

975.

APPROVAL, BONDS OF CRESTLINE VILLAGE SCHOOL DISTRICT, CRAWFORD COUNTY, \$32,870.51, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, December 7, 1923.

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

976.

WITNESS FEES—MILEAGE PAID FROM HOME TO COURT AND RETURN ONCE—FINES COLLECTED FOR CONTEMPT ARE GOVERNED BY SECTION 3056 G. C.

SYLLABUS:—

1. *A witness subpoenaed to attend court can only be paid mileage from his home to the court and return once, unless he is excused by the court to go home and return on a later day or the case is postponed to a later day.*
2. *Money derived from fines for contempt of court are governed by section 3056 G. C. the same as fines for offenses which are not made payable to some specific place or fund.*

COLUMBUS, OHIO, December 8, 1923.

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

GENTLEMEN:—This will acknowledge receipt of your letter of October 9th, in which you make request for opinion as follows:

“1. Under the provisions of section 3012 G. C., as amended Ohio Laws, volume 108, part 2, page 1203, may a witness subpoenaed to attend the court on a certain day, be legally paid mileage, to and from, the place of holding court, more than once, if detained a number of days before being excused?”

2. Under the provisions of section 3056, G. C., may fines assessed in the court of common pleas, in cases of contempt of court, be legally paid to the County Law Library Association?”

Section 3012 G. C., as amended, volume 108 O. L., page 1203, reads as follows:

“Each witness in civil cases shall receive the following fees: For each day's attendance at a court of record, before a justice of the peace, mayor or person authorized to take depositions, to be paid on demand by the party at whose instance he is subpoenaed, and taxed in the bill of costs, one dollar, and five cents for each mile necessarily traveled from his place of business to the place of giving such testimony and return, provided the distance be more than one mile; for attending coroner's inquest, the same fee and mileage, pro-

vided above, to be paid from the county treasury on the certificate of the coroner.

When a witness who attends in obedience to a subpoena is wanted after the day named therein for his attendance, he must remain without being served with a new subpoena; but upon a change of venue, the witnesses are not required to attend the court of the county to which the venue has been changed, unless resummoned."

40 Cyc., page 2166, par. h.

"(IV) According to some authorities, where a witness attends on the day named in the subpoena but the trial is postponed, the witness may return home and remain until the day of trial and is entitled to mileage for both attendances, but other authorities allow only single mileage in such case. A witness who lives in the city where the trial is had cannot be allowed mileage for travel between his home and the place of trial for each day during the time the case is on call.

(V) Mileage is computed from the residence of the witness to the place of trial, on the basis of the usually traveled and most practicable route, or, where there are two usually traveled routes, according to the route traveled, or the shortest and most direct route."

40 Cyc., page 2189.

Where the rules and practice of the court do not require the attendance of defendants or their witnesses on the first day of the term, but only the attendance of grand jurors and witnesses for the commonwealth, one attending at such time as a witness for the commonwealth, although bound over by recognizance to the sessions as defendant in another case, is entitled to witness fees for that day and single mileage.

Where witnesses were in attendance at court, and it was found that the case would not be reached before the following week, and they were permitted by the court to go home before Saturday, to return the following Monday, double mileage was allowed. A special permission from the court is necessary, and should be entered of record. And it seems that the order will be made or refused, under the circumstances of the case, so as to save costs."

Commonwealth v. Smith, 4 Pa. Co. Ct., 321.

"Where witnesses are subpoenaed to attend a trial in a district court, and are present at the day named in response to such subpoena, and thereupon, on application of both parties, the court postpones the trial to some subsequent day in the term, and notifies the witnesses to be present on such subsequent day without further subpoena, *held*, that such witnesses are justified in returning home and remaining until such subsequent day, and are entitled to mileage for attending court on that day."

Union Pacific Railway Co. v. Harris, 29 Kansas, 275.

"Where a case was called for trial on Monday, but trial postponed until Wednesday, witnesses who went home on Monday evening and returned on Wednesday morning will be allowed mileage therefor."

Harman v. Shank, 3 Pa. Dist. Rep., 813.

"Where a case is continued from Saturday night until Monday, mileage will be taxed for those witnesses who actually went home and returned."

Commonwealth v. Swisher, 3 Pa. Dist. Ct. 662.

"It is the duty of the clerk to tax only legal fees, and every intendment is in favor of the proper taxation, in the absence of proof to the contrary."

Chicago City Ry. Co. v. Burke, 102 Ill. App. 661.

"Witnesses living at a distance from the place of holding court are entitled to mileage only once in the same case: but where there is an adjournment of the hearing for a longer period than over night, as from Friday till Monday or some later day, it is within the discretion of the court to make a second allowance of mileage."

Waybright v. Bonnell, 21 Ohio N. P. (n. s.) 158.

The clause in section 3012, "and five cents for each mile, etc.," is separate from the clause "For each day's attendance, etc.," and is not governed by it.

My conclusion, from a careful reading of this statute and the decision cited, is that a witness can only be paid mileage from his home to the court and return once unless the case is postponed until a future date or he is excused by the court to go, home and return at a later day. In other words, when a witness arrives in court he is continually in court, as far as mileage is concerned, until the case is finished, postponed to a future day, or he is excused by the court to go home and return.

Section 3056 G. C. reads as follows:

"All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 % of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor. In all counties the fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such law library association, but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts shall not exceed five hundred per annum. The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

Section 12136 G. C. reads:

"A court, or judge at chambers, summarily may punish a person guilty of misbehavior in the presence of or near the court or judge as to obstruct the administration of justice."

Section 12137 reads:

"A person guilty of any of the following acts may be punished as for a contempt:

1. Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;
2. Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions;
3. A failure to obey a subpoena duly served, or a refusal to be sworn, or to answer as a witness, when lawfully required;
4. The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him;
5. A failure upon the part of a person, recognized to appear as a witness in court, to appear in compliance with the terms of his recognizance."

Section 12138 is as follows:

"In cases under the next preceding section, a charge in writing shall be filed with the clerk, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. But this section shall not prevent the court from issuing process to bring the accused party into court, or from holding him in custody, pending such proceedings."

Section 12141 reads:

"Upon the day fixed for the trial the court shall proceed to investigate the charge, and shall hear any answer or testimony which the accused may make or offer."

Section 12142 is as follows:

"The court shall then determine whether the accused is guilty of the contempt charged. If it be adjudged that he is guilty, he may be fined not exceeding five hundred dollars, or imprisoned not more than ten days, or both."

"Title of the original case may be used as the title in bringing charges for contempt, but the better practice would be to entitle them "The State of Ohio v. _____."

19 O. C. C., 651.

Lowe vs. State, 9. O. S., 337. In this case Lowe was summarily punished for contempt of court by the judge of the court of common pleas below in a certain hearing before that court. The entry in that case read in part as follows:

"It is therefore considered that the State of Ohio recover of the said Peter P. Lowe the said fine of twenty-five dollars," etc.,

and the title of the case here, you will note, is Lowe v. State.

Swan advises journal entries, charges, warrants, etc., be entitled "state v. _____."

Contempt is an offense against the court as representative of the state and not as an individual. An entry on the docket must be made, and in common pleas court the fine is due and payable to the state and is imposed as a punishment.

It seems to be the common practice in the courts of Ohio to make an entry on the docket, "The State of Ohio vs. _____."

"Contempts of court being punished as offenses against the administration of justice and not as personal affronts to those who exercise judicial functions, it is not indispensable that the violation of an injunction be punished by the judge who made the decree."

Menuet v. Grimes Candy Co.,
77 O. S., 386.

Section 12142 applies to sections 12136 and 12137;
46 O. S., 473;

Connell v. State of Nebraska, 80 Neb. 296:

"A prosecution for contempt of court is a criminal proceeding. The defendant is entitled to the benefit of any reasonable doubt as to his guilt."

Pattison's-Wilson's Criminal Ev., 906.
114 N. W., 294.
147 Fed. 947.

While contempt of court is a quasi-criminal offense, it is provided for by statute in Ohio (and is also an inherent power in the Court) and, having a penal section fixing the limitations of fines to be assessed therefor, is an offense within the provisions of section 3056 G. C., and fines collected for contempt are payable into a law library as provided therein.

Respectfully,
C. C. CRABBE,
Attorney-General.

977.

MUNICIPALITIES—WATER CONSUMERS OUTSIDE A MUNICIPALITY WHO HAVE INSTALLED FIRE HYDRANTS CONNECTING WITH CITY WATER WORKS SYSTEM NOT ENTITLED TO RECEIVE FREE WATER—VALIDITY OF SECTION 3967 G. C. AS CONSTITUTIONAL STATUTE NOT CONSIDERED.

SYLLABUS:

Section 3963 and 3967 G. C. were enacted to apply to the property and the people within the municipal corporations of the state.

Water supplied to people living outside such municipalities is intended to be paid for by those receiving such service for whatever purpose the same is used.

COLUMBUS, OHIO, December 8, 1923.

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

GENTLEMEN:—You have submitted the following request for an opinion:

"Section 3963 G. C. provides in part that: