

635.

POUNDAGE—SHERIFF'S FEES—UPON PROPERTY BOUGHT BY SECOND MORTGAGE HOLDER AT FORECLOSURE SALE—HOW CALCULATED.

SYLLABUS:

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.

COLUMBUS, OHIO, July 22, 1929.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication which reads as follows:

“You are respectfully requested to furnish this department with your written opinion upon the following:

The sheriff of Trumbull County sold certain property under foreclosure proceedings; the purchaser of the property was the second mortgage holder. The property sold for an amount sufficient to cover the claim of the first mortgage holder and part of the claim of the second mortgage holder, after paying the taxes and court costs. The distribution of the proceeds of the sale was as follows:

Amount received from the sale, \$4,025.00.	
Taxes -----	\$254.60
Court costs-----	61.90
First Mortgage-----	3,031.10
Second Mortgage-----	677.40

Question: Under the provisions of Section 2845, General Code, what poundage is the sheriff entitled to in this case?

In this connection, we are enclosing a letter from the sheriff, giving the details of the transaction and a decision of the Court of Appeals of Lucas County in which it was held in an exactly similar case that the sheriff was not entitled to any poundage. Inasmuch as this decision appears to be in direct conflict with an opinion of the Attorney General, No. 1943, rendered under date of April 7, 1928, and addressed to the prosecuting attorney of Fayette County, and Opinion No. 2054 of May 4, 1928, addressed to the same prosecuting attorney, we are asking for your ruling in the matter, so that we may advise the sheriff of Trumbull County whether or not he is entitled to poundage, and if so, how much.”

From the letter received by you from the sheriff of Trumbull County which is referred to in your communication, it appears that in the case here presented, the property was bid in and purchased by the second mortgage holder whose claim as set out in its cross petition was the sum of \$1,100.00.

In the consideration of the question presented in your communication, I assume that the full amount of the purchase price on the sale of this property on foreclosure was actually paid by the purchaser to the sheriff, and with this assumption, the question presented is whether upon the fact set out in your communication and the additional facts above stated herein, the sheriff is entitled to any poundage, and if so, upon what sum of money such poundage is to be computed.

Section 2845, General Code, so far as the same is applicable to the question here presented, provides 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, * * * ”

Section 2845, General Code, was formerly Section 1230 of the Revised Statutes. In the case of *Major, Sheriff, vs. The International Coal Company*, 76 O. S. 200, the court construing this statute as it then read as a part of the Revised Statutes, held that the sheriff was entitled to poundage only on moneys actually paid into his hands on the sale of property by him in an action to foreclose a mortgage on such property; and the court in said case further held that:

“Under Section 1230, Revised Statutes, a sheriff is not entitled to poundage upon the sale of mortgaged premises under an order of sale in foreclosure, where the real estate sold by him is bid off and purchased by one who is entitled to the whole of the proceeds arising from the sale.”

The provisions of Section 2845, General Code, which control and determine the question here presented, are identical with those contained in Section 1230, Revised Statutes. In the case above cited, the Supreme Court in its opinion, after quoting the pertinent provisions of Section 1230, Revised Statutes, said:

“The language of the provisions above quoted would seem to us to be too plain to require either comment or construction. Obviously, it was the plain purpose and intent of the Legislature to thereby provide, that upon sales of real estate, poundage should be allowed to the sheriff, only upon moneys actually made and paid to him, and that in no case should poundage be allowed to, or charged by the sheriff, when the real estate sold by him is bid off and purchased by a party entitled to a part of the proceeds, except on the amount over and above the claim of such party. Language more direct and certain, by which to express such purpose, could hardly have been employed, and unless the provisions of this section are to receive this interpretation, they are entirely without meaning or effect. In the present case no money,—except an amount sufficient to cover the expenses and costs of sale,—was actually made or paid to the sheriff, nor could the sheriff have lawfully demanded or required of the purchasers that they pay over to him, in money, \$871,000, the amount of their bid. Furthermore, in this case the purchasers, T. Edward Hambleton, Frank S. Hambleton, S. L. Mooney and W. C. Mooney, were, as owners and holders of all the outstanding bonds of The

International Coal Company, entitled to the whole of the proceeds arising from the sale of said real estate, such real estate having been bid off by them for an amount less, by \$4,886.10, than the sum required to satisfy their claim. So that, neither of the conditions, essential, under Section 1230, Revised Statutes, to the right of the sheriff to charge and receive poundage on a sale of real estate by him made, existed in this case: whereas, to entitle him to such poundage it was necessary that both should exist."

Under the decision of the Supreme Court in the case above cited, the effect of the purchase of the property at sheriff's sale by a mortgage holder or other lienor who is entitled on distribution, to a part of the proceeds of such sale, is to reduce the amount of money as proceeds of such sale upon which the sheriff is entitled to poundage by the amount of money to which such purchaser is entitled on such distribution; and if said mortgage holder or other lienor bidding in said property and purchasing the same is entitled to the whole of the proceeds of such sale, the sheriff is not entitled to any poundage.

However, it is noted that in the case of *Northwestern Lumber Co. vs. Remusat*, 6 Abstract 466, decided by the Court of Appeals of Lucas County, May 28, 1928, it was held that where the holder of the second mortgage upon property purchases the same at foreclosure sale, and the purchase price is more than the amount necessary to pay taxes, costs and prior liens, but is less than a sum sufficient, upon distribution, to satisfy the purchaser's claim, the sheriff is not entitled to poundage. The court in its opinion said:

"This action is in this court on appeal by Orville S. Brumback, one of the defendants, from an order and judgment of the Court of Common Pleas overruling a motion whereby he sought to compel the sheriff of Lucas County to pay to him the sum of \$39.85 retained by the sheriff as poundage from the proceeds of sale of a lot sold by the sheriff at public sale to satisfy certain liens and judgments thereon.

The purpose of the action was to foreclose and marshal certain alleged liens. The defendant Brumback was found to have a mortgage lien upon the premises in question subordinate only to the mortgage of the defendant, The Ohio Savings Association. At the sale Brumback became the purchaser of the lot on a bid of \$3,985.00. The sale was duly confirmed by the court and upon payment of the amount so bid the sheriff executed a deed for the premises and delivered it to Brumback. \$3,945.15 was required to pay the amount of the court costs, taxes and the prior lien of The Ohio Savings Association, leaving \$39.85, which the sheriff claimed and retained as poundage. The only question involved is whether the sheriff or Brumback is entitled to this sum. Section 2845, G. C., provides that 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.'

The \$39.85 in dispute was a part of the proceeds of the sale over and above the costs, taxes and claim of The Ohio Savings Association but not, after these were paid, an 'amount over and above the claim' of Brumback, the amount of his claim being \$2,389.46, plus interest.

If the sum bid and paid by him had been no more than the amount necessary to pay the taxes, costs and prior lien, we are of the opinion that the sheriff might properly have charged poundage, since the prior lienor was not the purchaser, and Brumback under such circumstances would not be a purchaser 'entitled to a part of the proceeds.' Had the lot sold for a sum more

than sufficient upon distribution to satisfy Brumback's claim, then poundage of course would be properly chargeable on 'the amount over and above his claim.' We conclude, therefore, that the sheriff should pay to Mr. Brumback the amount so retained by him as poundage."

The decision of the Court of Appeals in the case just cited, if correct, is dispositive of the question presented on the facts stated in your communication and in the letter of the sheriff accompanying the same, for the reason that although the proceeds of the sale of the property in this case were more than sufficient to pay the costs, taxes and the claim of the first mortgage holder, they were not sufficient to satisfy the claim of the second mortgage holder which bid in and purchased said property. Upon mature consideration of this question I am of the opinion that the conclusion reached by the Court of Appeals in the case above cited, cannot be supported on any possible construction of the provisions of Section 2845, General Code, above quoted.

Moreover, in my view of this statute, it is not the amount of the purchaser's claim set up in its cross petition and found by the court to be due it, which is to be deducted from the proceeds of the sale for the purpose of determining the amount of money upon which the sheriff's poundage is to be computed, but in such case the amount to be deducted for said purpose is the money which such purchaser is entitled to be paid on distribution of the proceeds of the sale.

Touching this question the United States District Court of the Northern District of Ohio in the case of *The City of St. Ignace*, 19 Fed. (2d) 952, construing the above quoted statute and decision in the case of *Major vs. Coal Company*, supra, said:

"In Ohio the sheriff is not allowed poundage on such part of the sale money as is extinguished by the distributive share of the purchase mortgage or lienor."

In the opinion of the court in the case of *Major vs. Coal Company*, supra, it was said that poundage is 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; and where such money is actually received and disbursed by the sheriff, he should, in my opinion, receive poundage at the prescribed rate on the money so received and disbursed by him except as such right may be limited by the terms of the statute.

Holding to the views expressed by the Supreme Court in the case of *Major vs. Coal Company* and in the case last above cited, I am of the opinion that in the case presented in your communication, the sheriff is entitled to poundage upon the full amount of the proceeds of the sale of said property over and above the amount which said second mortgage holder was entitled to be paid upon the distribution of such proceeds. It is obvious that in this case the same conclusions would be reached if the purchaser had not paid into the hands of the sheriff the full amount for the purchase price of the property, but had paid only that part of the purchase price which was over and above its distributive share of the price for which said property was sold.

The conclusion reached by me in this opinion on the question presented by the facts stated in your communication and in that of the sheriff of Trumbull County accompanying the same, is in accord with that reached in an opinion of this department directed to the prosecuting attorney, Fayette County, under date of May 4, 1928, Opinions of the Attorney General, 1928, Vol. II, page 1098.

Respectfully,

GILBERT BETTMAN,

Attorney General.