

If they had been elected to membership in one of the fire companies and had accepted it after their election and qualification as councilman I would say that they thereby forfeited the office of councilman, but under the circumstances it is my opinion that their membership in a fire company which was a part of the fire department of the city of Martins Ferry did not disqualify them from being elected as members of city council and their continuance of the performance of the duties of firemen after their election to council the same as before did not operate to cause a forfeiture of the office of councilman, although they were not eligible to receive any of the privileges or emoluments of the position of firemen. For these reasons it is my opinion that the findings of your examiner against the members of the city council at Martins Ferry who are acting as volunteer firemen should be rescinded.

The conclusions herein reached render unnecessary specific answers to the two questions asked in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

721.

WITNESS BEFORE MAYOR—FEES—FEE OF MAYOR OR MARSHAL OF MUNICIPALITY IN STATE CASES CANNOT BE PAID FROM COUNTY TREASURY—SUCH FEES ARE INSERTED IN JUDGMENT AND WHEN COLLECTED ARE DISBURSED BY COUNTY CLERK OF COURTS.

SYLLABUS:

1. *Each witness in a state case attending before a mayor under subpoena is entitled to receive one dollar for each day's attendance, and five cents for each mile necessarily traveled from his place of residence to the place of giving testimony and return, provided the distance be more than one mile, to be paid out of the county treasury upon the certificate of the mayor whether the defendant be discharged upon preliminary hearing or bound over to the grand jury.*

2. *There is no authority of law for the payment from the county treasury of fees of the mayor and marshal of a municipal corporation, incurred in any state case, whether the defendant be convicted or acquitted. By the terms of Section 3016, General Code, in felonies, and in minor state cases which have come to the Court of Common Pleas through a mayor's court, where the defendant is convicted, the fees of such mayor and his officers should be inserted in the judgment of conviction and when collected should be disbursed by the clerk of courts to the persons entitled thereto.*

COLUMBUS, OHIO, July 11, 1927.

MR. G. O. MCGONAGLE, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

“In a case here before the Mayor the defendants were arrested charged with robbery. No security for costs was taken or required by the Mayor. A large number of witnesses were subpoenaed. Upon the preliminary hearing defendants were, by the Mayor discharged from custody. Now as to

costs: Should the Mayor issue to the witnesses certificates for fees on the county treasury under G. C. 3014? If not, is the prosecuting witness liable for all costs?

In case the witnesses should be paid from the county treasury, are the Mayor or Marshal, or either of them, entitled to be paid from the county treasury? In a case where the Mayor binds over to grand jury, and no indictment is returned, or upon indictment, the State fails to convict, may the Mayor and Marshal be paid from the county treasury?"

1. In answering your first question your attention is directed to that portion of Section 3014, General Code, which provides:

"* * * Each witness attending before a justice of the peace, police judge or magistrate, or mayor, under subpoena, in criminal cases, shall be allowed the fees provided for witnesses in the court of common pleas, and in state cases said fees shall be paid out of the county treasury * * * upon the certificate of the judge or magistrate, and the same taxed in the bill of costs. * * *"

and to Section 4555, General Code, which provides:

"In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, *and in state cases on like certificate from the county treasury.*" (Italics the writer's.)

From the foregoing it will be seen that each witness who attends before a mayor, under subpoena in a criminal case, shall be allowed the fees provided for witnesses in the Court of Common Pleas, viz., for each day's attendance, "one dollar, and five cents for each mile necessarily traveled from his place of residence to the place of giving such testimony and return, provided the distance be more than one mile," these fees "to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court." See Sections 3011 to 3014, inclusive, General Code. In all *state* cases such fees are payable, upon the certificate of the mayor, from the county treasury.

Your attention is directed to a former opinion of this office which appears in Vol. I, Opinions, Attorney General, 1923, at page 436, the first, third, fourth, fifth and sixth paragraphs of the syllabus of which read:

"1. Under the provisions of Sections 3011, 3012 and 3014 of the General Code a witness attending a criminal trial under a subpoena in the Court of Common Pleas, justice's court, mayor's court or police court, entitled to receive one dollar for each day's attendance, and mileage at the rate of five cents per mile for the distance necessarily traveled from his place of residence to the place of giving testimony and return in those cases in which his attendance could have been compelled. The special enactments relating to municipal courts must be examined in each instance in order to determine what witness fees are properly charged therein.

* * * * *

3. In felony cases when properly subpoenaed the witness may receive mileage from his place of residence to the place of trial and return from anywhere in the state. The same is true of misdemeanor cases pending in the Court of Common Pleas.

4. Where a witness voluntarily reports to the court upon notice to do the same and received a subpoena, under such circumstances he is entitled to his statutory mileage and fees and only when his attendance could have been required by compulsory process.

5. Where due to the postponement of the case under order of the court, it is necessary for a witness to make another trip, he is entitled to his fees and mileage for the second attendance.

6. Witness fees are payable as provided in Section 3014 of the General Code irrespective of whether the state wins or loses, and it is not necessary to await the final determination of a proceeding in error in order that such fees may be paid."

You state in your letter "No security for costs were taken or required by the mayor." You will note that the provisions of Section 13499, General Code, apply only in misdemeanor cases and in the instant case the mayor would not have been authorized to require security for costs.

In view of the foregoing and answering your first question specifically I am of the opinion that inasmuch as the prosecution in question was a state case, each witness attending under subpoena is entitled to receive one dollar for each day's attendance, and five cents for each mile necessarily traveled from his place of residence to the place of giving testimony and return, provided the distance be more than one mile, these fees "to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court", to be paid out of the county treasury upon the certificate of the mayor who presided at the hearing.

2. The answer to your first question renders it unnecessary to answer your second inquiry.

3. You next inquire whether or not the mayor and marshal or either are entitled to an allowance of their fees out of the county treasury in state cases wherein a felony is charged,

1. Where the defendant is discharged on preliminary hearing.
2. Where the defendant is bound over to grand jury which failed to indict.
3. Where the defendant is indicted and acquitted.

Fees are in their nature a reward or compensation allowed by law to an officer for specific services performed by him in the discharge of his official duties and before such compensation can be allowed statutory authority to make such allowance must appear.

The only section of the General Code authorizing the payment of fees in state cases to the mayor and marshal of a municipal corporation is Section 3016, reading in part as follows:

"In felonies, when the defendant is convicted, the fees of the various magistrates and their officers, the witness fees and interpreter's fees shall be inserted in the judgment of conviction and when collected the same shall be disbursed by the clerk of courts to the persons entitled thereto; in minor state cases, which have come to the court of common pleas through said magistrate's courts, the fees above enumerated shall be inserted in the judgment of conviction and when collected the same shall be disbursed by the clerk of courts to the persons entitled thereto, except that in both felonies and minor state cases, said clerk shall pay the witness and interpreter's fees into the county treasury, monthly. * * *"

It will be observed that in case of a judgment of conviction, in which judgment the fees of the magistrate and his officers are to be inserted, this section authorizes the

clerk of courts to pay to the persons entitled thereto the fees of the magistrate and his officers only when the same are collected by the clerk.

While Section 3019 of the General Code provides:

“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.”

there is no section authorizing a like allowance to mayors and police officers of municipal corporations.

Answering your third question specifically it is my opinion that there is no authority of law for the payment from the county treasury, to the mayor and marshal of a municipal corporation, of fees of such officials incurred in any state case, whether the defendant be convicted or acquitted. By the terms of Section 3016, General Code, in felonies, and in minor state cases which have come to the Court of Common Pleas through a mayor's court, where the defendant is convicted, the fees of such mayor and his officers should be inserted in the judgment of conviction and *when collected* should be disbursed by the clerk of courts to the person entitled thereto.

Respectfully,

EDWARD C. TURNER,
Attorney General.

722.

GENERAL CORPORATION ACT—FEES FOR FILING ARTICLES OF INCORPORATION.

SYLLABUS:

Where, in articles of incorporation filed with the Secretary of State, authority is given to split up the number of shares into fractional shares with all the incidents of stock ownership in such fractional shares, the fee to be charged by the Secretary of State for the filing and recording of such articles of incorporation should be based upon the highest possible number of such fractional shares authorized to be issued.

COLUMBUS, OHIO, July 11, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication in which you ask my opinion as to the proper fee to be assessed against a corporation which has recently submitted its articles of incorporation to you. The pertinent part of the articles is as follows:

“FOURTH: The maximum number of shares which the Corporation is authorized to have outstanding is Forty-Five Hundred Shares, which shall be classified as follows: