

electors of a rural school district at either a general or special election called for that purpose, as authorized by Section 4726, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3735.

COURT COSTS—ASSESSMENT AND COLLECTION THEREOF STATUTORY—IN CIVIL ACTION NOT LIEN ON REAL ESTATE OF PARTIES PRIOR TO RENDITION OF JUDGMENT.

SYLLABUS:

1. *The assessment and collection of court costs is entirely statutory and there is no statutory provision whereby court costs accruing in a civil action are made a lien on the real estate of the parties to the action prior to the rendition of a judgment for the costs in favor of the successful party and the dormancy of the judgment is governed by the general provisions of law relating to dormancy of judgments.*

2. *Under and by virtue of section 3028 of the General Code, the clerk of courts is authorized to issue an execution against the parties to a civil action for the collection of court costs for which each party is responsible to pay. There is no time limitation provided by law within which the execution may issue. (1918 Attorney General's Opinion number 1322, approved and followed.)*

COLUMBUS, OHIO, January 3, 1935.

HON. JESSE H. LEIGHNINGER, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“It is our understanding that court costs become a lien on the real property of the plaintiff and defendant at the time such costs accrue. Under the statute when judgment is rendered the total costs would become a lien on the property of the party against whom judgment is rendered. Would you kindly give us your opinion as to whether or not the costs which are a lien against the party making them are subject to the six year statute of limitations, and whether judgment for costs becomes dormant and the lien released if levy of execution is not made within the five year period.”

You do not state in your inquiry whether or not the costs have been incurred in both criminal and civil cases but I assume for the purpose of this opinion that the costs involved have been incurred in a civil action.

The allowance of certain items of expense as court costs are purely statutory and the collection of same is governed by statute. It is stated in 11, O. Jur. 11 as follows:

“Costs, as such, were unknown at common law. Amercement was the nearest approach thereto. If the plaintiff failed in his action,

he was amerced for his false clamor. Damages in lieu of costs were, however, allowed at common law, in actions sounding in damages, the plaintiff, if successful, being allowed, in the assessment of his damages, a sum sufficient to remunerate him for his necessary expenses. Costs are, therefore, entirely dependent upon statute, and may be regulated, changed or entirely taken away at the will of the legislature."

The Supreme Court in the case of *Symons vs. Eichelberger*, 110 O. S. 224 held that court costs were not penalties. The court in the decision stated on page 238:

"Costs are not at the present time considered as punishment. The modern theory is that costs are allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court. * * * * Being in the nature of damages, costs do not constitute a penalty."

Section 3028 of the General Code provides for the issuance of execution for the collection of costs and provides for the form of the execution. Said section reads in part:

"When the party recovering neglects to sue out execution immediately, or after such execution has been returned without satisfaction of costs, the clerk, for his own benefit, may, or at the instance of a person entitled to fees in the bill of costs, taxed against either party, shall issue against the party indebted to such clerk or other person, for such fees, whether plaintiff or defendant, an execution to compel the party to pay his own costs, in the following form, to wit: * * *."

It will be noted from the above section that when the successful party to the action in whose favor costs have been awarded neglects to sue out an execution immediately, the clerk of courts is authorized to issue the execution either on his own behalf or on behalf of the party entitled to the costs. This section does not require that the clerk or any other county official bring an action for the collection of costs.

In the case of *Eckstein vs. Strauss*, 1 O. Dec. 292, it was held that the successful party in a civil action is liable for his costs and that the clerk could issue an execution against the successful party for the collection of his costs, notwithstanding there was no judgment for the costs.

This decision was based upon an interpretation of section 1321 Revised Statutes, which is section 3028 of the General Code. The court stated at page 293 of the decision:

"* * * * As to the claim that it seems unjust that a man who has won a lawsuit should have to pay any costs, it must be remembered that at common law no costs were allowed. Costs are a creation of the statute; who shall be liable for them, and how they should be collected, is entirely regulated by statute."

In an old decision of the Supreme Court in the case of *Elliott vs. Ellery*, 11 Ohio Reports 262, the court held that the clerk of courts could issue an execution to the sheriff for the collection of costs under a general order of the court. The statute then in effect provided for the collection of costs (Swan's Statute, Section 405) and was substantially the same as the present section 3028 of the General Code.

It is therefore my opinion that under section 3028, General Code, all that is necessary for the clerk to do in order to collect the costs assessed against the party to an action is to deliver an execution to the sheriff in the form provided by this section and it is not necessary that a separate action be brought to collect the costs.

The next question presented by your inquiry is whether or not there is any time limitation provided by law within which the execution for the collection of costs must issue and whether or not costs can be collected in a case where the judgment has become dormant through the lapse of time.

The question of the applicability of the statute of limitations to the collection of costs was passed upon by this office in an opinion reported in Opinions of the Attorney General for 1918, Vol. 1, page 925. The syllabus reads:

"The statutes of limitation do not run against the right of a clerk of courts to issue execution for costs under section 3028 G. C."

Section 3028 General Code has in no way been amended since the rendition of this opinion.

Section 11,222 General Code is a general statute limiting the time within which suit may be brought. This section reads:

"An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

The liability for costs is purely a statutory liability and if there is a time limit within which an execution for costs must issue, it is governed by this section. As above pointed out, it is not necessary that an action be brought for the collection of the costs. An action has been defined by the Supreme Court in the case of the Guardianship of Oliver, an Imbecile, 77 O. S. 474, as follows:

"An action is a formal demand of one's right from or upon another made in a court of justice."

Section 11,279, General Code, provides the manner of bringing a civil action and reads:

"A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

The issuance by the clerk of execution for collection of costs would not

be the bringing of an action within this definition. Section 11,663, General Code, provides that a judgment shall become dormant and cease to be a lien upon the estate of the judgment debtor if an execution is not issued within five years of the date of the judgment and every five years thereafter. The fact that the judgment in favor of the successful party has become dormant in no way affects the collection of the costs by the clerk.

The judgment lien which is created is in favor of the successful party on the theory that he has paid his costs and the lien is to secure the reimbursement of the court costs which he has paid or for which he has been forced to have incurred by reason of his instituting the action. The judgment lien for the costs to the successful party, by virtue of section 11,656, General Code, attaches to the real estate within the county of the judgment debtor on the date judgment is entered and to other lands on the date levy is made. The lien attaches to the personal property of the judgment debtor at the time seizure is made under the execution.

Section 11,708, General Code, provides that the judgment lien is lost as to other bona fide judgment creditors if execution is not levied within one year from the rendition of the judgment and as above pointed out the judgment lien of the successful party becomes dormant and ceases to operate as a lien if execution is not issued every five years thereafter.

It is apparent from a reading of all the sections of the Code relating to costs that there is no provision whereby the costs become a lien on the real estate of the parties as the costs accrue. The only lien is by virtue of the judgment and the lien is in favor of the successful party and secures the reimbursement of the costs which he has already paid or for which he is liable. This judgment is governed by all the provisions of law relating to dormancy of judgments.

Authority is granted the clerk of courts by section 3028, General Code, to collect the costs by issuing an execution to the sheriff. It is by virtue of this section and not the judgment that the clerk is authorized to issue the execution.

Summarizing and in specific answer to your inquiry it is my opinion that:

1. Under and by virtue of section 3028 of the General Code, the clerk of courts is authorized to issue an execution directed to the sheriff requiring him to proceed to collect the costs assessed against each party in a civil suit. Each party in a civil action is liable for the payment of his costs and it is not necessary that a separate proceeding be instituted in order to collect the costs. There is no statutory provision limiting the time within which the execution may issue. The fact that the judgment in favor of the successful party has become dormant through lapse of time does not affect the right of the clerk to issue the execution for the collection of the costs. The dormancy of the judgment affects only the judgment lien of the successful party. The item of court costs is separate from the principal judgment and the clerk of courts is authorized to have issued an execution against the parties to the action for the collection of the court costs for which each is responsible.

2. Section 11,222 of the General Code which limits the bringing of an action for the enforcement of a statutory liability to six years does not apply to the issuance of an execution for the collection of the court costs and there is no other statutory provision limiting the time within which the clerk may issue an execution.

3. There is no provision of law making court costs a lien on the real property of the parties to the action as the costs accrue and the same do not become a lien in favor of the successful party until the rendition of the judgment. The lien in favor of the successful party arises by virtue of the judgment and the sections of the Code relating to dormancy of the judgment apply to the judgment for the court costs. If an execution is issued by the clerk of courts as provided in section 3028, General Code, the lien will attach to the real estate of the parties as of the date of the levy and to the personal property as of the date of the seizure under the execution.

Respectfully,

JOHN W. BRICKER,

Attorney General.

3736.

APPROVAL—THREE ABSTRACTS OF TITLE, WARRANTY DEED, ENCUMBRANCE RECORD NO. 10 AND CONTROLLING BOARD CERTIFICATE RELATING TO THE PURCHASE OF SIX PARCELS OF LAND IN ASHLAND COUNTY BY THE STATE OF OHIO.

COLUMBUS, OHIO, January 3, 1935.

HON. CARL E. STEEB, *Secretary, Board of Control of the Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication to me with which you submit for my examination and approval three separate abstracts of title, a warranty deed, encumbrance record No. 10 and Controlling Board certificate relating to the purchase by the state of Ohio of six parcels or tracts of land in Hanover Township, Ashland County, Ohio. All of these tracts of land are in Section 17, Township 19, Range 16 of the Ohio River Survey and are more particularly described as follows:

(1) Being all of the North-west quarter of the North-east quarter of Section Seventeen (17), Township Nineteen (19), of Range Sixteen (16) except a strip Twenty-Nine (29) rods wide off the east side of the same heretofore deeded to Cora Belle Maxwell; the part hereby conveyed being $26\frac{1}{2}$ acres of land more or less.

(2) Being the South-west quarter of the North-east quarter of Section Seventeen (17), of Township Nineteen (19), and Range Sixteen (16), containing Forty (40) acres more or less.

(3) Being a part of the South-east quarter of the North-east quarter of Section Seventeen (17), Township Nineteen (19) of Range Sixteen (16), bounded and described as follows: Beginning at the center of the North-east quarter of Section 17, thence East 22 rods; thence south-easterly to a point on the south line of said South-east quarter of the north-east quarter 36 rods from the south-west corner of the same, thence west along the south line to the south-