

stocked his "farm," if necessary, with new animals; whether or not the owner thereof held himself out to the public as a breeder and raiser of muskrats; and whether or not the owner thereof regularly marketed his product.

Whether or not the "farm" about which you inquire is a bona fide muskrat farm is a question of fact determinable from all the facts and circumstances as shown by the evidence that might be adduced from witnesses qualified to testify. From the above discussion, it is believed that your department will be in a position to decide the question under consideration; however, if any difficulty be experienced in finally deciding the question, when all the facts shall have been ascertained, this department will afford such assistance as is desired.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1943.

POUNDAGE—SHERIFF'S FEES—SECTION 2845, GENERAL CODE,
CONSTRUED.

SYLLABUS:

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.

COLUMBUS, OHIO, April 7, 1928.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—This will acknowledge your letter dated April 2, 1928, which reads:

"In our Court of Common Pleas the holder of a second mortgage, amounting to \$3,727.91, filed suit in foreclosure. There was a first mortgage of \$18,002.33. The property sold for \$22,297.74 and was bid in by the holder of a third mortgage amounting to \$7,650.00. The property was sold subject to the first mortgage which will be assumed by the purchaser, but the holder of the second mortgage who brought the foreclosure proceeding is to be paid. The sheriff desires to know whether or not he is entitled to charge poundage under Section 2845, General Code. We shall appreciate receiving your opinion on this question at your earliest convenience."

Section 2845, General Code, to which you refer, in so far as pertinent, provides:

"For the services hereinafter specified when rendered, the sheriff shall charge the following fee, 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,
* * *"

Your attention is directed to the case of *Major, Sheriff, vs. The International Coal Co., et al.*, 76 O. S. 200, the syllabus of which reads:

"1. 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 so sold by him is bid off and purchased by one who is entitled to the whole of the proceeds arising from the sale, although such purchaser was not a party to the suit in which the decree of foreclosure was made and the order of sale issued.

2. In a suit for the foreclosure of a mortgage commenced and prosecuted by the mortgagee, as trustee for the holders of the bonds secured by said mortgage, such proceedings were had that the mortgaged property was duly advertised and sold by the sheriff, and was bid off and purchased by said bondholders; the purchase price being paid by them—as authorized by the provisions of the mortgage and the terms and conditions of the sale—by their paying in cash a sufficient sum to cover the costs and expenses of sale, and the residue by the surrender to the sheriff of the bonds secured by said mortgage in an amount sufficient to cover the balance of said purchase price, Held, that the sheriff was not entitled to charge and collect poundage on the amount of the bonds so surrendered, as for "money actually made and paid."

Section 2845, *supra*, was formerly Section 1230, Revised Statutes, and, in so far as pertinent to your inquiry, read the same then as now. After quoting the provisions of Section 1230, Revised Statutes, Judge Crew, who wrote the opinion of the Court, on page 207, used the following language:

"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."

And on page 208:

"Again, to give to the provisions of Section 1230, in the present case, the effect claimed for them by counsel for plaintiff in error, would be to disre-

gard the purpose for which poundage is allowed and given, namely, 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, and under the provisions of Section 1230, Revised Statutes, none can be allowed or charged."

As stated by Judge Crew in the opinion referred to, poundage is allowed 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.

You state that "the property was sold subject to the first mortgage which will be assumed by the purchaser." Inasmuch as the amount of money represented by the first mortgage was never received by the sheriff in so far as this amount is concerned no risk was incurred by him, and it follows that no compensation by way of poundage was earned by him and therefore cannot be allowed.

In view of the foregoing and answering your question specifically, it is my opinion that the sheriff is entitled to poundage only on the amount of money actually received by him in his official capacity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1944.

COUNTY COMMISSIONERS—AUTHORITY UNDER SECTION 3019,
GENERAL CODE—ALLOWANCES.

SYLLABUS:

The phrase "at the first meeting in January," as used in Section 3019, General Code, is directory merely and a board of county commissioners has authority to make the allowance therein provided at a later meeting of such board.

COLUMBUS, OHIO, April 7, 1928.

HON. F. E. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads:

"Section 3019, General Code, provides:

"* * * the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in place of fees, * * *"

A justice of the peace in and for this county did not make his claim until some time in February, this year; the commissioners are slow to allow the claim, stating that by reason of the J. P. not having his claims in so they could pass on it at the 'first meeting in January' they should not allow same."

Section 3019, General Code, to which you refer, provides:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting