

5363.

APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, April 15, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5364.

JUSTICE OF PEACE—ALLOWANCE IN SEC. 3019, G. C., MAY NOT BE PAID JUSTICE IN FELONY CASE WHERE DEFENDANT PUT ON PROBATION—MAY BE PAID IN MISDEMEANOR CASES WHEN.

SYLLABUS:

1. *The allowance provided in Section 3019, General Code, for a justice of the peace may not be paid in a felony case wherein the justice of the peace acts as an examining magistrate, and which results in the defendant being found guilty by the common pleas court and being put on probation.*

2. *County commissioners are unauthorized to make the statutory allowance provided in Section 3019, General Code, for a justice of the peace in misdemeanor cases where the defendant is found guilty by the common pleas court and put on probation without requiring the payment of costs, unless the county commissioners are satisfied the justice of the peace exercised reasonable care in requiring security for costs and unless the defendant is insolvent and such costs could not be collected from him by the proper legal proceedings.*

3. *In general, the phrase "In felonies wherein the state fails", refers to a situation wherein a defendant is actually tried for a felony which results in the acquittal of the defendant.*

COLUMBUS, OHIO, April 15, 1936.

HON. D. H. JACKMAN, *Prosecuting Attorney, Madison County, London, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

"The provisions of General Code 3019 have been passed upon by your office a number of times and I am familiar with the 1934 opinion number 2874.

However one question presents itself for determination which I am unable to find recited in your opinion. If a defendant charged either with a felony or misdemeanor is on trial before the Common Pleas Court or stands under indictment before the Common Pleas Court and is put upon probation either in charge of the County Probation Officer or the State Probation Officer, and the condition of the probation does not provide for the payment of costs; in that event is the Justice of the Peace who acted as examining magistrate entitled to his costs under General Code 3019?

Second Question: What is the meaning of the phrase: 'In felonies wherein the State fails'? In your opinion number 2874 you have passed upon a number of factual situations but I do not find where this particular phrase has been defined. Does it mean upon trial actually had before a jury which results in acquittal and if that is its meaning is it limited to that meaning alone?"

Sections 3019, 3020 and 3021, General Code, were all passed at the same time, and are in *pari materia*. These sections read as follows:

Section 3019:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees, but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be prorated on the basis of lost fees."

Section 3020:

"In ascertaining the amount of fees taxed by a justice of the peace, to make such allowance, in cases where such officer was authorized to take security for costs, it must appear that he exercised reasonable care in taking such security. Until satisfied by the certificate of such justice of the peace or by other proof, to the satisfaction of the commissioners, that the prosecuting witness was indigent and unable to pay the costs or procure security

thereof, and that the officer exercised due care in taking such security, such officer's fees in such causes shall not be included in ascertaining the amount so to be allowed."

Section 3021 :

"Where such officer takes security for costs that at the time of taking is insufficient, the commissioners, in making allowance to him, shall not take into account his fees in such case."

Prior to the 1934 opinion mentioned in your letter, the opinions of this office construing the provisions of the three above quoted sections of the General Code, were not in perfect harmony. Various interpretations had been given to the meaning of the expression "felonies wherein the state fails", as well as the phrase "misdemeanors wherein the defendant proves insolvent." However, with the rendition of that opinion, which in effect overruled certain prior opinions of this office, as well as harmonized other opinions, it would seem that the answer to your inquiries depends upon a proper interpretation of the 1934 opinion. This exhaustive opinion is to be found in Opinions of the Attorney General for 1934, Volume II, Page 946. The first 4 branches of the syllabus of that opinion read as follows :

1. The allowance provided in section 3019, General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, does not find sufficient evidence to bind the defendant over to the grand jury.

2. The allowance provided in section 3019, General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, binds the accused over to the grand jury and the grand jury fails to indict such accused.

3. The allowance provided in section 3019, General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, binds the accused over to the grand jury and the grand jury indicts the accused but before the trial the indictment is nolle.

4. County commissioners are unauthorized to make the statutory allowance provided in section 3019, General Code, for a justice of the peace and constable in misdemeanor cases where the defendant is tried and convicted, unless the county commissioners are satisfied the justice of the peace exercised reasonable

care in requiring security for costs and unless the defendant is insolvent and such costs could not be collected from him by the proper legal proceedings. The mere fact that the defendant serves his costs in jail does not prevent the justice of the peace and constable from receiving the fees provided in section 3019, General Code."

In your first question the defendant has been put on probation but the terms of the probation do not provide for the payment of costs. Before the defendant may be put on probation, it is, of course, necessary that he has either pleaded guilty to the offense charged or has gone to trial and been found guilty either by the court or the jury. So far as your first question pertains to felonies, it must be readily apparent from an examination of the principles enunciated in the 1934 opinion, that this is not a case where the state has failed. In fact, quite the reverse has happened. The defendant has been found guilty, either on his own admission or after a trial and, consequently, it would logically follow that the state has not failed within the meaning of that expression, as used in Section 3019, General Code, *supra*.

In your first question you also inquire concerning a situation where the defendant either pleads or is found guilty of a misdemeanor and is put on probation by the common pleas court, but the terms of such probation do not provide for the payment of costs. An examination of the fourth branch of the syllabus of the above 1934 opinion would seem to be dispositive of this inquiry. In other words, the determination of whether or not the county commissioners should make this statutory allowance depends on whether or not the county commissioners are satisfied that the justice of the peace exercised reasonable care in requiring security for costs and that the defendant is insolvent and such costs could not be collected from him by the proper legal proceedings.

In your second question you inquire as to the definition of the phrase "In felonies wherein the state fails". The Legislature has not seen fit to define this term but this office in the 1934 opinion, *supra*, attempted to apply the phrase to a number of factual situations. The following pertinent passage appears in this opinion at page 949:

"My immediate predecessor in that opinion seemed to be of the opinion that before the state failed in a felony prosecution, as that expression is used in section 3019, *supra*, there must be an actual trial and the accused found not guilty of the felony with which he has been charged. * * *"

The opinion referred to in the above passage appears in Opinions of the Attorney General for 1932, Volume III, Page 1460. After an exami-

nation of these two opinions it is my opinion that the thought therein expressed, namely, that Section 3019, General Code, requires an actual trial, resulting in the defendant being found not guilty of a felony, is sound.

In view of the above and without extending this discussion, it is my opinion:

1. The allowance provided in Section 3019, General Code, for a justice of the peace may not be paid in a felony case wherein the justice of the peace acts as an examining magistrate, and which results in the defendant being found guilty by the common pleas court and being put on probation.

2. County commissioners are unauthorized to make the statutory allowance provided in Section 3019, General Code, for a justice of the peace in misdemeanor cases where the defendant is found guilty by the common pleas court and put on probation without requiring the payment of costs, unless the county commissioners are satisfied the justice of the peace exercised reasonable care in requiring security for costs and unless the defendant is insolvent and such costs could not be collected from him by the proper legal proceedings.

3. In general, the phrase "In felonies wherein the state fails", refers to a situation wherein a defendant is actually tried for a felony which results in the acquittal of the defendant.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5365.

APPROVAL—PETITION CONTAINING A PROPOSED CONSTITUTIONAL AMENDMENT AND SUMMARY OF THE SAME.

COLUMBUS, OHIO, April 15, 1936.

MR. CHARLES H. HUBBELL, *10401 Almira Avenue, Cleveland, Ohio.*

DEAR SIR: You have submitted for my examination a written petition signed by one hundred qualified electors of this state containing a proposed constitutional amendment and a summary of the same under the provisions of Section 4785-175, General Code. It is proposed to amend the Constitution by the adoption of five new sections to be known as Sections 100a, 100b, 100c, 100d and 100e of Article I to read as follows:

"Section 100a. Subsequent to the first day of January next after the date this section becomes effective, unless another and