

2950.

WITNESS FEES—CIVIL CASES BEFORE JUSTICE OF THE PEACE—
ERRONEOUSLY PAID INTO COUNTY TREASURY—HOW SUCH
WITNESSES, MAGISTRATES OR CONSTABLES MAY THEN BE
PAID.

SYLLABUS:

When there are collected fees of witnesses, fees of magistrates and fees of constables, all emanating from civil cases before a justice of the peace, such fees belong and should be paid to such witnesses, magistrates and constables respectively; and it is error to pay them into the county treasury to the credit of the general fund. If such fees, however, are so erroneously paid into the county treasury to the credit of the general fund, (a) the auditor can not, upon the certificate of the erring payer, issue a warrant upon the treasurer for the payment of such money to those justly entitled thereto, but (b) the parties entitled to such fees may present to the county commissioners for their allowance, under section 2460, General Code, claims for the amount of money so paid erroneously into the county treasury, and when such claims are allowed by the county commissioners a warrant may legally be drawn by the auditor upon the county treasurer in favor of such parties for the amounts thereof.

COLUMBUS, OHIO, February 16, 1931.

HON. F. H. BUCKINGHAM, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter reading:

“Under Section 2979 of the General Code all the county officers turn over a list of uncollected costs to the prosecuting attorney for collection each year.

Some of these costs have been collected and turned into the county treasury as directed by that statute, but among the costs have also been witness fees and justice of the peace costs in cases appealed from justice court to the common pleas court. The last time the State Examiner was here he said that all costs collected by the prosecuting attorney should be turned into the county treasury and his instructions have been followed in the matter, but upon checking up on the amounts due to witnesses and to magistrates and constables for their costs we find that they have been turned into the county treasury as well.

The County Auditor has requested that I write you and get your opinion on how these fees due witnesses, magistrates and constables should be paid out of the county treasury to the different people to whom they belong.”

For the reason that criminal proceedings before a justice of the peace go up on error and not on appeal, I assume that your inquiry relates to fees which have accrued in civil actions only. Note, anyway, in passing, that as far as witness fees emanating before a justice in criminal cases are concerned, section 3012, General Code, provides that they shall be paid out of the county treasury.

It is apparent that the fees due witnesses, magistrates and constables in cases appealed from a justice's court to the court of common pleas were turned into the county treasury erroneously.

With respect to witness fees in civil cases the following statute is determinative. General Code, section 3012:

"Each witness in civil cases shall receive the following fees: For each day's attendance * * * before a justice of peace * * * to be paid on demand by the party at whose instance he is subpoenaed, and taxed in the bill of costs * * * ." (fees are then enumerated)

That the witness fees you mention were paid into the county treasury under section 2977, et seq., General Code, erroneously, is manifest immediately upon consideration of the plain terms of those sections. Section 2977, General Code, provides:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2978, General Code, enacts:

"Each probate judge, auditor, treasurer, clerk of courts, sheriff, surveyor and recorder, shall charge and collect the fees, costs, percentages, allowances and compensation allowed by law, and shall give to the person making payment thereof an official receipt in manner and form as may be prescribed by the bureau of inspection and supervision of public offices."

And section 2979, General Code, reads:

"On or before January 15th annually, each of said officers shall file with the prosecuting attorney of his county, a report in writing showing the amount of fees, percentages, penalties, allowances and other perquisites due his office from each person or corporation which has remained due and unpaid for more than one year prior to January 1st, next preceding, and it shall be the duty of the prosecuting attorney to, immediately proceed to collect the same by any of the means provided by law, and to pay the amount so collected into the county treasury to the credit of the general county fund. The county auditor shall not issue his warrant to either of said officers for his salary for the month of January in any year, until said report has been filed with the prosecuting attorney as herein required."

The error is clearly demonstrated when, on the one hand, it is realized that the above sections contemplate payment into the county treasury of such fees, etc., as shall be, by law, collected or received by any of the said officers as compensation for services rendered by them, that said fees are to be received and collected for the sole use of the county treasury and that they are to be held as public moneys belonging to the county to whose general fund they are to be accredited; while on the other hand, the witness fees under consideration did not accrue as compensation for services rendered by any of said officers and, instead of constituting public, county money, actually belong to witnesses for services rendered by them.

Keeping in mind the type of fees which are, under section 2977, et seq., General Code, supra, authorized to be paid into the county treasury, it likewise becomes

apparent, upon reading the statutes pertinent, that the justices' and constables' fees in controversy were erroneously paid into the county's treasury, instead of to the particular justices and constables to whom they properly belonged. Thus, section 1746-1, General Code, reads:

"For their services in civil proceedings, when rendered, justices of the peace shall tax as costs and collect from the judgment debtor the following fees, and no more: * * * ."

(then follows a schedule of fees)

And section 3347, General Code, says:

"For services actually rendered and expenses incurred, regularly elected and qualified constables shall be entitled to receive the following fees and expenses, to be taxed as costs and collected from the judgment debtor, except as otherwise provided by law: * * * ."

(then follows a schedule of fees)

I may add here, in passing, that, for the reasons above given, it is not only clear that the money in controversy was erroneously paid into the county treasury, but further, it is evident that the prosecuting attorney is not authorized by section 2979, General Code, even to collect the type of fees here in controversy.

You present the particular problem of money paid erroneously into a county treasury and of determining, therefore, how, therefrom, it may be paid to those who are justly entitled thereto. One encounters immediately that treasury-watchdog of the Ohio Constitution, article X, section 5, which provides:

"No money shall be drawn from any county * * * treasury, except by authority of law."

Much as one would expect to find some statute expressly authorizing the withdrawal of money paid erroneously into a county treasury, I find none as a matter of fact. However, section 2460, General Code, does provide:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law."

In 1916 there was rendered by one of my predecessors an opinion construing the section just quoted in a situation enough analogous to the present problem to furnish dispositive precedent for it. (1916 O. A. G., Vol. II, page 1331, Opinion No. 1828.) It there appeared that there came into the hands of the county clerk certain fines which, according to section 3056, General Code, belonged, and should have been paid, to the trustees of the county law library association. However, by mistake, the clerk paid the money into the county treasury to the credit of the general county fund, and presumably it had been expended or appropriated for county

purposes. The then Attorney General said that, since there was no statutory law authorizing the county auditor, upon certificate of the clerk setting forth the mistake, to issue a warrant upon the treasurer for such money, and since no money could be paid from the county treasury except in compliance with statutory law, he was of opinion that the money could not be paid over to the trustees in that manner. However, he held that a claim arose against the county for such money, to be paid to said trustees upon the allowance of the county commissioners as provided by section 2460, General Code.

Answering your inquiry specifically, my opinion is, therefore, that, when there are collected fees of witnesses, fees of magistrates and fees of constables, all emanating from civil cases before a justice of the peace, such fees belong and should be paid to such witnesses, magistrates and constables respectively; and it is error to pay them into the county treasury to the credit of the general fund. If such fees, however, are so erroneously paid into the county treasury to the credit of the general fund, (a) the auditor can not, upon the certificate of the erring payer, issue a warrant upon the treasurer for the payment of such money to those justly entitled thereto, but (b) the parties entitled to such fees may present to the county commissioners for their allowance, under section 2460, General Code, claims for the amount of money so paid erroneously into the county treasury, and when such claims are allowed by the county commissioners a warrant may legally be drawn by the auditor upon the county treasurer in favor of such parties for the amounts thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General,

2951.

HOTEL OR INN—POSTING CERTAIN NUMBER OF COPIES OF DEFRAUDING STATUTE IN PLACE OF BUSINESS SPECIFIED—NON-COMPLIANCE OF HOTELKEEPER NOT FATAL TO PROSECUTION OF DEFRAUDER.

SYLLABUS:

Failure to post notices, as required by the provisions of Section 13131 General Code, is not a proper defense to a prosecution for a violation of the provisions of this section.

COLUMBUS, OHIO, February 16, 1931.

HON. RICHARD C. THRALL, *Prosecuting Attorney, Marysville, Ohio.*

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

“Section 13131, of the General Code of Ohio, provides for the punishment of persons defrauding an innkeeper and defines what acts constitute the offense. The last sentence in the section provides that the proprietor of a hotel must keep a certain number of copies of this section of law displayed in his place of business.

A is charged with defrauding B and it is possible to produce all of the elements of the crime as defined by Section 13131. However, A,