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PENAL INSTITUTIONS—OHIO STATE REFORMATORY, ET AL.:

MONIES IN COMMISSARY FUND AND ENTERTAINMENT AND AMUSEMENT FUND — TRUST FUNDS — OPERATION OF COMMISSARY — STATUS, EMPLOYES — AUTHORITY SUPERINTENDENT TO DELEGATE PERSON TO ESCORT OR GUARD PRISONER:

ESCAPE, WITNESS, ATTENDANCE AT FUNERAL — MONIES PAID BY CLERK OF COURTS TO PERSON WHO ESCORTED PRISONER, A WITNESS — DISPOSITION, MONIES PAID TO PRIVATE PERSON OR GUARD FOR ATTENDANCE UPON PRISONER WHEN AWAY FROM SUCH INSTITUTION — RESPONSIBILITY OR LIABILITY OF SUPERINTENDENT, EXPENDITURE OF MONIES.

SYLLABUS:

1. *Monies in what are known as the Commissary Fund and the Entertainment and Amusement Fund of the Ohio state reformatory and like institutions are trust funds created and maintained for the benefit of the reformatory, that is, to promote the welfare and betterment of the inmates of the institution, and as such they are trust funds tinged with a public interest. They may only be used for the purpose for which they were created.*

2. *Monies in the Commissary Fund of the Ohio state reformatory may be used to pay the compensation of the person in charge of and operating the commissary.*

3. *Monies in the Commissary Fund may not be used to augment the pay of the chief clerk or of any official or employee of the Ohio state reformatory.*

4. *The person in charge of and operating the commissary at the Ohio state reformatory, who is paid out of the Commissary Fund, is not a state employee.*

5. *There is no authority vested in the superintendent of the reformatory to delegate to such person, or to any private person, authority to return an escaped prisoner, or to escort and guard a prisoner who is required to appear as a witness in court, or to escort and guard a prisoner attending a funeral.*

6. *Any monies heretofore paid to the person in charge of and operating the commissary at the Ohio state reformatory by the clerk of courts for his time and expenses, when such person escorted a prisoner required to be a witness in court, may be retained by such person.*

7. *Any monies heretofore paid to such person by private persons for escorting a prisoner to a funeral may be retained by him.*

8. *Monies paid to a guard of the Ohio state reformatory for escorting and guarding a prisoner to court to testify as a witness to cover his expenses, may be retained by such guard. However, under the holding in the case of State ex rel. v. Coffin, 56 O.S. 240, compensation for the guard's time may not be paid or taxed as costs, since such guard receives the compensation fixed by law for performing his duty.*

9. *Where a guard of the Ohio state reformatory escorts and guards a prisoner to a funeral on such day or days as he is not required by his contract of employment to be on duty, he may lawfully be paid by private persons for his time, and be reimbursed for his out-of-pocket expenses. He may also be paid for so acting on days he is required to be on duty, where deductions are made from the current state payroll for such time as he is absent.*

10. *Under the law of Ohio, including Section 1842, General Code, the executive control and management of the Ohio state reformatory is under the superintendent of such institution. It is the duty of the chief clerk of the Ohio state reformatory to keep the accounts of the Commissary Fund in such a manner as accurately to exhibit the financial transactions relating to it. The superintendent of the reformatory, the chief clerk and other institutional authority are accountable for the handling of receipts and disbursements from the Commissary Fund for which they are personally responsible.*

11. *The superintendent of the Ohio state reformatory is not, merely because of his official position, responsible for any unlawful expenditure*

*of monies in one of the institutional funds, as for example the Commissary Fund, in the absence of personal participation or acquiescence therein, or knowledge thereof, provided he uses that degree of care in the management of the trust in question which would be pursued by a man of ordinary prudence and skill in the management of his own estate.*

Columbus, Ohio, April 5; 1941.

Honorable Joseph T. Ferguson, Auditor of State,  
Columbus, Ohio.

Dear Sir:

Your request for my opinion asking several questions with reference to certain employes at the Ohio state reformatory duly received. Your letter reads as follows:

“In the course of an examination of Ohio State Reformatory, several questions of a legal nature have arisen concerning which we desire your opinion.

Mr. A is employed at the institution in the capacity of a commissary officer, viz., in immediate charge of the institutional commissary. His salary as commissary officer is paid from, and included as a part of, the administrative cost of operation of the commissary, the profits of which are transferred to a fund known as the amusement fund, which is stated to be maintained and administered by the institutional authorities for the general benefit of the inmates. The Chief Clerk of the institution deposits the receipts into, and disburses money from, the commissary fund, which is on deposit as a checking account in a Mansfield bank, and the salary of Mr. A is paid by check in his favor, drawn on the above account, signed by the Chief Clerk, and countersigned by the Superintendent.

At various times in the past, Mr. A, on order of the Superintendent, has made trips to various parts of the state for the purpose of (1) returning escaped fugitives, (2) escorting prisoners who appear as witnesses in court, (3) escorting prisoners in attendance at funerals.

In view of the above facts, we desire to be informed as to whether or not Mr. A is to be considered a state employee, whether or not it is lawful and proper for the Superintendent to authorize Mr. A to perform the duties noted in the paragraph immediately above, and in the event money is paid to Mr. A in respect to any of the above services, for his time and/or expenses, either by the Clerk of Court in respect to item (2) above, or

by third persons of a private character in respect to item (3) above, what portion of the money received, if any, may Mr. A receive for his personal use, or what disposition should be made to Mr. A by the Clerk of Courts or third parties?

While Mr. A is away from the institution on the above trips, his compensation as commissary officer continues without deduction. It is our information that such employment as commissary officer is on a monthly basis.

In addition, we desire your advice concerning services performed by the guards, officers, and the Chief Clerk of the institution, whose salaries are paid by warrants issued by the Auditor of State, and who perform services identical with Mr. A in respect to escorting prisoners to court as witnesses or for attendance at funerals. Money is paid to these institutional or state employees in the same manner as paid to Mr. A, and we here raise the same legal questions for your consideration as were asked in reference to Mr. A. In the majority of the above cases, no deductions are made by the institutional authorities from the regular compensation of the said employees for the days or time while the guards and chief clerk are away from the institution for the above noted purposes.

At the said reformatory, a commissary is operated, as above noted, whereby inmates of the institution may purchase sundry items. The expense of operation of the store is paid from the receipts, and at various times, the institutional authorities transfer the profits to amusement fund. Do the above funds, the commissary fund and amusement fund, constitute public monies within the definition of the law, and what is the authority, responsibility, and accountability of the Superintendent, Chief Clerk, and various institutional authorities in regard to the proper administration of the above fund, in respect to the handling of the receipts and disbursements therefrom.

In respect to this, does the Superintendent of the institution have the authority to use the receipts or profits of the Commissary to pay the salary of a storekeeper or officer in charge of the commissary. Under what circumstances, if any, does the Superintendent have the authority to supplement the pay of a state employee, as the Chief Clerk, with money derived from the operation of the store.

The amusement fund is stated to be a local fund administered by the institutional authorities for the general benefit of the prisoners. Does the Superintendent have the authority to use such fund, or the commissary fund as above noted, other than for the benefit of the prisoners, or the purchase of new supplies?

In the event there has been an illegal expenditure of money from a local institutional fund, as the commissioner or amuse-

ment fund, may a finding be made against the institutional official or officials, who directly authorized or made the unlawful expenditure, as well as the Superintendent of the institution, because of the nature of his official position?"

It is believed that a rearrangement and restatement of the specific questions asked by you will conduce to brevity. And your questions may be stated thus:

1. Are monies in what is known as the "Commissary Fund," that is, monies used in the operation of what is known as the commissary in the Ohio state reformatory, and like institutions, and the profits derived from such operation, as well as monies in what is known as the "Entertainment and Amusement Fund," in such institutions, public monies under the law, and may such monies (excepting such part of the Commissary Fund as may be used in the operation of the commissary) be used for purposes "other than for the benefit of the prisoners?"

2. May monies in the Commissary Fund be used to pay the person in charge of and operating the commissary?

3. May monies in the Commissary Fund be used to augment the pay of the chief clerk of the reformatory?

4. Is the person in charge of and operating the commissary a state employe?

5. May such person lawfully be sent (a) to return escaped prisoners; (b) to escort and guard prisoners required to appear as witnesses in court; or (c) to escort and guard prisoners attending funerals?

6. If money be paid to such person by the clerk of courts when he escorts a prisoner to be a witness in court, either "for his time and/or expenses," what portion of the money so received, if any, may such person retain for his personal use, "or what disposition should be made" of any money received in this manner?

7. If money be paid to such person by private persons for escorting a prisoner to a funeral, either "for his time and/or expenses," what portion of such money, if any, may be retained for his personal use, "or what disposition should be made" of any money so received.

8. If the chief clerk, or a guard at the reformatory, escorts a prisoner to court to testify as a witness and is paid "for his time and/or expenses" by the clerk of courts, what portion of the money so received, if any, may the chief clerk, or the guard, retain for his personal use, "or what disposition should be made" of any money so received?

9. If the chief clerk, or a guard at the reformatory, escorts a prisoner to a funeral and is paid by a private person, what portion of any money so paid, if any, may the chief clerk, or the guard, retain for his personal use, or "what disposition should be made" of any money received for such a service?

10. What is the authority, responsibility and accountability of the superintendent of the reformatory, the chief clerk and the various institutional authorities in connection with the proper administration of the Commissary Fund and the handling of the receipts and disbursements from such fund, and

11. If there has been an illegal expenditure of money from a local institutional fund, such as the Commissary Fund, or the Entertainment and Amusement Fund, may a finding be made against the institutional official or employee who directly authorized or made the unlawful expenditure, and may a finding be also made against the superintendent or other chief officer of the institution because of his official position?

While there is no express or specific statutory authorization for the creation or operation of a commissary in the institutions of the kind here involved, or for the creation and maintenance of either a Commissary Fund or Entertainment or Amusement Fund, that such authority exists is explicit from a number of statutes granting general powers to officers in charge of such institutions. These statutes are Sections 1832, 1835, 1838, 1840 and 1842, General Code.

Section 1832, General Code, provides as follows:

"The intent and purpose of this act are to provide humane and scientific treatment and care and the highest attainable degree of individual development for the dependent wards of the state;

To provide for the delinquent such wise conditions of mod-

ern education and training as will restore the largest possible portion of them to useful citizenship;

To promote the study of the causes of dependency and delinquency, and of mental, moral and physical defects, with a view to cure and ultimate prevention;

To secure, by uniform and systematic management, the highest attainable degree of economy in the administration of the state institutions consistent with the objects in view;

This act (G.C. §1832 et seq.) shall be liberally construed to these ends."

This section was enacted in an act entitled "An Act - To create a board of administration for the institution(s) of the state named herein and to repeal certain sections of the General Code." (102 v. 211; 5-11-1911.)

Section 1835, General Code, reads:

"The director of public welfare shall appoint a fiscal supervisor, and such other employes as may be deemed necessary for the efficient conduct of the business, prescribe their titles and duties and fix their compensation, except as otherwise provided herein. The department of public welfare shall have full power to manage and govern the following institutions: \* \* \*

The Ohio state reformatory.  
The Ohio reformatory for women.  
The Ohio penitentiary.  
The London prison farm. \* \* \* "

Section 1838, General Code, provides:

"The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions."

The first paragraph of Section 1840, General Code, reads:

"The board shall accept and hold on behalf of the state, if deemed for the public interest, any grant, gift, devise or be-

quest of money or property made to or for the use or benefit of said institutions or any of them, whether directly or in trust, or for any pupil or inmate thereof. The board shall cause each such gift, grant, devise or bequest to be kept as a distinct property or fund, and shall invest the same, if in money, in the manner provided by law; but the board may, in its discretion, deposit in a proper trust company or savings bank any fund so left in trust during a specified life or lives, and shall adopt rules and regulations governing the deposit, transfer or withdrawal of such funds and the income thereof. The board shall, upon the expiration of any trust according to its terms dispose of the funds or property held thereunder in the manner provided in the instrument creating the trust.”,

while the second paragraph requires an annual report “of all such funds and property and the terms and conditions relating thereto,” and further requires that the proper officer “shall keep an itemized book account of the receipt and disposition thereof, which book shall be open at all times to the inspection of any member of the board of administration or of the board of state charities.”

By Section 1842, General Code, it is provided in part that:

“Each of said institutions shall be under the executive control and management of a superintendent or other chief officer designated by the title peculiar to the institution, subject to the rules and regulations of the board and the provisions of this act. \* \* \*

The chief officer shall have entire executive charge of the institution for which he is appointed, except as otherwise provided herein. He shall select and appoint the necessary employes, but not more than ten per cent of the total number of officers and employes of any institution shall be appointed from the same county. \* \* \*

The board after conference with the managing officer of each institution shall determine the number of officers and employes to be appointed therein.

It shall from time to time fix the salaries and wages to be paid at the various institutions, which shall be uniform as far as possible, for like service, provided that the salaries of all officers shall be approved in writing by the governor.”

In the administrative code of 1921, among others, the department of

public welfare was created (Sec. 154-3, G.C.), and the Ohio board of administration and the position of fiscal supervisor - Secretary of the Ohio board of administration abolished (Sec. 154-26, G.C.)

Section 154-57, General Code, provides in part as follows:

“The department of public welfare shall have all powers and perform all duties vested in or imposed upon the Ohio board of administration and the fiscal supervisor thereof, excepting the control of the state school for the deaf, and the state school for the blind, by this chapter transferred to the department of education as a division thereof; and excepting the power to purchase supplies for the support and maintenance of state institutions provided for in Section 1849 of the General Code, by this chapter transferred to the department of finance; \* \* \* Wherever powers are conferred or duties imposed by law upon the boards and officers mentioned in this section such powers and duties, excepting as aforesaid, shall be construed as vested in the department of public welfare. \* \* \* ”

The Entertainment Fund of the Ohio penitentiary, which of course is similar to what you refer to as the Entertainment and Amusement Fund of the Ohio state reformatory, was considered in Opinion No. 1994, Opinions, Attorney General, 1921, Vol. 1, p. 301. Accompanying the request for that opinion was a statement showing the history of the fund from the date of its establishment by the old board of administration on September 12, 1913. This statement contained a copy of the resolution adopted by the old Ohio board of administration on August 27, 1920, reading as follows:

“WHEREAS, It has come to the attention of the board that at some institutions cigars, tobacco, candies, etc., are being sold to inmates, employes and others from stock owned by some officer or employe of the institution; and

WHEREAS, This board deems it for the best interest of all concerned to have such items handled through the industrial and entertainment fund; therefore, be it

RESOLVED, That the managing officer of each institution over which this board has supervision be instructed that if in his opinion the sale of cigars, tobacco, candies, etc., to the inmates and employes (either or both) is a benefit to the institution, said sales may be made, but effective as of September 1, 1920, arrangements shall be made to handle all of said business through the industrial and entertainment fund, placing requisi-

tions in the regular way for all purchases, and receipts from sales shall be placed to the credit of the industrial and entertainment fund, and the stock purchased paid for from said fund."

The syllabus of this opinion reads:

"1. The entertainment and amusement fund, created by authority of the board of administration out of the interest accruing on other funds of the penitentiary and added to by funds obtained otherwise, but being the property of the institution, is a trust fund and must be strictly accounted for as such by the warden in his official capacity.

2. Proper expenditures from a fund created by the board of administration are those made for the beneficiary thereof in the furtherance of the purpose and intent expressed in creating the same. The beneficiary in the instant case is the penitentiary, and in the absence of specific directions by the board of administration in creating the fund, any expenditure that may with reason and justice be said to come within the purposes of the fund are legal expenditures."

In the opinion proper it was said as follows at page 304, et seq.:

"The establishment of this fund, or other fund having the same purpose for which this fund and the commissary are maintained, finds legal sanction under the broad power assigned for the creation of the board of administration in section 1832 G.C., which declares the intent of the legislature, \* \* \*

If this fund may not be said to get a proper legal status from the general intention expressed in the creation of the board of administration, it is certainly sufficiently authorized under the provisions of the statute as found in Sections 1838 and 1840 G.C. \* \* \*

It will be seen that Section 1840 G.C. vests all money or property, real and personal, held for the benefit of the several institutions under control of the board of administration, in trust for their use. This entertainment and amusement fund of the Ohio penitentiary, created by order of the board out of funds belonging to this institution, and the stock of goods purchased by the fund are in the custody of the board of administration by authority of law, and such fund and stock are thus a part of the property held in trust for the state.

The money earned by the prisoners by giving a minstrel show, permitted *in furtherance of their betterment and that of the institution of which they are a part* by authority of the warden, so long as the money thus earned is not paid pro rata to those engaged in giving the show, is a fund belonging to the

institution as a whole. \* \* \* Without the express declaration of the statute that such money is held in trust for the state, such funds become trust funds, or funds held for others, the possession of which is the result of official position, and for that reason a strict accounting should be had of such funds. In *State vs. Maharry*, 97 O.S. 272, the first syllabus reads:

'All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law.' \* \* \*

In the creation of this fund it is reasonable to conclude that it was done to benefit the institution *and not for the benefit of any official or employe.* \* \* \*

In obedience to the order of the board of administration passed in 1913, the placing of the accounting of the fund in the hands of the chief clerk, by whomsoever done, was in compliance with the law as found in section 2192 G.C., which, in part says:

'The clerk shall keep the accounts of the penitentiary in such a manner as to accurately exhibit the financial transactions relating to it. \* \* \*'

The purchases and other transactions made by use of the entertainment and amusement fund are some of the financial transactions relating to the penitentiary, and so they should be accurately accounted for as are other such transactions, if the plain mandate of the statute is to be observed. \* \* \*

\* \* \* this entertainment and amusement fund and the property purchased with it is public money and public property, held in trust for the use of the state by its agents or officers, who are the warden and the board of administration. \* \* \*'' (Emphasis mine.)

The above opinion was quoted with approval and followed in Opinion No. 2439, Opinions, Attorney General, 1928, Vol. III, p. 1911, having to do with a like fund established at the Ohio reformatory for women, the first branch of the syllabus reading:

"Moneys in the custody of the matron of the Reformatory for Women at Marysville, constituting the entertainment and amusement fund for the institution, should not be deposited in the State Treasury. Said fund is a trust fund and should be held and administered as such in accordance with the terms of Section 1840, General Code."

In the opinion at page 1912, et seq., the then Attorney General said:

“So far as I am advised, the term (Entertainment and Amusement Fund) first came into use, so far as its receiving official recognition is concerned, when the Ohio Board of Administration, as shown by its minutes of September 12, 1913, directed the fiscal supervisor to authorize the Warden of the Ohio Penitentiary to credit certain interest which had accrued on what was formerly known as a convict fund, parole and advance parole and probation account, to what was thereafter to be known as an ‘entertainment and amusement fund.’ Since that time similar funds in other institutions have been designated the ‘entertainment and amusement fund’ and administered for the benefit of *the inmates of the institution.*”

I learn upon inquiry from the Department of Public Welfare that accumulations to this fund by giving entertainments and by sales of property is left to the judgment of the supervising officer of the institution, as is also the manner of disbursement of the fund, no set rules having been promulgated by the Department of Public Welfare in this respect. General supervision is, however, exercised by the department over the administration of the fund, and no course of conduct is permitted with respect thereto which in the judgment of the department is not in the public interest and for the welfare of the inmates of the institution, in whose behalf the funds are administered. \* \* \*

The fund in my opinion has the same status as the fund under consideration in the opinion of 1921, above referred to. *That is to say, it is in the nature of a trust fund for the benefit of all the inmates of the institution* and should be held and administered as provided by section 1840, supra, for the administration of funds arising from grants, gifts, devises or bequests of money or property made to or for the use or benefit of the said institution or of any inmate thereof. \* \* \* ” (Emphasis mine.)

I concur with my predecessors in office in the reasoning and conclusions of the two opinions above quoted from and am of the opinion that both of the funds about which you inquire are trust funds created and maintained for the benefit of the reformatory, that is, to promote the welfare and further the betterment of the inmates of that institution. And with this basic principle in mind, I come now to answer your questions.

1. While in a narrow or strict sense, monies in the two funds here involved are not “public monies,” as are funds actually in the state treasury, or monies of the state treasury, as for example monies in the liquor control fund established pursuant to the provisions of Section

6064-10, General Code, yet they are public monies in a broad sense, just as are funds derived from tolls received by the state bridge commission, in the operation of bridges taken over by the state of Ohio. See opinion No. 849, Opinions, Attorney General, 1939, Vol. II, p. 1131, 1135. See also the case of Louisville Trust Company, et al., 258 Ky. 846, 81 S.W. (2nd), 894, involving public funds of an analogous character, in which it was said:

“That the funds (revenue from a municipal bridge) are *public funds* there can be little doubt. They are specific funds set apart for the payment of bonds issued by the city, which, though not direct obligations of the city within the meaning of the constitutional inhibitions against indebtedness, yet are obligations of the city within the limitations prescribed by the enabling act of 1928, and the trust indenture. *The fact that the funds have been pledged for a particular purpose does not alter their character of public funds.*” \* \* \* (Emphasis mine.)

The public has a direct and substantial interest in the well-being and rehabilitation of the inmates of the reformatory and the funds in question were lawfully created by the proper public officers for this purpose. Certain it is that both upon reason and authority the funds in question are trust funds and might with propriety be called public trust funds, or trust funds tinged with a public interest, and being trust funds they may only be used for the purposes for which the trust was created.

2. In the operation of a commissary, it is as necessary to have a manager or operator to care for and sell the merchandise as it is to have merchandise to sell, and it seems to follow logically that for this reason the compensation of the person in charge of and operating the commissary may lawfully be paid from the profits thereof.

3. Clearly, monies in the Commissary Fund may not be used to augment the salary or compensation of the chief clerk of the reformatory for at least two reasons. In the first place, the trust was not created to increase the salaries of state employees but for the benefit of the prisoners. The complete absence of a casual relationship between increasing the salary or compensation of the chief clerk or of any other state employee, and the betterment of the inmates of the institution, is manifest. Secondly, the salary of the chief clerk is fixed by law. He is in the classified civil service. In the General Appropriation Act of 1939 (H.B. 674, p. 276, et seq.), an elaborate classification is provided for state employees and the

Legislature has directed that "the compensation of all employees in the classified civil service of the state shall be uniform for position within the same service, group and grade as established by the classification of the said service as at any time made by the rules of the state civil service commission." It is further provided that so much of the appropriation made for personal service as pertains to the compensation of employees "may be expended only in accordance with the classification and rules of the state civil service commission" at the rates of annual salary fixed by the appropriation act for the respective groups and grades set forth.

Promotions of state employees from one grade to another with consequent increase of salary are provided for by Section 486-15, General Code, and Rule 9 of the civil service commission, and, if in the opinion of the responsible officers, the compensation of the chief clerk at the reformatory is not adequate, steps to increase his salary should be taken in accordance with law.

Moreover, it is expressly provided in Section 1842, *supra*, that the department of public welfare "after conference with the managing officer of each institution shall determine the number of officers and employees to be appointed therein" and shall from time to time fix the salaries and wages to be paid at the various institutions, *which shall be uniform, as far as possible, for like service*, the section further providing that "the salaries of all officers shall be approved in writing by the governor."

4. While, as we have above pointed out, the operation of the commissary is a lawful undertaking and one in which the public has a real interest, it does not follow that the person in charge of and operating a commissary is a state employee. It might be said that he is a quasi-public employee. There is no statute creating his position, nor is he paid from funds appropriated from the state treasury. He is not in the classified civil service as he would be required to be, unless, of course, he were employed under a lawful exemption.

5. Not being a state employee, I know of no authority by which he may lawfully be sent to return an escaped prisoner, to escort and guard a prisoner who is required to appear as a witness in court, or to escort and guard a prisoner attending a funeral. Reformatory guards are provided for by law, all of whom are in the classified civil service, and the official roster of the state of Ohio discloses that the reformatory is

manned with some eighty or eighty-five guards in addition to numerous other state employees, all in the classified civil service. The very word "guard," when used in connection with a penal institution, means a "restrained watch, as over a prisoner or other person under restraint" (Century Dictionary). There is nothing in the statutes pertaining to the Ohio state reformatory which authorizes the superintendent to appoint a private individual to act as a guard over a prisoner, or to delegate to such an individual authority to return an escaped prisoner, or guard a prisoner lawfully without the confines of the reformatory. Moreover, in so far as escorting and guarding witnesses when in attendance upon a court are concerned, as will be seen from the language of Section 13444-9, General Code, hereinafter quoted, it is contemplated that prisoners shall be transported to and from a court requiring their testimony in charge of an officer. While it is true that the section uses the words "guard or attendant," these two words are in apposition to the word "officer" and the word "attendant" must therefore mean an officer or state employee of a kind other than a "guard," but whose duties are of a like character. This construction is not only supported by the "noscitur a sociis" rule; that is, when a word in a statute is ambiguous, its meaning may be made clear by considering the company in which it is found and the meaning of the terms which are associated with it, but also by the fact that Section 13444-8, General Code, specifically refers to the warden or superintendent of a penal institution or the keeper of a workhouse or jail.

6, 7. What was been said above furnishes the answers to questions 6 and 7. Since the person managing and operating the commissary may not lawfully be sent to escort and guard a prisoner, there will be no occasion for him to receive from a clerk of courts, or from private individuals, any monies to cover his time and expenses.

If in the past such person has received any compensation of this sort, since he is not a public employee I know of no reason why he should not retain the same; if any monies were obtained by him from private persons by means of fraud or extortion, such private persons could recover what they had paid. In this connection, however, I am informed that the amount of any such monies so received was fixed by the superintendent and voluntarily paid by the persons interested.

8. Coming to the 8th question above posed, I assume that you refer to cases in which prisoners are taken to court to testify in criminal causes.

Section 13444-7 provides that when it is necessary to procure the testimony of a prisoner "imprisoned in the penitentiary, reformatory, workhouse or jail, within this state," the court may order a subpoena to be issued direct to the keeper of said institution, commanding him to bring the prisoner before the court. Section 13444-8 provides that the "warden, superintendent or keeper, upon receiving such subpoena, shall take such witness, or cause him to be taken, before such court, at the time and place named in such subpoena." Section 13444-9 provides:

"When such witness is in attendance upon a court, he may be placed in the jail of the county. The expenses of the officer in transporting him to and from such court, including compensation for the guard or attendant of such prisoner not exceeding the per diem salary of such guard for the time he is away from said institution, shall be allowed by the court and taxed and paid as other costs against the state."

In 42 O. Jur. 32, it is said that "the expense of transporting an inmate of a penitentiary, reformatory, workhouse, or jail to and from court to bear witness in a criminal proceeding and of guarding such prisoner must be allowed by the court and taxed and paid as other costs against the state, although under a former statute it was held that compensation of the guards could not be so taxed." This statement is not entirely accurate for the reason that what is referred to as a former statute is in fact the same statute with slight changes in phraseology made by the codifying commission of 1910. What is denominated a "former statute" was Section 7292, Revised Statutes, with reference to which it was held as follows in *State ex rel Coffin*, 56 O.S. 240, 46 N.E. 819 (1897):

" \* \* \* Guards of the penitentiary who take a convict before such court in obedience to a subpoena are, while so engaged, performing their appropriate duties for which compensation is fixed by section 7388-14, Revised Statutes, and no deduction from the monthly compensation so fixed by the statute can be made on account of their absence from the penitentiary while engaged in such service, nor can compensation to them for such service be taxed as costs in the case." (p. 241)

At the time the *Coffin* case was decided, the compensation of the Ohio penitentiary guards was fixed by permanent statute, as it now is, there being no like permanent statutes pertaining to guards at the Ohio state reformatory. This fact is not important, however, for the reason that the salary or compensation of guards of penal institutions other than the penitentiary has been fixed for several years under the provisions of

Section 1842, *supra*, and in the biennial appropriation acts of the Legislature (Sec. H.B. 674, 93rd General Assembly, p. 285). As has been held by this office in previous opinions, an appropriation act, during its existence, is as much a law as a permanent statute, and it follows that the holding in the Coffin case applies to reformatory guards with equal force.

9. With reference to the legality of a reformatory guard receiving compensation for his time from the relatives or other interested persons when such guard escorts and guards a prisoner for the purpose of attending a funeral,—the answer to this question is not free from difficulty. I have no doubt but that unless his expenses be otherwise paid, such a guard may be fully reimbursed for his out-of-pocket expenses, although I question the propriety of his receiving pay of any kind from the prisoner's relatives or other interested persons, while on duty as a servant of, and being paid by, the state. While escorting and guarding the prisoner under such circumstances, the guard is but performing one of the duties for which he is compensated by the state on an annual basis.

In this connection, I am informed that it has been for many years the practice of the Ohio penitentiary to require private individuals interested in the return of a prisoner, for the purpose of attending a funeral or for other similar purposes, to pay the per diem compensation of a guard escorting and guarding such prisoner, the guard's compensation for such time as he is absent from duty for such reason being deducted from the current state payroll. I know of no reason why such a practice may be said to be unlawful, even though I know of no express or specific statutory authority for a prisoner to be absent from the penal or reformatory institution in which he is confined for reasons of the sort here under consideration. Such practice is not only dignified by precedent of many years standing, but by the soundest moral and humane considerations as well. As stated in 15 Am. Jur. 155, according "to the more enlightened modern thought, the holdings of and decisions of courts and the teachings of penologists, the humane rule has been adopted that the infliction of penalties for violations of the criminal laws is to be considered as in no sense a punishment, but rather as the reformation of the wayward and the protection of society. In other words, the great end of punishment is not the expiation or atonement of the offense committed, but the prevention of further offenses of the same kind," citing *inter alia*, Mr. Justice Harlan in the case of *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 579, 28 L. Ed. 262, 265 (1884). It requires no argument to

demonstrate that prohibiting a prisoner from attending the death bed or the funeral of one to whom he is or was closely related would be anything but conducive to the rehabilitation of such prisoner. I therefore conclude that, even though there be no statute expressly authorizing such an absence, because of the long existing custom and administrative practice in this respect in all the penal and reformatory institutions of the State, and because such a privilege tends to further the end sought to be accomplished in rehabilitating convicts, the custom and practice heretofore followed in this respect should not be disturbed in the absence of action by the Legislature.

In so far as the reformatory is concerned, information is to the effect that guards are there employed on the basis of a five and one-half day week, and that guards escorting and guarding prisoners for the purposes here under review are sent on those days when they are not required to be on duty. In other words, in such cases the guards so employed are used during such times as they might use their time for such personal purposes as they deem desirable. I see no objection to this practice. Whether, in view of the requirements as to uniformity in the classification and compensation of persons in the classified service occupying positions within the same service, group and grade above discussed, the practice with reference to leaves of the kind here involved should be uniform in all state penal and reformatory institutions under rules and regulations prescribed by the welfare department, is a matter lying within the sound discretion of the director of public welfare.

From what has been said, I conclude that if compensation for the guard's time be given by the prisoner's relatives or other interested parties under such circumstances as are lawful, as for example when he is not on duty or being paid by the state, or at a time when he is not required under his contract of employment to be on duty, it is my opinion that any money so received may be retained by such guard.

10. Question 10 requires no additional discussion. From what has been said, the superintendent of a reformatory is responsible for the proper control and management of the institution. The duties of the chief clerk have been already adverted to and if either the superintendent or the chief clerk are responsible for an improper use of the funds with which we are concerned in this opinion, he would be accountable therefor.

11. The 11th question has been answered in part in the answer to question 10. Manifestly a finding may be made against any institution official or employee who either makes, participates in or authorizes an unlawful expenditure of public monies. On the other hand, in the absence of a knowledge of, or acquiescence in, the improper use of such funds, I see no reason why a finding may or should be made against the superintendent of the reformatory or the chief officer of a like institution merely because of his official position.

I am, of course, not unmindful of the rules of law applicable to the liability of public officers for public funds entrusted to their care, or of the fact that there is a divergence of authorities on this question in this country. In McQuillin on Municipal Corporations (Rev. Ed.), Vol 2, p. 382, it is said as follows:

“The judicial decisions are not uniform on the question of the liability of the public officer for loss of public funds intrusted to his care. Where the liability does not appear from the construction of charter or statutory provisions applicable, or of the terms of the official bond, the officer is regarded either as the debtor of the local corporation and in this capacity is held liable for such funds irrespective of the cause of their loss, *or as an insurer who is liable irrespective of the cause of the loss*, except, as said by some courts, where the loss is by act of God or the public enemy, or, as a trustee or bailee, and not as an insurer, and in this relation is liable only in cases wherein he acts without diligence, caution, prudence and good faith. Where the latter rule is followed, if a more stringent obligation is desired it must be prescribed by statute.” (Emphasis mine.)

In support of the principle above emphasized, the case of *State ex rel. Bolsinger v. Swing, et al.*, 54 O.A. 251, 7 O.O. 438, 6 N.E. (2nd) 999 (1936), is cited, which followed the case of *Seward v. National Surety Co.*, 120 O.S. 47, 165 N.E. 537 (1929).

Both of these cases, among others, are cited in 32 O. Jur. 957, as authority for the proposition that it is “one of the duties of a public officer intrusted with public monies to keep them safely, and this duty of safe custody must be performed at the peril of the officer. In effect, according to the weight of authority followed in Ohio, a public officer is an insurer of public funds lawfully in his possession and, therefore, liable for losses which occur even without his fault. The liability is absolute, admitting of no excuse except an act of God or the public enemy.” The *Bolsinger* case had to do with a county treasurer who is made an insurer

by statute, while the Seward case was concerned with a postmaster whose duties and liabilities are regulated "by law and by the rules of the United States Post Office Department."

Whether the principles announced in these cases would apply to the superintendent of the reformatory, or the head of one of the institutions involved, it is unnecessary here to decide because of the nature of the funds here being considered. As above shown, while the funds in question are public monies in the sense that the public has an interest in their proper disbursement and use, they are not public funds in the sense that they belong to the state, or to the people of the state. They are trust funds; and being such the liability of the person responsible therefor, that is, the trustee, is measured by the law of trusts and not by the law relating to public funds belonging to, or in which the state or one of its political subdivisions has a direct and immediate interest. This fact was recognized by the Legislature in Section 1840, *supra*, providing for the deposit of such funds "in a proper trust company or savings bank." As said in Bogart on Trusts and Trustees, Vol. 2, p. 1213:

"Trusts to help poor prisoners or captives in obtaining release from confinement or in ameliorating their condition during imprisonment \* \* \* have been held charitable. It would seem fairly easy to place them in the eleemosynary class."

In contradistinction to public monies of the kind here involved, as held in *Ayers et al, v. Lawrence, et al. Commissioners*, 59 N. Y. 192, 198 (1874), "when 'public funds' are referred to, taxes, customs, etc., appropriated by the government to the discharge of its obligations, are understood." See also 32 O. Jur. 714, where it is said that public funds are "moneys belonging to the state or to political subdivisions thereof, including municipal corporations."

Touching the question as to the degree of care and diligence required of a trustee, the law is stated thus in 26 R.C.L. 1280:

" \* \* \* as a general rule the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. *A trustee is not an insurer.* He is not absolutely bound for the result of his actions, except when he departs from the line of duty, or, keeping within that line, is wanting in diligence. \* \* \* if he has exercised the proper care and diligence he is not responsible for mere error or mistake. \* \* \* "

Before the head of an institution may be lawfully held, there must have been such acts or omissions as would constitute a breach of the duty above set forth. And in this connection it should be remembered that the chief clerk and other employees are appointed from a civil service list certified by the civil service commission, and it is difficult to see how it could be said that the superintendent or other chief officer acted negligently in appointing one to a position from persons whom the civil service commission had found to be of good moral character and competent to perform the duties of the position to which he was eligible to be appointed, and if the superintendent did not participate in, and had no knowledge of, the unlawful expenditure and exercised that degree of care which an ordinary prudent man would exercise, I know of no theory of law upon which findings against him might be based.

For the above reasons, and in specific answer to your question, it is my opinion that:

1. Monies in what are known as the Commissary Fund and the Entertainment and Amusement Fund of the Ohio state reformatory and like institutions are trust funds created and maintained for the benefit of the reformatory, that is, to promote the welfare and betterment of the inmates of the institution, and as such they are trust funds tinged with a public interest. They may only be used for the purpose for which they were created.

2. Monies in the Commissary Fund of the Ohio state reformatory may be used to pay the compensation of the person in charge of and operating the commissary.

3. Monies in the Commissary Fund may not be used to augment the pay of the chief clerk or of any official or employee of the Ohio state reformatory.

4. The person in charge of and operating the commissary at the Ohio state reformatory, who is paid out of the Commissary Fund, is not a state employee.

5. There is no authority vested in the superintendent of the reformatory to delegate to such person, or to any private person, authority to return an escaped prisoner, or to escort and guard a prisoner who is

required to appear as a witness in court, or to escort and guard a prisoner attending a funeral.

6. Any monies heretofore paid to the person in charge of and operating the commissary at the Ohio state reformatory by the clerk of courts for his time and expenses, when such person escorts a prisoner required to be a witness in court, may be retained by such person.

7. Any monies heretofore paid to such person by private persons for escorting a prisoner to a funeral may be retained by him.

8. Monies paid to a guard of the Ohio state reformatory for escorting and guarding a prisoner to court to testify as a witness to cover his expenses, may be retained by such guard. However, under the holding in the case of *State ex rel. v. Coffin*, 56 O.S. 240, compensation for the guard's time may not be paid or taxed as costs, since such guard receives the compensation fixed by law for performing his duty.

9. Where a guard of the Ohio state reformatory escorts and guards a prisoner to a funeral on such day or days as he is not required by his contract of employment to be on duty, he may lawfully be paid by private persons for his time, and be reimbursed for his out-of-pocket expenses. He may also be paid for so acting on days he is required to be on duty, where deductions are made from the current state payroll for such time he is absent.

10. Under the law of Ohio, including Section 1842, General Code, the executive control and management of the Ohio state reformatory is under the superintendent of such institution. It is the duty of the chief clerk of the Ohio state reformatory to keep the accounts of the Commissary Fund in such a manner as accurately to exhibit the financial transactions relating to it. The superintendent of the reformatory, the chief clerk and other institutional authority are accountable for the handling of receipts and disbursements from the Commissary Fund for which they are personally responsible.

11. The superintendent of the Ohio state reformatory is not, merely because of his official position, responsible for any unlawful expenditure of monies in one of the institutional funds, as for example the Commissary Fund, in the absence of personal participation or acquiescence

therein, or knowledge thereof, provided he uses that degree of care in the management of the trust in question which would be pursued by a man of ordinary prudence and skill in the management of his own estate.

Respectfully,

THOMAS J. HERBERT,

Attorney General.