

778.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND THE A. W. BURNS CONSTRUCTION COMPANY, FOR PAVING OF ROAD AT OHIO STATE UNIVERSITY, COLUMBUS, OHIO, AT AN EXPENDITURE OF \$38,261.67—SURETY BOND EXECUTED BY THE DETROIT FIDELITY AND SURETY COMPANY.

COLUMBUS, OHIO, August 21, 1929.

HON. RICHARD T. WISDA, *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 the Board of Trustees of the Ohio State University, and The A. W. Burns Construction Company, of Columbus, Ohio. This contract covers the paving of road west of horse barn, west of gymnasium, north and south of chemistry building, on the grounds of the Ohio State University, including Alternate "A", as covered by the plans and specifications for said work, and calls for an expenditure of thirty-eight thousand two hundred sixty-one and 67/100 dollars (\$38,261.67).

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 furnished evidence to the effect that the consent of the Controlling Board to the expenditure has been obtained, as required by Section 11 of House Bill No. 510 of the 88th General Assembly. In addition you have submitted a contract bond, upon which the Detroit Fidelity and Surety 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 herewith to you, together with all other data submitted in this connection.

Respectfully,

GILBERT BETTMAN,

Attorney General.

779.

COSTS—JUDGES' ELECTION CONTEST—LEGALITY OF PAYMENT FROM STATE TREASURY OF VARIOUS ITEMS OF EXPENSE—EMERGENCY BOARD UNAUTHORIZED TO PROVIDE FOR PAYMENT.

SYLLABUS:

1. *Provisions in the judgment entry of the Court of Appeals in an election contest case under the provisions of Sections 5137, et seq., General Code, ordering "the proper legal costs" of the proceeding to be paid from the treasury of the State of Ohio, have reference only to such expenses incurred in the hearing and determination of such cases as are by law made costs in the case and taxable as such.*

2. *Although there is no statutory provision which makes the compensation of examiners or tellers appointed by a Court of Appeals for its assistance in the hearing and determination of an election contest case costs in such case, if such Court of Appeals in its judgment entry specifically makes allowance of the compensation of such examiners or tellers as costs in the case, in amounts fixed by the court, this department if it find such compensation so fixed by the court to be reasonable, in amount, should not advise against the payment of such compensation as costs contrary to the judgment and decree of the court.*

3. *The fact that the Court of Appeals in an election contest case heard and determined by it under the provisions of Sections 5137, et seq., General Code, by its judgment entry orders certain items of costs incurred in the trial of said proceeding to be paid out of the state treasury, does not present a case of "an emergency requiring the expenditure of money not specifically provided by law" within the meaning of those terms as used in Section 2313, General Code, and the emergency board is not authorized to make an allotment of moneys appropriated to it generally by the Legislature, for the purpose of paying such costs.*

COLUMBUS, OHIO, August 21, 1929.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

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

"An itemized bill in the sum of \$3,560.15 has been filed by C. D. Hoffman, Clerk of Courts of Montgomery County, Ohio, accompanied by an entry of the Court of Appeals certifying this amount from the State treasury.

The aforesaid amount represents the costs in the case of W. S. McConnaughey, Contestor, vs. Robert C. Patterson, Contestee, involving the question of the election of a Common Pleas judge for Montgomery County at the November election, 1928.

I would like to have your opinion as to the legality of this bill.

The Clerk of Courts cites Section 5144, General Code, as authority for the payment of this bill, but inasmuch as no payment may be made from the State Treasury unless there is a specific appropriation therefor, we see no way of payment, if legal, unless such appropriation would be authorized by the Emergency Board.

We would especially inquire as to the legality of the last item in the attached bill of \$1,630.00, for the services of watchman, which was paid out of the county treasury. This amount certainly would be a charge to be paid by the county, the same as other election expenses."

The itemized bill referred to in your communication is one of certain costs and expenses incurred in a certain cause and proceeding in the Court of Appeals of Montgomery County, wherein W. S. McConnaughey unsuccessfully contested the election of Robert C. Patterson to the office of Common Pleas Judge of Montgomery County at the November election, 1928, which case was heard and decided by Judge Phil M. Crow of the Third District, Judge Silas Richards of the Sixth District, and Judge Roscoe J. Mauck of the Fourth District, each sitting as a member of the Court of Appeals of Montgomery County by designation under the provisions of Section 1528 of the General Code.

The itemized bill of the costs and expenses incurred in connection with the trial of said case is as follows:

Clerk of Courts of Montgomery County, Ohio.....	\$43 00
Sheriff of Montgomery County, O.....	6 15
Rent for safety deposit box.....	3 00
Depositions taken by Gale Morgan.....	553 00
Stenographer, Catherine Beigel.....	15 25
A. U. Thomas, Teller, 24 days @ \$10.00 per day.....	240 00
Harry J. Miller, Teller, 24 days @ \$10.00 per day.....	240 00
Chas. Dugan, Teller, 24 days @ \$10.00 per day.....	240 00
Wm. J. Fitzpatrick, Teller, 21 days @ \$10.00 per day.....	210 00
Harold F. Demann, Teller, 3 days @ \$10.00 per day.....	30 00
Phil M. Crow, Judge, 6 days @ \$20.00 per day.....	120 00
Silas S. Richards, Judge, 5 days @ \$20.00 per day.....	100 00
Roscoe J. Mauck, Judge, 5 days @ \$20.00 per day.....	100 00
Printing of Tally Sheets.....	29 75
Watchmen paid out of County Treasury.....	1,630 00
	<hr/>
	\$3,560 15

Under the provisions of Section 5137, General Code, the Court of Appeals has exclusive original jurisdiction of the contest of election of Common Pleas judges. This jurisdiction is conferred upon the Court of Appeals not as judicial power under the provisions of Section 1 of Article IV of the Constitution, but is conferred pursuant to the express provisions of Section 21, Article II of the state Constitution which provides that the General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted.

Section 5139, General Code, makes provision as to the time and manner in which the issues shall be made up in a case of this kind and Sections 5140 to 5143, inclusive, of the General Code, make provision as to the manner in which the evidence in the case shall be taken and as to the manner in which the same shall be presented and heard by the court. Section 5144, General Code, reads as follows:

"If the contesting elector is not a claimant for the office, he shall at the time of filing his appeal also file a bond, with sureties to be approved by the clerk, conditioned that he will pay all costs that may be finally adjudged against him therein. Upon the final hearing, the court shall adjudge the costs of the case as to it seems just and equitable, and in such adjudication it shall find what part, if any thereof, should be paid from the state treasury."

From the provisions of Section 5144, General Code, above quoted, it will be noted that upon final hearing of the cause the court is authorized to adjudge the costs of the case as to it seems just and equitable, and what part, if any, of such costs shall be paid from the state treasury.

The judgment entry of the court in this case after finding that said Robert C. Patterson was duly elected at the general election held November 6, 1928, to the office of Common Pleas judge for Montgomery County, Ohio, and that he was legally entitled to receive the certificate of election theretofore awarded him by the board of deputy state supervisors of elections, provides further as follows:

"And coming now to adjudge the cost of the proceedings herein the Court does find that the questions involved were of general public importance and were in all instances caused to arise through the errors and mistakes of officials of the State of Ohio, and that it is just and equitable that the State of Ohio should therefore pay the same.

Wherefore: it is hereby ordered by the Court that all of the proper legal costs of this proceeding, due either to the sheriff or Clerk of the Courts of Montgomery County, Ohio, including in the latter the fees of the stenographer and notary in the taking of depositions and an allowance of ten (\$10.00) dollars per day each to the several examiners appointed by the court to assist in the making of said recount for each day expended thereon, shall be paid from the treasury of the State of Ohio, as provided by law."

The order of the court above quoted so far as any question here presented, deals only with the proper legal costs of the case, and no item of expense incurred in connection with the trial of the case can properly be allowed and paid as costs otherwise than pursuant to statutory provision.

The term "costs" includes in its legal meaning only such costs as may be taxed pursuant to statutory provision therefor. *Farrier vs. Carins*, 5 Ohio 45; *State ex rel vs. Guilbert*, 77 O. S. 333; *Equipment Company vs. Kauffman*, 13 O. N. P. (N. S.) 59.

In the case of *State ex rel. vs. Guilbert, supra*, in which there was involved the question as to the right to include in a criminal cost bill certain expenses incurred by the county in securing the evidence of an expert witness on behalf of the state in a criminal case tried in the Common Pleas Court of the county, it was said:

"Costs, in the sense the word is generally used in this state, may be defined as being the statutory fee 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. * * * The word does not have any fixed legal significance. 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."

In this connection it has been further held that expenses are costs only when made so by statute and that the term "costs" includes only those expenditures which are by law taxable and to be included in the judgment. *State ex rel vs. Commissioners*, 6 O. D. (N. P.) 240.

In this view it is obvious that there is no authority for including in the bill of costs the following items in the itemized bill set out above, to-wit: Rent for safety deposit box, \$3.00; printing of tally sheets, \$29.75; watchman paid out of the county treasury, \$1,630.00.

The same is true with respect to the per diem allowance of the Court of Appeals judges who heard the case, which allowance under the provisions of Section 2253-3, General Code, as amended, 112 O. L. 346, is to be paid from the treasury of Montgomery County upon the warrant of the county auditor. Properly construed there is nothing in the judgment entry of the Court of Appeals in this case which seeks to make the above mentioned items of expense costs in said case or requires the payment of the same out of the state treasury.

With respect to the other items set out in the itemized bill above referred to, it is assumed that the items of \$43.00 and \$6.15 payable to the clerk of courts and sheriff, respectively, may be the proper legal fees of such officers for services rendered by them in this case. The proper costs of the clerk and sheriff are included in the judgment entry and order of the court in this case and the same may therefore be properly allowed for payment out of the state treasury as required by the judgment and order of the court.

As to the item "Depositions taken by Gale Morgan, \$553.00" it may be said, assuming that if the bill of the notary is not excessive, but is such as complies with the provisions of Sections 127 and 11545, General Code, there can be no question but that the fees for taking such depositions are properly costs, and that as such under the order of the court, the same are properly payable out of the state treasury.

As to the item of \$15.25 for the services of Catherine Beigel as stenographer, it may perhaps be assumed that this item represents only the stenographer's per diem properly chargeable as costs under the provisions of Section 1549, General Code, and on this assumption said item may properly be allowed as costs and paid out of the state treasury pursuant to the order of the court made in this case.

As to the other items set out in said itemized bill, to wit, those covering the compensation of examiners or tellers appointed by the court for its assistance in the hearing and determination of said case, it is to be observed that there is no statutory provision making such expenses costs. Inasmuch, however, as the Court of Appeals has specifically made an allowance of the compensation of these tellers as costs in the case, and such compensation so fixed by the court is reasonable in amount, I do not feel that I am in position to advise against the payment of this claim in the face of the decree of the court. See Opinions of the Attorney General, 1915, Vol. I, page 688.

In your communication to me you refer to the fact that no specific appropriation has been made by the Legislature for the payment of any of these claims and that you do not see how any payment of the same can be made unless some appropriation for the purpose is authorized by the Emergency Board. As to this, it is to be observed that the Emergency Board has no legislative power whatever. By House Bill No. 510, the same being the General Appropriation Act, passed by the 88th General Assembly, an appropriation was made to the Emergency Board of \$500,000 for each of the years 1929 and 1930. The question presented in your communication with respect to this matter is whether any part of the moneys so appropriated to the Emergency Board may be allotted by said board for the purpose of paying the claims allowed as costs in the judgment entry of the Court of Appeals in the case above referred to.

Touching the power and authority of the Emergency Board, Sections 2313 and 2313-1, General Code, provide as follows:

Sec. 2313. "In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or in case of an emergency requiring the expenditure of money not specifically provided by law, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission, may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made or to expend money not specifically provided for by law. Such applicant shall fully set forth to the secretary in writing the facts in connection with the case. As soon as can be done conveniently, the secretary shall arrange for a meeting of the board, and shall notify the applicant of the time and place of the meeting and request his presence. No authority to make such expenditures shall be granted with the approval of less than two members of the board, who shall sign it."

Section 2313-1. "The written authority provided for in Section 2313 shall specify the amount in which and the purposes for which obligations may be created as therein provided. It shall be filed with the Auditor of State and he shall open an account in payment of any obligation authorized as provided in Section 2313. The applicant receiving such authority shall issue proper vouchers to the Auditor of State, as provided by section two hundred

and forty-four of the General Code. Upon receipt of such vouchers the auditor, if satisfied as provided in said section that the claim presented is due and payable, shall draw his warrant on the treasurer of state against any appropriation for the uses and purposes of the emergency board."

In an opinion of this department under date of August 3, 1927, Opinions of the Attorney General, 1927, Vol. II, page 1441, construing the above quoted provisions of the General Code, it was held:

"The Emergency Board is empowered to make an allotment of funds only (a) in case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or (b) in case of an emergency requiring the expenditure of money not specifically provided by law, i. e., in case of a sudden or unexpected happening or unforeseen occurrence or condition."

"The power and duty of determining whether or not a case of emergency exists is primarily vested in the Emergency Board, which is to be guided by legal principles and not by questions of policy, any abuse of discretion being reviewable by the courts."

No question is here presented with respect to any deficiency in any of the appropriations made for the expenses of any institution, department or commission of the State for this biennial period, and the only question is whether the act of the Court of Appeals in the case above referred to, directing the payment of certain specified items out of the treasury of the State as costs is "an emergency requiring the expenditure of money not specifically provided by law", within the meaning of Section 2313, General Code. In the former opinion of this department of August 3, 1927, above referred to, it is said:

"While the power and duty of determining whether or not 'a case of an emergency' exists is primarily vested in the board itself, the board is to be guided by legal principles in determining what is an emergency and not by questions of policy. The word emergency has been defined many times and its meaning is not difficult to ascertain. The definition given by the Century Dictionary, quoted with approval by the Supreme Court of Ohio, in the case of *State ex rel. vs. Zaugerle, Auditor*, 95 O. S. 1, 8, is readily understandable and is as follows:

'(1) A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances.

(2) A sudden or unexpected occasion for action; exigency; pressing necessity.'

Only is the board empowered to act, when an emergency, as that term is legally defined, exists. Any attempt to exercise a discretion in the absence of an emergency under the law is clearly unwarranted."

The act of the Court of Appeals in directing the payment of the claims above referred to out of the state treasury does not, in my opinion, create an emergency within the meaning of that term as used in Section 2313, General Code, although aside from the action of such Emergency Board, there are no moneys presently available for the payment of such claims. The statutory provisions providing for the hearing of election contests involving the office of Common Pleas judge have been in existence for many years, as have the provisions of Section 5144, General Code,

authorizing the trial court in a case of this kind to allow the payment of costs out of the state treasury. The election contest case above mentioned was pending in the Court of Appeals in Montgomery County while the 88th General Assembly was in session and, although, perhaps, it is not proper to say that a judgment of that court in this case with respect to the payment of court costs therein was a matter that the General Assembly should have contemplated, yet, it is clear that the act of the court in directing the payment of the costs in the case out of the state treasury rather than in some other manner, does not present any case of emergency within any accepted definition of that term as used in Section 2313, General Code.

Moreover, with respect to this question, it will be noted that under the provisions of Section 2313, General Code, the action of the Emergency Board is invoked by an application made to such Emergency Board by the trustees, managers, director or superintendent of some state institution or by some officer or commission or some department of the state government. With respect to the question here presented, it cannot be said that any officer, board or commission of the state government could be called upon to make application to the Emergency Board for authority to expend moneys in payment of the court costs specified in the judgment entry of the Court of Appeals; and further, in this connection, it does not appear what state officer, board or commission would issue vouchers for the payment of such costs if such payment were authorized by the Emergency Board.

Upon the considerations above noted, I am led to the conclusion that the only way that the items specified in the judgment entry of the Court of Appeals and therein allowed by the court as costs to be paid out of the state treasury, can be so paid will be by an appropriation made by the Legislature for that purpose.

Respectfully,

GILBERT BETTMAN,

Attorney General.

780.

APPROVAL, ENCUMBRANCE ESTIMATE TO LAND OF PHILIP MORTON
IN CARTHAGE, CINCINNATI, HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, August 21, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of even date herewith, submitting for my examination and approval encumbrance estimate No. 5267 and Controlling Board's certificate relating to the proposed purchase by the State of Ohio of a perpetual easement in and over a tract of land in Carthage, Cincinnati, Ohio, owned of record by one Phillip Morton, and which tract or parcel of land is more particularly described in Opinion No. 691 of this department recently directed to you.

An examination of encumbrance estimate No. 5267 shows that the same is in all respects properly executed and that there are sufficient balances in a proper appropriation account to pay the purchase price of the easement which the State purposes to secure in and upon said tract of land.

The Controlling Board's certificate executed under date of September 8, 1927, shows a release of the sum of \$25,000 in the appropriation account for the purchase of a water filtration system which, I assume, covers the purpose for which this easement is to be secured. Said encumbrance estimate and Controlling Board's certificate relating to the purchase of the easement here in question are accordingly hereby approved.