a city school district may be paid expenses actually incurred. When the superintendent for any reason cannot so act, after the board by resolution has declared such necessity to exist and has so authorized a member to perform such duty any reasonable expense actually incurred by members of the board in search of teachers may be paid for it. The service fund, once created, may be used only to pay expenses of the members of the board actually incurred in the performance of their duties.

COLUMBUS, OHIO, June 22, 1920.

Bureau of Inspection and Supervision of Public Offices Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following questions:

> "1. Is it legal for the board of education of a city to pay expense of superintendent of schools in traveling in search of teachers to be employed in the schools by said board of education?
> 2. Is it legal for such board of education to pay expense of a member of the board of like nature?
> 3. Can the service fund under section 7704 G. C., be used for expenses of any one other than a member of the board?"

There is no section of the school law that I am able to find bearing directly upon the mode or manner of the procurement of teachers that is directly in point in answering your questions. Reliance therefore must be placed upon what is implied by a reasonable construction of the law generally touching the powers of boards of education covering the expenditures in question.

The language of the constitution is in part as follows:

> "The general assembly shall make such provisions, * * * as * * * will secure a thorough and efficient system of common schools throughout the state. * * *" Art. VI, Sec. 2.

Pursuant to the authority thus given, the legislature has passed many school laws that impose various and sundry duties in broad general terms on boards of education looking to the thoroughness and efficiency of our public schools.

Your questions refer to no city board of education in particular, nor do they say that the expenses have been paid or made by any. However, I assume that some