

properly paid out of the fund from which the Legislature contemplated such costs should be paid. If, for any reason, there is a recovery of costs then the same should be credited back to that fund.

You also wish to know whether or not you have any authority to pay from the state insurance fund the stenographic salaries and expenses incurred in the preparation of rehearing records provided for in said Section 1465-90, General Code.

The Legislature has nowhere made any provision for the payment of salaries and expenses incurred in the making of rehearing records as part of the costs of litigation. Since many of these records do not ever reach the courts the expense of preparing them could not be considered a proper charge as part of the costs in a case, and therefore such salaries and expenses could not be paid from the state insurance fund.

The question as to whether or not the costs so paid should be charged against the risk of the employer of the employee filing the suit is an actuarial matter rather than a legal matter, and as long as the burdens placed upon the state insurance fund are uniformly spread over the various classifications according to actuarial methods a question of law would not be involved.

It is therefore my opinion that (1) when the Industrial Commission of Ohio is required to advance costs in connection with a case pending in court for the preparation of a proper bill of exceptions to be used in error proceedings in the Court of Appeals or for the printing of records to be filed in the Supreme Court, such money may be advanced from the state insurance fund and if any such costs are recovered by way of judgment they should then be credited to that fund, and (2) the Industrial Commission is not authorized to pay from the state insurance fund the salaries and expenses incurred in the preparation of rehearing records.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5028.

CRIMINAL LAW—DEFENDANT MAY REQUIRE PREPARATION OF TRANSCRIPT AND COURT'S CHARGES, WITHOUT ADVANCING COST THEREOF.

SYLLABUS:

A defendant in a criminal case may require the court stenographer to prepare a transcript of the testimony, as well as the charges of the court, without advancing the cost of preparing such transcript. The cost of such transcript is a proper item of the costs of such trial.

COLUMBUS, OHIO, December 21, 1935.

HON. LAWRENCE F. KELLAR, *Prosecuting Attorney, Delaware, Ohio.*

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

“The following question has come up in this county, and I should like to present the same to you for your official opinion.

When a person has been convicted of a felony and said person or defendant has been conveyed to the Ohio State Penitentiary or the proper state institution in accordance with the sentence of the Court, and the cost bill in said case to the state has accompanied said defendant, and the defendant, through his attorney, requests a transcript to be made of the proceedings and trial in said Common Pleas Court for the purpose of taking the same to the Court of Appeals on error, shall the costs of said transcript be paid by said defendant or by the county upon the proper warrant, and if the costs of said transcript are to be paid by the defendant, may the Court stenographer require the same to be paid in advance?”

Section 1552, General Code, which is pertinent to your inquiry, provides as follows:

“The compensation of shorthand reporters for making such transcripts and copies shall be not more than twelve cents per folio of one hundred words, to be fixed by the common pleas judges of the subdivision. Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendant and transcripts ordered by the court in either civil or criminal cases, and copies of decisions and charges furnished by direction of the court shall be paid from the county treasury, and taxed and collected as other costs. *The clerk of the proper court shall certify the amount of such transcripts or copies, which certificate, shall be a sufficient voucher to the auditor of the county, who shall forthwith draw his warrants upon the county treasurer in favor of such shorthand reporters.*” (Italics the writer's).

Section 1553, General Code, provides in part as follows:

“When ordered by the prosecuting attorney or defendant in a criminal case, or when ordered by the court for its own use, in either

civil or criminal cases, the costs of such transcripts shall be taxed as costs in the case, collected as other costs, and paid by the clerk of the proper court, quarterly, into the treasury of such county, and credited to the general fund. * * *

In an opinion to be found in *Opinions of the Attorney General for 1930*, Volume 1, page 353, practically the exact question you present was passed upon by the then Attorney General. The syllabus of that opinion reads as follows:

“1. Compensation of a stenographer for services rendered in making the transcript of a criminal case may lawfully be included in the cost bill and paid by the state as provided in Section 13455-8 of the General Code.

2. Compensation of an attorney for services rendered under the provisions of Section 13439-3, General Code, is not costs that the statutes authorize to be paid out of the state treasury.”

The request there read:

“I desire your opinion as to whether the county or state can pay for bill of exceptions in a first degree murder case where the accused has been convicted by the jury, without a recommendation of mercy.

Also whether or not the state will reimburse the county at all for the costs and the attorney fees which are incurred in a case of this kind, in the Court of Common Pleas, as well as the Court of Appeals and in the Supreme Court.”

From the opinion at page 355 I quote the following language:

“You will note that these sections (1552 and 1553) expressly provide that the compensation of shorthand reporters for making transcripts in criminal cases shall be ‘taxed and collected as other costs.’ Since ‘other costs’ are collected from the state by virtue of Section 13455-8 of the General Code, I am of the view that in the case such as you present in your letter, the compensation paid out of the county treasury to a stenographer for making a transcript may lawfully be included in the cost bill and paid by the state as provided by the terms of Section 13455-8 of the General Code.”

From the above quoted sections, as well as the 1930 opinion, *supra*, it would appear that a defendant who has been convicted and who contemplates prosecuting error, may require the court stenographer to prepare a transcript of the testimony without advancing the cost of preparing such transcript. The cost of preparing the transcript is a proper item of costs under

Section 13455-3, General Code. Since this is a proceeding in error, it might be well to consider Sections 13459-2 and 13459-6. These sections read in part as follows:

Sec. 13459-2:

“On application, by or on behalf of the accused, to an officer required to make a record or docket entries in such case, and upon tender of the proper fee, such officer shall make and deliver to such accused, or his counsel, a complete certified transcript of the record, omitting therefrom, if so requested, a bill of exceptions. * * *”

Sec. 13459-6:

“* * * If the judgment be reversed, the plaintiff in error shall recover from the defendant in error all court costs incurred to secure such reversal, including the cost of bills of exceptions and transcripts. * * *”

In a subsequent communication you raise the question as to whether or not these sections which were not quoted in the 1930 opinion, *supra*, would require the defendant to advance the cost of preparing the transcript of the testimony before the same may be required.

A careful examination of these sections tends to the conclusion that the legislature intended that the defendant should advance to the clerk of courts the cost of preparing the transcript of the docket and journal entries and not that the defendant must advance the cost of preparing the transcript of the testimony and charges of the court. While perhaps not relevant to the question, it might be pertinent to point out that any other conclusion than the one herein reached would seriously jeopardize the chances of an indigent prisoner having his conviction reviewed by an appellate court.

In view of the above, it is my opinion that a defendant in a criminal case may require the court stenographer to prepare a transcript of the testimony, as well as the charges of the court, without advancing the cost of preparing such transcript. The cost of such transcript is a proper item of the costs of such trial.

Respectfully,

JOHN W. BRICKER,

Attorney General.