

every instance, and the inevitable conclusion would be that the people of a municipality are powerless to grant by charter general authority to the council to exercise on their behalf the powers of local self-government expressly reserved by the Home Rule provisions.

I am of the opinion that the broad power conferred by the charter provision which you quote, is amply sufficient to vest in the council of the city of Cincinnati the authority to enact all ordinances and resolutions which properly pertain to the subject of local self-government and that, in the exercise of that power, it may, unless restricted by some provision of the charter not before me, properly make an appropriation to defray the cost of an exhibit in an exhibition whose primary purpose is the furtherance of the welfare and prosperity of the city, since such an appropriation, under the authorities, would obviously be for a public purpose.

Respectfully,

EDWARD C. TURNER,
Attorney General.

394.

COSTS IN FELONY CASES—WHEN PAID TO EXAMINING MAGISTRATE.

SYLLABUS:

When a convict who has been convicted of a felony is sentenced otherwise than to imprisonment in a reformatory or the penitentiary, or to death, there is no provision of law whereby the examining magistrate who had bound over the defendant may be paid his costs or an allowance in lieu thereof, from public funds.

COLUMBUS, OHIO, April 27, 1927.

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

GENTLEMEN:—I am in receipt of your communication requesting my opinion as follows:

“In a case where an affidavit is filed before a justice of the peace charging the violation of Section 13008, General Code, and such person is bound over to the grand jury, indicted, pleads guilty and is sentenced by the court to a term in a work house, is this a felony wherein the state failed to convict or a misdemeanor in which the defendant proves insolvent so that the costs of the justice of the peace and constable may be included in the allowance made by the county commissioners in lieu of fees under Section 3019, General Code?”

Section 13008, General Code, reads as follows:

“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, fails, neglects or refuses to provide such child or such woman with the necessary or proper home, care, food and clothing, 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 12372, General Code, provides:

"Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors."

Section 3019, General Code, reads as follows:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees, but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be prorated on the basis of lost fees."

It is said in Cyc. Vol. 12, page 132, that:

"In many states by statute all crimes which are punishable in the state prison with or without hard labor are felonies. A crime is a felony under such a statute if it may be punished by imprisonment in a penitentiary or state's prison although the court may in its discretion reduce the punishment to imprisonment in jail or a fine."

It will be observed by the provisions of Section 13008, supra, that any person convicted of the offense therein described, may be imprisoned in a jail or workhouse or in the penitentiary. The Supreme Court of Ohio in considering the provisions of this statute in the case of *McKelvy vs. State of Ohio*, 87 O. S. page 1, said:

"As the punishment for the offense charged herein may be imprisonment in the penitentiary under Section 13008 above, this fixes its character and makes it a felony, notwithstanding the fact that it may also be punished as a misdemeanor."

In view of the fact that the Supreme Court has definitely said that the offense described in Section 13008, supra, is a felony, the mere fact that it may be punished as a misdemeanor makes it none the less a felony. It is apparent that under the circumstances which you have outlined in your inquiry the state has not failed to convict but did convict and the court in its discretion administered the punishment as though it was a misdemeanor. This, however, does not make it a misdemeanor and under the circumstances it would appear that the provisions of Section 3008, supra, are not applicable. That is, it is neither a case of a felony where the state failed to convict nor a misdemeanor where the defendant proved insolvent, and it will be necessary for us to look further in order to determine how the costs of the justice of the peace who had bound over the defendant can be paid.

Sections 13722, 13723, 13724 and 13726, respectively of the General Code, provide *inter alia* as follows:

"Sec. 13722. 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. * * *"

"Sec. 13723. 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. * * *"

"Sec. 13724. 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."

"Sec. 13726. 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."

As will be noted by the provisions of Sections 13724 and 13726, supra, when a convict is sentenced for a felony to imprisonment in a reformatory, penitentiary or to death, and has no property out of which the costs of his conviction can be collected, the costs are paid from the treasury of the state, but I find no provision of law which takes care of a situation such as you have outlined in your inquiry, and I am therefore of the opinion that there is no way provided for the payment from public funds of the costs, or an allowance in lieu thereof, which accrue before an examining magistrate when he binds over a defendant, who is afterwards convicted of a felony and sentenced otherwise than to imprisonment in a reformatory, or the penitentiary, or to death.

Respectfully,

EDWARD C. TURNER,
Attorney General.

395.

MISDEMEANORS—COMMITMENT TO MARYSVILLE REFORMATORY—
COSTS OF COMMITMENT.

SYLLABUS:

When persons are convicted of misdemeanors involving violations of state laws, in the municipal court for the city of Ashtabula and sentenced to the Marysville Reformatory, the expense of executing the order of commitment should, by virtue of the provisions of Section 3017, General Code, be paid from the county treasury of the county of Ashtabula. Under the same section "in like manner such expense shall be paid from the municipal treasury when incurred in ordinance cases."

COLUMBUS, OHIO, April 27, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your communication in which you refer to Sections 1579-850 and 3017 of the General Code, and state:

"Defendants are occasionally committed to the Marysville Reformatory from the Municipal Court of Ashtabula for the commission of misdemeanors and the question of the taxing district's liability for the expense of conveying such prisoner has been raised."

You ask: