

library accountant, head of the supply department, library cashier and two assistant library cashiers?"

Sections 7631 to 7643, General Code, provides for the establishment of free public libraries and the management and control of same.

Section 7635 provides as follows:

"The board of education may provide for the management and control of such library by a board of trustees to be elected by it as herein provided."

An examination of the sections relating to free public libraries fails to reveal any section whereby a bond is required of any of the employes of said public library. I also fail to find any statute permitting the board of trustees to expend money for payment of premiums of a surety bond given for any of its officers or employes.

It is a well known rule of law that an administrative board may not expend money except as provided by statute, and there is no provision of the statute in regard to free public libraries which permits the expending of money for premium on surety bonds.

It was held in the case of *State ex rel. The A. Bentley & Sons Co. v. Pierce, Auditor*, 96 O. S., 44, as follows:

"In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

It was held by a former Attorney General in an opinion found in *Opinions of the Attorney General for 1919, Vol. 2, p. 1277*, as follows:

"There being no general or special statutory provision which may be invoked as authority for payment out of public funds, of premiums on a surety bond given by the state inspector of plumbing, it follows that such premiums as are incurred in the giving of the statutory bonds are the individual obligations of the official giving the bond."

The sections in relation to free public libraries do not authorize the payment of premiums on surety bonds, and it is my opinion that expenses so entailed must be regarded as the obligation of the official incurring the same, in the absence of authorization for charging it against public funds.

Respectfully,

C. C. CRABBE,

Attorney General.

432.

COMMON PLEAS JUDGE—ENTITLED TO RECEIVE EXPENSES FROM STATE TREASURY WHERE ASSIGNMENT HAS BEEN MADE BY CHIEF JUSTICE OF SUPREME COURT WHEN RESIDENT JUDGE IS DISABLED OR DISQUALIFIED—SECTION 1687 G. C. CONSTRUED.

SYLLABUS:

A common pleas judge who temporarily presided and holds court in a county other than the one in which he resides, is entitled to receive his actual and necessary expenses from the state treasury only in cases where an assignment of such judge has been made by the chief justice of the supreme court under and in pursuance of section 1687 G. C., when the resident common pleas judge is disabled or disqualified from hearing the cause.

COLUMBUS, OHIO, June 11, 1923.

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

DEAR SIR:—This department is in receipt of your recent communication as follows:

“Can the Auditor of State legally issue a warrant in payment of an expense account filed by a judge of a Common Pleas Court while holding a court in a county other than his home county? If so, under what condition?”

Article 4, section 3, of the Constitution of Ohio, as adopted in 1912, as far as pertinent, provides:

“One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the court of common pleas as are necessary, may be held at the same time in any county. Any judge of the court of common pleas may temporarily preside and hold court in any county; and until the general assembly shall make adequate provisions therefor, the chief justice of the supreme court of the state shall pass upon the disqualification or disability of any judge of the court of common pleas, and he may assign any judge to any county to hold court therein.”

Before the adoption of this section of the Constitution, the jurisdiction of the common pleas judges was limited to the district in which their respective counties were located and the expenses of a judge holding court outside of his county were provided for by section 2253, as follows:

“In addition to the annual salary provided in the two preceding sections, each judge of the court of common pleas shall receive his actual and necessary expenses, not exceeding one hundred and fifty dollars in any one year, incurred while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state.”

After the adoption of the above section of the Constitution, section 2253 was amended in 103 O. L., page 419, as follows:

“In addition to the annual salary and expenses provided in sections 1529, 2251 and 2252 each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not

exceeding three hundred dollars in any one year, incurred while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to the judge and upon presentation of a sworn itemized statement of such expenses."

At the same session of the legislature and in the same enactment, section 1469 was amended to read as follows:

"The chief justice shall preside at all terms of the supreme court. When he receives satisfactory information that an unusual amount of business has accumulated in the common pleas court of any county, he may assign a judge or judges from another county in the state to aid in disposing of such business. In case of the absence or disability of the chief justice, the elder of the two judges having the shortest time to serve, and not holding office by appointment to fill a vacancy, shall preside and perform the duties of chief justice."

Section 2253 G. C. was again amended in 104 O. L., p. 251, as follows.

"In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year, incurred, while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year."

Section 2253 as amended in 108 O. L., p. 1301, and as it reads at present, is as follows:

"In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses incurred, while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county."

Obviously the only authority which would justify you in issuing a warrant in payment of the expense account filed by the judge of the common pleas court

while holding court in the county other than the one in which he resides, would be section 2253, General Code.

Prior to the adoption of section 3, Article 4, of the Constitution of Ohio in 1912, common pleas judges were elected in the subdivisions of judicial districts and there was no provision of law for any common pleas judge to preside in a county outside of the judicial district. There was considerable clamor and dissatisfaction because of the long delays due, as many thought, to an insufficient number of common pleas judges, and the remedy advanced was the proposition for a common pleas judge in each county in the state; this sentiment finally crystalized in the constitutional amendment above referred to.

Some attention must be given and some meaning must be attached to the word "resident" in this amendment; it is to be observed that the amendment provides for one *resident* judge in each county and such additional *resident* judge or judges as may be provided by law.

The old judicial districts were thereby abolished and the jurisdiction of common pleas judges enlarged so that under certain conditions and circumstances "any judge of the court of common pleas may temporarily preside and hold court in any county". But this provision and sentence are intimately connected with what follows in the amendment, not only by the punctuation used, but by the co-ordinate conjunction "and". The subsequent provision is that until the General Assembly shall make adequate provision therefor, the chief justice of the supreme court of the state shall pass upon the disqualification or disability of any judge of the court of common pleas and he may assign any judge to any county to hold court therein.

It is evident that the members of the Constitutional Convention were proposing, and the people adopted the proposition, that so far as possible there should be a resident common pleas judge at all times in the county to hold court and to dispense justice, and to prevent vexatious delays in litigation. It was equally evident that in some cases the resident common pleas judge would be disqualified or disabled to preside in his own county, and this amendment itself provides that until the legislature shall speak, the chief justice may assign a judge when he is to preside in any other county of the state than the one of his residence.

The very next legislature which convened after the adoption of the new constitution undertook to conform the judicial procedure of the state to the new provisions and amended section 1469 G. C., whereby authority was given the chief justice to assign common pleas judges to counties other than their residences, to aid in disposing of an accumulation of court work. At the same session section 1687 G. C. was amended to confer upon the chief justice authority to assign a common pleas judge to a county other than his residence, when the resident judge was disqualified by reason of relationship, bias or prejudice. The legislature also amended section 2253 G. C., by which the actual and necessary expenses of a common pleas judge, while holding court in a county in which he did not reside, were to be paid from the state treasury upon the warrant of the auditor of state, based upon the presentation by the judge of a sworn itemized statement of such expenses. This last section was enacted in its present form to provide for the payment of expenses incurred by common pleas judges in counties other than their residence, except when acting under an assignment by virtue of section 1469 G. C.

The pertinent inquiry here is, when may a common pleas judge properly hold court in a county other than his residence, so as to entitle him to receive his actual and necessary expenses from the state treasury?

In view of the circumstances surrounding the proposal and adoption of the constitutional amendment, authorizing a common pleas judge temporarily to preside and hold court in a county other than the one in which he resides, coupled with the plain language of the amendment itself, the conclusion is irresistible that until the legislature acts, such authority must be conferred by the chief justice by assigning a common pleas judge to a county other than his residence, and that the chief justice might act only in cases where the resident common pleas judge was disabled or disqualified. And, in pursuance of the authority of said amendment, the legislature has by the adoption of section 1687 provided the cases in which only a common pleas judge may preside and hold court in a county other than the one in which he resides. That section reads as follows:

"Section 1687: When a judge of the common pleas court or of the superior court of Cincinnati is interested in a cause or matter pending before the court in a county of his district, or is related to, or has a bias or prejudice, either for or against, a party to such matter or cause, or to his counsel or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit of any party to such cause or matter, or of the counsel of any party, setting forth the fact of such interest, bias, prejudice or disqualification, the clerk of the court shall enter the fact of the filing of such affidavit on the trial docket in such cause and forthwith notify the chief justice of the supreme court, who shall designate and assign some other judge to take his place. Thereupon the judge so assigned shall proceed and try such matter or cause. The affidavit herein referred to shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

It is to be observed that under the provisions of this section the assignment is for the purpose of trying a particular cause in which the resident common pleas judge is interested or in which he is related to or has a bias or prejudice either for or against a party or his counsel, or is otherwise disqualified. Upon such facts being shown to the chief justice, an assignment of another judge may be made, and it is only under such circumstances and under such an assignment that such common pleas judge is entitled to receive from the state treasury reimbursement for his actual and necessary expenses.

The only other authority for the assignment by the chief justice to a county other than his residence is conferred by section 1469 G. C., and in that event he is entitled to be reimbursed for his expenses from the treasury of the county for which he is performing the duties, for the time being, of common pleas judge.

It follows from what has been said, and in specific answer to your question, that the auditor of state may legally issue a warrant in payment of an expense account filed by a judge of a common pleas court while holding court in a county other than his home county, only when such common pleas judge has been assigned to hold court in such county by the chief justice of the supreme court of Ohio under the provisions of and in accordance with section 1687, General Code of Ohio.

Respectfully,

C. C. CRABBE,
Attorney General.