

1901.

PROSECUTIONS UNDER SECTIONS 13008 AND 13009 G. C.—WHEN STATE
LIABLE AND NOT LIABLE FOR COSTS IN SUCH CASES.

1. *State not liable for costs in prosecutions under the provisions of sections 13008 and 13009 G. C. when sentence is suspended and the defendant placed under bond in accordance with the provisions of sections 13010 and 13013 G. C.*

2. *State is liable for costs in prosecutions under the provisions of sections 13008 and 13009 when the execution of the sentence is suspended and the defendant is placed upon probation in accordance with the provisions of section 13706 of the General Code.*

COLUMBUS, OHIO, March 9, 1921.

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

GENTLEMEN:—The following communication has been received by this department, together with a request for a written opinion on the same:

“Kindly let us have your written opinion on the following propositions:

First. Is the state liable for costs of prosecution when sentence is suspended under the provisions of sections 13010 and 13013 G. C.?

Second. Must the court confine itself to said sections in humane cases, or may it place the defendant on probation under the provisions of section 13706 et seq., and if the court suspends sentence in such cases, under the general probation law, above cited, is the state liable for the costs of prosecution?”

The following communication relative to same matter under consideration also received:

“The sentences which we had in mind when we wrote question No. 1 were those to the Ohio penitentiary and the reformatories at Mansfield and Marysville, but we would like to have you believe that we are aware of the fact that when the sentences are to the workhouse or jail the state is not liable for the costs of prosecution.

The propositions involved in our second question are violations of sections 13008, 13009 and 13012 of the General Code, with sentences to the penitentiary or reformatories of the state, and the same suspended and the defendants placed on probation under sections 13706 et seq., instead of 13010 and 13013 of the General Code.

Relative to the first question contained in your inquiry, sections 13010 and 13013 G. C. provide as follows:

“Sec. 13010. If a person, after conviction under either of the next two preceding sections and before sentence thereunder, appears before the court in which such conviction took place and enters into bond to the state of Ohio in a sum fixed by the court at not less than five hundred dollars nor more than one thousand dollars, with sureties approved by such court, conditioned that such person will furnish such child or woman with necessary and proper home, care, food and clothing, or will pay promptly each week for such purpose to a trustee named by such court, a sum to be fixed by it, sentence may be suspended.”

"Sec. 13013. If a person, after conviction under the next preceding section and before sentence thereunder, appears before the court in which such conviction took place and enters into bond to the state of Ohio in a sum fixed by the court at not less than five hundred dollars, with sureties approved by such court, conditioned that such person will pay, so long as such child remains in such home, to the trustees thereof or to a trustee to be named by the court, for the benefit of the trustees of such home, the reasonable cost of keeping such child, the amount and time of payment to be fixed by the court, sentence may be suspended."

Section 13008 G. C. provides:

"Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects or refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

Section 13009 G. C. provides:

"Whoever, being the father of a legitimate child under sixteen years of age, or, being the husband of a pregnant woman, leaves, with intent to abandon, such child or pregnant woman, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

Section 13012 G. C. provides:

"Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, being legally an inmate of a county or district children's home in this state, neglects or refuses to pay to the trustees of such home when able so to do by reason of property, or by labor or earnings, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

It would appear from an examination of the statutes cited, and especially from the provisions of section 13008 and 13009 G. C., that the crime committed could be either that of a misdemeanor, or a felony, but since you state in your second communication that you are interested only in the law in this event which applies to felonies, such will be taken for granted.

It would seem that by the provisions of sections 13010 and 13013 G. C. that the "suspension of sentence" therein indicated, should not be confused with "suspension of execution of sentence" as contemplated in sections 13706 and 13709 G. C., which are as follows:

"Sec. 13706. In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional

institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence, at any time before such sentence is carried into execution, and place the defendant on probation in the manner provided by law."

"Sec. 13709. When it is the judgment of the court that the defendant be placed upon probation and under the supervision of the penitentiary or the reformatory, the clerk of such court shall forthwith make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder and the reasons therefor, and certify them to the warden of the penitentiary or to the superintendent of the reformatory, to which the court would have committed the defendant but for the suspension of sentence."

It will be observed that the "suspension" herein indicated is a suspension of the "*execution of the sentence*" and not merely a "suspended sentence" as is contemplated in sections 13010 and 13013 G. C. In the former case it is to be presumed that the sentence has been passed, but that the execution of its terms has been suspended; while in the latter case of merely "suspended sentence" it would seem that sentence has not been passed, but has merely been suspended; that is, the entire terms of the sentence lie in abeyance, for the reason that the court has made no final disposition of the same. Thus it would appear that in the case of "suspended sentence," as contemplated in sections 13010 and 13013 G. C. the defendant could not in any way be held to be under the custody or control of any penal institution, for the reason that no sentence had been passed, and accordingly there could be no certification by the clerk of court to the warden of the penitentiary, or superintendent of the reformatory, as prescribed by provisions of section 13709 G. C., for the reason that there would in such case be nothing to certify. Thus it would clearly seem to follow that in such cases there would not be any liability upon the state for the costs of prosecution, and such would be the opinion of this department.

Proceeding to the second question contained in your communication, namely, "Must the court confine itself to said sections in humane cases, or may it place the defendant on probation under the provisions of section 13706 et seq. and if the court suspends sentence in such cases, under the general probation law above cited, is the state liable for costs of prosecution?"

The first part of the question above cited as to what course a court should or should not adopt in the determination of a question before it is a matter properly within the judicial and discretionary power of the court to determine and one which is wholly without the province of this department, and is therefore passed in so far as the purposes of this opinion are concerned. The second part of the same question would, however, seem to be a matter, the discussion of which, would appear to be proper, and within the scope of this department, since it is presumably based upon a given condition of facts, and the question involved is an application of the rules of law thereto.

Presuming then the second question to be, "Is the state liable for costs of prosecution where defendant has been convicted under the provisions of sections 13008 and 13009 G. C. and the execution of the sentence is suspended by the court and defendant placed upon probation under the provisions of section 13706 G. C.?"

Upon examination of the provisions of section 13706 G. C. supra, it would seem

that the court would have the power to place the defendant upon probation, and to suspend the execution of the sentence at any time before such sentence is carried into execution.

Section 13726 provides:

"When the clerk of court certifies on the cost bill that execution was issued according to the provisions 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 provides:

"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."

It will be observed, by the provisions of the sections above cited, that proper certification of the proceedings may be made by the clerk of court to the warden of the penitentiary or to the superintendent of the reformatory, in which event it would also appear that the defendant would still be under the custody and control of the penal institutions above cited and the rules and regulations thereof, even though the execution of the sentence has been suspended and the defendant placed upon probation in accordance with the provisions of section 13706.

It would therefore be the opinion of this department that the state would be liable for the costs of prosecutions in such cases as are indicated by the second question of the above inquiry.

Respectfully,
JOHN G. PRICE,
Attorney-General.