

1728.

OHIO STATE REFORMATORY—WHERE PERSON CONVICTED ON TWO SEPARATE INDICTMENTS CHARGING SEPARATE OFFENSES—SENTENCED ON EACH—COSTS PAID IN EACH CASE BY STATE UNDER SECTION 13722 G. C. ET SEQ.

*Where a person has been convicted on two or more separate indictments charging different offenses, and has been sentenced on each to an indeterminate period of imprisonment in the Ohio State Reformatory, the costs in each case should be paid by the state in the manner provided by section 13722 G. C. et seq.*

COLUMBUS, OHIO, December 22, 1920.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter reading thus:

“The court of common pleas sentenced one who was under indictment for burglary and larceny and who was also under indictment for arson. The accused was arraigned and plead guilty to both charges on the same day, and the court accordingly sentenced the accused to the reformatory, upon both charges.

When the prisoner was delivered to Mansfield Reformatory the sheriff endeavored to collect costs under section 13726, but the record clerk refused to allow the costs, excepting in one case. As the matter now stands, the costs are unpaid in one case, and it has been requested that we get an opinion from you upon this question.

I find section 2166 provides that a person may be sentenced to the penitentiary for two felonies, and, by virtue of that section, we think that in such cases, and understand it is the practice for the state to allow the costs in both cases, where a man be sent to the penitentiary. Why would not the same principle apply to persons sentenced to the reformatory?”

The sections of the General Code pertaining to the payment of costs in the case of persons sentenced on felony charges to the Ohio penitentiary and the Ohio state reformatory are as follows:

“Section 13722 G. C. (108 O. L. Part II, p. 1219). Upon sentence of a person for felony, the clerk shall make and certify, under his hand and the seal of the court, a complete itemized bill of the costs made in such prosecution including the sum paid by the county commissioners, duly certified by the county auditor, for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal.”

“Section 13723 G. C. The clerk shall forthwith issue to the sheriff of the county in which the indictment was found, and to the sheriff of any other county in which the convict has property, executions against his property for the costs of prosecution, which shall be served and returned within ten days, with the proceedings of such sheriff or the want of property upon which to so levy, endorsed thereon. When a levy is made upon property under such execution, a writ shall forthwith be issued by the clerk

for the sale thereof and such sheriff shall proceed to sell the property as in other cases, and make return thereof according to law, and, after paying the costs of conviction, execution and sale, pay the balance to the person authorized to receive it."

"Section 13724 G. C. (108 O. L. Part II, p. 1219.) If the convict is sentenced for felony to imprisonment in a reformatory, the penitentiary, or to death, and no property has been levied upon, the sheriff shall deliver such certified cost bill, having accredited thereon the amount paid on costs, with the convict to the warden of the penitentiary or superintendent of such reformatory. When property has been levied upon and remains unsold, the clerk shall not certify to the sheriff the costs of such conviction, or part thereof, for payment from the state treasury, but the convict shall be delivered to such warden or superintendent in pursuance of his sentence, upon payment of the cost of transportation."

"Section 13726 G. C. (108 O. L. Part II, p. 1219.) When the clerk of courts certifies on the cost bill that execution was issued according to the provision of this chapter, and returned by the sheriff 'no goods, chattels, lands or tenements found whereon to levy,' the warden of the penitentiary or the superintendent of such reformatory shall certify thereon the date on which such prisoner was received at the institution, and the fees for transportation; whereupon the auditor of state shall audit such cost bill and the fees for transportation and issue his warrant on the treasurer of state for such amount as he finds to be correct."

"Section 13727 G. C. Upon the return of the writ against the convict, if an amount of money has not been made sufficient for the payment of the costs of conviction, and no additional property is found whereon to levy, the clerk shall so certify to the auditor of state, under his seal, with a statement of the total amount of costs, the amount made and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state, to the order of such clerk."

Since the amendments to sections 13724 and 13726 G. C., found in 108 O. L. Part II, p. 1219, there can be no doubt of the applicability of said sections to sentences to the Ohio state reformatory, although even before such amendments it was held that said sections were so applicable. (Opinions of Attorney-General for 1917, Vol. II, p. 1162).

It now only remains to inquire whether any good reason exists why costs should be paid by the state in only *one* case where the facts are as put by your letter; namely where a person has been arraigned on two or more separate indictments charging different offenses, has been convicted on each, and has been sentenced on each to an indeterminate period of imprisonment in the Ohio state reformatory.

In all the years of litigation in criminal cases in Ohio, there seems to have been no disposition on the part of any one to question the proposition that one convicted upon two or more indictments charging separate offenses, may be sentenced to imprisonment on each indictment, and such has been the practice. The only litigation in that connection seems to have been on the question whether the sentences once imposed were to be regarded as concurrent or cumulative. See *Williams vs. State*, 18 O. S. 47. *Henderson vs. James, Warden*, 52 O. S. 242, 247.

While section 2166 G. C., relating to indeterminate sentences to the penitentiary, can perhaps not be said to *authorize* sentence for two or more separate felonies,

said section undoubtedly does *recognize* the practice of imposing such sentences and provides for the length of term of imprisonment in such cases. Said section says:

"Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum, nor be less than the minimum term provided by law for the felony of which the prisoner was convicted. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. \* \* \*"

Your statement to the effect that it has been the practice for the state to allow the costs in each case where a person is sentenced to the *penitentiary* for two or more separate felonies is, as I am informed, correct, although there appears to be no statute giving *express* authority for that to be done. It will be observed that that part of section 2166 G. C. which speaks of a sentence "for two or more separate felonies" has to do merely with the length of the term of imprisonment, and says nothing at all about the payment of costs.

Inasmuch as the payment of costs, in the case of a person sentenced on two more indictments to the Ohio penitentiary, rests on the basis of administrative practice, rather than upon any express statutory language, it would seem that the same practice should apply to the case of a person sentenced on two or more indictments to the Ohio state reformatory, both institutions relating to the same general class of offenders, to-wit, those convicted of felonies.

It is therefore my opinion that where a person has been arraigned on two or more separate indictments charging different offenses, has been convicted on each, and has been sentenced on each to an indeterminate period of imprisonment in the Ohio state reformatory, the costs in each case should be paid by the state in the manner provided by section 13722 G. C. et seq.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

1729.

APPROVAL, LEASE TO HENRY L. SCHULER, CLEVELAND, OHIO,  
PORTION OF OHIO CANAL LANDS IN NORTHFIELD AND BOSTON  
TOWNSHIPS, SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, December 23, 1920.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 22, 1920, transmitting in triplicate form a lease to Henry L. Schuler of Cleveland, Ohio, for a portion of the Ohio canal lands in Northfield and Boston townships, Summit county, Ohio, for hydraulic purposes.

I note from the lease that the annual rental provided is \$1,148.00. I also note