

mitted in writing, in this particular case on account of the urgency of the matter and what I have said above confirms what I have said to you over the telephone.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

175.

COSTS IN MINOR STATE CASES—NO PROVISION IN LAW FOR COLLECTION AGAINST STATE—DEFENDANT NOT ENTITLED TO REIMBURSEMENT FOR TAKING A RECORD OF THE PROCEEDINGS BEFORE A MAGISTRATE.

*SYLLABUS:*

1. *Where a minor state case is reviewed on error proceedings in a court of common pleas, and the judgment of the lower court is reversed, and final judgment entered against the state, the defendant being discharged and the state ordered to pay the costs, there is no statute making provision as to where the clerk of courts should send such cost bill.*

2. *Such defendant has a valid judgment against the State of Ohio, but until means are provided by statute how same shall be paid, and the legislature appropriates money to pay said judgment, he cannot collect it.*

3. *Where a defendant in a minor state case advances money to a stenographer for taking a record of the proceedings before a magistrate, and on error proceedings judgment is entered discharging said defendant and ordering the state to pay the costs, said defendant is not entitled to reimbursement for such advancement.*

COLUMBUS, OHIO, March 11, 1927.

HON. C. E. MOYER, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

“Some time ago J. B. was arrested on a State Warrant, wherein an affidavit signed by the Sheriff charged said J. B. with “Possession of Intoxicating Liquor”, which affidavit was filed before the Mayor of Huron, Ohio, trial was had and the defendant, J. B. was found guilty. The case was taken on error to the Common Pleas Court, where trial was had, the judgment reversed and final judgment entered against the State and B. being discharged, and defendant in error, which was the State of Ohio, ordered to pay the costs.

As this was a state case the Clerk of Courts does not know, or is in doubt as to whom to send the bill for payment of the costs.

Also the plaintiff in error, J. B., advanced \$25.00 to the stenographer who took the proceedings before the Mayor and prepared a transcript and the question now arises as to who shall refund the \$25.00 to said plaintiff in error and where the \$25.00 shall be collected from if same can be refunded.”

1. In answer to your first question, your attention is directed to the following sections of the General Code:

Section 13751 provides in part, as follows:

“In a criminal case \* \* \* the judgment or final order of the court or officer inferior to the Common Pleas Court may be reviewed in the Common Pleas Court \* \* \* .”

Section 13752 provides:

“On application, by or on behalf of the accused, to an officer required to make a record or docket entries in such case, and upon tender of the proper fee, such officer shall make and deliver to such accused or his counsel a complete certified transcript of the record, omitting, if so requested, a bill of exceptions therefrom. If the prosecution was before a court or tribunal in which a complete record is not made, such officer shall so make and deliver a certified transcript of the judgment and all entries in the case, and on receipt of a copy of a summons as hereinafter mentioned, shall forward to the clerk of the court, the original papers in the case.”

Section 13755 provides in part, as follows:

“Upon the hearing of a petition in error, the court may affirm the judgment or reverse it, in whole or in part and order the accused to be discharged or grant a new trial. If the judgment be reversed, the plaintiff in error shall recover from the defendant in error all court costs incurred to secure such reversal, including the cost of bill of exceptions and transcripts. \* \* \* .”

Section 3025 provides:

“In all actions, motions and proceedings in any of the courts of this state, the costs of the parties shall be taxed and entered of record separately.”

It was held in the case of *Martin vs. Clinton Co.*, 8 N. P. 390, that this section applies to both civil and criminal cases.

Section 3026 provides:

“On the rendition of judgment in any cause the costs of the party recovering \* \* \* shall be carried into his judgment. \* \* \* .”

You state in your letter that final judgment was entered against the state and the state ordered to pay the costs. This order of the court of common pleas, in effect, is a judgment against the State of Ohio for the amount of the costs taxed in said cause.

No provision is made by statute how or by what method such a judgment may be collected. The defendant has a valid judgment against the State of Ohio, but until the legislature provides a statutory method to pay such judgment or appropriates money therefor, the judgment creditor is without means to collect.

I cannot concur in that portion of a former opinion of this office which appears in the Opinions of the Attorney General for 1924, page 706, and holding as follows:

“1. In state cases, proper court costs, including the costs of bills of

exceptions and transcripts, incurred by the accused in securing a reversal of a judgment as provided for in Section 13755, General Code, is 'expenses provided by statute' within the meaning of the appropriation designated under the heading 'prosecution and transportation of convicts' (110 O. L., 600), and upon proper proof of the incurring of such expense it may be legally paid from such fund.

2. Such provision applies to both misdemeanors and felonies.

5. Reasonable costs actually incurred by the accused employing a stenographer to take testimony and transcribe the same in courts inferior to the court of common pleas, is a proper expense."

The question that presents itself is whether the legislature has made any provision or appropriation out of which any such judgment may be paid. The only possible fund from which such a judgment could conceivably be paid is found in the general appropriation bill of the Eighty-sixth General Assembly, at page 159, the heading of which reads: "Prosecution and Transportation of Convicts", this being the same in form and substance as referred to in the former opinion of this office, supra.

This appropriation item is one of regular recurrence and its descriptive terms have not been changed for many years. The judgment of the Common Pleas Court that the state pay the costs is not such an expense that may be paid therefrom. The costs to be recovered by the plaintiff in error were not incurred in the prosecution or transportation of convicts. They were incurred in resisting and defending a criminal charge.

It is my opinion that had the legislature intended that reimbursement should be made from this particular fund it might easily so have provided. In the absence of any specific statement to that effect I do not feel warranted in extending the purposes of this appropriation beyond the plain meaning of the words used.

Your attention is directed to Opinion No. 155, rendered by this department under date of March 8, 1927, the syllabus of which reads:

"The appropriation 'Prosecution and Transportation of Convicts' found in the appropriation bill of the last General Assembly, cannot be used for the payment of claims for court costs or other costs incurred by the accused in securing a reversal of a judgment, as provided in Section 13755 of the General Code."

No provision is made by statute where or to whom the Clerk of Courts should send such a bill for said costs. The plaintiff in error has a valid judgment against the State of Ohio, but until means are provided by statute how the same shall be paid or until the legislature appropriates money to pay said judgment, he cannot collect it.

2. I come now, to your second inquiry.

Costs were unknown to the common law, and no costs whatever were recoverable. The right to recover costs is purely statutory; and the term "costs" has a legal significance, and includes only "taxable costs". The only costs which shall be carried into a judgment are taxable costs.

No statute provides for an official stenographer in the court of a mayor or a justice of the peace, or that a stenographic record of the proceedings be taken. Any expense so incurred, is not a "taxable" cost and hence a plaintiff in error cannot recover an amount so expended.

Answering your question specifically, for the reasons stated it is my opinion

that in a minor case wherein a defendant advances money to a stenographer for taking a record of the proceedings before a magistrate, and on error proceedings final judgment is entered discharging said defendant, and ordering the state to pay the costs, said defendant is not entitled to reimbursement for such an advancement.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

176.

APPROVAL, BONDS OF CITY OF MANSFIELD, RICHLAND COUNTY,  
OHIO—\$9,400.00.

COLUMBUS, OHIO, March 12, 1927.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

177.

APPROVAL, LEASES, MIAMI AND ERIE CANAL, OHIO CANAL, PORT-  
AGE LAKES, BUCKEYE LAKE AND INDIAN LAKE.

COLUMBUS, OHIO, March 12, 1927.

*Department of Highways and Public Works, Division of Public Works, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your letter dated February 18, 1927, in which you enclose the twenty-eight leases hereinafter described, executed in triplicate, for my approval:

MIAMI & ERIE CANAL	Valuation.
H. B. Carver, land lease.....	\$600 00
Columbia Gas Supply Co., gas main.....	300 00
Columbia Gas Supply Co., gas main.....	300 00
C. C. Kuhn, land lease.....	300 00
Logan-Long Co., land lease.....	250 00
Hamby Parkison, land lease.....	250 00
Wm. F. Pixler, land lease.....	416 67
Margaret Puhl, land lease.....	200 00
Stearns & Foster Co., land lease.....	1,000 00
Union Gas & Electric Co., gas main.....	600 00
Union Gas & Electric Co., gas main.....	300 00
R. T. Whitaker, land lease.....	400 00