

**Note from the Attorney General's Office:**

1930 Op. Att'y Gen. No. 30-1583 was overruled by  
1960 Op. Att'y Gen. No. 60-1150.

1582.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND R. BURTON CHILD, FINDLAY, OHIO, FOR CONSTRUCTION OF TUNNELS AND ROADS AT LONGVIEW STATE HOSPITAL, CINCINNATI, OHIO, AT AN EXPENDITURE OF \$24,725.00—SURETY BOND EXECUTED BY THE HARTFORD ACCIDENT AND INDEMNITY COMPANY.

COLUMBUS, OHIO, March 3, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for and on behalf of the Department of Public Welfare (Longview State Hospital), and R. Burton Child of Findlay, Ohio. This contract covers the construction and completion of the general contract for tunnels and roads, including alternate "A" of Item 2 of the proposal dated December 16, 1929, at Longview State Hospital, Cincinnati, Ohio, and calls for an expenditure of twenty-four thousand, seven hundred and twenty-five dollars (\$24,725.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted evidence that the Controlling Board has properly consented to and approved the expenditure of the moneys appropriated by the 88th General Assembly, for the purpose covered by this contract, in accordance with Section 11 of House Bill No. 510 of the 88th General Assembly. In addition, you have submitted a contract bond upon which the Hartford Accident and Indemnity Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation Act have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same to you herewith, together with all other data submitted in this connection.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

1583.

CRIMINAL LAW—EXPENSE OF TRANSCRIPT OF CASE, BUT NOT ATTORNEY FEES MAY BE INCLUDED IN COST BILL AND PAID BY STATE.

**SYLLABUS:**

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.*

COLUMBUS, OHIO, March 4, 1930.

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

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

“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.”

Section 13455-3 of the General Code provides that upon sentence of a person for felony, the clerk of courts shall make and certify a complete itemized bill of costs made in the prosecution. Section 13455-4, General Code, provides that the clerk issue executions for the costs of prosecution to the sheriff against the property of a person sentenced for a felony. Section 13455-5, General Code, provides that if the convict is sentenced to imprisonment in the penitentiary or reformatory and no property is levied against, the sheriff is required to deliver the itemized costs to the warden or superintendent of the institution to which the person is conveyed.

Section 13455-7, General Code, provides as follows:

“When the clerk of courts certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff ‘no goods, chattels, lands or tenements found whereon to levy,’ the warden of the penitentiary or superintendent of such reformatory shall certify thereon, the date on which said prisoner was received at the institution and the fees for transportation, whereupon the auditor of the state shall audit such cost bill and the fees for transportation, and issue his warrant on the treasurer of the state for such amount as he finds to be correct.”

Section 13455-8, General Code, provides as follows:

“Upon the return of the writ against the convict, if an amount of money has not been made sufficient for the payment of costs of conviction and no additional property is found whereon to levy, the clerk shall so certify to the Auditor of State, under his seal, with a statement of the total amount of costs, the amount paid and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the State to the order of such clerk.”

The sections referred to and quoted above, provide under what circumstances the State pays the costs of prosecution of a person sentenced and committed to the penitentiary or reformatory. However, in order to ascertain whether or not the items to which you refer in your letter are costs within the meaning of these sections, it is necessary to examine the statutes relating to these particular items. There is a general rule that recovery and allowance of costs rests entirely upon statutory provisions. This is so because costs were not known at common law.

Section 1552 of the 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 transcript 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 of (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. \* \* \* "

You will note that these sections 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.

Addressing myself to your inquiry with reference to attorney fees, Section 13439-2 and Section 13439-3, General Code, are pertinent. Section 13439-2, authorizes the court to appoint counsel for a person accused of felony if after indictment the accused is without and unable to employ counsel. Section 13439-3 provides in part as follows:

"Counsel so assigned in a case of felony shall be paid for their services by the county, and shall receive therefor, in a case of murder in the first or second degree, such compensation as the court approves; \* \* \* The auditor of the county shall draw his order on the treasurer for the payment of such counsel in the amount fixed by the judge or judges of the court, and certified by them to the county auditor."

There is nothing in Section 13439-3, General Code, authorizing this expense to be taxed as costs, nor that it be collected in any other way except upon an order by the county auditor on the treasurer of the county.

In the case of *State ex rel Commissioners of Franklin County vs. Guilbert, Auditor*, 77 O. S. 333, the court was called upon to determine whether or not compensation of an expert witness for services rendered under the provisions of

a statute which provided that the "county commissioners may upon the certificate of the prosecuting attorney or his assistant, allow and pay an expert such compensation for his services as the court approves and the commissioners deem just and proper," were costs that the statute authorized to be paid out of the state treasury. The court in the course of its opinion, said as follows:

"Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed and included in the judgment or sentence. The word does not have a fixed legal signification. As originally used it meant an allowance to a party for expenses incurred in prosecuting or defending a suit. Costs did not necessarily cover all of the expenses and they were distinguishable from fees and disbursements. They are allowed only by authority of statute, and the word not having a fixed legal signification, it does not follow that the compensation of the expert, though an expense, is costs made in the prosecution."

The court held in this case that there was nothing in the act authorizing the expense for the expert to be taxed as costs or to be paid otherwise than by the county commissioners and therefore was not costs that the statute authorized to be paid out of the state treasury. Section 13439-3, *supra*, does not make any provision that the compensation for the services of an attorney should be taxed as costs and is similar in this respect to the statute that the court had under consideration in the case of *State ex rel. Commissioners of Franklin County vs. Gilbert, Auditor*, and therefore the ruling of the court in that case is determinative of the question presented by you.

I am therefore of the view that 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.

In specific answer to your inquiry, I am of the opinion that:

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.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

1584.

ADOPTION—RIGHTS OF MOTHER UNDER TWENTY-ONE TO CONSENT TO HER CHILD'S ADOPTION OR SURRENDER IT TO AN AGENCY UNDER TERMS OF SECTIONS 1352-12 AND 1352-13, GENERAL CODE.

SYLLABUS:

*A mother who is a minor under 21 years of age may lawfully give her consent to the adoption of her child, under the provisions of Section 8025 of the General Code, and may also surrender such child under Sections 1352-12 and 1352-13, General Code.*