

183.

COSTS—EXTRADITION OF PERSONS FOR MISDEMEANOR—NOT CHARGEABLE TO PROSECUTION—HOW DEPUTY SHERIFF REMUNERATED FOR EXPENSES.

*SYLLABUS:*

1. *The costs of extradition of a defendant charged under the laws of Ohio with a misdemeanor cannot be made a part of the costs of prosecution.*

2. *The expenses of a deputy sheriff incurred by him as the agent of the Governor in the extradition of a defendant charged with a misdemeanor can only be paid from the fund authorized by Section 3004, General Code, by order of the prosecuting attorney, unless the misdemeanor charged is one of those enumerated in Section 1665, General Code, in which case the county commissioners are required by Section 1665-1 of the General Code to pay such expenses from the general fund of the county.*

COLUMBUS, OHIO, March 11, 1929.

HON. MERVIN DAY, *Prosecuting Attorney; Paulding, Ohio.*

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

“At the present term of our court, one E. K. was indicted by our grand jury for an offense under the laws of Ohio for a crime committed in Ohio. The accused being actually present in Ohio and thereafter fled to the State of Indiana. He was later apprehended in Fort Wayne, Indiana, refused to come to Ohio and stand trial without extradition papers. Whereupon the necessary papers were procured and our deputy sheriff was appointed as agent to visit the Governor of Ohio and the Governor of Indiana to secure the necessary papers, which were issued.

The deputy sheriff incurred expenses, to wit: \$5.00 to the Governor of Ohio; \$3.00 to the Governor of Indiana; about \$20.00 railway fare and some other necessary expenses, making a total expense of \$32.00.

Thereafter the accused was brought before our court and plead guilty to the charge. It being a misdemeanor the court ordered the defendant to pay a fine of \$110.00 and the costs of prosecution and to stand committed until such fine and costs were paid.

The right to include the costs of extradition as above laid out with the costs of prosecution, having been disputed, the accused paid the fine and costs and deposited with the Clerk of Court a sum of money sufficient to cover the cost of extradition.

QUERY: Is the necessary cost incurred in extraditing said defendant a part of the costs of prosecution, such that the accused is liable therefor or should this expense be paid by the county and not collected from the defendant.”

Section 2491, General Code, provides:

“When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated

in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

Section 13722, General Code, provides:

"Upon sentence of a person for a felony, the clerk shall make and certify, under his hand and the seal of the court, a complete itemized bill of the costs made in such prosecution including the sum paid by the county commissioners, duly certified by the county auditor, for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal."

Construing these sections together, it is to be observed that the costs of extradition can be assessed against a defendant in a criminal action when the defendant is charged with a felony under the laws of Ohio, but I find no authority given by statute for payment of expenses of the agent of the governor when the prisoner is charged with a misdemeanor.

I assume from your communication that the defendant in the case to which you refer was indicted for a misdemeanor under the laws of Ohio; therefore, neither Section 2491, General Code, *supra*, nor Section 13722, General Code, *supra*, will apply in the matter to which you specifically refer.

Costs are unknown to the common law and hence are given only by the statute. 15 C. J. 330; *Farrier vs. Cairn*, 15 O. 45; *Bell vs. Bates*, 3 O. 380; *State vs. Commissioners*, 14 C. C. 26. Accordingly, unless the statute provides therefor, these items of costs may not be assessed. Since there is no statutory authority in this instance, I am of the opinion that the costs of extradition of a fugitive from justice cannot be a part of the costs of prosecution when the defendant has been charged with a misdemeanor.

It remains to be determined how the deputy sheriff may receive reimbursement for the expenses incurred. Section 2997 of the General Code provides for allowances to the sheriff for, among other things, "his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses." This would authorize the payment of expenses in every instance where the sheriff or his deputies are, in their official capacity, subjected to expense of the character mentioned. In this instance, however, the deputy is acting not as a deputy, but as the agent of the governor in an extradition matter. As I have heretofore pointed out, those expenses may be paid and charged as costs where the defendant has been charged with a felony, but the only instance of which I know where the expenses of the agent are payable in misdemeanor cases is that provided for in Section 1665-1 of the General Code. This section authorizes the payment by the county commissioners from the general expense fund of the county where the extradition is had of one charged with failure to support a minor, etc., under the provisions of Section 1665, General Code, which is a part of the Juvenile Court Act. Accordingly, unless the misdemeanor is one under the provisions of this section, there is no specific statutory authority for the payment of the expenses of the agent, and I do not feel that Section 2997 is applicable.

The fund appropriated to the use of the prosecuting attorney under authority of the provisions of Section 3004, General Code, is to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance

of justice. The section is broad enough, in my opinion, to cover the expenses here under consideration.

I am, accordingly, of the opinion that the expenses of a deputy sheriff incurred by him as the agent of the governor in the extradition of a defendant charged with a misdemeanor can only be paid by order of the prosecuting attorney from the fund authorized by Section 3004, General Code, unless the misdemeanor charged is one of those enumerated in Section 1665, General Code, in which case the county commissioners are required by Section 1665-1 of the General Code to pay such expenses from the general fund of the county.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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184.

CORPORATION—RECEIVING DEPOSITS TO USE AS CAPITAL AND ISSUING NOTES TO EVIDENCE INDEBTEDNESS—ENGAGED IN BANKING BUSINESS.

*SYLLABUS:*

*A corporation which solicits and receives deposits of money and, as evidence of its indebtedness to depositors, issues interest-bearing promissory notes payable at a fixed time and uses the proceeds of such deposits as working capital in its business is engaged in a banking business.*

COLUMBUS, OHIO, March 12, 1929.

HON. E. H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

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

“The ————— Mortgage Company, a corporation, was organized under the laws of this state some years ago for the following purposes, to-wit:

‘Of acquiring, owning, holding and disposing of bonds, notes, bills of exchange, mortgages, bills of lading, warehouse receipts, and other securities, as owner, agent, factor or broker; of acquiring, owning, holding and selling real and personal property necessary or convenient to carry out the purpose aforesaid; and the doing of all things necessary or incident thereto.’

Since its organization the company has been actively engaged in the business of loaning money and buying and selling mortgages on property located in its home county.

The attention of the Division of Banks has recently been called on several occasions to advertising matter of this company inserted in daily newspapers and in pamphlet form, copies of which advertisement I am herewith enclosing you.

Funds obtained by this method are used by the company as working capital in its business. Receipt of all moneys placed with the company, as outlined in the copies of advertisements, which I am enclosing, is evidenced by a promissory note executed by the company and delivered to the party placing his funds with it. A blank note such as is given the customer is also herewith enclosed.