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FEES—COUNTY COMMISSIONERS HAVE NO AUTHORITY TO ALLOW COMPENSATION TO AN ATTORNEY WHO IS ASSISTING PROSECUTING ATTORNEY IN A CRIMINAL CASE PENDING ON ERROR IN THE COURT OF APPEALS UNLESS SAID ATTORNEY HAS BEEN APPOINTED BY AND COMPENSATION APPROVED BY SAME COURT—NO PROVISION FOR COMPENSATION IN SUPREME COURT.

## SYLLABUS:

1. A board of county commissioners of a county has no authority to allow compensation to attorneys for services rendered by them by way of assistance to the prosecuting attorney in the presentation and argument of a criminal case pending on proceedings in error in the Court of Appeals unless such attorneys have been appointed for said purpose by the Court of Appeals and the compensation has been approved by said court in the manner provided by Section 13562, General Code, and the payment of such compensation out of the county treasury on the allowance of the county commissioners without such appointment and approval by the Court of Appeals is illegal.

2. There is no statutory provision authorizing the appointment of attorneys to assist the prosecuting attorney of a county in the presentation and argument of a criminal case pending on proceedings in error in the Supreme Court; the board of county commissioners of the county in which such criminal case originated is without authority to allow compensation to attorneys for such services, and the payment of the same out of the county treasury on such allowance is illegal.

COLUMBUS, OHIO, November 9, 1928.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication which reads as follows:

“Referring to your Opinion No. 2702, rendered to this department under date of October 11, 1928, we desire to submit a further question with reference to compensation of attorneys employed to assist the prosecuting attorney.

You refer in your opinion to an opinion of the Attorney General in his 1913 Report, Volume 2, page 1357, in which it is held that an attorney appointed by the common pleas court is only bound to take care of the case in that court and that is the end of the employment unless the circuit court, now the court of appeals, appoints him to render services in that court in the same case. We are advised by our examiner that the record of the Court of Appeals in this case does not disclose the appointment of the attorney to assist the prosecuting attorney in that court but that the attorneys were paid \$1,580.00 for services in the court of appeals and \$2,857.00 for services in the Supreme Court, on the allowance of the Court of Common Pleas and County Commissioners.

Question: Were these amounts legally paid and if not, may they be recovered through a finding made by our examiners?”

The question presented in your communication requires a consideration of the provisions of Section 13562, General Code, which reads as follows:

“The common pleas court or the court of appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court,

and the county commissioners shall pay such assistant such compensation for his services as such court approves and to them seems just and proper."

Former Opinion No. 2702 of this department referred to in your communication, had to do, among other things, with the appointment and compensation of certain attorneys, two in number, who were appointed to assist the prosecuting attorney in the prosecution of the case of the *State of Ohio vs. George Vargo*, indicted and convicted for murder in the first degree in Lake County during the year 1926. In said opinion it was held that:

"Under the provisions of Section 13562, General Code, a Court of Common Pleas, or the Court of Appeals, wherever it is the opinion of such court that the public interest requires it, may appoint one or more attorneys to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners are required to pay such assistant, or assistants, such compensation for their services as the court approves and the commissioners deem just and proper."

So far as this opinion involved a consideration of the provisions of Section 13562, General Code, the same was addressed to the question whether the Common Pleas Court or the Court of Appeals could lawfully appoint more than one attorney to assist the prosecuting attorney in a criminal case pending in such court. As above indicated, this question was answered in the affirmative.

The question here presented relates to the compensation allowed and paid to these two attorneys for services rendered by them in the Court of Appeals of Lake County and in the Supreme Court of Ohio by way of assistance to the prosecuting attorney in said courts, in the Vargo case above mentioned.

Touching the question made in your communication on the facts therein stated, it was held in the opinion of this department in the year 1913, likewise referred to by you, as follows:

"Under Section 13562, General Code, an attorney appointed by the common pleas court to assist in the trial of a case is only bound to take care of a case in the court wherein he is appointed. This court then allows him for fees which the commissioners pass upon and pay in such amount as they approve. His service is then at an end."

The then Attorney General, after quoting the provisions of Section 13562, General Code, said:

"Under this statute the attorney appointed by the common pleas court is only bound to take care of the case in that court. This court then allows his fees for the services rendered in that court, which the commissioners pass upon and pay in such amount as they approve. That is the end of the employment unless the circuit court (now court of appeals) appoints him to render services in that court in the same case. He cannot receive fees for services in the reviewing court unless such court appoints him and allows his fees. The reviewing court might deem the services unnecessary and refuse to appoint. Each court has exclusive jurisdiction as to such appointment to assist in the trial of such cases, pending in their respective courts; and the common pleas appointment does not extend to, or bind the reviewing court. Counsel is not bound to appear and render services in the reviewing court without an appointment therein."

In view of the language of Section 13562, General Code, I do not see how any construction can be placed upon the provisions of this section with respect to the question here presented other than that reached by the then Attorney General in the opinion above quoted. From the provisions of said section it appears that although the approval by the Common Pleas Court or by the Court of Appeals of the compensation of attorneys appointed by such court to assist the prosecuting attorney in a criminal case there pending is not conclusive upon the county commissioners who, notwithstanding such approval, may allow such attorneys such compensation as they deem just and proper, the county commissioners, on the other hand, are not authorized to allow any compensation to attorneys who may assist the prosecuting attorney in a criminal case unless such attorneys have been appointed by the court in which such case is pending and the compensation has been approved by such court.

It appears from your communication that no appointment was made by the Court of Appeals of the attorneys herein referred to to assist the prosecuting attorney in the Vargo case while that case was pending in the Court of Appeals of Lake County, nor was the compensation of said attorneys for services therein approved by that court. Inasmuch as under the provisions of Section 13562, General Code, as construed by the former opinion of this department above quoted, the appointment of these attorneys by the Common Pleas Court was wholly ineffectual so far as their services in the Court of Appeals was concerned, it follows that there was no authority whatever for the allowance made by the county commissioners to these attorneys by way of compensation for their services in the Court of Appeals, and that the payment of such compensation out of the treasury of Lake County was illegal.

There is nothing in the provisions of Section 13562, General Code, or of any other statute of this state which authorizes the appointment of attorneys to assist the prosecuting attorney of a county in a criminal case pending in the Supreme Court. With respect to this matter Section 333, General Code, provides that the Attorney General shall appear for the State in the trial and argument of all civil and criminal causes in the Supreme Court in which the State may be directly or indirectly interested. If a criminal case pending in the Supreme Court is of such importance or difficulty as to require assistance to the prosecuting attorney in the presentation of such case, the assistance of the Attorney General can be had under the provisions of the statute just referred to. In any event, it is plain that no statutory provision has been made for the appointment of attorneys to assist the prosecuting attorney in cases pending in that court, and that for this reason there was no authority for the action of the County Commissioners of Lake County in allowing compensation to these attorneys for services rendered by them in the Supreme Court. The payment of such compensation out of the treasury of Lake County was likewise illegal.

By way of specific answer to your question I am of the opinion that the payments made to these attorneys for their services in the Court of Appeals and in the Supreme Court were illegal and that a finding for the recovery of the money so paid should be made in the manner provided by Section 286, General Code.

In connection with the above opinion, I deem it proper to point out that if the Court of Appeals did in fact appoint the attorneys in question to assist the prosecuting attorney in the trial of the case here involved in that court, a *nunc pro tunc* entry to that effect might now be made, and the compensation of such attorneys fixed by such court, if it has not already fixed their compensation.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*