

sufficient to authorize payment of the so-called subsidy to the several normal schools for other than model schools.

Respectfully,
C. C. CRABBE,
Attorney General.

1599.

SECURITY FOR FINE—COURT MAY NOT ACCEPT CHATTELS—SECTION 13717 G. C.

SYLLABUS:

Section 13717, General Code, does not permit a court to accept chattels as security for a fine in a criminal case.

COLUMBUS, OHIO, July 3, 1924.

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

Gentlemen:—

This will acknowledge receipt of your letter of June 10th, in which you request my opinion as to whether under Section 13717, General Code, the words "secured to be paid" permit a court to take "watches, rings and other articles of value" as security for fines and costs.

Section 13717, General Code, reads:

"When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned 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 sixty cents per day for each day's imprisonment."

Section 13718, General Code, is as follows:

"When a magistrate or court renders judgment for a fine, an execution may issue for such judgment and the costs of prosecution, to be levied on the property, or, in default thereof, upon the body of the defendant. The officer holding such writ may arrest such defendant in any county and commit him to the jail of the county in which such writ issued, until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

This section gives an immediate right to levy on defendant's property, such as watches, rings, etc. If the defendant puts up watches, rings, etc., as security for a fine, I fail to see how such fine could be collected from such property, except by levy and sale, in which proceeding defendant could set up his exemptions. I do not believe he waives such rights by merely depositing chattels as security. It would add nothing to the rights the state already has, except that defendant's

property would be handier to levy on; and if he has exempt property, the fine can be immediately collected and it is the court's duty to collect.

Bail statutes, such as Section 13524, General Code, require a surety to have property worth double the sum of the bail and he must have property *liable to execution*, recognizing the right of claiming exemptions and recognizing the fact that a surety should be a party other than the defendant.

Collection of bail requires legal action, as would the collection on chattels given as security, and Section 13717 makes no provision for sale of such chattels by the court without levy of execution. The defendant might even mortgage the property after turning it over to the court, and the mortgage become a prior lien unless the court had levied execution on it, and other attachments and executions might be levied on the same property between the time of judgment and the time set for payment. When the court issues execution, it becomes the duty of the officer to whom it is issued to levy, advertise ten days and sell, as provided by Section 11668, General Code. If the court wait sixty days, six months or a year before issuing an execution, the chattels might be lost because of mortgages, other executions or attachments, and hence would not make the payment of the fine secure, and, it being the duty of the court to issue execution, he would have no authority to put off levy to a future date.

Of course, a court might require enough chattel property to reach beyond exemptions allowed by law, and though the statute is indefinite as to the security to be given but apparently leaves it to the court to take such security as he sees fit, yet, in view of the above, I believe the legislature intended him to follow the usual course in taking security, which is by a written instrument, signed by others than the defendant, it having been held that a person cannot become his own surety.

35 CYC, 1284:

"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."

59 Barb. (N. Y.) 38.

"Secured" implies the actual giving of security.

Pennel vs. Rhodes,
9 Q. B. 114.

35 CYC, 1285:

"A security on property is where a right over property exists, by virtue of which the enforcement of a liability or promise is facilitated, or made more certain."

8 Encyc. Pl. & Pr. 974:

"A sheriff has no right to accept a check in settlement of a fine."

32 Ark. 200:

"Neither a justice of the peace, nor constable, nor any other person or officer has any legal authority to take a mortgage for a fine adjudged to the State in a criminal prosecution, and treat the judgment as 'paid or collected;' such mortgage is not such payment or satisfaction of the judgment of the justice, as will prevent an appeal from it by defendant."

15 Ark. 427:

"A sheriff has no power or discretion to receive a note or *property*, in payment or satisfaction of a fine adjudged against a defendant in a criminal prosecution, nor has the county treasurer and *ex officio* treasurer of the common school fund, to whom such fine is directed to be paid, any such power or discretion; a note so given and received in such case, being no payment or satisfaction, the fine had not passed beyond the pardoning power of the Governor."

4 Cushing (Mass.) 576:

"A promissory note, given to a magistrate for the amount of fines and costs imposed by him upon the maker of the note on a criminal charge, is void, for want of consideration moving from the payee personally, and also because the transaction is in violation of a public duty."

12 Metcalf (Mass.) 468:

"A justice of the peace sentenced a prisoner, whom he had convicted of larceny, to pay a fine and costs, and, on his failure to pay them, delivered a mittimus to an officer, who, while conducting the prisoner to jail, took the promissory note of a third person, for the amount of the fine and costs, and his own fees, payable to the justice, and discharged the prisoner. HELD, in a suit by the justice on the note, that it was void for illegality of consideration."

34 Tex. Crim. Rep. 131:

"A sheriff has no authority to bind the State and release sureties on penal bonds by accepting checks, promissory notes, or *any property other than money* in payment of fines and forfeitures."

3 Tex. App. 338:

9 N. Y. St. 728:

"Practice—Undertaking—Party signing is not Surety. Where an undertaking on which an order of arrest was granted was signed by one of the plaintiffs in the action and one surety. HELD, that it was not executed by two sureties: *that the plaintiff could not be surety.*"

The statute provides that payment of the fine be secured until a future time for payment. It implies the entering into of an agreement to pay a judgment at a time set by the court and agreed to by the defendant and leaves no room for doubt or uncertainty.

It is my opinion that a court cannot take chattel property as security for a fine, under the terms of Section 13717, General Code.

Respectfully,
C. C. CRABBE,
Attorney-General.