Your question, however, does not oncern 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 obtainng 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:

"Whoever, having a husband or wife, marries another person, is guilty of bigamy, and shall be imprisoned in the penitentiary not less than one year nor more than seven years. This section does not extend to a person whose husband or wife has been continuously absent for five years next preceding such marriage without being known to such person to be living within that time."

The gist of the offense of bigamy under the provisions of Section 13022 of the General Code, is the act of marriage while the spouse by a former marriage is still living and the former marriage is still in force. The crime is committed where the act of marriage takes place.

From the facts stated in your letter, it is apparent that the act of marriage upon which the crime of bigamy must be predicated was performed in the State of West Virginia. The general rule upon the subject of venue in bigamy cases is stated in 7 Corpus Juris, page 1167, as follows:

"In the absence of statute providing otherwise, the offense of bigamy can be prosecuted and punished only in the county in which an unlawful marriage was solemnized and the venue must be laid in that county."

In some states, statutes make a continuance of cohabitation under the void second marriage an offense and in prosecutions under such statutes the venue may be laid in the county where such cohabitation takes place. However, in states that have such statutes, the courts have held that continued cohabitation after a bigamous marriage is a separate and distinct offense from bigamy.

The state of Alabama has a statute of such character, which statute is as follows:

"If any person having a former wife or husband living, marries another, or continues to cohabit with such second husband or wife in this state, he or she must on conviction be imprisoned in the penitentiary, or sentenced to hard labor for the county for not less than two nor more than five years."

In construing this statute, the Supreme Court of Alabama held in the case of *Beggs* vs. *State,* 55 Ala., 109, as shown by the second branch of the syllabus, as follows:

"The offense of bigamy under the statute, as at common law is complete when the second marriage is complete, without proof of subsequent cohabitation, and is indictable only in the county in which the second marriage is solemnized; while subsequent cohabitation under the second marriage, which is a distinct offense, may be indicted and punished in any county in which it is committed; but under an indictment for bigamy, a conviction cannot be had on proof only of subsequent cohabitation, in the county in which the indictment was found, when the second marriage took place in another county, or in another state."

The provisions of Section 13022 of the General Code, do not make a continuance of cohabitation under a void marriage an offense, and therefore a violation of Section 13022, General Code, may only be prosecuted in the county in which the second marriage took place.

I am not unmindful that the Supreme Court of Ohio held in the case of *Carmichael* vs. *State,* 12 O. S., 553, that a common law marriage furnishes the basis for a bigamous indictment when such common law marriage was the second marriage. However, the facts stated by you in your letter do not present such a situation.

In the case of *Carmichael* vs. *State, supra,* the syllabus is as follows:

"It appeared from the statement in the bill of exceptions, that the person who solemnized a marriage had no license or authority under the laws of the state. There was no other objection to the form of the marriage, and thereafter the parties cohabited as husband and wife. Held, that it was to be inferred from the statement that the parties openly and mutually consented to a contract of present marriage—then to become husband and wife, and thereafter cohabited as such, and that this constituted a legal marriage, and the man having then a wife living, might, on proof of such second marriage, be properly convicted of bigamy."

This case bears out the conclusion reached by me that mere cohabitation after a void marriage does not in itself form the basis for a violation of Section 13022 of the General Code, for if it did it would not have been necessary for the Supreme Court to determine that the facts in this case constituted a common law marriage, for there was no question that the parties were cohabiting together after the marriage had been solemnized.

While the statutes of Ohio generally provide that the venue of crimes is in the counties wherein the offenses are committed, nevertheless there are statutes which make provision that certain offenses may be prosecuted in other counties than where the offenses are committed. However, there is no statute in Ohio which authorizes th prosecution of a person on a charge of bigamy in any other county than that in which the offense was committed, and the offense is committed, as I have heretofore concluded, in the county in which the second marriage took place.

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

Respectfully,
GILBERT BETTMAN,
Attorney General.

1410.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR SALE OF DRIVEWAY IN CITY OF HAMILTON TO THE PAULINE M. SCHWARTZ COMPANY, HAMILTON, OHIO.

COLUMBUS, OHIO, January 14, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date, submitting for my examination and approval a transcript of your proceedings and findings relating to the proposed sale to The Pauline M. Swartz Company, of Hamilton, Ohio, of the interest of the State of Ohio in and to a certain twenty foot driveway in said city, extending easterly from the east line of Third Street to the west line of Smith Street, said driveway being a parcel of land twenty feet in width by sixty-five feet in length; said proposed sale and conveyance being under authority of an act of the 88th General Assembly, passed April 3, 1929 (113 O. L. 523).

The property here in question and the proceedings of your department relating to the sale of said property are the same property and proceedings under considera-