

**Appeal From Justice Court—Justice Court, Jurisdiction of After Appeal Taken From.**

After notice of appeal from a judgment in a justice court against a defendant upon a criminal charge, and the giving and approval of a bond on appeal, the justice court must transmit all papers to the district court, together with the bond, and such justice has no jurisdiction to release to bondsmen and return the cash bond. If the defendant pay the amount of the judgment, without the costs, it may be that defendant would be estopped from questioning the authority of the justice to receive the payment pending the appeal, and that the fact of such payment being brought to the attention of the district court would be ground for dismissing the appeal and recovery on the bond for the costs of the case.

The question of whether the justice has authority to render judgment for costs in addition to the fine is one for the district court to decide upon an appeal, as the justice has no jurisdiction to take any steps whatsoever in the case after the appeal to the district court has been perfected.

February 9, 1905.

Mr. C. R. Stranahan, County Attorney Boulder, Montana.

Dear Sir:—Your letter of the 7th instant duly received. The second inquiry in your former letter was inadvertently overlooked and the letter filed away, hence the delay in replying.

The facts, as stated in your letter and upon which you desire an opinion, are about as follows: A defendant was convicted on a complaint before a justice of the peace for assault and battery and the jury assessed a fine of \$1.00 and costs; the defendant gave verbal notice of appeal at the conclusion of the trial and rendering of verdict, and a cash bond on appeal was put up for twice the amount of the judgment for fine and costs, under Section 2714, Penal Code. The defendant subsequently paid

the fine (presumably to the Justice), and the bondsmen demanded a return of the cash bond, upon the ground that the jury had no jurisdiction to assess the costs against the defendant.

You desire to know if there is any statute which will authorize the assessing of the costs against the defendant in a criminal case. There is another question which, under your statement of the facts, must be first decided, and that is: "Has the Justice of the Peace jurisdiction to receive payment of the fine and to release the bondsmen after the giving of notice of appeal and the putting up of a bond on appeal?"

Section 2713, Penal Code, provides that "An appeal is taken by the defendant giving notice in open court of his intention so to do at the time of the rendition of the verdict of judgment, or by filing with the justice within five days thereafter a written notice of appeal."

Section 2714, Penal Code, provides that "When the appeal is from a judgment for fine the defendant must, within ten days after the rendition of the verdict or judgment, file with the justice an undertaking, with two sufficient sureties, in double the amount of the judgment for fine and costs, to the effect that defendant will pay the same or such part thereof as the district court may direct, or if the appeal is dismissed, that judgment may be entered against said sureties in the district court therefor."

Section 2715, Penal Code, provides that "If, on appeal, judgment is rendered against the defendant, or if the appeal is dismissed, the court must render a judgment against the sureties for the amount of fine and costs."

There seems to be no express provision in the Penal Code requiring the justice, upon an appeal being taken, to certify to the district court the papers and proceedings in the case, together with the bond; yet such was doubtless the intent of the legislature in providing for appeals from justices in criminal cases, for by no other method would such appeal be effective.

Section 205, Code of Civil Procedure, provides that "When jurisdiction is by the constitution or this code, or any other statute, conferred upon a court or judicial officer, all the means necessary to carry into effect are also given; and, in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or method of proceeding may be adopted which may appear most conformable to the spirit of this code."

The district court is given jurisdiction of cases appealed from justices of the peace, by Section 11, of Article VIII, of the Constitution, and Section 42 of the Code of Civil Procedure. The mode most conformable to the spirit of the code for carrying into effect this jurisdiction would be a proceeding analogous to that prescribed for certifying up all papers upon an appeal from a justice court in a civil action, which is found in Section 1762, Code of Civil Procedure. By that section it is provided as follows: "Upon receiving the notice of appeal and filing an undertaking, as required in the next section, the justice or judge must, within ten days, upon the payment of the fees therefor, transmit to the clerk of the district court a certified copy of his docket, the pleadings, all notices, mo-

tions and other papers filed in the cause, the notice of appeal and the undertaking filed; and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers and may be fined for neglect or refusal to transmit the same \* \* \*."

Under the procedure, as outlined in this section, it was clearly the duty of the justice, upon the appeal being taken by the giving of the notice, and perfected by the depositing of a cash bond in double the amount of the fine and costs, to transmit all papers in the case, together with the cash bond, to the clerk of the district court. By the perfection of the appeal, the justice lost all jurisdiction of the case except that necessary to transmit the proceedings to the district court.

"A justice court is a court of inferior jurisdiction and there are no legal presumptions in favor of its jurisdiction. Its jurisdiction must affirmatively appear on the face of the record." (Layton v. Trapp, 20 Mont. 455; State v. Laurandean, 21 Mont. 216.)

"Where an appeal has been perfected the jurisdiction of the appellate court court over the subject matter and the parties attaches, and the lower court has no power to render any further decision affecting the rights of the parties in the cause until it is remanded." (2 Enc. Pl. & Pr. p. 327, and cases cited in note 5; Bryan v. Berry, 8 Cal. 130.)

"A trial court retains power to take all necessary steps for the transmission of the record on appeal." (2 Enc. Pl. & Pr. 329, note 3).

"The perfection of the appeal terminates the authority of the inferior court." (Vol' 2 Century Digest, Sec. 2191, appeal in error, and cases cited.)

"Pending an appeal the lower court has no jurisdiction of the case and can grant no orders therein." (Same.)

"The appeal removes the subject matter, and all matters connected therewith, to the appellate court, and is thenceforth within its control." (Same).

The justice, therefore, had and has no jurisdiction to release or return the cash bond to the bondsmen. On the other hand, it is and was his duty to transmit the papers in the case, together with the bond, to the district court. If the defendant wishes to abandon his appeal, it must be done in the district court, which alone has jurisdiction of the cause upon the appeal being perfected. If the defendant wishes to attack the right of the jury to find the verdict against him for costs, in addition to the fine, he must do so in the district court.

As to the right of the justice to receive payment of the fine of \$1.00, while under ordinary circumstances he could not do any act pending the appeal which would affect the judgment appealed from, it may be that where the payment is tendered and made by the person taking the appeal, such person would be estopped from questioning the right of the justice to receive the payment. And if this is correct, the fine having been paid by the appellant, and this fact being brought to the attention of the district court would probably be ground for the dismissal of the appeal in that court and the recovery upon the bail bond of the amount of costs taxed in the judgment appealed from. It would probably be better for

the justice to return the fine received by him as having been received without jurisdiction, and thus the entire matter may be adjudicated by the district court upon the appeal.

Under the view above expressed it is not necessary to go into a discussion of the question which you ask as to the right of the justice to enter a judgment for costs in addition to the fine. However, in this connection I would refer you, in addition to the sections you mention in your letter, to Section 2910, Penal Code, as having some bearing upon the question; also, in investigating this question it might be well to compare our present statutes with those contained in the Compiled Statutes, Sections 508, et seq., of the criminal practice act, as some of the old laws were apparently re-enacted in the codes.

Yours very truly,

ALBERT J. GALEN,

Attorney General.