

1400.

APPROVAL, BONDS OF THE CITY OF JACKSON, JACKSON COUNTY—
\$4,400.00.

COLUMBUS, OHIO, December 19, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1401.

PROSECUTING ATTORNEY—ASSISTANT COUNCIL MAY BE APPOINTED BY COURT OF COMMON PLEAS—COMPENSATION FIXED BY COUNTY COMMISSIONERS—RELATIVE AUTHORITY OF COMMON PLEAS COURT AND COUNTY COMMISSIONERS, DISCUSSED:

SYLLABUS:

1. *A court of common pleas may appoint counsel to assist the prosecuting attorney, under and by virtue of Section 13562, General Code, without first consulting the board of county commissioners as to whether or not any appropriation previously has been made for compensating such appointee. The allowance of such appointee's compensation, and the fixing of the amount thereof, rests entirely in the discretion of the county commissioners; and the same can not be paid unless an appropriation has been made therefor.*

2. *Under the provisions of Section 13618, General Code, the amount of compensation to be paid by the county to an attorney under appointment by the trial court for the purpose of defending an indigent prisoner, is such sum or sums as the commissioners of said county, in the exercise of their discretion may allow, subject to the limitations set out in said section.*

3. *County commissioners, by virtue of the authority vested in them to fix the amount of appropriations, as provided for in Sections 5625-29, et seq., General Code, have it within their power to regulate the aggregate amount to be expended by the prosecuting attorney, in any one year, of the allowances made to him under the authority of Section 3004-1, General Code. If the court, in fixing an allowance under Section 3004-1, General Code, fixes it in excess of the amount appropriated, and the county commissioners do not within the fiscal year amend their appropriation so as to include the amount of such allowance, then, such an allowance is ineffective, and the court is without power to require the commissioners to appropriate monies to cover same.*

COLUMBUS, OHIO, December 19, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your communication requesting my opinion in answer to several questions submitted to you by the county commissioners of Portage County. These questions were submitted to you by letter from the clerk of said board of county commissioners, which letter is as follows:

"At the request of the board of county commissioners, the following questions are sent you with the request that you advise the board the holding of your department thereon.

(a) Under Section 13562, appointment of counsel to assist prosecuting attorney, has the court the right to appoint such assistants without consulting the board as to their idea of a just and proper allowance, or without ascertaining if there are funds available for such appropriation? In other words, does Section 13562 take precedence to Section 5625-33 (d)?

(b) Under Section 13618, payment of counsel assigned in cases of felony, has the court the right to contract for such counsel without securing first an appropriation by the commissioners for an agreed sum? This question also depends upon the last question in the paragraph (a).

(c) Under Section 3004-1, additional funds for investigation and prosecuting crimes, has the court the right to order payment of additional allowance for the prosecuting attorney without securing an appropriation? What action can the court take if the funds are all appropriated for current expenditures and no appropriated funds can be diverted and reappropriated?

These questions being of such a nature that the prosecuting attorney might be biased somewhat, it is felt that it would be best to refer them to your department. It appears that the court is of the opinion that an expenditure approved by him is not subject to appropriation nor question or criticism, but should be paid forthwith.

Assuring you that we will appreciate any information that you may have on these questions, we remain,"

Sections 13562, 13618, and 3004-1, read as follows :

Section 13562. "The common pleas court or the court of appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners shall pay such assistant such compensation for his services as such court approves and to them seems just and proper."

Section 13618. "Counsel so assigned in a case of felony shall be paid for their services by the county, and may receive therefor, in a case of murder in the first or second degree, such compensation as the court approves; in a case of manslaughter, not exceeding one hundred dollars, and, in other cases of felony, not exceeding fifty dollars. The auditor of such county shall not draw an order on the treasurer for the payment of such counsel until the account for such services has been presented to and allowed by the commissioners thereof."

Section 3004-1. "When in the opinion of the prosecuting attorney an emergency exists by reason of the unusual prevalence of crime or when it appears to be probable that criminal efforts are being made to obstruct the due administration of justice, if the funds available to him under the provisions of Section 3004 of the General Code are insufficient for the purposes of the necessary investigation and prosecution of such activities and offenses, he may make application to the judge or judges of the court of common pleas of the county for additional funds. The judge or judges, if satisfied that the expenditure of additional funds will be for the public benefit and will promote the administration of justice, may by order entered in the journal of the court allow to him additional funds not in excess of ten thousand dollars

(\$10,000.00) in any one year. This fund shall be expended upon the order of the prosecuting attorney in the manner prescribed by Section 3004 of the General Code."

Section 5625-33, General Code, 112 Ohio Laws, 406, reads in part as follows :

"No subdivision or taxing unit shall :

(a) * * *

(b) Make any expenditure of money unless it has been appropriated as provided in this act.

(c) Make any expenditure of money except by a proper warrant drawn against an appropriate fund which shall show upon its face the appropriation in pursuance of which such expenditure is made and the fund against which the warrant is drawn.

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same * * * has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * * ."

It will be observed, by the terms of both Section 13562 and Section 13618, supra, that the compensation of attorneys, appointed in the one case to assist the prosecuting attorney in the trial of the case, and in the other to defend an indigent prisoner, is subject to the approval or allowance of the county commissioners, after approval by the court. In Section 13562, supra, you will note the following language :

"Such compensation for his services as such court approves and to them (the county commissioners) seems just and proper."

Again in Section 13618, supra :

"Such compensation as the court approves; * * * The auditor of such county shall not draw an order on the treasurer for the payment of such counsel until the account for such services has been presented to and allowed by the commissioners thereof."

If there could be any doubt as to the meaning of the language used in the section last referred to, it is definitely settled by our Supreme Court in the case of *Long vs. Commissioners*, 75 O. S. 539.

Section 13618, supra, has not been changed since its enactment in 1894, 91 Ohio Laws, 64. The case of *Long vs. Commissioners*, supra, was decided in 1907. Commenting on the language of Section 13618, supra, Judge Price in the Long case said, on page 546 :

"It says: 'Counsel so assigned in any cases of felony shall be paid for their services by the county, and may receive therefor in any case of murder in the first or second degree such compensation as the court *approves*.' The talismanic words, 'examined' and 'allowed' are absent. The word '*approves*' is not the equivalent of '*allowed*' or of the word '*fixed*,' which is sometimes used to express a similar sense. The word '*approve*' seems to relate for its object to something made, done or said by another. If the legislature intended by this section so worded, to invest the trial court with exclusive power to

determine what compensation should be paid by the county in such cases, it has been unfortunate in the use of our common language. It rather appears to us that the trial court is authorized to suggest the amount which should be paid—to approve of a certain sum that should be paid, relying on the commissioners to respect and give proper weight to the opinion of the court. But that the act of *approval* by the court is final on the subject, we think is clearly denied by the balance of the section. It fixes a limit of \$100 in any case of manslaughter, and in any other case of felony, \$50. Hedging again on the whole subject, the act proceeds to say: 'But the auditor shall not draw an order on the treasurer for the payment of *any such counsel*, until such account for services shall have been *presented to and allowed by* the commissioners.'

This clause is very weighty, for without the order or warrant of the county auditor it would be most difficult to obtain payment. The language prohibits the giving of any such order until the bill has been presented to and allowed by the commissioners. They thus hold the key to the public purse, and if they do not unlock it, the *approval* of the court is an empty ceremony.

Nor can we see that the action of the commissioners is subject to the *approval* of the court before it becomes effective. So that it seems to us that the court is permitted, and perhaps authorized, to express an opinion as to what the compensation of attorneys should be for defending in cases of murder in the first or second degree, but the commissioners are not required to adopt it, and they are empowered to examine and make the allowance, and until they do so, the county auditor can not draw an order for its payment, and there can be no payment without such order.

* * * * *

What is the result of our construction? The amount of the compensation is vested in the discretion of the county commissioners, and their decision is final. * * * "

A similar observation might be made with reference to the language of Section 13562, *supra*. In either case the same conclusion must necessarily be reached, that is, that, under Section 13562, *supra*, the commissioners do the paying of such an amount as seems to them "just and proper," and, under Section 13618, *supra*, of such an amount as they "allow." The court in either case merely "approves," or as the Supreme Court says, "expresses an opinion" as to what the compensation of attorneys should be.

The court in the Long case, *supra*, after reviewing the history of Section 13618, *supra*, holds:

"1. Under the provisions of Section 7246, Revised Statutes, (now Section 13618, G. C.) the amount of compensation to be paid by the county to attorneys for defending indigent prisoners, under appointment by the trial court, is such sum or sums, as the commissioners of such county, in the exercise of their discretion, may allow, subject to the limitations mentioned in said section, although the trial court may approve a different amount." (Parenthesis the writer's.)

2. The allowance of such compensation resting in the discretion of the county commissioners, subject to the limitations specified in said section, no right of appeal from their determination to the court of common pleas, exists in favor of the attorney or attorneys who may be dissatisfied with such allowance."

In any case, no matter what the court may approve or the commissioners allow, no payment can be made of this allowance until it has been appropriated in accordance with the provisions of Sections 5625-29, 5625-30, 5625-31, and 5625-32, General Code, which sections provide for the appropriation of public monies by the taxing authority of each subdivision or taxing unit. This is definitely stated in Section 5625-33, *supra*.

The third question submitted by the commissioners has been fully answered in a former opinion of this department, being Opinion No. 76, rendered on February 12, 1927, and addressed to the prosecuting attorney of Portage County. The syllabus of this opinion, in part, reads:

"1. * * *

2. County commissioners by virtue of the authority vested in them by the provisions of General Code Sections 5649-3g and 5649-3h to fix the amount of the appropriations, have the power to regulate the aggregate amount, to be expended by the prosecuting attorney in any one year, of the allowances made to him by virtue of Section 3004-1 of the General Code.

3. The court in fixing an allowance under Section 3004-1 of the General Code must look to the appropriation made by the county commissioners for that purpose. If the court makes an allowance in excess of the amount appropriated and the county commissioners do not within the fiscal year amend their appropriation measure so as to include the amount of such allowance, then although such allowance is not illegal, it is ineffective."

It will be observed that Sections 5649-3g, 5649-3h and 5660, General Code, referred to in the above opinion, have since been repealed. Their pertinent provisions are now incorporated in Sections 5625-29 to 5625-33, both inclusive, General Code. (112 Ohio Laws, 404).

In the second question submitted, it is said, with reference to Section 13618, *supra*, "has the court the right to contract for such counsel without securing first an appropriation by the commissioners for an agreed sum?" As I view the matter, since the payment of counsel is dependent entirely on the allowance by the commissioners, the court does not contract for the services of counsel but simply makes an appointment. This appointment may be made by the court regardless of whether or not an appropriation has been made to compensate such counsel. However, an appropriation must be made before the commissioners can make a lawful order for the payment of whatever allowance is finally made.

Under an earlier form of this statute, as enacted in 1844, Vol. 44 Ohio Laws, 28, wherein the compensation for attorneys for defending indigent prisoners, under appointment by the court, was vested wholly in the commissioners, nothing being said about allowances so made being approved by the court, the question arose as to whether or not an appeal might be taken from the order of the commissioners. This question was before our Supreme Court in the case of *Commissioners of Geauga County vs. Ranney, et al.*, 13 O. S. 388, in which the court said:

"Gholson, J.—The question upon the motion to dismiss the appeal, depends upon the consideration, whether the appellants rendered their services under a contract between them and the county, which gave a right to such compensation as judicial tribunals, created by law for its ascertainment, might determine, or rendered their services as attorneys under the order of the court of common pleas, in the expectation of a fee, the amount of which was ascertainable only in the discretion of a specified authority. In the former view, the board of county commissioners was the tribunal, in the first instance, to act upon the justice and amount of the claim, and an appeal to the court of

common pleas might be properly taken. In the other view, it can not be properly claimed, that from the exercise of a mere discretionary power, vested in the board of county commissioners, an appeal might be taken to the court of common pleas, under the general language of the law allowing and regulating such appeals. We do not understand the counsel for the defendants in error to claim that, in this view, their appeal could be sustained, and their argument to show their right to appeal, proceeds on the assumption that they had established the former view to be the correct one.

* * * * *

The conclusion which must follow the views we have expressed is, that the appeal from the board of county commissioners to the court of common pleas ought to have been dismissed for want of jurisdiction. The judgment of the district court and of the court of common pleas will, therefore, be reversed, with costs; and this court, rendering such judgment as the court of common pleas should have rendered, will order that the appeal be dismissed for want of jurisdiction."

In specific answer to the questions submitted, in view of the foregoing, it is my opinion:

1. A court of common pleas may appoint counsel to assist the prosecuting attorney, under and by virtue of Section 13562, General Code, without first consulting the board of county commissioners as to whether or not any appropriation previously has been made for compensating such appointee. The allowance of such appointee's compensation and the fixing of the amount thereof rests in the discretion of the county commissioners (75 O. S. 539); and the same can not be paid unless an appropriation has been made therefor.

2. Under the provisions of Section 13618, General Code, the amount of compensation to be paid by the county to an attorney, under appointment by the trial court for the purpose of defending an indigent prisoner, is such sum as the commissioners of said county, in the exercise of their discretion, may allow, subject to the limitations set out in said section. (Following first branch of syllabus in case of *Long vs. Board of Commissioners*, 75 O. S. 539.)

3. County commissioners, by virtue of the authority vested in them to fix the amount of appropriations, as provided for in Section 5625-29, et seq., General Code, have it within their power to regulate the aggregate amount to be expended by the prosecuting attorney, in any one year, of the allowance made to him under the authority of Section 3004-1, General Code. If the court, in fixing an allowance under Section 3004-1, General Code, fixes it in excess of the amount appropriated, and the county commissioners do not within the fiscal year amend their appropriation so as to include the amount of such allowance then, such an allowance is ineffective, and the court is without power to require the commissioners to appropriate monies to cover same.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1402.

APPROVAL, BONDS OF THE CITY OF WARREN, TRUMBULL COUNTY—
\$12,085.00.

COLUMBUS, OHIO, December 19, 1927.

Industrial Commission of Ohio, Columbus, Ohio.