

1950.

JUSTICE OF THE PEACE—UPON PAYMENT OF PROPER FEE MUST DELIVER CERTIFIED TRANSCRIPT OF PROCEEDINGS—APPELLANT NOT REQUIRED TO PAY COST OF ENTIRE PROCEEDINGS BEFORE DELIVERY—SECTION 10384, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *By the terms of Section 10384, General Code, it is the duty of a justice of the peace, upon the appellant's demand and the payment of the legal fee therefor, to deliver to appellant or his agent, a certified transcript of the proceedings had before such justice of the peace in order that appellant may perfect his appeal.*

2. *An appellant from the judgment of a justice of the peace upon the giving of a bond for appeal is not required, by the terms of Section 10384, General Code, to pay the costs of the entire proceedings had before such justice of the peace before he may demand a certified transcript of the proceedings.*

COLUMBUS, OHIO, April 10, 1928.

HON. E. A. BROWN, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads as follows:

“I submit the following inquiry for your opinion:

In civil cases before a justice of the peace in which an appeal is taken from the judgment of the justice of the peace, and a good and sufficient appeal bond is properly filed with the justice of the peace and \$2.50, the transcript fee, tendered to the justice of the peace, has the justice of the peace the legal right to require the appellant to pay all costs in the justice of the peace court before delivery to appellant of a certified transcript of case?”

Section 10354, General Code, in so far as pertinent, provides:

“If either the plaintiff or defendant, in his bill of particulars claims more than twenty dollars, the case may be appealed to the Court of Common Pleas * * * .”

Section 10382, General Code, reads:

“In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of a justice of the peace, to the Court of Common Pleas of the county where the judgment was rendered.”

Section 10383, General Code, provides:

“Within ten days from the time a justice renders a judgment, the party appealing therefrom must give a bond to the adverse party, though he need not sign it, with at least one sufficient surety to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs; conditioned that appellant will prosecute his appeal to effect without unnecessary delay, and that, if on the appeal judgment be rendered against him, he will satisfy it and the costs.”

Section 10384, General Code, reads as follows :

“Upon the giving of bond for appeal, the justice shall make a certified transcript of his proceedings, the bond included, which, on the appellant’s demand, and the payment of the legal fee therefor, shall be delivered to him or his agent, who, on or before the thirtieth day from the rendition of the judgment appealed from, shall deliver it to the court to which the appeal was taken.”

By the terms of Section 1746-1, General Code :

“For their services in civil proceedings, when rendered, justices of the peace shall tax as costs and collect from the judgment debtor the following fees, and no more: * * * making transcript of docket, including certificate, two dollars and fifty cents * * * .”

Your attention is directed to the case of *Leffingwell vs. Flint*, 1 Ohio 274, the head-note of which reads :

“An appellant from the judgment of a justice is not bound to pay the costs before he can demand transcript.

A justice is liable to action for refusing transcript.”

The facts of that case, as appear in the opinion of the Court, were as follows :

“The defendant being a justice of the peace in the township of Warren, on an application for that purpose, issued a summons against the plaintiff, on which a judgment was afterward rendered for \$28.81, and cost of suit. The defendant, Leffingwell, gave notice of an appeal to the Court of Common Pleas, and before the expiration of the ten days allowed for that purpose, executed a recognizance, with security, approved of by the justice, and then demanded a transcript of the proceedings, which was refused, unless he would pay the cost of the suit, amounting to about \$7.00. The appellant refused to pay that sum, but offered to pay the fee for the transcript, and tendered thirty-one cents. The transcript was withheld. The appellant lost the benefit of his appeal, and an execution issued against him on the judgment, by which a part of his property was taken and sold. It also appeared from the record, that the writ, in this suit, issued before the commencement of the term to which the transcript ought to have been returned. The defendant pleaded not guilty, with a notice that he was always ready to give the plaintiff the transcript required, on his paying the cost of the suit, which he refused to do.

The cause was tried in the Common Pleas, and removed to this court by appeal.

A number of witnesses were called, who proved the facts substantially as charged in the declaration.

The principal points contested were, whether the justice had a right to withhold the transcript, in consequence of a refusal to pay the cost, and whether the suit was not commenced before the cause of action arose.”

On page 275, the court said :

“The statute is not only silent as to the payment of cost, but requires the appellant to give security for the debt and cost, and cost that may accrue in

the Court of Common Pleas; it is, therefore, impossible to suppose that the costs are to be paid before the appeal. It would be an outrage on common sense to give the law such a construction, as would require the appellant to pay the cost, and, at the same time, to give security to pay them."

Although Sections 10383 and 10384, supra, have been amended since the *Leffingwell vs. Flint* case, supra, was decided, the provisions thereof have not been materially changed so as to affect the question that you present.

In view of the foregoing and answering your question specifically, it is my opinion that by the terms of Section 10384, General Code, it is the duty of a justice of the peace, upon the appellant's demand and the payment of the legal fee therefor, to deliver to appellant or his agent, a certified transcript of the proceedings had before such justice of the peace in order that appellant may perfect his appeal. Such appellant is not required to pay the costs of the entire proceedings had before such justice of the peace before he may demand such transcript.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1951.

COUNTY COMMISSIONERS—POWER TO IMPROVE WATERCOURSE
LYING WITHIN LIMITS OF MUNICIPALITY—ASSESSMENT FOR IM-
PROVEMENT DISCUSSED.

SYLLABUS:

1. *When petitioned for by the mayor or council of a municipality, a board of county commissioners has power to improve a watercourse, by deepening and widening the same and constructing retaining walls along the banks thereof, notwithstanding the fact that the entire improvement lies within the corporate limits of such municipality.*

2. *Under the provisions of Sections 6454 to 6463, inclusive, and related sections of the General Code, all land affected by the improvement of a watercourse, by deepening and widening the same and building retaining walls along the banks thereof, shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise. That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare and such part of the assessment as may be found to benefit state or county roads or highways shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision. The entire cost of such an improvement may not be assessed against a city, except where the county surveyor and the board of county commissioners, in a sound exercise of their discretion, find that no land is benefited by the improvement.*

3. *A municipality, or other political subdivision of the state, is unauthorized to make a levy to pay an assessment made by a board of county commissioners for the improvement of a watercourse, without the fifteen mill limitation provided by law, without a vote of the people.*

COLUMBUS, OHIO, April 10, 1928.

HON. GEORGE E. SCHROTH, JR., *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads: