

I find that the terms and provisions of this lease and the conditions and restrictions therein contained are in conformity with the above mentioned Act of the legislature and with other related statutes. I am, therefore, approving this lease, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

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2124.

ARSON—DEFENDANT IN CRIMINAL CASE—INSANITY,  
PLEA—WHERE PROSECUTING ATTORNEY EMPLOYS  
MEDICAL EXPERTS—EXPENSE OF SERVICE—MAY BE  
PAID OUT OF FUND ARISING UNDER PROVISIONS OF  
SECTION 3004 G. C.

*SYLLABUS:*

*Where a defendant in a criminal case, upon arraignment on an indictment for arson, pleads not guilty by reason of insanity, and an examination of such defendant by medical experts for the purpose of informing the prosecuting attorney as to the sanity of such defendant, either before trial or for the purpose of testifying at the trial of such case, such a service is properly to be procured by the prosecuting attorney and the expense therefore, not being otherwise provided by law, it may properly be paid out of the fund arising under the provisions of Section 3004, G. C.*

COLUMBUS, OHIO, March 19, 1938.

HON. T. B. WILLIAMS, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR: Your communication of recent date requesting my opinion reads as follows:

“A. B. was indicted by the November term of the grand jury of this county for the crime of arson. This man was suspected of setting fire to at least nine buildings within the past two years.

The defendant was brought into court, accompanied by his counsel and for plea said he was not guilty and he also,

by his counsel, filed in writing, a special plea of "Not Guilty" by reason of insanity as provided by Section 13440-2 of General Code.

The court under Section 13441-4 of the General Code appointed three physicians of this county to examine the defendant.

As prosecuting attorney, and believing it to be in furtherance of justice and believing he should be examined by experts, I had two medical experts from Columbus, Ohio, to come here and examine the defendant so that I could thoroughly prepare the case for the state.

I therefore desire your opinion on the following:

First—Can I pay these two men from the allowance made to me under Section 3004 of General Code?

Second—If I cannot pay them out of this fund, how can they legally be paid especially so when I believe that the expense was made in furtherance of justice? I know of no other fund."

You state in your request that the defendant in the instant case being arraigned upon an indictment for arson, pleaded not guilty by reason of insanity. You state that the court under the provisions of Section 13441-4 G. C., appointed three physicians for the purpose of examining such defendant as to his sanity. The procedure authorized in such circumstances is fully set forth in Section 13441-4, G. C., which reads as follows:

"In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by the court or jury, the court shall have power to commit the defendant to a local insane hospital, or the Lima State Hospital, where the defendant shall remain under observation for such time as the court may direct not exceeding one month; and the court may in such case appoint one or more disinterested qualified physicians, specialists in mental diseases (but not to exceed three), to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing. In case of such appointment the court shall forthwith notify counsel of the names and addresses of the persons so appointed. The expert witnesses appointed by the court may be called by the court and shall be subject to examination and cross-examination by the prosecuting attorney and counsel for the

defendant. *The appointment of such expert witnesses, and their testifying as witnesses, shall not preclude the prosecuting attorney or defendant from calling other witnesses to testify on the subject of insanity.* Such persons so appointed may be required by the court to prepare a written statement under oath, concerning the mental condition of the defendant, and file the same in the case, but such report shall not be read as evidence except that it may be used by either counsel on the cross-examination of the witness who signed the same. The court shall instruct the jury in the case of such appointment and testimony of such expert witnesses, that the credibility of such witnesses in common with all other witnesses in the case is for the exclusive consideration and determination of the jury. Such persons so appointed shall be paid a reasonable fee for their examination or service, and their reasonable expenses. the amount whereof shall be certified by the judge or court making the appointment, and paid by the county." (Italics the writer's.)

The underscored portion of the General Code section last above referred to, saves to the prosecuting attorney or the defendant the right to call other witnesses for purposes of testifying on the subject of insanity of the defendant. However, there is no provision for the payment of such other witnesses for this purpose, although the physicians so appointed are authorized to be paid a reasonable fee for their examination or service, together with their reasonable expenses.

Section 3004, G. C., reads as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and *in the furtherance of justice, not otherwise provided for.* Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county." (Italics the writer's.)

Under the provisions of Section 13441-4, G. C., you, as prosecutor, are not precluded from calling other witnesses to testify on the

subject of the insanity of the defendant, but no provision is made under this section for the payment of such witnesses.

I am presuming from your request that you have used the two medical experts as witnesses in the trial of a case. The expense of procuring these expert witnesses has not been otherwise provided for and you specifically have the right to procure other witnesses for the purposes stated in your request. Certainly, when the prosecuting attorney in the performance of his official duties, one of which is to procure evidence in criminal cases, believes that such an examination as given by the two medical experts referred to in your request is in the furtherance of justice, he may make use of the fund arising under the provisions of Section 3004, G. C.

In specific answer to your request, it is, therefore, my opinion that where a defendant in a criminal case, upon arraignment on an indictment for arson, pleads not guilty by reason of insanity, and an examination of such defendant by medical experts for the purpose of informing the prosecuting attorney as to the sanity of such defendant, either before trial or for the purpose of testifying at the trial of such case, such a service is properly to be procured by the prosecuting attorney and the expense therefor, not being otherwise provided by law, may properly be paid out of the fund arising under the provisions of Section 3004, General Code, when such expenses are incurred in the furtherance of justice.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

2125.

COUNCIL, CITY OF CLEVELAND—POWERS—ORDINANCE  
MAY SETTLE CERTAIN LEGAL CLAIMS FOR OR  
AGAINST CITY—NOT NECESSARY TO REPEAL OR  
AMEND SECTION 82, CLEVELAND MUNICIPAL CODE.

*SYLLABUS:*

*The Council of the City of Cleveland, by the enactment of special legislation has the power to settle certain legal claims for or against the*