

the sinking fund of a township may be transferred under the provisions of Section 5625-13, General Code.

3. In order that such funds appearing in the sinking fund of a township may be available for road improvement purposes when the township has no bonds or notes outstanding, transfer should be made to the road improvement fund under Section 5625-13, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3104.

ATTORNEYS FEES—DEFENDING INDIGENT PRISONER ON FELONY CHARGE—MISTRIAL RESULTS—COUNSEL MAY NOT RECEIVE MORE THAN ALLOWED BY STATUTE.

SYLLABUS:

Where counsel is assigned to defend a case of felony less than manslaughter and is allowed a fee by the court, and a mistrial is declared, the counsel so appointed may not receive more than the \$50.00 fee allowed by statute, and a court of common pleas, by the terms of Section 13439-3, General Code, has no authority to allow an additional amount.

COLUMBUS, OHIO, March 31, 1931.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for my opinion concerning the payment of attorneys appointed to defend indigent prisoners under Section 13439-3, General Code. In the request you refer to a letter received from one of your examiners in which he inquires whether or not an attorney, after having defended an indigent prisoner in a felony case not involving murder in the first or second degree or manslaughter, which action resulted in a mistrial, may receive a payment of \$50.00 and later receive an additional fee of \$25.00 in the retrial of the case.

The second question presented is whether or not the judges of the common pleas court in joint session may provide that, in case of retrial, counsel shall be allowed an additional fee of not more than one-half the amount allowed at the original trial, even though such payment results in an attorney's compensation being in excess of the statutory limitation of \$50.00 as provided in Section 13439-3, General Code.

Section 13439-3, General Code, to which you refer, was passed by the 88th General Assembly and reads as follows:

“Counsel so assigned in case of felony shall be paid for their services by the county, and shall receive therefor in case of murder in the first and second degree such compensation as the court may approve; in a case of manslaughter not exceeding \$100.00, in other cases of felony not exceeding \$50.00.”

Section 13439-3, *supra*, which repealed Section 13618, General Code, contains

identically the same language as the latter section with the exception that the power of approving the amount of counsel fees for the defense of indigent prisoners was transferred from the county commissioners to the judge or judges of the court of common pleas.

A review of the history of the provisions of law governing the appointment of attorneys to defend indigent prisoners is contained in an opinion found in Opinions of the Attorney General, 1924, page 539, wherein it is stated, at page 542:

“The original enactment for the assignment of counsel for indigent prisoners, made no provision for compensation; later enactments expressly prohibited the payment of compensation in such cases. Subsequent statutes removed this prohibition, but confined the compensation to certain classes of felony, and required the claim for compensation to be first examined and allowed by the county commissioners.

“It is evident that the entire trend of this legislation was to control and limit the compensation paid as fees for defending indigent prisoners.”

The word “case,” as generally used, connotes an entire series of legal proceedings, including appeals and reviews. See 10 *C. J.*, 1247 and *Words and Phrases*, Vol. I, page 985.

In an opinion found in the Annual Report of the Attorney General, 1913, at page 1425, the then Attorney General stated:

“The taking of a case to a reviewing court, as I view it, is no part of the duty of counsel appointed to defend an indigent prisoner, however much he may be convinced of error in the trial, or interested in securing a reversal. Counsel appointed in taking a cause to a reviewing court must do so with the understanding that he can only receive fifty dollars for his work in both courts, and also that if he secures a reversal he must go through a second trial with a limitation of \$50 attached to his compensation.”

I see no distinction between the services required of counsel where a case is taken to the Court of Appeals, remanded and retried, and where a retrial is had by reason of a declaration of a mistrial.

Since from the foregoing an additional fee may not be allowed counsel of an indigent prisoner for services rendered in a mistrial, it follows that a common pleas court may not formulate a set of rules providing for the allowance of fees to counsel in case of retrial of not more than one-half the amount allowed for the original trial.

Although to so hold may seem to be unjust, this results directly from the language used by the legislature and the remedy for this situation lies in legislative action.

It is, therefore, my opinion that where counsel is assigned to defend a case of felony less than manslaughter, and is allowed a fee by the court, and a mistrial is declared, the counsel so appointed may not receive more than the \$50.00 fee allowed by statute, and a court of common pleas, by the terms of Section 13439-3, General Code, has no authority to allow an additional amount.

Respectfully,

GILBERT BETTMAN,
Attorney General.