2702.

COUNSEL—APPOINTMENT OF NOT MORE THAN TWO FOR INDIGENT PRISONER BY COMMON PLEAS COURT—AUTHORITY OF HIGHER COURT AND COMPENSATION—NUMBER AND APPOINTMENT OF ASSISTANTS TO PROSECUTOR, DISCUSSED.

SYLLABUS:

1. *Under the provisions of Section* 13617, *General Code, a trial court may assign counsel, not exceeding two, to an indigent prisoner accused of crime at any time in the proceedings the trial court deems such assignment to be necessary and proper to the accused person's defense. Counsel so appointed, unless such appointment be revoked, has full authority to prosecute proceedings in error in the Court of Appeals, or the Supreme Court, or both; and counsel so appointed may in a case of murder in the first or second degree receive such compensation as the trial court approves and the county commissioners allow.*

2. *Under the provisions of Section* 13562, *General Code, a Court of Common Pleas, or the Court of Appeals, wherever it is the opinion of such court that the public interest requires it, may appoint one or more attorneys to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners are required to pay such assistant, or assistants, such compensation for their services as the court approves and the commissioners deem just and proper.*

3. *Where, pursuant to the provisions of Sections* 1647 *and* 1550, *General Code, an additional shorthand reporter is appointed by a court, for a term of less than one year, and the compensation of such shorthand reporter is fixed by the court at the maximum allowed by law, viz., fifteen dollars per day, such shorthand reporter may not receive from the county treasury an additional sum to cover railroad fare, meals, lodging and miscellaneous expenses.*

COLUMBUS, OHIO, October 11, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your letter of recent date in which you request my opinion upon certain questions asked in a letter from one of your examiners, which you enclose and which reads as follows:

"Would like your opinion on the following:

QUESTION NO. 1. In the Common Pleas Court of Lake County, in the case of *State of Ohio* vs. *George Vargo,* the defendant was indicted and convicted of murder in the first degree. Following is a history of such case:

Defendant indicted on April 13, 1926.

Indictment served on April 14, 1926.

Trial in Common Pleas Court started May 24, 1926.

Jury returned verdict on June 4, 1926.

Motion for new trial filed June 7, 1926.

Motion for new trial overruled June 18, 1926.

Defendant sentenced to death on June 18, 1926.

Case taken to Court of Appeals August 30, 1926.

Later taken to the Supreme Court where it was held that the sentence of the Common Pleas Court Court be carried out.

Attorney H. T. N. was employed by the defendant George Vargo as his counsel at the beginning of the case. On June 7, 1926, after the case had been tried in the Common Pleas Court, the court appointed H. T. N. and E. K. G. as counsel for said defendant. (We are advised that the defendant had something around $2,500.00 with which he employed Mr. N. as counsel).

The following bills were allowed and paid by the county for defending the accused in the Court of Appeals and in the Supreme Court:

Date	Name	Purpose	Amt. of Bill	Amt. Paid
10-25-26	E. K. G.	Hearing case in Court of Appeals	$1,000 00	$750 00
10-25-26	H. T. N.	Hearing case in Court of Appeals	1,000 00	750 00
4-11-27	G. & N.	Hearing case in Supreme Court	1,533 32	1,533 32
		Total paid		$3,033 32

The question arises whether or not the Court of Common Pleas has the authority to appoint counsel for the defendant in the Court of Appeals and Supreme Court, after the case was tried in the Common Pleas Court. We are of the opinion that, under the provisions of Section 13617, G. C., such counsel should be appointed at the time the case started, if the defendant was without means to employ counsel. But in this case the records show that he did not need counsel appointed by the court until it was found that the case was to be taken to the Court of Appeals.

If you find that the court had no authority in making such appointments shall findings for recovery be made or hold same as illegal payments?

QUESTION NO. 2. In the same case, *State of Ohio* vs. *George Vargo,* Attorneys E. F. B. and R. M. O. were appointed on April 19, 1926, by the Court of Common Pleas to assist the prosecuting attorney in the trial of the accused.

The following bills were allowed and paid such attorneys for their services in said case:

Date	Name	Amount Paid by County
7-12-26	E. F. B. and R. M. O.	$2,575 00
9-27-26	" " " " " " "	1,580 00
3-14-27	" " " " " " "	1,518 99
5- 9-27	" " " " " " "	1,338 20
	Total paid	$7,012 19

Within the meaning of Section 13562, G. C., under which said appointment was made, we are of the opinion that the court can appoint only one attorney to assist the prosecuting attorney. If you find that such is the case shall finding for recovery be made against E. F. B. and R. M. O. jointly for one-half of the amount paid?

* * * *

QUESTION NO. 3. The following appointment appears on the journal of the Court of Common Pleas:

'C. R. P. is hereby appointed assistant shorthand reporter taking effect this 27th day of February, 1928, at the rate of $15.00 per day for each day of service in taking testimony and performing other duties under the orders of such court, or $90.00 per week, which allowance shall be paid for all services rendered.'

Mr. P. lives in Cleveland and during the time he worked here, February 27, 1928, to March 31, 1928, the county allowed and paid, on the approval of the court, his railroad fare, meals, lodging and miscellaneous expenses while in Painesville. Total amount of such expenses being $167.20.

We are unable to find any provisions of the statute authorizing the county to pay the expense of a court stenographer in the Common Pleas Court. There have been other stenographers appointed, who live in Cleveland, but they did not receive any expenses. Shall finding for recovery be made?"

1. The answer to your first question involves consideration of Sections 13617 and 13618, General Code, the former having to do with the authority of a court to appoint counsel to defend an indigent prisoner charged with crime and the latter section providing how counsel so assigned may be paid.

Section 13617, General Code, was originally Section 14 of an act passed March 7, 1831 (29 v. 155), entitled:

"An Act—Directing the mode of trial in criminal cases."

As then enacted Section 14 read as follows:

"The court before whom any person shall be indicted is hereby authorized and required to assign such counsel, not exceeding two, as he or she shall desire, if the prisoner has not the ability to procure counsel * * *."

On March 6, 1869 (66 v. 303), Section 14 was amended to read as follows:

"After a copy of the indictment has been served upon the defendant, the accused shall be brought into court and if he be without counsel, and unable to employ any it shall be the duty of the court to assign him counsel, at his request, not exceeding two * * *."

By an act of March 3, 1875 (72 v. 46), the Legislature amended said section to read:

"The court before whom any person shall be indicted for an offense, which is capital or punished by imprisonment in the penitentiary for life, is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel * * *."

On April 10, 1879 (76 v. 56), the Legislature again amended this section to read:

"After a copy of the indictment has been served or opportunity had for receiving the same, as provided in the last section, the accused shall be brought into court, and if he be without counsel, and unable to employ any, the court shall assign counsel, not exceeding two * * *."

On March 11, 1880 (77 v. 59), said section was enacted to read as it now appears in the General Code and which, in so far as pertinent, provides:

"After a copy of the indictment has been served or opportunity had for receiving it, as provided in the next preceding section, the accused shall be brought into court, and, if he is without and unable to employ counsel, such court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours."

Section 13618, General Code, in so far as pertinent to your inquiry, reads:

"Counsel so assigned in a case of felony shall be paid for their services by the county, and may receive therefor, in a case of murder in the first or second degree, such compensation as the court approves; * * * "

I find no reported Ohio case which answers the question presented in your first inquiry.

In the case of *State ex rel.* vs. *Commissioners,* 26 O. S. 599, the court, at page 600, used the following language:

"At all times since the passage of the act of March 7, 1831, directing the mode of trial in criminal cases, the courts of this state have had opportunity, and were required to assign such counsel as any person indicted in such courts might desire, if the accused person had not the ability to procure counsel."

The duty of a trial court in respect to providing an accused with counsel before his arraignment, is discussed in the case of *Brooks* vs. *State,* 17 Ohio App. 510, the first paragraph of the headnotes to which reads:

"Under Section 13617, General Code, providing that in case accused is without or unable to employ counsel the court shall assign him counsel, it is the duty of the trial court to assign counsel, before arraignment, to one under indictment for first degree murder, where such prisoner notifies the court before arraignment that 'he did not intend to employ counsel.' "

At page 517, the Court said:

"Of course, if a defendant charged as the accused here was charged, was able to procure and had procured counsel of his own choice before his arraignment, he need not invoke the benefits of Section 13617, General Code, nor would the court after making such inquiry of him, under such circumstances, undertake to assign him counsel. But how was it here in this instance? The plaintiff in error was indicted for first degree murder. At first he stated he would employ his own counsel. Afterward, and before arraignment, he ascertained that he was not able to employ counsel for his defense, and so advised the court, as the sheriff states, or, as the court states, 'he understood that he did not intend to employ counsel.' What, then, was the duty of the trial court in respect to providing accused with counsel before his arraignment? Was it his duty to assign him counsel? Section 13617 reads: 'If he is without and unable to employ counsel, such court shall assign him counsel, not exceeding two, who shall have access to such

accused at all reasonable hours.' When? Not after, but before, his arraignment, because counsel is assigned to examine the indictment and advise him of the charge therein stated, before his plea is taken. *This statute contemplates that counsel shall be assigned from the inception to the termination of a homicide case,* having, in the language of the statute, 'access to such accused at all reasonable hours.' Section 10, Article I of the Bill of Rights, also guarantees one charged with a capital offense the assistance of counsel, reading, as it does, that 'the party accused shall be allowed to appear and defend in person and with counsel.' * * * Granting that the message he sent to the court through the sheriff was so understood, was there not a duty resting upon the court under the statute to assign him counsel for his defense under this indictment for first degree murder? We think there was, and, under the section referred to, we further think that it was a fundamental right; that it was a duty under the statute whose enactment was inspired by humane consideration for the indigent." (Italics the writer's.)

I have carefully examined the authorities in states other than Ohio and I find but few cases that are here pertinent.

In the case of *State* vs. *Moore,* 60 Pac. 748 (Kans. 1900) the first paragraph of the headnotes reads:

"1. A person accused of crime is entitled to the assistance of counsel at every step and stage of the prosecution."

In the case of *Stout* vs. *State,* 90 Ind. 1, the defendant was indicted for murder in the first degree, the case originating in the Montgomery Circuit Court from which a change of venue was taken to the Parke Circuit Court. The defendant was convicted and sentenced to death. At page 4, the Court used the following language:

"After this cause reached the Parke Circuit Court the appellant made application to that court to be permitted to defend the proceedings against him as a poor person. This application was granted and John R. Courtney, an attorney of that court, was appointed to conduct the defense for the appellant.

Upon his first appearance by counsel in this court, the appellant filed his application in writing, supported by his affidavit, to be permitted to prosecute this appeal as a poor person, and we have been asked to make formal ruling upon that application.

The subject of admitting litigants to prosecute or defend actions as poor persons is one over which the court has no original jurisdiction. We have no funds under our control out of which payment could be made for such services contemplated by Section 260 of the present code.

The provisions of that section confer original and general jurisdiction only upon the nisi prius courts, and *when a nisi prius court admits a litigant to prosecute or defend as a poor person, the privilege, unless revoked, extends to all the subsequent proceedings in the cause, including appeals to this court.* Consequently, the privilege of defending as a poor person, granted to the appellant by the Parke Circuit Court, extends to the proceedings upon this appeal." (Italics the writer's.)

To the same effect is the case of *People* vs. *Grout,* 84 N. Y. S. 97, the second paragraph of the headnotes of which reads:

2. "Code Cr. Proc. Sec. 308, providing that when a prisoner is arraigned without counsel he must be asked if he desires counsel, and, if so, the court must assign counsel, and providing that in a capital case the court shall allow counsel so assigned reasonable compensation, payable by the county, does not limit the authority of the court to the appointment of counsel at the arraignment, but authorizes such appointment at any time before trial or at the trial."

I find but one case which holds to the contrary. I refer to the case of *Campbell* vs. *State,* 62 So. 57 (Ala.), wherein, on page 58, the court said:

"When a defendant is indicted for a capital offense, and is unable to employ counsel, the trial court is required to appoint not exceeding two attorneys to represent *him* in *that* court. Code 1907, Sec 7839. The above section does not authorize the trial court to appoint counsel to represent a defendant who is indicted for a capital offense in this court, or in the Appellate Court, and there is no statute which requires a trial court to appoint counsel to represent in the trial court any defendant who stands indicted in that court for any offense for which he may not be punished capitally."

The language of Judge Allen in the case of *Thomas, Warden,* vs. *Mills,* 117 O. S. 114, reported in the Ohio Law Bulletin and Reporter for August 8, 1927, is somewhat applicable to the question here under consideration. In that case, the right of the Warden of the Ohio Penitentiary to deny an accused person, who had been convicted of first degree murder and was then confined in the penitentiary, but who was prosecuting proceedings in error, permission privately to confer and consult with his counsel, was involved. The court held as follows:

"Under Article 1, Section 16 of the Ohio Constitution, a prisoner confined in the Ohio Penitentiary after conviction for felony, has a constitutional right to confer with his attorney with regard to an error proceeding pending in the said felony prosecution."

In the opinion Judge Allen said:

"The constitutional provisions applicable are found in Article 1, Sections 10 and 16, of the Ohio Constitution, which read as follows:

'Section 10. * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed * * *.'

'Section 16. All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.'

Is the constitutional right of McDermott infringed under Article 1, Section 10, by the refusal of the warden to permit him to see his attorney?

* * *

In the strict definition, the word 'trial' in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecu-

tion is otherwise ready, down to and including the rendition of the verdict; and the term 'trial' does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error.

In *Thompson* vs. *Denton,* 95 Ohio St. 333, 116 N. E. 452, it was stated that the term 'trial' in Article IV, Section 6 of the Ohio Constitution, is broad enough to include any judgment, finding, order, or decree not interlocutory in its nature, affecting the substantial rights of a party to a chancery suit, and that holding was essential, to the decision in the syllabus. The *Denton case* did not construe the word 'trial' as used in Article I, Section 10, however, and the privilege extended under that section has never been held in this state to permit a sentenced convict to attend the hearing of error proceedings. We think that it was not intended that the word 'trial' in that provision should be so all-inclusive. Certainly the privilege meant to be given to an accused person under this section of the Constitution was that of defending himself against the charges and testimony of witnesses as made in the trial court, and it was never contemplated that a convict should be dragged back and forth from the penitentiary to be present at mere arguments of law made by his counsel upon error proceedings. We therefore hold that no constitutional right was infringed under this section in refusing the interview.

Was Article I, Section 16 of the Constitution of Ohio violated by the warden's refusal? That section provides that every person shall have justice administered without denial or delay. *Surely the right to be represented by counsel in every state of a criminal proceeding is a right inherent in justice itself, and any person who is denied the right is denied justice."* (Italics the writer's.)

I cannot agree with a construction of Section 13617, which would limit the authority of the trial court to assign counsel for the defense of an indigent prisoner charged with crime to the time of the arraignment only. It seems to me that the adoption of such a narrow construction would defeat the purpose of the statute, which is to secure the aid of counsel for persons coming within the provisions of the statute, and would be, at least to some extent, in conflict with the spirit of Sections 10 and 16 of Article I of the Constitution of Ohio, quoted in the above excerpts from the opinion of Judge Allen.

I am therefore of the opinion that Section 13617, General Code, is sufficiently broad to authorize a trial court to assign counsel, not exceeding two, to an indigent prisoner accused of crime at any time in the proceedings the trial court deems such assignment to be necessary and proper to the accused's defense. I am also of the opinion that counsel so appointed, unless such appointment be revoked, has full authority to prosecute proceedings in error in the Court of Appeals, or the Supreme Court, or both; and that counsel so appointed may in a case of murder in the first or second degree, receive such compensation for his services as the trial court approves and the commissioners allow.

2. Your second question requires a construction of Section 13562 of the General Code, which provides:

"The Common Pleas Court or the Court of Appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners shall pay such assistant such compensation for his services as such court approves and to them seems just and proper."

This section should be used in connection with Section 2918, General Code, which reads:

> "Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund. Nothing in such sections shall prevent the appointment and employment of assistants, clerks and stenographers to the prosecuting attorney as provided in this chapter, or the appointment by the Court of Common Pleas or Circuit Court of an attorney to assist the prosecuting attorney in the trial of a criminal cause pending in such court, or the county commissioners paying for such services as provided by law."

Section 13562 was originally enacted in 52 Ohio Laws 178 and has been amended a number of times since the original enactment. It is believed that the history of the legislation is unimportant except for the fact that in each instance the language authorizing such an appointment refers to an attorney in the singular. In some instances the appointee is designated as "an assistant prosecuting attorney." This circumstance, together with the fact that the Legislature has frequently made use of the word "counsel" in providing for services of attorneys for the benefit of public officials gives rise to the argument that it was the clear intention of the Legislature to limit such an appointment to one. It will be conceded that there would be much force to this contention, if it were not for the provisions of Section 12368, General Code, which reads:

> "In the interpretation of part fourth, the words 'person' and 'another' when used to designate the owner of property, the subject of an offense, include not only natural persons, but every other owner of property; the word 'writing' includes printing; the word 'oath' includes an affirmation; the word 'bond' includes an undertaking; *words* in the present tense include the future tense, in the masculine gender include the feminine and neuter genders, *in the singular number include the plural number and in the plural number include the singular number;* 'and' may be read 'or,' and 'or' read 'and,' if the sense requires it." (Italics the writer's.)

The section last quoted is the first section in the division of the General Code under the heading Part Fourth, Penal. Title II of said Part Fourth treats of Criminal Procedure and Section 13562, supra, is included therein. It, therefore, follows that Section 13562 must be construed in accordance with the rules of interpretation contained in Section 12368, in order to arrive at the real intent of the Legislature. In view of this situation words found in the latter section in the singular number include the plural number and vice versa. It would, therefore, appear that the word "attorney" in said section may be read in the plural. It is believed that such a construction does no violence to the section. It will be remembered that in many instances in the passing upon the validity of indictments, courts have read into criminal sections the provisions of Section 12368. If such section can properly be considered in determining the rights of the accused it certainly may be considered in construing the section in question.

And it may here be observed that Section 27, contained in Part First of the General Code, as is Section 2918, supra, also provides that:

> "In the interpretation of parts first and second, unless the context shows that another sense was intended, * * * words * * * in the plural include the singular; * * * "

Moreover, it is my opinion that Section 13562 should be liberally construed to effect the purpose intended by the Legislature. Unquestionably it was the intent of the Legislature, when enacting the section in question, that the State should be adequately represented by counsel in cases involving the prosecution of persons charged with crime and that such counsel should receive compensation for their services. The observation of the Supreme Court of Iowa in the case of *Korf* vs. *Jasper County,* 108 N. W. 1031, with reference to the right of a trial court to assign additional counsel for the defense of an accused, applies with equal force to the State. The court said:

> "So, too, where only one attorney has been assigned or employed, it may prove essential to a fair trial that additional counsel be designated to assist the accused to the end that he may be in a situation to cope in the forensic contest with the forces opposed, with something like equality in professional ability and experience."

Obviously, there is little danger of abuse in the appointment of counsel to assist the prosecuting attorney, for the reason that the power to make the appointment is lodged, not in the prosecuting attorney, but in the court, which is probably the best qualified to determine the necessity of the appointment, the compensation of such counsel being left both to the court and to the discretion of the county commissioners, which discretion the court cannot control.

In addition, it must be remembered that Section 13562 was not enacted as a limitation, but as a grant, or rather as a recognition or affirmance of the common law rule that courts of general criminal jurisdiction have inherent power, in the absence of statute, to appoint counsel to assist the prosecuting attorneys. As stated in 32 Cyc. 720:

> "The court also has inherent power, independent of statute, in its discretion to allow assistant counsel to the prosecuting attorney, unless the power of appointing assistants is vested in other hands."

That this power existed at common law was recognized by the Supreme Court in the case of *Price* vs. *The State,* 35 O. S. 601.

One of the well settled rules of statutory construction is that a statute in affirmance of a rule of the common law is to be interpreted in accordance with the construction that has hitherto been placed upon the common law. As stated in Black on Interpretation of Laws, page 233:

> "Again, *the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law.* 'The general rule in the exposition of all acts of parliament is this, that *in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rule of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare;* and therefore in all general matters the law presumes the act did not intend to make any alteration, *for if the parliament had had that design, they would have expressed it in the act.'*" (Italics the writer's.)

The same authority at page 234 further states, as a well settled principle, that:

> "A statute which is supplementary to the common law does not displace that law any further than is clearly necessary. The statute is in general

considered as merely cumulative, unless the rights or remedies which it creates are expressly made exclusive."

Amplifying this rule, it is said at page 235:

"Statutory regulations, it is said, for the exercise of a pre-existing common-law right should not be construed by the same rigid rules as are sometimes applied to statutes regulating the exercise of a right conferred by statute and in derogation of the common law."

Here it may be observed that there is no express limitation as to the number of attorneys that may be appointed to assist the prosecuting attorney contained in Section 13562, as there is in Section 13617, supra, authorizing the assignment of counsel for the defense, which later section provides that the court shall assign counsel to the defendant *"not exceeding two."*

There is a further reason, and one which, in my opinion, is entitled to great weight in reaching the conclusions herein set forth. I am informed that courts generally throughout the state for many years have construed the section here involved as authorizing the appointment of more than one attorney to assist the prosecuting attorney. No authority need be cited to the effect that the construction placed upon the statute by the officers whose duty it is to execute it, is entitled to great consideration, and especially would this rule apply where the officers in question are members of the judiciary.

For the reason, then, that Section 13562 must be construed in accordance with the legislative rule of interpretation prescribed by Section 12368 to the effect that words in the singular number include the plural number, because such construction best serves the purpose of the Legislature, since the statute is an affirmance of the common law rule on the subject, which must be said to stand unaltered as far as is consistent with a reasonable interpretation of such statute, and in view of the construction heretofore placed upon such section by the courts of the state, it is my opinion that under the provisions of Section 13562, General Code, a Court of Common Pleas or the Court of Appeals, wherever it is the opinion of such court that the public interest requires it, may appoint one, or more than one attorney, to assist the prosecuting attorney in the trial of a case pending in such court, and that the county commissioners are required to pay such assistant, or assistants, such compensation for their services as the court approves and the commissioners deem just and proper.

In connection with the above discussion your attention is directed to a former opinion of this office, reported in the Annual Report of the Attorney General for 1913, Vol. II, page 1357, the second paragraph of the syllabus of which reads:

"Under Section 13562, General Code, an attorney appointed by the Common Pleas Court to assist in the trial of a case is only bound to take care of a case in the court wherein he is appointed. This court then allows him for fees which the commissioners pass upon and pay in such amount as they approve. His service is then at an end."

In the opinion, after quoting Section 13562, General Code, the then attorney general said:

"Under this statute the attorney appointed by the Common Pleas Court is only bound to take care of the case in that court. This court then allows his fees for the services rendered in that court, which the commissioners pass

upon and pay in such amount as they approve. That is the end of the employment unless the Circuit Court (now Court of Appeals) appoints him to render services in that court in the same case. He cannot receive fees for services in the reviewing court unless such court appoints him and allows his fees. The reviewing court might deem the services unnecessary and refuse to appoint. Each court has exclusive jurisdiction as to such appointment to assist in the trial of such cases, pending in their respective courts; and the common pleas appointment does not extend to, or bind the reviewing courts."

See also the opinion of this office reported in Opinions, Attorney General, 1919, Vol. I, page 29, the first paragraph of the syllabus of which reads:

"The Common Pleas Court and the Court of Appeals are authorized to appoint an attorney to assist the prosecutor in the trial of criminal cases pending in such courts, respectively, when in the opinion of the court the public interest requires it. Section 13562, G. C."

3. Coming now to a consideration of your third question, your attention is directed to Section 1547, General Code, which in so far as pertinent, provides:

"When the services of one or more additional shorthand reporters are necessary in a county, the court may appoint assistant shorthand reporters, in no case to exceed ten, who shall take a like oath, serve for such time as their services may be required by the court, not exceeding three years under one appointment, and may be paid at the same rate and in the same manner as the official shorthand reporter. * * * "

Section 1550, General Code, provides:

"Each such shorthand reporter shall receive such compensation as the court making the appointment shall fix, not exceeding three thousand dollars each year in counties where two or more judges of the Common Pleas Court hold court regularly, and in all other counties not more than two thousand dollars. Such compensation shall be in place of all per diem compensation in such courts. Provided, however, that in case such appointment shall be for a term of less than one year, such court may allow a per diem compensation not exceeding the sum of fifteen dollars per day, for each day such shorthand reporter shall be actually engaged in taking testimony or performing other duties under the orders of such court, which allowance shall be in full for all services so rendered.

The auditor of such county shall issue warrants on the treasurer thereof for the payment of such compensation in equal monthly installments, when the compensation is allowed annually, and when in case of services per diem, for the amount of the bill approved by the court, from the general fund upon the presentation of a certified copy of the journal entry of appointment and compensation of such shorthand reporters."

The journal entry of appointment of the shorthand reporter in question reads:

"C. R. P. is hereby appointed shorthand reporter taking effect this 27th day of February, 1928, at the rate of $15.00 per day for each day of service in taking testimony and performing other duties under the orders of such court, or $90.00 per week, which allowance shall be paid for all services rendered."

It is obvious that the Court of Common Pleas appointed the shorthand reporter in question under and by virtue of Section 1547, supra, and fixed his compensation as provided by Section 1550, supra.

I know of no law permitting a county to allow and pay any compensation to a shorthand reporter, except as provided for and authorized by Section 1550, supra. Nor is there any statute authorizing payment to a shorthand reporter of such expenses as railroad fare, meals, lodging and miscellaneous expenses in a case of the kind described in the letter from your examiner. In other words, the payment to such shorthand reporter over and above the amount authorized in the journal entry making the appointment was illegal and it is my opinion that a finding for the amounts so unlawfully paid should be made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2703.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN COLUMBIANA, MERCER AND WILLIAMS COUNTIES.

COLUMBUS, OHIO, October 11, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

2704.

APPROVAL, ABSTRACT OF TITLE TO LAND OF EDWARD CUNNINGHAM IN NILE TOWNSHIP, SCIOTO COUNTY, OHIO.

COLUMBUS, OHIO, October 11, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date enclosing corrected abstract of title and a warranty deed signed by Edward Cunningham and wife covering certain land in Nile Township, Scioto County, Ohio, and more particularly described in Opinion No. 2367 of this department, dated July 18, 1928.

As noted in said former opinion above referred to, the only question of consequence presented on a consideration of the abstract of title arises from the fact that one of the deeds in the chain of title to the lands here in question was executed to a partnership in its firm name. As to this it appears that on and prior to May 28, 1897, the lands in question were owned in fee simple by one Andrew J. Miller. On said date, said Andrew J. Miller and Mary Miller, his wife, executed and delivered a warranty deed for said land to Wallenstein, Loeb, Freiberg and Company for a stated consideration of eight hundred dollars, but actually in satisfaction of a debt then owing by him to said partnership. Although it appears that the lands in question were con-