CRIMINAL COSTS:
STATE: State not liable for costs of transcript, on appeal, ordered by trial court under Section 485.100, RSMo 1949, when defendant had not properly perfected an appeal.

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September 16, 1953

Honorable Richard K. Phelps
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion which reads, in part, as follows:

> "In the criminal case of State vs. Jesse W. Smith, tried in Division No. 7 of the Circuit Court of Jackson County, Missouri, before the Honorable Ray G. Cowan, an affidavit for appeal in forma pauperis was filed out of time by the defendant. At the time said appeal was taken the trial court directed the court reporter to prepare a transcript of the record of trial. The Supreme Court refused to entertain the appeal because it was not timely filed. Subsequently the Comptroller and Budget Director declined to pay a bill in the amount of $92.20, submitted by the court reporter, for the cost of preparing said transcript, on the ground that the bill had accrued after the time allowed by statute for taking an appeal.
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> "QUERY: Under Section 485.100, Revised Statutes of Missouri, 1949, is the State of Missouri liable for the cost of preparing a transcript of the record in a criminal case where the appeal in forma pauperis was filed out of time by the defendant, and the reporter preparing said transcript was directed to do so by the trial court?"

Honorable Richard K. Phelps:

Section 485.100, RSMo 1949, provides that any judge may, in his discretion, order a transcript made and the state shall pay the costs of same where the defendant takes an appeal and is unable to pay such costs. Said section reads:

> "Each court reporter shall also receive from any person or persons ordering transcripts of his notes the sum of fifteen cents per folio of one hundred words, each four figures to be counted as one word; and any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees making the same shall be taxed in the same manner as other costs in the case; provided, that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of his notes of the evidence, for one of which he shall receive fifteen cents per hundred words, and shall receive no compensation for the other."

The case in question was appealed to the Supreme Court and a decision was rendered by that court in State vs. Smith, 242 S.W. (2d) 515. The court dismissed the appeal and, as grounds for said dismissal, it held that no appeal was applied for within the time provided by statute, namely, Section 547.040, RSMo 1949, and that no writ of error was applied for or issued within the time fixed by statute or rule of court, therefore the court had no jurisdiction of said appeal.

In view of this decision, there is no need to go into the validity of the application and affidavit for appeal since the Supreme Court has already ruled that it was not valid.

Honorable Richard K. Phelps:

The question now raised, is the state liable for cost of said transcript in view of the foregoing decision.

It is well established that a county or state does not become liable for any unauthorized act of a public official; that persons dealing with any public official are chargeable with knowledge of the extent of their authority and are bound, at their peril, to ascertain and determine whether the public official is acting within the power conferred upon him by the statutes and Constitution of the State of Missouri.

Under the foregoing statutory provisions, Section 485.100, supra, the court was vested with discretionary power and it was not mandatory upon him to order a transcript in any case wherein the defendant had not fully complied with the statutory procedure for perfecting an appeal to the Supreme Court. Under the foregoing decision, at the time the defendant filed his application and affidavit for appeal in forma pauperis in the Circuit Court, the time for filing a motion for new trial and application and affidavit for appeal had lapsed. The law, at that time, required the defendant to file a motion for new trial and application and affidavit for appeal during the same term of court at which the judgment was rendered. See Section 547.070, RSMo 1949.

In view of the fact that the time had lapsed for perfecting an appeal in this case, we question whether the trial court properly exercised its authority in ordering said transcript for the defendant.

Notwithstanding the statute did provide that the trial court, in its discretion, may order a transcript and the state pay the costs of same, in construing the laws, one must consider all sections that are applicable and if we consider Sections 547.070 and 547.080, RSMo 1949, in effect at the time, along with Section 485.100, supra, then certainly it was never the legislative intent, in enacting the latter referred to section, that the Circuit Judge could order a transcript at costs to the state when the defendant had failed to file a motion for new trial and application and affidavit for appeal as provided by statute, as it would avail the defendant nothing and cost the state unnecessary expenses. In this instance, the court should not have ordered the transcript for the reason that the defendant, under the law at the time, could not possibly perfect an appeal. It is quite possible the act of the

trial court, in ordering said transcript, was motivated by an erroneous interpretation of the law as finally determined in this case by the Supreme Court and it is unfortunate if this court reporter, acting upon orders by the court, prepared said transcript and now cannot be compensated by the state.

In Elkins-Swyers Office Equipment Company v. Moniteau County, 209 S. W. (2d) 127, 357 Mo. 448, the court held public officials' unauthorized acts, as distinguished from an individual agent, within apparent scope of his authority, are not binding on the sovereign as principal. In Etna Insurance Company v. O'Mally, 124 S. W. (2d) 1164, 343 Mo. 1232, l. c. 1166, the court held that in order for a state officer to enter into a valid contract, he must be so empowered by either the Constitution or statute, and reads, in part, as follows:

> "(4-7) Did the superintendent of insurance have the authority to employ the respondents in these restitution proceedings? Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. State v. Bank of the State of Missouri, 45 Mo. 528; State to the Use of Public Schools, etc., v. Crumb, 157 Mo. 545, 57 S. W. 1030; State ex rel. Blakeman v. Hays, 52 Mo. 578; State v. Perlstein, Tex. Civ. App., 79 S. W. 2d 143; 59 C. J., Section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the Legislature. * * *"

It has been well established that persons dealing with state officers are chargeable with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. See Sager v. State Highway Commission, 160 S. W. (2d) 757, l. c. 763, 349 Mo. 341; State ex rel. Blakeman v. Hayz, 52 Mo. 578; and Sugg v. Wisconsin Lumber Company, 283 Fed. 290.

We are not unmindful of the fact that there is some limited authority to the effect that where power or jurisdiction is delegated to a public official or tribunal over a subject matter and its exercise is confined to his discretion, the act so done is generally binding and valid as to the subject matter. See Belcher v. Linn, 65 U. S. 508, 24 How. 508, 17 L. Ed. 754. However, we believe that in view of the foregoing statutes clearly showing that the defendant had not complied with the statutory requirements for perfecting his appeal which fact is undisputable in view of the decision rendered by the Supreme Court in State v. Smith, supra, that the court should have taken cognizance of these statutes in exercising his discretionary authority that to a certain extent these statutes limited his discretionary authority in ordering a transcript at the cost of the state. While it is unfortunate, in this instance, to so hold that the state cannot pay for this transcript inview of the fact it will work a hardship on this particular reporter, we are of the opinion that is the proper construction to place upon the authority granted under Section 485.100, supra.

CONCLUSION

It is the opinion of this department that while the trial judge was vested with discretionary power to order a transcript in a criminal case for the defendant at the cost of the state when the defendant was unable to pay for same, in view of the fact the defendant had failed to file a motion for new trial and application and affidavit for appeal during the term at which the judgment was rendered, as required by law, that the court in so ordering the transcript exceeded his authority and that the state is not liable for the cost of said transcript.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

ARH/mv