

Under the provisions of the sections above quoted it is clear that a witness is limited to the one witness fee of one dollar irrespective of how many causes he appears in before the court in one day, unless the court otherwise directs by special order. If the court sees fit it may allow any witness a witness fee for each appearance before said court on any day, provided such appearances are on separate matters, since Section 3014, *supra*, vests that discretion in the court.

In view of the above, I am of the opinion that a witness subpoenaed to appear in a criminal cause before the municipal court of Cincinnati is limited to the one witness fee of one dollar per day, 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, irrespective of how many causes he appears in before said court during the day, unless the court otherwise directs by special order. The court may, under the provisions of Section 3014, General Code, if he sees fit, allow a witness a witness fee for each appearance before the court on any day, provided such appearances are on separate matters. In no event would any such witness be entitled to more than one mileage fee on any day, whether he testifies in one or several causes.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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155.

APPROPRIATION "PROSECUTION AND TRANSPORTATION OF CONVICTS"—CANNOT BE USED FOR PAYMENT OF CLAIMS FOR COURT COSTS.

*SYLLABUS:*

*The appropriation "Prosecution and Transportation of Convicts" found in the appropriation bill of the last General Assembly, cannot be used for the payment of claims for court costs or other costs incurred by the accused in securing a reversal of a judgment, as provided in Section 13755 of the General Code.*

COLUMBUS, OHIO, March 8, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date, reading as follows:

"We respectfully request your review of Attorney General's Opinion No. 2099, dated December 20, 1924, interpreting the provision of Section 13755, General Code as amended 108 O. L., page 36 (Part 1).

I have on file in this office a large number of claims presented against the state for services in preparing transcripts in minor courts, which I have refused to pay as not being legal claims against the appropriation 'Prosecution and Transportation of Convicts—\$225,000.00'. House Bill 517, 86th General Assembly.

I had personal knowledge that such expenditures were not included in the budget supporting said appropriation bill.

I believe the inquiries propounded in said Opinion No. 2099 will present

all the legal questions involved. If anything further is desired, I am at your service.

The opinion to which you refer is to be found in Opinions of the Attorney General for 1924, at page 706. The major conclusion of that opinion is stated in the first branch of the syllabus, which is as follows:

"In state cases, proper court costs, including the costs of bills of exceptions and transcripts, incurred by the accused in securing a reversal of a judgment as provided for in Section 13755, General Code, is 'expenses provided by statute' within the meaning of the appropriation designated under the heading 'prosecution and transportation of convicts' (110 O. L., 600), and upon proper proof of the incurring of such expense it may be legally paid from such fund."

In reviewing that opinion it seems to me to be unnecessary to consider whether or not the items which are sought to be recovered from the state are properly within the meaning of Section 13755 of the General Code. For the purposes of this discussion, it may be assumed that the items submitted by the claimants may properly be classified as included within those things which according to the terms of said section shall be recovered from the defendant in error.

The important question is whether the legislature has made any provision or appropriation out of which any claim which may be a valid claim under Section 13755 may be paid. It therefore becomes necessary to examine the appropriation bill to determine this question. The only possible fund from which this type of claim could conceivably be paid is found in the general appropriation bill of the Eighty-sixth General Assembly, at page 159. The heading is "Prosecution and Transportation of Convicts." The more detailed description has a special heading under the more general title of "Fees, Costs, Mileage and other expenses provided by statute."

In the opinion of my predecessor, this language was sufficiently broad to comprehend the expenditure of money for the repayment of the costs authorized to be recovered under Section 13755 of the General Code. In so concluding, I am of the opinion that he has not given sufficient weight to the history and terminology of the appropriation item.

It is significant to me that this appropriation item is one of regular recurrence. It has become in the nature of a fixed charge and its descriptive terms have not been changed for many years. The general heading "Prosecution and Transportation of Convicts" is of major importance in the interpretation of the purposes of the appropriation. In order to interpret correctly the legislative intention, it becomes necessary to scan the general law to find just what payments coming under this category were evidently intended.

Commencing with Section 13720 and ending with 13727 of the General Code are found the pertinent sections applicable to the disposition of the costs incurred in a criminal prosecution for felony, together with the procedure for the delivery of the convict to the penitentiary. You will note that Section 13722 provides for the clerk making an itemized bill of the costs made in such prosecution, including the sum paid by the county commissioners. The succeeding section provides for the issuance of execution against the property of the convict "for the costs of prosecution." Thereafter, the sections provide, in substance, for forwarding the bill for costs by the sheriff, or so much as has not been satisfied on execution. Provision is also made for a mileage allowance to the sheriff for the cost of transportation incurred in taking the convict to the penitentiary. Sections 13726 and 13727 both

provide for a certification by the warden of the penitentiary as to the costs and fees and the payment therefor by the auditor of state. No specific fund is described in these sections. It is perfectly obvious, however, that these are the provisions of the Code to which the legislature has reference in the recurring use of the description "Prosecution and Transportation of Convicts."

On reviewing the history of the sections, it is found that they are of very early origin. The use of the words "Prosecution and Transportation of Convicts" in the various appropriation bills apparently dates from the initial enactment of these sections, which have continued with minor changes from earlier than 1850 to the present day.

The question occurs, however, as to whether there are other items which may not properly be charged to this appropriation. The answer is in the affirmative, where the legislature has specifically so provided. I call your attention to Section 103 of the General Code, which provides for the allowance of costs on the return of parole prisoners, which is specifically designated to be paid "from the appropriation for the prosecution and transportation of convicts."

Again, in Section 2215 of the General Code, certain payments for officers are specifically directed to be made from the appropriation "for the conviction and transportation of convicts." These two sections have heretofore been under consideration by this department, and, in Opinions of Attorney General for 1915, at page 434, the wording of the two sections was held to be synonymous. Payment was therefore properly authorized out of a fund which had been appropriated in the same manner in which the appropriation was made in the present instance.

The provisions of section 13755 of the General Code, so far as pertinent are as follows:

"Upon the hearing of a petition in error, the court may affirm the judgment or reverse it, in whole or in part, and order the accused to be discharged or grant a new trial. If the judgement be reversed, the plaintiff in error shall recover from the defendant in error all court costs incurred to secure such reversal, including the cost of bills of exceptions and transcripts. \* \* \*

It would appear to be a rather strained construction to hold that the costs referred to therein come within the descriptive terms "fees, costs, mileage and other expenses provided by statute" incident to "Prosecution and Transportation of Convicts."

This section is entirely silent as to the source from which these costs are to be paid. Had the legislature intended that this particular appropriation item should comprehend these costs, it might easily have specifically so stated as it did in the instances to which I heretofore referred. Its failure so to do is of some significance.

I am prepared to follow my predecessor when he says that subsequently enacted statutes providing for payment may properly be referable to this appropriation item, although the language of the appropriation bill has not been changed. In other words, it is entirely conceivable that the legislature might change or add to in some respects the provision for costs of prosecution and transportation without defeating the right to payment from this fund. I am not prepared, however, to say that the fund may be held chargeable with items plainly not within the descriptive words of the appropriation unless specifically so directed, as it has in the instance of the two sections above cited, viz., sections 103 and 2215 of the General Code. In the absence of any specific statement, I do not feel warranted in extending the purposes of the appropriation beyond the plain meaning of the words used.

You are therefore advised that you are unauthorized to make payment from

the appropriation "Prosecution and Transportation of Convicts" of any claims filed by virtue of section 13755 of the General Code.

Respectfully,  
EDWARD C. TURNER.  
*Attorney General.*

156.

TRUSTEES OF COUNTY CHILDREN'S HOME—MUST FIX SALARY OF SUPERINTENDENT AND MATRON TO CONFORM TO APPROPRIATION OF COUNTY COMMISSIONERS.

SYLLABUS:

1. *The aggregate amount of compensation that can be paid to any public official or employee, for and during any fiscal year, is limited by the amount appropriated therefor.*

2. *When an appropriation is made by county commissioners for the yearly compensation of the superintendent and matron of a county children's home which is of a lesser amount than their salaries have theretofore been fixed, it becomes the duty of the trustees of the home to fix the salaries to conform to the appropriation.*

COLUMBUS, OHIO, March 8, 1927.

HON. CLARENCE J. CROSSLAND, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I am in receipt of your communication of recent date, reading as follows:

"I herewith submit to you the following statement of facts for your opinion as to what may be done relative to a legal solution thereof.

At the beginning of the year 1926, the Superintendent of the Muskingum County Children's Home was being employed at an annual salary of \$1800. The matron of said home was then being employed at an annual salary of \$864.

The Muskingum County Commissioners in their appropriations for 1926 allowed for salary for said superintendent and matron a total of \$2100.

For the first three months of 1926 the superintendent drew a total of \$450 and the matron drew a total of \$216. Effective April 1, 1926, the Board of Trustees of said home passed a resolution conformable to said appropriation, fixing the salary of superintendent at \$750 for the ensuing nine months, or 83.33⅓ monthly, and of matron at \$684 or \$76 monthly. Neither said superintendent nor said matron drew any further salary, although continuing in their respective capacities.

No action was at any time taken by said Board of Trustees for reduction in pay of said superintendent or matron pursuant to General Code Section 486-17 et seq. At the end of 1926, there was an unincumbered balance in said Children's Home fund for salary of said superintendent and matron of \$1434. There was a further unincumbered balance in other items of said fund of \$2172.71.

In the 1927 appropriations this total unincumbered balance of \$3606.71 was reappropriated to the said Children's Home fund. In the item for