

salary as may be fixed by the commission and approved by the governor, *such salary to be paid in the same manner as that of the members of the commission.*'

By the terms of the above section, neither the Public Utilities Commission, nor the Director of Commerce, has any voice in the selection, appointment or removal of the special counsel under consideration. The Director of Commerce has no control over the fixing of his salary. This is done by the Public Utilities Commission, subject to approval by the Governor, and it is not one of the functions of the Commission placed under the direction of the Director of Commerce. The special counsel is appointed by the Attorney General and serves at his pleasure.

It is clear, therefore, that the special counsel designated by the Attorney General to perform the services and discharge the duties of attorney to the Public Utilities Commission is an employe of the Attorney General's department and not of the Department of Commerce.

For these reasons it is my opinion that:

1. The Attorney General's department is not one of the several departments included in Section 154-20, General Code, the term "several departments," as used in that section, applying only to the departments enumerated in Section 154-3, General Code.

2. The special counsel appointed by the Attorney General and by him designated under the provisions of Section 497, General Code, "to perform the services and discharge the duties of attorney" to the Public Utilities Commission is an employe of the Attorney General and not an employe in the Department of Commerce.

3. The inhibition contained in the last sentence of Section 154-20, General Code, has no application whatsoever to any of the employes in the Attorney General's department, including the special counsel designated under Section 497, General Code, to act as attorney for the Public Utilities Commission.

Respectfully,

EDWARD C. TURNER,

Attorney General.

786.

BILL OF COSTS—INDICTMENT AND RE-INDICTMENT FOR SAME.
CRIME—SECTIONS 2491 AND 13722, GENERAL CODE, DISCUSSED

SYLLABUS:

Where a person charged with a felony was extradited and bound over to the grand jury, indicted at the following session thereof and then re-indicted for the same crime at the next session of the grand jury, so that there were pending against the same defendant two or more indictments for the same criminal act, upon election and trial being had upon one of them resulting in the conviction and sentence of the accused for a felony, the sum paid by the county commissioners for the arrest and return of the convict as authorized by Section 2491, General Code, is, by the terms of Section 13722, General Code, a proper item in the bill of costs made in such prosecution.

COLUMBUS, OHIO, July 27, 1927.

HON. C. LUTHER SWAIN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of inquiry, the pertinent parts of which read:

"A person charged with a felony was extradited, and upon hearing was bound over to the grand jury. The costs of extradition were paid, at the time, by the county. This party was indicted at the following session of the grand jury, and gave bond. At the next session of the grand jury, it was deemed advisable to re-indict this person upon the same state of facts, and for the same crime.

The clerk in entering the cases upon his docket, entered the transcript and gave it a number of a criminal case. The first indictment was given the same number. The second indictment was given another number, and the record does not now show the transcript, although this was the same case, but just a different number.

If trial was had, and verdict of guilty, or a plea of guilty entered, in the second case, do the costs in the transcript and the costs of extradition become a part of the second case?

This is the same felony, the same crime, as the one in the extradition proceedings and in the transcript, and it appears to me that the costs follow the case, the set of facts, without regard to the number thereon, (the clerk could enter on the docket in the second case the notation that the transcript was given a different number, showing what number).

The General Code recognizes the practice or custom and the legality of the two or more indictments against the same person for the same crime, in G. C. Sec. 13578:

'If there be pending against the same defendant two or more indictments for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and, upon trial being had upon one of them, the remaining indictment or indictments shall be quashed.'

I may state that the same question arises in cases where several persons are jointly bound over to the grand jury, and a joint indictment is brought, with the number of this indictment being the same number that was given the transcript, and also separate indictments are returned against each person for the same crime. Trial is had on the separate indictments to avoid discharging any of the defendants under G. C. Sec. 13670, and the joint indictment is quashed or nolle.

I may state that, as far as this office is concerned, it makes no difference as to the indictment upon which trial is had or plea of guilty is entered, but I would prefer to use the second indictment. The Clerk and the Court are much concerned as to the costs, and desire to know whether or not the costs would follow, should I elect to proceed upon the second indictment in the state of facts as given to you."

Your attention is directed to Section 13578, General Code, which provides:

"If there be pending against the same defendants two or more indictments for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and, upon trial being had upon one of them, the remaining indictment or indictments shall be quashed."

In the case that you present, there being two indictments pending against the same defendant for the same criminal act, you must elect upon which indictment you will proceed, and, upon trial being had upon one of them, it is then your duty to quash or otherwise dispose of the remaining indictment according to law.

It is assumed that the expenses incident to extradition were paid by the county commissioners in accordance with Section 2491, General Code, which provides:

"When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

By the terms of this section authority is given to the boards of commissioners of the several counties, when any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person or has requested the President of the United States to issue extradition papers, to pay all necessary expenses or so much thereof as to them seems just incurred by the agent designated in such requisition or request to execute them in pursuing and returning such person so charged.

In other words, the expenses incident to the pursuing and return of a person so charged may be paid, in the first instance, by the board of commissioners regardless of whether the charge results in acquittal, *Nolle prosequi* or conviction. If, however, the person so charged, is subsequently convicted of a felony and sentenced therefor the provisions of Section 13722, General Code, apply.

Section 12375 of the General Code, reads as follows:

"In all sentences in criminal cases, including violations of ordinances the judge or magistrate shall include therein, and render a judgment against the defendant for the costs of prosecution; and, if a jury has been called in the trial of the cause, a jury fee of six dollars shall be included in the costs, which when collected shall be paid to the public treasury from which the jurors were paid."

By Section 13722, General Code, it is provided that:

"Upon sentence of a person for a 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." (Italics the writer's.)

Section 13723, General Code, reads:

"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 the 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 13727, provides as follows:

“Upon the return of the writ against the convict, if an amount of money has not been 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.”

By the terms of Section 12375, *supra*, in all sentences in criminal cases the judge shall include therein and render a judgment against the defendant for the costs of prosecution. As provided in Section 13722, *supra*, upon sentence of a person for a felony, the clerk of courts shall make and certify a complete itemized bill of the costs made in *such* prosecution *including the sum paid by the county commissioners 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.*

Answering your question specifically, it is my opinion that in so far as the costs of extradition are concerned it is immaterial upon which indictment you elect to proceed. If, upon either indictment, the defendant is sentenced for a felony, the clerk may properly include in the itemized bill of costs made in such prosecution, the sum paid as provided by Section 2491, *supra*, by the county commissioners for the arrest and return of the convict. If you elect to proceed upon the first indictment and the defendant is convicted and sentenced for a felony, the clerk should make and certify, under his hand and the seal of the court, a complete itemized bill of the costs made in such prosecution, *viz.*, the costs incident to the preliminary hearing and being held to answer to the grand jury together with whatever costs accrued upon and after indictment and include therein 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. If you elect to proceed upon the second indictment and the defendant is convicted and sentenced for a felony, the clerk should make and certify, under his hand and the seal of the court, a complete itemized bill of the costs made *in such prosecution*, *viz.*, whatever costs accrued upon and after indictment and include therein 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.

Respectfully,

EDWARD C. TURNER,
Attorney General.

787.

CANAL LANDS—HOUSE BILL No. 162, DISCUSSED WITH REFERENCE TO THE RIGHTS OF CERTAIN LESSEES UNDER A LEASE GIVEN TO D. Z. COOPER.

SYLLABUS:

Application of House Bill 162 passed by the 86th General Assembly on March 25, 1925, entitled “An Act—To abandon for canal purposes that portion of the Miami and Erie canal between the Maumee river at Defiance, Defiance county, Ohio, and a point 500