

respect to the conditions affecting said improvement and calling for the construction of the same, it may be stated in conclusion that while the total amount of the cost and expense of this improvement is to be apportioned by way of assessment upon all of the property in the improvement area benefited by the improvement, the assessment to be levied upon said railroad right of way or upon any other particular lot, tract or parcel of land in said improvement area should be such as is commensurate with the special benefit received by such particular lot, tract or parcel of land as compared to the whole of the special benefits conferred by the improvement.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2906.

FINES AND COSTS—SECURITY THEREFOR—MUNICIPAL COURT UN-AUTHORIZED TO ACCEPT PROMISSORY NOTE SIGNED BY DEFENDANT ALONE.

SYLLABUS:

A municipal court may not accept a promissory note signed by a defendant alone, to secure the payment of a fine and costs as provided in Section 13451-9 of the General Code.

COLUMBUS, OHIO, February 3, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of recent date, which is as follows:

“Section 13451-9 G. C., as amended, 113 O. L., page 199, reads:

‘When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain in jail until such fine and costs are paid or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs, at the rate of \$1.50 per day for each day’s imprisonment; provided that no commitment under this section shall exceed six months, and this section shall not affect the laws relating to the workhouses.’

Question: May a judge of a municipal court accept as security for the payment of a fine and costs, a note signed by the defendant, such note being a mere promise to pay at a given date, or in installments?”

Section 13451-9, General Code, quoted in your letter, provides that the “magistrate,” which includes the municipal court, may order that a person sentenced remain in jail until his fine be paid or secured to be paid. The statutes of Ohio do not specify the kind of security which may be accepted by the magistrate under the provisions of this section, nor are there any court decisions in Ohio in which the meaning of the phrase “or secured to be paid”, as used in this section or in cognate sections, has been determined.

In an opinion rendered by my predecessor under date of December 12, 1927, which is found in Opinions of the Attorney General, 1927, Volume 4, page 2455, consideration was given to similar language contained in Section 13717, General Code,

which section was repealed by the act to revise and codify the code of criminal procedure of Ohio (113 O. L. 123). Section 13451-9 was enacted in its stead, containing the same language as was contained in Section 13717, General Code. My predecessor held, as shown by the first and second branches of the syllabus, as follows:

"1. Magistrate is authorized to take either chattels or choses in action, including a mortgage, as security for the payment of a fine and costs. In case of default of payment of fine, mayor has right to sell chattels and foreclose mortgage.

2. Where security for fine and costs fails, execution may be levied upon the property of the defendant, or, in default thereof, upon the body of the defendant."

While it is true that in this opinion the security considered was a certificate of stock and a mortgage on real estate, nevertheless the holding appears broad enough to include all chattels and choses in action as security for the payment of a fine. I agree with my predecessor that the securities considered by him, to wit, a mortgage on real estate and a certificate of stock, may be accepted by a magistrate to secure the payment of a fine but I can not agree that all choses in action and chattels may be so accepted. Security is defined in 35 Cyc., 1284, as follows:

"Security.—That which makes secure or certain; that which renders a matter sure; an instrument which renders certain the performance of a contract; anything given as a pledge or caution; something which makes the enjoyment or enforcement of a right more secure or certain; anything that makes money more assured in its payment, or more readily recoverable; safety; certainty; anything given or deposited to secure the payment of a debt, or the performance of a contract; something to be given or deposited to make certain the fulfillment of an obligation, the observance of a provision or the payment of a debt; an evidence of debt or of property, as a bond, a certificate of stock, and the like."

It certainly was not the intention of the legislature that a person sentenced to pay a fine and costs should be released from immediate imprisonment on a naked promise to pay the fine nor by depositing an unsecured note signed by a defendant, which is nothing more than evidence of such a promise. The legislature made provision, by virtue of Section 13454-2 of the General Code, for the levying of an execution against the property of a defendant to satisfy a judgment for a fine and costs in a criminal case. An unsecured promissory note would not make more certain the recovery of such a judgment. In order to recover on the note it would be necessary to obtain a judgment based upon the failure of the defendant to pay such note and the judgment so obtained would not place the state in any better position to collect the fine and costs, for it already had such a judgment against the defendant and the right to levy execution against his property when the fine was imposed. Since an unsecured promissory note signed by a defendant does not make the payment of the fine and costs more assured or more readily recoverable, I am inclined to the view that upon the giving of such a note by a defendant the payment of the fine and costs is not "secured to be paid" within the meaning of Section 13451-9 of the General Code.

Specifically answering your inquiry, I am of the opinion that a municipal court may not accept a promissory note signed by a defendant alone, to secure the payment of a fine and costs as provided in Section 13451-9 of the General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.