

sary to properly carry on the functions of their position and having been authorized by the electorate to determine in the first instance the manner of performing their public duties, their determination of the necessity for any course of action should be given considerable weight. Should they abuse the discretion thus vested in them their judgment should, of course, be overruled. In doing so however, consideration should be given to the fact that where by law discretion is vested in a public officer, that discretion will not be interfered with except in case of its abuse, and the burden of showing abuse of authority in a public officer is on one who asserts the abuse.

In the determination of matters of this kind consideration must be given to the fact that because of the complexity of our civilization and modern methods of doing business, the incurring of expenses by public officers in the performance of their public duties will now oftentimes be considered necessary, whereas in former times such expenses would have been considered improper.

On other occasions I have observed that the remedy for extravagance in the use of public funds for traveling expenses is political. Officers who embark on unnecessary junkets should be held responsible at the polls. It is perhaps better that the check be political in character rather than to enact prohibitory sections which might result in hamstringing honest and efficient public officials in their sincere efforts to perform their official duties.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2171.

STENOGRAPHIC FEES—COST OF BILL OF EXCEPTIONS FOR CRIMINAL NOT PAYABLE BY COUNTY—COST OF TRANSCRIPT OF TESTIMONY FOR CRIMINAL PAYABLE BY COUNTY IN C. P. COURT BUT NOT IN J. P. COURT—WHEN PROSECUTOR'S STENOGRAPHER MAY SERVE AS SHORTHAND REPORTER BEFORE GRAND JURY.

SYLLABUS:

1. *No authority exists for the payment of compensation to a stenographer for the preparation of a bill of exceptions in a criminal case, nor for the payment of a stenographer for making a transcript of testimony for a defendant in a criminal case in the court of a justice of peace. However, under the provisions of Section 1552 of the General Code, a stenographer who makes a transcript of the testimony in a criminal case in the court of common pleas at the request of a defendant receives compensation out of the county treasury.*

2. *A stenographer appointed by the prosecuting attorney, under the provisions of Section 2915 of the General Code, may lawfully serve as a reporter appointed by the court, providing it is physically possible to properly perform the services of both positions, and may lawfully receive, in addition to compensation as prosecuting attorney's stenographer, per diem compensation for each day such stenographer is engaged in taking shorthand notes of the testimony before a grand jury.*

COLUMBUS, OHIO, July 30, 1930.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

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

"I desire your opinion on the following propositions:

No. 1. Could a person who has been convicted in a justice of the peace

court for a violation of the Crabbe Act or for a violation of the fish and game laws, or of a felony in a court of record compel the county in which the defendant was convicted to pay a stenographer for a bill of exceptions in the event the accused desired to prosecute error in a higher court?

If the defendant cannot compel the county to pay for such bill of exceptions would it be legal for the county commissioners to allow the stenographer's bill?

No. 2. Could a person drawing a salary from the county as the prosecuting attorney's stenographer, at the same time draw per diem compensation for taking testimony before the grand jury?"

A bill of exceptions not only includes a transcript of the testimony taken by a stenographer before a court but also includes other evidence such as photographs and documents offered as exhibits. A bill of exceptions also contains certain formal parts which set forth the time, term and court wherein the cause was heard, a statement with reference to the allowance of the bill of exceptions by the court, etc. The statutes of Ohio make no provision for the preparation of a bill of exceptions by a stenographer in a cause heard in the inferior courts or in the courts of record, therefore no authority exists for the payment of a stenographer for such service out of the public funds. There are no statutes which make provision for the taking of a stenographic record in the court of a justice of peace, nor do the statutes make provision for an official stenographer in such courts. Therefore no authority exists for the payment of a stenographer for such service. At this point your attention is directed to Section 13459-6 of the General Code which provides in part as follows:

"Upon the hearing of the petition in error the court may affirm the judgment or reverse it, in whole or in part, or modify it as provided in Sec. 1, paragraph 4, of the chapter entitled 'New Trials, Etc.,' and order the accused to be discharged or grant a new trial; or the court may remand the accused for the sole purpose of correcting the sentence, if a sentence imposed was contrary to law. If the judgment be reversed, the plaintiff in error shall recover from the defendant in error all court costs incurred to secure such reversal, including the cost of bills of exceptions and transcripts."

Section 13459-1, General Code, authorizes the review of a judgment in a criminal case of a court inferior to the court of common pleas by the court of common pleas and therefore when a judgment of the justice of peace is reversed by the court of common pleas the defendant may recover all court costs, including costs of bill of exceptions and transcripts from the defendant in error which, in a criminal case, is the state of Ohio. However, the question arises what if any statutory authority exists as to the method of payment of such costs. This question was before my predecessor, and in an opinion found in Opinions of the Attorney General, 1927, Vol. I, at page 293, he held, as shown by the first and second branches of the syllabus, as follows:

"1. Where a minor state case is reviewed on error proceedings in a court of common pleas, and the judgment of the lower court is reversed, and final judgment entered against the state, the defendant being discharged and the state ordered to pay the costs, there is no statute making provision as to where the clerk of courts should send such cost bill.

2. Such defendant has a valid judgment against the State of Ohio, but

until means are provided by statute how same shall be paid, and the legislature appropriates money to pay said judgment, he cannot collect it."

The then Attorney General in the course of this opinion says:

"You state in your letter that final judgment was entered against the state and the state ordered to pay the costs. This order of the court of common pleas, in effect, is a judgment against the State of Ohio for the amount of the costs taxed in said cause.

No provision is made by statute how or by what method such a judgment may be collected. The defendant has a valid judgment against the State of Ohio, but until the legislature provides a statutory method to pay such judgment or appropriates money therefor, the judgment creditor is without means to collect."

He further says:

"The question that presents itself is whether the legislature has made any provision or appropriation out of which any such judgment may be paid. The only possible fund from which such a judgment could conceivably be paid is found in the general appropriation bill of the Eighty-sixth General Assembly, at page 159, the heading of which reads: 'Prosecution and Transportation of Convicts,' this being the same in form and substance as referred to in the former opinion of this office, *supra*.

This appropriation item is one of regular recurrence and its descriptive terms have not been changed for many years. The judgment of the Common Pleas Court that the state pay the costs is not such an expense that may be paid therefrom. The costs to be recovered by the plaintiff in error were not incurred in the prosecution or transportation of convicts. They were incurred in resisting and defending a criminal charge.

It is my opinion that had the legislature intended that reimbursement should be made from this particular fund it might easily so have provided. In the absence of any specific statement to that effect I do not feel warranted in extending the purposes of this appropriation beyond the plain meaning of the words used."

The reasoning in this opinion, in so far as it touches upon the question as to whether or not there exists any authority for the payment of such costs by the State of Ohio, is applicable here since the legislature in the last appropriation bill made no provision for the payment of such judgments and the language with reference to the appropriation for "prosecution and transportation of convicts," at page 85 of the general appropriation bill of the 88th General Assembly, is the same as it was in the appropriation bill which my predecessor had under consideration. I am inclined to agree with the conclusion reached by my predecessor that since the legislature did not appropriate money to pay such a judgment and by no means are provided by statute how the same shall be paid, therefore a defendant cannot collect such costs.

Provision for the payment of compensation of a stenographer for preparing the transcript of the testimony in a criminal case in the court of common pleas at the request of a defendant is made in Section 1552 of the General Code, which provides in part as follows:

"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 transcripts 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."

From a reading of the provisions of this section it is apparent that a stenographer who makes a transcript in a criminal case in a court of common pleas at the request of a defendant receives compensation from the county treasury.

I now come to your second question. Section 2915 of the General Code authorizes the prosecuting attorney to appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office and provides that he fix their compensation not to exceed the aggregate amount fixed by the judge or judges of the common pleas court.

Section 13436-8 of the General Code provides as follows:

"The official shorthand reporter of the county, or any shorthand reporter designated by the court, at the request of the prosecuting attorney, or any such reporter designated by the attorney general in investigations conducted by him, may take shorthand notes of the testimony, and furnish a transcript to the prosecuting attorney or the attorney general, as the case may be, and to no other person; but such reporter shall withdraw from the jury room before the jurors begin to express their views or take their vote on the matter before them. Such reporter shall take an oath to be administered by the judge after the grand jury is sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to such jury or prosecuting attorney or attorney general, as the case may be, unless called upon in a court of justice to make disclosures."

It will be noted that only an official shorthand reporter or a shorthand reporter designated by the court at the request of the prosecuting attorney, or any such reporter designated by the attorney general in investigations conducted by him, may take shorthand notes before a grand jury.

The duties of a shorthand reporter before the grand jury are not part of the duties of a stenographer appointed by the prosecuting attorney under the provisions of Section 2915 of the General Code. The appointment of a stenographer to take notes of the testimony before the grand jury, other than an official reporter, may be made under the provisions of Section 1547 of the General Code which provides as follows:

"When the services of one or more additional shorthand reporters are necessary in a county, the court may appoint assistant shorthand reporters, in no case to exceed ten, who shall take a like oath, serve for such time as their services may be required by the court, not exceeding three years under one appointment, and may be paid at the same rate and in the same manner as the official shorthand reporter. Such shorthand reporters when so appointed shall be ex-officio shorthand reporters of the insolvency and superior courts, if any, in such county."

If the appointment of an additional shorthand reporter is made for a term of less than one year the court may allow per diem compensation. (See Sec. 1550.) Therefore, if a stenographer appointed by a prosecuting attorney under the pro-

visions of Section 2915 of the General Code is also appointed by a court under the provisions of Section 1547 of the General Code for the purpose of taking shorthand notes before a grand jury, such stenographer would be entitled to per diem compensation, if the appointment is for less than one year, for each day such reporter is actually engaged in the taking of testimony before the grand jury, unless the two positions are incompatible. The statutes of Ohio do not inhibit a stenographer appointed by the prosecuting attorney performing services as an assistant shorthand reporter appointed by the court, under the provisions of Section 1547 of the General Code, for the purpose of taking stenographic notes before a grand jury, nor do I find anything in the duties of these positions which makes either a check upon or subordinate to the other so that if it is physically possible for one person to properly perform the duties of both positions they are not incompatible and such stenographer would be entitled to receive, in addition to the compensation received from the funds allowed to a prosecuting attorney, per diem compensation for each day such stenographer is engaged in taking shorthand notes of the testimony before a grand jury.

In view of the discussions herein and in specific answer to your inquiries, I am of the opinion that:

1. No authority exists for the payment of compensation to a stenographer for the preparation of a bill of exceptions in a criminal case, nor for the payment of a stenographer for making a transcript of testimony for a defendant in a criminal case in the court of a justice of peace. However, under the provisions of Section 1552 of the General Code, a stenographer who makes a transcript of the testimony in a criminal case in the court of common pleas at the request of a defendant receives compensation out of the county treasury.

2. A stenographer appointed by the prosecuting attorney, under the provisions of Section 2915 of the General Code, may lawfully serve as a reporter appointed by the court, providing it is physically possible to properly perform the services of both positions, and may lawfully receive, in addition to compensation as prosecuting attorney's stenographer, per diem compensation for each day such stenographer is engaged in taking shorthand notes of the testimony before a grand jury.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2172.

APPROVAL, ABSTRACT OF TITLE, WARRANTY DEED AND ENCUMBRANCE ESTIMATE TO LAND OF ELLMER H. ERNST AND HELEN M. ERNST, IN FRANKLIN TOWNSHIP, ROSS COUNTY, OHIO.

COLUMBUS, OHIO, July 30, 1930.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date submitting for my examination and approval an abstract of title, warranty deed, encumbrance estimate No. 140, Controlling Board certificate and other files relating to the purchase of a tract of 30 acres of land in Franklin Township, Ross County, Ohio, which is owned of record by Ellmer H. Ernst and Helen M. Ernst, and which is more particularly described as follows: