

Your attention is also directed to Opinion No. 2065, dated May 7, 1928, addressed to the Prosecuting Attorney of Pike County, the first paragraph of the syllabus of which reads:

"1. Where a defendant in a criminal case has been found guilty and sentenced to pay a fine, and such defendant executed a note and mortgage to secure such fine, if the collection of the fine were postponed, and the benefit thereof accrued to one bound to pay the fine or go to jail in lieu of payment, such note and mortgage would be enforceable on the ground that those signing such note and mortgage after securing the benefits thereof, were estopped from denying the validity of the note and mortgage given by them, even though it should be held that a magistrate is without authority to accept security of this nature to secure the payment of a fine."

I am enclosing herewith a copy of this opinion.

In view of the foregoing discussion, and in specific answer to your question, it is my opinion that, upon the facts stated in your communication, the mayor may under the law issue an execution upon the property of the defendant, or, in default thereof, upon the body of the defendant. In addition thereto, I am further of the opinion that he may in his official capacity commence a civil action in a court of competent jurisdiction against the defendant to require the defendant to endorse the bond given as security and take such other steps as may be required to enable the mayor to sell the bond and apply the proceeds in satisfaction of the fine and costs imposed upon the defendant.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2586.

COSTS—PROCEEDINGS FOR APPROPRIATION OF PRIVATE PROPERTY FOR STATE ROAD—PAYABLE BY HIGHWAY DIRECTOR WHEN NO APPEAL TAKEN—TRANSCRIPT OF PROBATE RECORD UNNECESSARY TO STATE'S TITLE.

SYLLABUS:

1. *In a case where the property owner does not appeal from the finding and award of compensation and damages therefor made by the Director of Highways in the appropriation by him of property for state road purposes, under the provisions of Section 1201, General Code, such property owner is not liable for any of the fees and costs in the proceedings in the probate court relating to the appropriation of such property. In such case the lawful fees and costs incurred in such proceedings in the probate court should be paid by the Director of Highways out of the funds provided by Section 1188, General Code.*

2. *Although a transcript of the record of the proceedings in the probate court in such case is not necessary to complete the title of the State to the property appropriated by the Director of Highways, if such transcript is desired by the Director of Highways as appropriate evidence of the record title of the State to the property appropriated, he is authorized to obtain such transcript and pay for the same out of the funds provided by Section 1188, General Code.*

COLUMBUS, OHIO, September 17, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

“Under date of July 20, 1928, the Director of Highways entered upon his Journal a resolution appropriating certain property of one Jacob Eby, necessary for Right of Way in connection with the improvement of SH (ICH) No. 19, Section N, in Montgomery County. A copy of this resolution is enclosed.

Certified copies of the resolution together with a tender in the form of a warrant upon the Auditor of State for Two Hundred Dollars covering compensation and damage to the residue, together with a plat of the land sought to be appropriated was deposited with the Probate Court of Montgomery County, and receipt of the same acknowledged by said court.

The property owner did not appeal the action of the Director on the amount tendered but accepted the Two Hundred Dollar warrant within the ten day period as provided by law.

The chief deputy of the Probate Court of Montgomery County has now presented the department, through the division deputy director in Cincinnati, a bill for Twelve Dollars court costs and sheriff fees of Two Dollars and Thirty-five Cents or a total of Fourteen Dollars and Thirty-five Cents, covering the court costs in handling this appropriation case.

It has been the policy of this department following informal advice of your office, that when a property owner accepts a tender without appealing against the appropriation proceedings, the costs would be borne by the property owner.

Conversely, when an appropriation case was settled out of court for a higher amount in order to avoid trial costs, or if a jury brought in a verdict for an amount higher than that tendered, court costs would have been borne by the State.

The chief deputy of the Probate Court of Montgomery County advised a representative of this department in Dayton yesterday, that the court would not complete the record in this case until the costs of the case had been paid; further, that in the absence of a specific citation of the Code authorizing them to do so, the court would not certify these costs to the property owner and, further, that if the State refused to pay said costs, then same would be marked unpaid in the County records and the case left incompleated upon the court record.

It is the understanding of this department, that in appropriation cases upon the part of the Director of Highways, that a transcript of the Probate Court Record constitutes our legal title to the Right of Way appropriated. If this premise is correct, it is respectfully requested that the department be advised as to the proper manner in which to proceed, if such procedure is the duty of this department, in order that this case may be legally closed and title of the property appropriated recorded in the name of the State of Ohio.”

The proceedings relating to the appropriation of property by the Director of Highways for highway purposes are provided for by Sections 20, 21, 22 and 23 of the Norton-Edwards Act (112 v. 440 et seq.), which have been carried into the General Code as Sections 1202, 1201, 1201-1 and 1188, respectively.

Section 1202, General Code, provides that the Director of Highways shall have power and is authorized to alter, widen, straighten, re-align or relocate any road or highway on the state highway system. To this end he is authorized to purchase or appropriate property for the necessary right of way for such purposes, and also such property as may be necessary in the location or construction of any bridge, culvert, grade separation project or other highway improvement which he, by law, is or may be required to locate or construct.

Section 1201, General Code, provides as follows:

"If the director is unable, for any reason, to purchase the property for such purposes, or any of them, mentioned in the preceding sections, he may proceed to condemn such land or property, whether the property of an individual or corporation, in the manner following:

1. The director shall first enter on the journal of the department of highways a finding that it is necessary for the public convenience and welfare to appropriate such property as he may deem needed for the purposes, or any of them, hereinbefore mentioned. Such finding shall contain a definite, accurate and detailed description of such property deemed needed and the name and place of residence, if known or with reasonable diligence ascertainable, of each person or corporation the owner or owners of the property sought to be appropriated.

2. The director shall in such finding also fix what he may deem to be the value of such property sought to be appropriated, together with the damage to the residue, if any, and deposit the value thereof, together with such damages, if any, with the probate court of the county within which such property, or a part thereof, is situated, for the use and benefit of such owner or owners; and thereupon the director shall be authorized to take possession of and enter upon said property for any and all the purposes hereinbefore mentioned. At the time of making such deposit with the probate court the director shall also file with such probate court a true copy of his finding that it is necessary to appropriate such property and containing a description of the property and a statement of the compensation and damage, if any, so fixed. Said copy shall be recorded in the records of said court.

3. The probate court shall forthwith notify such owner or owners of the amount of money deposited with it on account of the property sought to be appropriated, which notice shall contain a definite, accurate and detailed description of the property sought to be appropriated as shown by the copy of the finding filed with the court by the director, and, upon application of such owner or owners, said court shall turn over to them the amount of money so deposited with the court on account of the property sought to be appropriated. Such notice shall be served upon such owner or owners by the sheriff in like manner as summons in civil actions is served, and the costs thereof shall be paid as in other civil actions. In case the owner or owners are non-residents of the state or cannot be found, the probate court shall give notice by publication for one week in some newspaper published in and of general circulation in the county, or if there is no such newspaper published in the county, then in some newspaper of general circulation in the county."

Section 1201-1, General Code, makes provision for the proceedings to be had where the property owner is not satisfied with the finding and award made by the

Director of Highways under the provisions of Section 1201, General Code, above quoted. This section provides that if any owner of property sought to be appropriated by the Director for the purposes above mentioned is not satisfied with the finding of the Director as to the necessity of the improvement and the amount of compensation or damages awarded, or both, such property owner shall, within ten days after service by the sheriff of the notice provided for in the preceding section or within fifteen days after the date of publication of such notice, if so made, give notice in writing, in duplicate, to the probate court of an intention to appeal from the amount of compensation or damages, or both, fixed by the Director.

Section 1201-1, General Code, in the second paragraph thereof provide as follows:

"The probate court shall thereupon fix the amount of bond to be given by the appellant, which shall be reasonable, and cause an entry thereof to be made on the journal of the court, and forthwith transmit by registered mail to the director one copy of said notice of intention to appeal and a copy of said entry. The appellant, within five days after the fixing of the amount of said bond, shall file with the probate court a bond, in the amount so fixed, with sureties to the approval of the probate court, and such bond shall be conditioned to pay all costs made on the appeal, if the appellant fails to sustain such appeal, or the same is dismissed. Minors, or other persons under disability, or their respective guardians, shall not be required to give bond. The property of such persons shall be liable for all costs adjudged against them or their legal representatives."

This section further provides that upon the appeal bond being filed and approved, or in cases where no bond is required upon notice of intention to appeal being filed, the probate court shall fix a day for the hearing of all preliminary questions and motions, and for the examination of the papers and proceedings; and that if the probate court finds that said appeal has been properly perfected and said proceedings are substantially regular, he shall fix a day for the trial of the case by a jury, which is to be called and impaneled as by said section provided. Said section further provides that at the conclusion of the trial the court shall charge the jury and the jury shall find and return a verdict separately upon each claim for compensation and damages appealed from, and that the jury shall also determine in its verdict whether the property sought to be taken is necessary for the public convenience and welfare, if the finding of the Director in that respect is appealed from. It is further provided that if a new trial shall not be granted for cause shown, the probate court shall render a judgment in favor of the appellant for the amount of the verdict, if any, returned by the jury.

Paragraph 10 of said Section 1201-1, General Code, provides that:

"The probate court shall make a record of all proceedings before him and tax the costs in favor of the prevailing party and against the losing party. If there are several appellants in the same action and costs are adjudged against them, the court shall apportion the costs equitably among them."

Section 1188, General Code, provides as follows:

"The costs and expenses in connection with the purchase and appropriation of property for highway purposes, unless otherwise provided by law, shall be payable by the director out of any funds of the department of highways available for the construction, improvement, maintenance and repair of highways."

With respect to any question made or suggested in your communication, it may be said that I know nothing of any advice of this department, informal or otherwise, to the effect that when a property owner accepts an award of compensation or damages made by the Director of Highways in an appropriation proceeding of this kind without appealing therefrom, the costs should be borne by the property owner. On the contrary, it is quite clear that the only instance in which the property owner may be charged with any costs in any of the proceedings relating to the appropriation of his property is where he appeals from the finding and award of the Director of Highways and he fails to sustain such appeal on the trial of the case, or the same is dismissed.

In this connection it may be said that in a case such as is here presented, where the property owner accepted the award of compensation and damages made by the Director of Highways, he can not be charged with the costs of the proceedings relating to the appropriation without thereby violating the provisions of Section 19 of Article I of the State Constitution, which guarantees him full compensation for the property appropriated.

It follows from the conclusion here reached that the property owner named in your communication is not chargeable with any of the court costs in the proceedings relating to the appropriation of his property, that the lawful court costs made by the Director of Highways in said proceedings are to be paid by him. As to this it will be noted that Section 1188, General Code, above quoted, provides that the costs and expenses in connection with the appropriation of property for highway purposes, unless otherwise provided by law, shall be payable by the Director of Highways out of any funds of the department of highways available for the construction, improvement, maintenance and repair of highways.

Aside from the provision in the third paragraph of Section 1201, General Code, relating to the payment of costs in connection with the service on the property owner of the notice provided for therein, none of the sections of the General Code above noted makes any provision as to the fees and costs to be charged by the probate court for the services imposed upon it in the proceedings relating to the appropriation of property for road purposes. In this connection, however, it is to be noted that Section 1603, General Code, provides as follows:

“For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services.”

Paragraph 10 of Section 1201-1, General Code, which has been quoted herein, provides that the probate court shall make a record of all proceedings before him, and this provision, together with those contained in paragraph 3 of Section 1201, General Code, in my opinion, requires the probate court to make a record of its proceedings in the case here presented. The lawful fees and costs of the probate court for its services in making this record should be paid by the Director of Highways, but inasmuch as the duty imposed upon the probate court with respect to making such record is absolute said court would have no right to refuse to make up his record in said proceedings until the fees and costs therefor are paid. In this connection, however, I am further of the opinion that the probate court can not be required to make up and deliver to the Director of Highways a transcript of said proceedings until the lawful fees and costs for making such transcript are paid.

You state in your communication that it has been your understanding that in cases of appropriation of property made by the Director of Highways, a transcript of the probate court record constitutes your legal title to the property appropriated. The inquiry made in your communication does not require any decision on the question as to the time when the title to property appropriated by the Director of Highways

passes to the State of Ohio in a case like that here presented. It is sufficient for the purpose to say that in such case when the property owner accepts the award of compensation and damages made by the Director of Highways, or fails to perfect his appeal therefrom, the title to the property is then in the State, and that no transcript of the proceedings in the probate court relating to such appropriation is necessary to complete such title. Such transcript of the proceedings in the probate court, taken in connection with the record of proceedings in the office of the Director of Highways with respect to such appropriation, may properly be considered to be appropriate evidence of the title of the state to the property appropriated, and as such the Director of Highways, under the provisions of Section 1188, General Code, would doubtless be authorized to obtain such transcript and pay for the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2587.

PRISONER—INSOLVENT—OPINION No. 2380, APPROVED AND FOLLOWED.

SYLLABUS:

Opinion No. 2380, dated July 23, 1928, approved and followed.

COLUMBUS, OHIO, September 17, 1928.

HON. F. E. SLABAUGH, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

“Referring to your Opinion No. 2380, rendered me on the 23rd day of July, 1928, and in a further attempt to clarify the matter of the imprisonment of insolvent prisoners for a period of more than sixty days in the county jail, I am asking your department for a further opinion upon the effect of the decision of the Supreme Court in *re Boyer, Superintendent, Stark County Work House, vs. The State of Ohio ex rel. Halyburton*, being case No. 20937 on the Opinion No. 1182, cited in Opinion 2380, which opinion was addressed to the Commissioner of Prohibition in Ohio, the syllabus of which reads:

‘Section 11172, General Code, prescribing that a probate court may upon the hearing grant to an insolvent debtor, who had been imprisoned under process for fine, penalty or costs in a criminal proceedings, a certificate of release or dismiss his petition as seems just, vests in the court a legal or judicial discretion to be exercised according to law upon the facts found to be true by such court, and if the court finds that an applicant is in fact insolvent and has complied with all the provisions of the law relative to insolvent debtors, such court may not refuse to grant the certificate provided for in that section.’

Is it the opinion of the attorney general that the probate court has still the authority under Section 11172, G. C., to cause the release of prisoners under confinement in the county jail, who have served sixty days imprisonment and are insolvent, as you advised the state prohibition director?”