

and battery, with a view to the release of such person from imprisonment for non-payment of the fine; and the instruments so taken are void."

4 Cush. Mass. 578:

"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."

Corpus Juris, 1152.

In these cases, notes given in payment of fines were held void, as Court had no authority to take notes; and the same rule applies to checks. A Court taking a check takes it at his own risk.

A mayor, taking a check in payment of a fine, endorsing and depositing same, is in the same position as any endorser of such a negotiable instrument. The fact that he holds the office of mayor does not make him official custodian of moneys coming into his hands. The law holds him personally responsible for moneys collected by him, and the fact that he keeps an account in the bank in his name as mayor does not relieve him of the responsibility.

In the case you mention, the mayor did not turn the original check in to the county or city nor keep it in his own possession, but cashed it for the party paying the fine, and having paid the amount of such fine to the city, county or state, by his check, he cannot recover same nor hold the amount out of other fines collected by him.

Respectfully,

C. C. CRABBE,

*Attorney General.*

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2099.

COURT COSTS—WHEN SAME MAY BE PAID FROM FUND DESIGNATED "PROSECUTION AND TRANSPORTATION OF CONVICTS"—SECTION 13755, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *In state cases, proper court costs, including the costs of bills of exceptions and transcripts, incurred by the accused in securing a reversal of a judgment as provided for in Section 13755, General Code, is "expenses provided by statute" within the meaning of the appropriation designated under the heading "prosecution and Transportation of Convicts" (110 O. L. 600), and upon proper proof of the incurring of such expense it may be legally paid from such fund.*

2. *Such provision applies to both misdemeanors and felonies.*

3. *The accused may recover such costs in cases taken on error from a justice or mayor to the court of common pleas, when reversed.*

4. *The provisions of Section 13755 do not apply to any costs except those incurred by the plaintiff in error.*

5. *Reasonable costs actually incurred by the accused employing a stenographer to take testimony and transcribe the same in courts inferior to the court of common pleas, is a proper expense.*

6. *Stenographer's fees in the court of common pleas is not a proper item of expense, for the reason that such stenographer is otherwise compensated and the accused does not incur such expense.*

COLUMBUS, OHIO, December 20, 1924.

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

Gentlemen:—

You have requested my opinion on the following:

"When by the provisions of Section 13755 G. C. the court to which error is prosecuted renders the following judgment:

' \* \* \* the said plaintiffs in error are hereby discharged and that they recover from the defendant in error the costs necessarily expended in preparing their bill of exceptions and transcript of the record, and that the clerk of this court is hereby ordered to tax as a part of the costs herein the costs of said bill of exceptions and transcript, and judgment is rendered accordingly.'

"and the clerk certifies the amount of such costs to the Auditor of State, is he authorized or required to pay the same from the appropriation, 'Prosecution and Transportation of Convicts', which is made for payment of 'fees, costs, mileage and other expenses provided by statute', (110 O. L. 600), or any other appropriation in the absence of any law specifically requiring same to be paid from the state treasury? (See Section 13726 G. C. for the payment of costs from any state treasury).

"If the answer to the above is in the affirmative, answers to the following questions are desired:

1. Does the law refer to both misdemeanor and felony cases?
2. Does it refer to cases taken on error from the court of a mayor or justice of the peace to the common pleas court?
3. May the following items of costs included in the clerk's certificate be paid:
  - (a) Costs of the officers of the lower court in the trial of a case in that court? (See Section 3019, General Code.)
  - (b) Compensation of stenographers for taking shorthand notes of testimony and other proceedings in courts inferior to the common pleas court? (No law for same and no fee fixed.)
  - (c) Compensation of such stenographers for making transcripts of such notes? (No law for and no fee fixed.)
  - (d) Compensation of stenographers for taking shorthand notes of testimony and other proceedings in the common pleas court when error is prosecuted from that court to a higher court? (See Sections 1549 and 1550, General Code.)
  - (e) Compensation of such stenographers for making transcripts of such notes? (See Sections 1551, 1552 and 1553, General Code.)"

Section 13755, to which you refer, in part provides:

"Upon the hearing of a petition in error, the court may affirm judgment or reverse it, in whole or in part, and order the accused to be discharged or grant a new trial. 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 costs of bills of exceptions and transcripts.'

The last sentence of the above quotation was added in an amendment to the original section in 108 O. L., Part 1, page 36. Heretofore there had been no such provisions made for the recovery of the defendant in error of such costs in such proceedings. It is clear from such provision that the defendant is entitled to recover all court costs incurred by him to secure such reversal, including the cost of bill of exceptions and transcript. The form of entry usually adopted by the Supreme Court of Ohio provides that the plaintiff in error recover from defendant in error costs expended in the Supreme Court and in the lower courts, and in effect in such cases is a judgment against the state.

Said entry, a part of which you quote, specifically provides that the plaintiff in error recover from defendant in error such costs and expenses, and in effect is a judgment against the state, when state cases are involved. The reasons for the provisions of such section are apparent. When error has intervened and a case has been reversed upon such grounds, theoretically speaking, at least, the state has done an injustice to the accused, and it is the purpose of this enactment to in some measure make him whole by returning to him the court costs and expenses which he has incurred to secure justice. There being no specific statutes as to how such costs and expenses shall be paid, and it being an absurdity to provide for the recovery of such costs and expenses without any means of payment by the state, every reasonable effort should be made to find a means whereby the intention of the legislature in this respect may be carried out.

While the language of the appropriation bill which you have set forth in your communication is no different now than it was before amendment of Section 13755, it is believed to be sufficiently broad to include the costs and expenses referred to. Of course, it could be argued that in view of the fact that there has been no change in the language of the appropriation since the amendment of Section 13755, that such funds should logically be applied to only the purposes included within such provisions before the amendment of said section. However, it must be remembered that it has been held that the language of an appropriation bill has the force and effect of law. This being true, the same rules of statutory construction may logically apply.

It has been established by the courts of this state that a statute may include by reference a case not originally contemplated when it deals with a genus within which a new species is brought.

State of Ohio vs. Cleveland, 83 O. S., 61.

It is believed that there is no apparent reason why the principles of the case above cited cannot apply to the case under consideration. The subject is prosecution and transportation of convicts, and relates to fees, costs, mileage and other expenses provided by statute. The recovery provided for in Section 13755 can reasonably be included within "costs and other expenses provided by statute."

By reason of the foregoing, it is believed that a fair interpretation of the language of the appropriation bill discloses an intention of the legislature to include within such an appropriation the payment of the accused of the costs and expenses referred to in Section 13755. This will dispose of the major question which you present.

In disposing of your interrogatory as to whether recovery of the accused under the provisions of Section 13755 relates to both misdemeanor and felony cases, you are referred to Section 13751, which must be construed as in *pari materia* with Sec-

tion 13755, and clearly discloses that said sections relate to criminal cases. It would therefore follow that misdemeanors are included.

You next inquire whether such recovery may be had by the accused in cases taken on error from the court of a mayor or justice of the peace to the court of common pleas.

You are advised that Section 13751 specifically provides that "the judgment or final order of a court of officer inferior to the common pleas court may be reviewed in the common pleas court." The statute itself makes an affirmative answer to your inquiry.

You further inquire whether the costs of the officers of the lower court in the trial of a case in such court may be paid from such appropriation. This inquiry should be answered in the negative, for the reason that the language of Section 13755 must necessarily relate to court costs incurred by the accused. This could not be construed to cover the court costs, not incurred by defendant.

The next question you present is whether compensation of stenographers for taking shorthand notes of testimony and other proceedings in courts inferior to the common pleas court may be paid from such fund.

You intimate that there is no law for same and no fee fixed.

In answer thereto, you are referred to Section 13755 which authorizes the recovery by the accused of costs of bill of exceptions and transcript. It is evident that in a lower court where there is no provision for an official stenographer, the only practical method whereby a bill of exceptions could be obtained would be for the accused to employ at his own expense a stenographer to take the testimony and transcribe the same. It, therefore, must follow that it would be a proper expense to be paid from such fund.

You also raise the question whether the compensation of stenographers in common pleas court in such error proceedings, for taking shorthand notes and making transcript from such notes, may be paid from such appropriation.

You are advised that these questions must be answered in the negative, for the reason that it is a part of such stenographers' duty to take the testimony, for which a salary is paid, and the defendant is not required to advance fees for such service.

Under the sections to which you refer, such stenographer is required to transcribe such testimony upon request of the defendant, and provision is made for the payment of such service from the county treasury and the defendant is not required to incur any expense in this respect.

Respectfully,

C. C. CRABBE,

*Attorney General.*

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2100.

APPROVAL, BONDS OF CITY OF NELSONVILLE, ATHENS COUNTY,  
\$3,388.00, STREET IMPROVEMENTS.

COLUMBUS, OHIO, December 20, 1924.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*