

administration within constitutional limitations, must be sustained on the authority of *Cunnius vs. Reading School District*, supra, such legislation, to be valid, should meet the requirements of that decision by providing safeguards for the protection of the interest of the absentee in case he should return, and since the bill under consideration fails to do so, you are advised that if the bill is enacted in its present form it would be unconstitutional.

In case it is desired to go forward with this legislation, it is respectfully suggested that the bill be amended so as to provide, as did the Pennsylvania statute, that notice to the absentees be also published in a newspaper published and of general circulation in the county at or near the place where the absentee resided when last heard from, etc., in addition to providing safeguards for the protection of the absentee's interests in case of his return.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1982.

JUSTICE OF PEACE AND CONSTABLE—NO PROVISION FOR PAYMENT FROM COUNTY TREASURY OF COSTS OF SAID OFFICERS IN CASES TRIED UNDER SECTION 13423 G. C. WHERE DEFENDANT IS ACQUITTED—SEE 108 O. L., 1221—EXCEPTION.

As a result of the amendment of 13439 in 108 O. L., Part II, page 1221, there is no provision for payment from the county treasurer of the costs of justices of the peace and constables in cases tried under 13423, where the defendant is acquitted, except under 3016, where recognizances are taken, forfeited and collected.

COLUMBUS, OHIO, April 9, 1921.

Department of Agriculture, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent letter, reading as follows:

"In reply to your communication of March 29, relative to the amendment of section 13439, regarding payment of costs in cases filed by this department when the defendant was found not guilty, or for other reason not required to pay costs in the case, please favor me with an official opinion as to what shall be our procedure in such cases."

In the communication of March 29, referred to, you were advised of the amendment of section 13439, in 108 O. L., Part 2, page 1221. The result of that amendment, as pointed out, is that it no longer provides for the payment of costs from the county treasury, where the defendant is acquitted or otherwise discharged, as it did before the amendment.

Section 3016 provides for the payment of costs from the county treasury, where the defendant is convicted in case of felony and that in all cases where recognizances are taken, forfeited and collected, and no conviction is had, such costs shall be paid from the county treasury.

Section 3017 provides that in no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, constable or other officers named therein.

While section 3019 provided for an allowance to be made to such officers, in felonies in which the state fails to convict and in misdemeanors where the defendant proves insolvent, of one hundred dollars per year as an allowance *in lieu of fees*, this is to provide for some compensation for what may be termed "lost costs." Whether or not in the past section 11439 was regarded as an exception to section 3017, is not now material, as this last section was amended in House Bill 294, beginning with section 1746, page 1204, 108 O. L., Part 2, so that as amended all reference to the payment of such costs from the county treasury was omitted.

Section 1746—the justice of the peace criminal fee section—was so amended in that act, providing for the collection of such fees "from the judgment debtor, except as otherwise provided by law."

Section 3017 was also amended in the same act and still contains the provision that "in no other case whatever shall any fees be paid from the state or county treasury to a justice of the peace," and the other officers named therein. But in the amendment provision was made for the payment of actual necessary expenses of any salaried court officer charged with the execution of certain warrants and orders. Section 3016 was unamended and section 3019, so far as involved here, was not changed by the amendment to that section.

From this it will be seen that as the law now stands, there is no provision for the payment of costs in cases filed by your department under 13423 G. C., except where recognizances are taken, forfeited and collected, and no conviction is had. Of course the allowance of an annual amount under section 3019 is available in "place of fees" where in felonies the state fails and in misdemeanors where the defendant proves insolvent. This section is not available, however, in misdemeanors under section 13423, under which your department prosecutes before justices of the peace, where the defendant is acquitted. It may make it clearer to you to state that as a general principle the theory of the payment of costs in such cases is that they are borne by the litigating parties unless the state specifically provides for their payment from the public funds. It is noted you ask to be advised what your procedure in such cases will be. Of course the procedure, meaning the various legal steps taken in the prosecution of such cases provided by law, is unchanged and the procedure thus understood will be the same as it has been, but I take it that you mean to inquire whether you should continue to file cases in the justice of the peace court, in view of the absence of provisions for the payment of the costs in case of unsuccessful prosecution.

As to this the only thing that may be suggested is that the jurisdiction, power and duty of the officers remain the same and it is their duty to hear and determine these cases, notwithstanding there is no provision for the payment of their costs from the county or state treasury and at this time, in the absence of specific questions in actual cases, it would be impracticable to advise you further in the matter other than to say that such questions may be considered as they arise.

Respectfully,

JOHN G. PRICE,
Attorney-General.