

2382.

COURT REPORTER—CASE REFERRED BY COMMON PLEAS COURT
TO MASTER COMMISSIONER—NO PER DIEM FEE FROM COUNTY
—SECTION 11490, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *Where an official court reporter or an assistant court reporter is employed to take and transcribe the testimony in the hearing of a case before a master commissioner, to whom such case has been referred by the Common Pleas Court of the county under the provisions of Section 11490, General Code, there is no legal authority for the payment of the per diem allowances of such stenographer for his services in such hearing out of the treasury of the county; and if such per diem allowance of such stenographer has been paid out of the county treasury, a finding for the recovery of the same should be made.*

2. *In such case, unless the proper charges of the stenographer are paid directly by the parties, the same may be included as a part of the fees and charges of the master commissioner and, as such, allowed by the court as costs in the case.*

COLUMBUS, OHIO, July 23, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your inquiry as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

An action in equity against a corporation for an accounting was brought in the County of “C”; on motion of the plaintiff a change of venue was ordered to the County of “M”; the Common Pleas Court of the County of “M” referred the case to a special Master Commissioner; the official stenographer of the County of “M”, who was receiving a salary under the law, was used by the Master Commissioner to take the testimony and reduce it to writing; before the hearing was terminated the Master Commissioner died and a new Master Commissioner was appointed. The Common Pleas Court then appointed an assistant stenographer to complete the hearing and reduce the testimony to writing. Both the official stenographer and the assistant stenographer received compensation out of the county treasury of “M” County at the rate of \$10.00 per day both for taking the testimony and transcribing the same. The whole of this compensation is taxed as costs in the case. The final judgment of the Court adjudged the costs two-thirds to be paid by the plaintiff and one-third by the defendant. The County of “M” having paid \$1,196.60 to the stenographers sent to the County of “C” a statement of such amount, citing Section 1147, G. C., and asking for a reimbursement.

Question 1. Was the compensation of the stenographers paid out of the county treasury of “M” in accordance with law, both as to taking of testimony and the transcribing of the same?

Question 2. Was this amount properly taxed as part of the costs in the case?

Question 3. Was the County of “C” liable for the payment of the amount to the County of “M”? If not, upon the examination of the accounts of “C”, can a finding be made against the County of “M” for the return of the amount?

Question 4. If the plaintiff has paid less than two-thirds of the costs, which included the stenographer's fees, can he be held liable for the balance up to two-thirds of the costs?

Question 5. In case no finding can be made in favor of the County of "C" against the County of "M", is the County of "C" entitled to pro rata share of the costs paid by the plaintiff?

Since the receipt of the above communication, I am advised by your examiner that the official shorthand reporter of the County of "C", who was paid a regular salary by such county, was the person appointed as assistant official shorthand reporter in the County of "M", for work in connection with the particular case to which you refer, and that he was paid from the treasury of the County of "M" for work in connection with this case the sum of \$869.80. The regular official shorthand reporter of the County of "M" was paid \$326.80 for work in this case in addition to his regular salary.

I am also advised that the regular compensation of both these shorthand reporters had previously been fixed at a stated amount per year. Their compensation in the case in question was computed, as you state, at the rate of \$10.00 per day, which covered both the taking of the testimony and transcribing the same. It also appears from the statement of your examiner that the parties to this litigation had agreed that the stenographers should be paid at the rate of \$10.00 per day and that they would bear this expense as a part of the costs of the case, to be paid by the party who should, upon the determination of the cause, be charged with the payment of the costs.

The questions presented in your communication arise out of the payment out of the treasury of "M" County of the compensation of an official court reporter of said county and of an assistant court reporter for services rendered by them for taking and transcribing testimony taken in a hearing before a master commissioner, in a certain cause in equity referred to such master commissioner by the Common Pleas Court of said county, the trial of which cause had theretofore been removed on a change of venue from "C" County to "M" County.

Sections 1546, et seq., General Code, make provision for the appointment of official shorthand court reporters and assistant shorthand court reporters whose compensation, if their term of appointment is one year or more, is to be a salary payable out of the county treasury. In addition to the regular salary of such official shorthand reporters and assistant official shorthand reporters, by way of salary or otherwise, they are entitled to make and receive a folio charge at prescribed rates, for transcripts and copies furnished by them, which, if ordered by a party in an action, is to be paid by such party, and which, if ordered by the court, is to be paid from the county treasury and collected as other costs. (Section 1552, General Code.) Section 1549, General Code, provides that in every case reported there shall be taxed for each day's service of the official or assistant shorthand reporter a fee of four dollars (\$4.00), to be collected as other costs in the case.

In an opinion of this department under date of October 15, 1913 (Annual Report of the Attorney General, 1913, Vol. 2, p. 1410), it was held that when a case is referred to a referee and tried and an official stenographer, who is receiving an annual salary, is called to take the testimony the case is one before the court and the official stenographer is not entitled to a per diem for this employment, but that the per diem of four dollars per day provided for in Section 1549, General Code, is to be collected as costs and paid into the general county fund. However, I do not think that the opinion of this department above referred to affords any assistance in the consideration of the questions here presented. There is quite a difference between the hearings of a case before a referee and the hearing of a case before a master. A referee tries the

case; a master takes the testimony of witnesses and reports to the court the evidence in the case together with his conclusions on the law and the facts.

Touching the reference of actions to master commissioners and the payment of their compensation for services rendered on such reference, Sections 11490 and 11492, General Code, provide as follows:

Section 11490. "Upon motion of a party, the court, or a judge thereof in vacation, may refer an action in which the parties are not entitled to a trial by jury, to a regular or special master commissioner, to take the testimony in writing, report it to the court, and therewith his conclusions on the law and facts involved in the issues, which report may be excepted to by the parties, and confirmed, modified, or set aside by the court."

Section 11492. "A master commissioner or special master shall be allowed such fees as are allowed for similar services to other officers."

The last section above quoted must be read in connection with Section 11486, General Code, providing for the compensation of referees. This section is as follows:

"The referees shall be allowed such compensation for their services as the court deems just, which shall be taxed as a part of the costs in the case."

Reading these sections of the General Code together, the conclusion is reached that the fees of a special master commissioner, appointed by the court, for services rendered in the case in which he is appointed, are part of the costs of such action and may be charged and collected as such.

Touching the several questions presented in your communication, it may be observed that in the absence of statutory provision authorizing the same, stenographic fees and charges cannot, as separate and distinct items, be made a part of the costs in an action. As above noted, Section 1549, General Code, provides for a per diem charge of four dollars for the services of the official stenographer employed in taking the testimony, which is to be charged as a part of the costs in the case. However, as above observed, the hearing of a case before a master commissioner is not a hearing before the court within the provisions of said Section 1549, General Code, and the same have no application to cases heard before a master commissioner. In this connection it is to be noted that by the terms of Section 11490, General Code, when a case is referred to a master commissioner, he is required to take the testimony, in writing, and report it to the court, together with his conclusions on the law and facts involved in the issues in the case. In such case, although the compensation of the stenographer employed in the hearing before the master for taking the testimony, making transcripts and for other services rendered by him in connection with such hearing, cannot be charged as separate items as a part of the costs in the case, the compensation of such stenographer for such services may be included as a part of the fees and charges of the master commissioner and, as such, made a part of the costs in the case and collected.

Touching the questions made in your communication on the facts therein stated, it is to be observed that there is nothing in the statutes of this state which requires the master commissioner, to whom a case has been referred, to employ an official court stenographer or an assistant court stenographer to take and transcribe the testimony in such case. With respect to a private stenographer performing such services in a hearing before a master commissioner, it is clear that the most that could be said with respect to his compensation for such services, if such compensation is not otherwise taken care of by the parties, is that the same should be charged up and collected as a part of the costs in the case. The mere fact that the stenographer employed

for the purpose of taking and transcribing testimony heard before such master appears to be an official court stenographer or an assistant official court stenographer would not, in my view, alter the situation so far as the payment of the compensation of such stenographer is concerned. If he is an official court stenographer or an assistant court stenographer, on an annual salary, such salary would perhaps go on during the time that he is engaged in the hearing of the case before the master commissioner, but he would not be entitled to the payment of any per diem compensation out of the county treasury anymore than would a private stenographer so employed.

I am of the opinion, therefore, that in the case referred to in your communication there was no authority whatever for paying the per diem compensation of either of the stenographers employed by the master commissioner out of the treasury of "M" county. It follows that in this case the stenographers employed to take and transcribe the testimony at the hearing before the master commissioner should be required to pay back into the treasury of "M" county the money illegally paid to them out of such treasury and that they should be required to look to the money paid in as costs in the case as the source of their compensation, unless the same is paid directly by the parties.

By way of specific answer to the questions made in your communication, it is obvious that the first question is to be answered in the negative.

As to your third question, it is quite clear that the county of "C" is no more liable for the payment of the compensation of the stenographers than is the county of "M"; and that a finding should be made against the county of "M" for the return of the amount paid to it by the county of "C."

With respect to your second question, it is to be observed that the compensation of said stenographers, to a reasonable amount, could be made a part of the fees and charges of the master commissioner and, as such, taxed as a part of the costs in the case.

It is not clear to me how your department is concerned with the fourth question made in your communication, but answering the same it may be said that if the compensation of the stenographers has been properly made a part of the costs in the case, in the manner above pointed out, the plaintiff, in the action referred to in your communication, on the facts therein stated, can be held liable for the balance of the costs including such stenographers' fees, up to two-thirds of the costs in the case.

In view of what has been said in answer to your third question, no answer to the fifth question made in your communication is required.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2383.

INDEXES—SECTIONAL—CONTRACTORS EMPLOYED BY COUNTY COMMISSIONERS HAVE ACCESS TO RECORDS DESPITE OBJECTION OF RECORDER—DEPUTY COUNTY OFFICER MAY PERFORM PRIVATE BUSINESS IF PUBLIC DUTIES ARE NOT INTERFERED WITH.

SYLLABUS:

1. *By authority of Section 2766, General Code, county commissioners who contract for the making of county sectional indexes may permit their contractor to have access to the records kept in the office of the county recorder at such time and during such hours as may seem to the commissioners most expedient, whether the county recorder consents to the same or not.*