

therefore, to receive the fees set forth in Sections 2845 and 3347 of the General Code, and the mayor is authorized to tax these fees as costs against the defendant. It must be kept in mind, however, that under the provisions of Section 2845 of the General Code a sheriff or deputy sheriff must pay the fees collected for serving a warrant into the general fund of the county.

In specific answer to your inquiry, I am of the opinion:

1. The mayor of a village may legally issue a warrant of arrest directed to a sheriff, deputy sheriff or constable if the offense is a violation of the state laws.

2. The fees provided by Section 2845 of the General Code for the services of a sheriff and deputy sheriff, and the fees provided in Section 3347 for a constable in serving warrants directed to them by a mayor of a village in state cases, may be legally taxed and collected from defendants, and such fees may be paid to these officers. However, the fees so collected by a sheriff or deputy sheriff must be paid into the general fund of the county.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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1408.

SHERIFF—RIGHT TO COLLECT FIRST MORTGAGE HOLDER'S CLAIM  
AND CHARGE POUNDAGE WHERE SECOND MORTGAGE HOLDER  
BUYS PROPERTY—WHEN POUNDAGE NOT CHARGEABLE.

SYLLABUS:

1. *Where a second mortgage holder purchases the property in a foreclosure proceeding, the sheriff may collect the amount of the first mortgage holder's claim and charge poundage thereon. He may also refuse to permit the said first mortgage holder to receipt the sheriff's docket until the money has passed through his hands.*

2. *In the event the sheriff does not require the money to be paid to him, but on the other hand agrees that the purchaser shall pay the first mortgage holder direct, under such circumstances poundage could not be charged.*

COLUMBUS, OHIO, January 14, 1930.

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

GENTLEMEN:—Acknowledgment is made of your communication requesting my opinion upon the following:

“Under the law relating to poundage which a sheriff may charge in the foreclosure of a mortgage, you hold in an opinion rendered to this department under date of July 22, 1929, that in case the holder of the second mortgage purchases the property at sheriff's sale that the sheriff under the provisions of Section 2845, G. C., is entitled to poundage at the rate prescribed therein on the full amount of the proceeds of such sale over and above the distributive share of such proceeds payable to the second mortgage holder. A request has been made to this department for your opinion upon two additional questions:

First, is a sheriff entitled to poundage in this case if he does not receive and disburse the money due to the first mortgage holder? See Opinion at page 1098 of your 1928 Opinions.

Second, may the sheriff insist that the purchase price of the property be paid to him by the purchaser and can he refuse to permit the first mortgage holder to receipt his docket, he having received the amount of his claim from the purchaser?"

Section 2845 of the General Code which relates to the poundage of the sheriff and which was under consideration in the opinions to which you refer, provides in part as follows:

"For the services hereinafter specified when rendered, the sheriff shall charge the following fees, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor; \* \* \* poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per cent; on all sums over ten thousand dollars, one-half of one per cent, but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, \* \* \* "

In my opinion No. 635, to which you refer, it was held as disclosed by the syllabus, that:

"Where at a foreclosure sale of real property the second mortgage holder bids in such property and pays the purchase price thereof to the sheriff, and thereafter such purchaser receives his distributive share of the proceeds of such sale on his mortgage claim and lien, the sheriff, under the provisions of Section 2845, General Code, is entitled to poundage at the rate prescribed therein on the full amount of the proceeds of such sale over and above the distributive share of said proceeds payable to the second mortgage holder, although such distributive share so paid to the second mortgage holder is not sufficient to pay the full amount of the claim set up in his cross petition and found by the court to be due him on his mortgage."

The syllabus of the opinion of my immediate predecessor found in Opinions of the Attorney General for the year 1928, page 1098, reads:

"The fees of a sheriff for poundage provided by Section 2845, General Code, are allowed and given as a compensation to the sheriff for the risk incurred in handling and disbursing money actually received by him in his official capacity. Where no money is received and no risk incurred, no compensation by way of poundage is earned."

The opinions above referred to consider the case of *Major, Sheriff, vs. The International Coal Co., et al.*, 76 O. S. 200, in which it was held in substance that poundage is given as "compensation to the sheriff for the risk incurred in handling and disbursing money actually received by him in his official capacity. Where no money is received and no risk incurred, no compensation by way of poundage is earned. \* \* \* "

An analysis of the opinions hereinbefore referred to, clearly discloses that the sheriff may not charge poundage in those instances where he does not handle the money. Section 2845, supra, also states in unambiguous language that when the real estate is bid off and purchased by a party entitled to a part of the proceeds the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party.

Your question, however, does not concern a case in which the first mortgage holder purchases the property. Under the circumstances you present, clearly it is the duty of the sheriff to collect the money and distribute the same as provided by law. It follows that he would be entitled to poundage on said claim in view of the authorities hereinbefore cited in the event he makes the collection and distribution. However, if as a matter of fact he does not receive the money he would incur no risk in handling and disbursing the same, unless by implication he is charged with the responsibility of the same whether or not he actually has the physical possession of such money. In other words, it is a close question as to whether or not the sheriff does not receive and disburse the money constructively, when as a matter of fact he permits the purchaser to pay the first mortgage holder direct. That is to say, it could well be argued that in such a procedure the sheriff constitutes the purchaser as his agent to perform his duties in reference to collection and distribution of such money. While the question is not so free from doubt, it is my opinion that where the sheriff does not receive the money from the purchaser to cover the first mortgage holder's claim, but on the other hand permits the same to be paid direct to the said mortgage holder by the purchaser, the sheriff is not entitled to poundage.

It is further my opinion that the sheriff may require such sums to be paid to him and may refuse to permit the said first mortgage holder to receipt his docket unless the money has passed through his hands.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

1409.

CRIMINAL LAW—PERSON MARRYING IN FOREIGN STATE WHILE HAVING AN UNDIVORCED SPOUSE—SAID PERSON LIVING AND LATER COHABITING IN OHIO—PROSECUTION FOR BIGAMY UNAUTHORIZED.

**SYLLABUS:**

*Where a person marries a second time, while his first spouse is still living, and the first marriage is still in force, and the second marriage is performed in the state of West Virginia, such person cannot be prosecuted in the State of Ohio for the violation of Section 13022, General Code, even though the persons cohabit together in the State of Ohio under the void second marriage.*

COLUMBUS, OHIO, January 14, 1930.

HON. W. W. BADGER, *Prosecuting Attorney, Millersburg, Ohio.*

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

“A marries B in Illinois, and deserts her in Indiana, and within a year after deserting B, marries C in West Virginia, without obtaining a divorce from B. A and C lived in Ohio before the marriage and lived in Ohio after the marriage. The marriage to C in West Virginia was obtained by making false report both to C and to the court in securing the license. A and C cohabited in Ohio as husband and wife.

Is A guilty of bigamy in Ohio?”

Section 13022 of the General Code, provides as follows: