

Section 6956-23 of the General Code provides for the changing of the location of a main market road or intercounty highway when the same is necessary to accomplish the abolishment of such grade crossing.

Section 6956-37 of the General Code provides in substance that the director of highways and public works shall have the same power to raise or lower or cause to be raised or lowered the grade of any main market road or intercounty highway above or below railroad tracks as that conferred by the Fisher Act upon county commissioners but only after proper hearing as provided in Sections 3 and 7 of said act.

Section 6956-38 makes provision for that part of the costs to be borne by the state in grade separations and provides that the same shall be paid from the intercounty highway or main market road fund of the department of highways and public works.

An examination of this agreement will reveal that it involves a relocating of the present grade crossing in Intercounty Highway No. 18 with the tracks of the Pennsylvania Railroad Company and that the State of Ohio has agreed to contribute the sum of \$32,500 toward this project.

Finding that the director of highways and public works has authority in law to enter into a contract containing the terms and conditions as the one submitted to me for my approval and that the same is correct in form, I hereby approve the same.

I am returning herewith the contract submitted to me for my approval in order that you may execute the same in behalf of the State of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

611.

COUNTY SHERIFF—DUTY AS TO FEDERAL PRISONERS—DEFINITION OF WORD "SUBSISTENCE" AS USED IN SECTION 3179, GENERAL CODE—SECTION 2850, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *It is the duty of a county sheriff to receive prisoners committed by authority of the United States and confine them in the county jail. Such prisoners should be supported while so confined as are other prisoners in the jail and the expense of the subsistence of such prisoner while in the county jail shall be charged for by the sheriff on the basis of the actual cost of such subsistence.*

2. *The word "subsistence" as used in Section 3179, General Code, for which the sheriff is authorized to make a charge for federal prisoners includes not only the cost of furnishing the food for said prisoners but of furnishing articles of personal clothing, laundry work, medical attendance and nursing when necessary and such articles as are necessary to provide the means for personal cleanliness of the prisoners, but should not include the cost of fuel or warming the jail or such other articles as would be included among the furnishings of the jail.*

3. *The amendment of Section 2850, General Code, by the 87th General Assembly does not operate to make any change in the law with reference to the confinement and subsistence of federal prisoners in county jails.*

COLUMBUS, OHIO, June 13, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your communication, requesting my opinion in answer to the following questions:

“Question 1. Under the provisions of Section 3179 and 2850 of the General Code, as amended by the present general Assembly, may a sheriff charge to the federal government the maximum of 75 cents per day for the subsistence of federal prisoners or can he only receive the actual cost of keeping and feeding such prisoners?”

Question 2. In the event that the sheriff may legally receive from the federal government the maximum of 75 cents or any amount in excess of the actual cost, should the amounts so received be paid into the county treasury and the commissioners of the county pay to such sheriff the actual cost of keeping and feeding the federal prisoners in the same way that he is paid for keeping and feeding state prisoners, or can the sheriff make such contract as he can with the federal authorities and retain the amount received under such contract for his own use?”

Section 2850, General Code, as amended by the present general assembly, provides as follows:

“The sheriff shall be allowed by the county commissioners the actual cost of keeping and feeding prisoners or other persons confined in the jail, but at a rate not to exceed seventy-five cents per day of three meals each. * * * The sheriff shall furnish, at the expense of the county, to all prisoners or other persons confined in the jail, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate. * * * ”

Section 3179, General Code, the terms of which have been left unchanged, provides as follows:

“The sheriff shall receive prisoners charged with or convicted of crime committed to his custody by the authority of the United States, and keep them until discharged by due course of law. A prisoner committed for an offense by the authority of the United States shall be supported at the expense thereof during his confinement in jail. No greater compensation shall be charged by a sheriff for the subsistence of such prisoner, than is authorized by law to be charged for the subsistence of state prisoners. The commissioners of a county in which a prisoner so committed may be confined shall receive from the United States one dollar per month for the use of the jail for each person so committed. A sheriff or jailer who neglects or refuses to perform the services and duties required of him by this section shall be liable to like penalties, forfeitures, and actions as if such prisoner had been committed under the authority of this state.”

Before the amendment of Section 2850, General Code, by the present legislature it provided in part as follows:

"The sheriff shall be allowed by the county commissioners not less than forty-five or more than seventy-five cents per day for keeping and feeding prisoners in jail. * * * "

It will be noted that Section 2850, General Code, as amended, provides that the allowance to be made by the county commissioners to the sheriff for keeping and feeding prisoners shall in no case be more than the actual cost of such keeping and feeding, and fixes a maximum amount below which the cost of such keeping and feeding must be kept in the larger counties and a minimum and maximum sum within which the keeping and feeding must be kept in the smaller counties. By the provisions of Section 3179, supra, the same rule would apply so far as the amount to be charged by the sheriff for keeping and feeding federal prisoners is concerned, the pertinent provision of the statute being: "No greater compensation shall be charged by a sheriff for the subsistence of such prisoner than is authorized by law for the subsistence of state prisoners."

It had been the practice over the state for county commissioners to make allowances to sheriffs for keeping and feeding prisoners on the basis of a flat rate within the limits prescribed by law, irrespective of the actual cost of the keeping and the feeding of the prisoners and it had been held by the courts that the sheriff was entitled to whatever profit he might make out of the feeding of the prisoners.

In the case of *State of Ohio ex rel Gentsch vs. Hirstus, et al.*, action was brought to recover from the sheriff of Cuyahoga county the amount which had been allowed to him for keeping and feeding prisoners which was in excess of the actual cost thereof. Both Judge Babcock and Judge Estep of the Cuyahoga County Common Pleas Court held that these allowances made to the sheriff were to be in addition to his salary as the wording of the statutes would indicate and that the sheriff was entitled to any profit he might make on the feeding of the prisoners, as one of the emoluments of his office. Judge Estep's opinion may be found in the report of the case in 15 O. N. P. (N. S.), page 505. The case was affirmed by the court of appeals in *State of Ohio, ex rel Frank F. Gentsch*, 25 O. C. C. (N. S.) 177. The headnote of this case is as follows:

"There is no claim or obligation resting upon a sheriff to account for or pay over to the county or state the amount received by him for keeping and feeding prisoners during his term of office in excess of the actual cost of so doing."

This rule was changed however by the Supreme Court of Ohio in the case of *Kohler, Sheriff, vs. Powell, Chief Justice*, 115 O. S. 418. The Ohio Law Bulletin and Reporter for January 17, 1927. The second paragraph of the syllabus of this case is as follows:

"The sheriff has no right to collect from the county to reimburse himself for expenditures made or indebtedness incurred for feeding the prisoners confined in the county jail any sum in excess of such disbursement or indebtedness so incurred. The law does not permit the sheriff to secure a private personal profit out of the feeding of the prisoners confined in the jail."

The reasons given for the holding in this case are in substance, that, inasmuch as the legislature has provided for the payment of a definite salary to the sheriff for the performance of the duties of his office, among which are the keeping of the jail and the feeding of the prisoners, and has further provided that the sheriff shall

be reimbursed for any necessary expenses in performing the duties of his office, it cannot be supposed that there was any intention on the part of the legislature to set up a system whereby the sheriff might make a personal profit, in addition to his salary, out of the performance of the duties of his office.

While the supreme court did not have under consideration the provisions of Section 3179, General Code, the discussion of the opinion being confined to the provisions of law relating to the feeding of state prisoners it is clear that the same observation would apply to the keeping and feeding of federal prisoners, as the statute itself, Section 3179, *supra*, specifically states that no greater compensation shall be charged for the subsistence of federal prisoners than is authorized by law to be charged for the subsistence of state prisoners. It is therefore clear that federal prisoners are on the same basis so far as payment for their feeding and keeping are concerned as are state prisoners and that the federal government cannot be charged any more for this service than the actual cost of doing it.

In the consideration of the question of supporting federal prisoners in county jails there arises another question which is more difficult of solution.

An analysis of Section 3179, General Code, discloses that it provides five things:

First: The sheriff shall receive and keep federal prisoners.

Second: Such prisoners must be supported at the expense of the federal government.

Third: The sheriff shall make a charge for the "subsistence" of such prisoners.

Fourth: The county commissioners shall receive from the United States Government one dollar per month for the "use of the jail", for each such prisoner committed thereto by the federal government.

Fifth: Provision is made for penalizing the sheriff for failure to perform the services and duties enjoined by the statute.

It is apparent that the intention of the law is that neither the county nor the sheriff are to be put to any expense for which they are not to be reimbursed on account of the confinement of federal prisoners. All the cost of supporting and confining such prisoners is to be met by the United States Government. This expense is divided into two parts. One is for the use of the jail for which the commissioners are to receive one dollar per month for each prisoner and the other is for the charge which is made by the sheriff for the subsistence of the prisoner. The question arises as to what that charge includes and, having determined this, the other question suggests itself as to what shall be the basis of the charge, whether at actual cost or on the basis of a flat rate per day or month. The first question is whether the support contemplated by the statute and the subsistence spoken of includes only keeping and feeding or whether it includes other things such as the use of the beds or bedding, the furnishing of clothing, medical care and nursing and such other things as may be necessary for the prisoner or whether some of these things are included within the terms "use of the jail."

Whatever our conclusion may be as to what is included within the terms "support" and "subsistence" and "use of the jail" it is well settled by the pronouncements of the supreme court in the Kohler case and in the plain wording of Section 2850 as amended, that the sheriff himself cannot be permitted to make a personal profit from the feeding or subsistence of any prisoner. It is equally well settled that political subdivisions are not authorized to conduct any business such as the maintenance of a jail with a view to profit. It therefore clearly follows that all charges made for the confinement of federal prisoners in county jails should be on the basis

of the actual cost of such services. It is true the legislature has arbitrarily fixed the amount of one dollar per month for each prisoner as the proper charge for the use of the jail. This is a legislative determination that one dollar per month is the proper charge for the use of the jail. If the legislature had seen fit to fix some definite amount as a proper charge for the other things that must necessarily be furnished such charge would be the proper charge to make, but it did not do so. It provided that for such things as were necessarily included within the term "subsistence" a charge therefor should be made by the sheriff and that charge should be the same as for state prisoners, which, as has been determined, must be at actual cost.

The word "subsistence" includes more than food. While technically it means only what is necessary to sustain life, lexicographers define it "sufficiency to support life". It is my opinion that as the word is used in this statute it should include such other needs as would be necessary and proper to provide for the prisoners.

Section 3177, General Code provides as follows:

"The county commissioners, at the expense of the county, shall provide suitable means for warming the jail, and its cells and apartments, frames and sacks for beds, nightbuckets, fuel, bed, clothing, washing, nursing when required, and such fixtures and repairs as are required by the court. They may appoint a physician for the jail, at such salary as is reasonable, to be paid from the county treasury. Such physician, or any physician or surgeon employed in the jail, shall make a report in writing whenever required by the commissioners, the grand jury or the court. The sheriff shall make a report to the commissioners annually, or oftener if they so require, of the property of the county in the jail, and the condition thereof."

The things enumerated in the section last above quoted are to be furnished at the expense of the county. It is elsewhere provided that the sheriff shall furnish at the expense of the county such articles as are necessary to provide the prisoners with the means of keeping clean. (Section 2850 supra.) It cannot be supposed that all these articles should be furnished as a part of the jail for one dollar per month and as there is no other provision, relating to feeding prisoners, for reimbursement for the cost of these things it must be concluded that they are included within the terms of the word "subsistence" for which the sheriff is charged with the duty of furnishing.

Some of these articles, such as fuel and the beds and bedding being a part of the jail furnishings are in my opinion included within the term "use of the jail" and should be furnished for the one dollar per month which the government pays for the use of the jail, but personal clothing, laundry work, medical attendance and nursing when necessary, and provision for the personal cleanliness of the prisoners may be charged for as a part of the subsistence of the prisoners at actual cost. The sheriff is charged with the duty of furnishing these things and is authorized to charge therefor.

The question arises as to how the accounts for the cost of the various things that go to the subsistence of federal prisoners shall be handled, whether the county commissioners shall furnish all the necessities set out in Section 3177, supra, including food for federal prisoners the same as other prisoners in the county jail and have the sheriff make a charge for such things as provided in Section 3179, supra, and as the statutory agent of the county, collect the account for the county, or is the sheriff to handle the matter as a personal matter between him and the United States Government.

Provision is made authorizing the county commissioners to make allowances to the sheriff for keeping and feeding prisoners in the county jail by Section 2997 of the General Code, and the question arises as to whether or not this section is applicable to federal prisoners in the county jail as well as other prisoners.

Section 2997, General Code, reads in part as follows:

“In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law. * * * ”

The plain wording of Section 3179, *supra*, indicates that the entire matter of the subsistence of federal prisoners in county jails is to be taken care of as provided in the statute; that is, that the sheriff is to receive and keep the prisoners and charge for their subsistence. The use of the jail, which is the only expense the county is put to in the matter, is to be paid for at the rate of one dollar per month.

The history of Section 3179, General Code, shows that the original enactment in 1806 (5 O. L. 71) directed how the sheriff should render his account for the cost of subsistence of federal prisoners, and further directed that he should include in this account fifty cents per month for each federal prisoner and collect the same as the agent of the county. When this act was amended in 1860 (57 O. L. 108) to read as it now reads, nothing was said as to the sheriff's duty in this regard.

In view of the fact that Section 3179, General Code makes provision for reimbursement of the cost of the confining of federal prisoners in county jails, it is my opinion that the terms of Section 2997, *supra*, are not applicable in such cases, and that county commissioners are not authorized to make allowances from county funds for feeding and subsisting federal prisoners, and that the entire transaction, other than one dollar per month which the commissioners are to receive for the use of the jail is between the sheriff and the federal government.

In an opinion of this department which may be found in the Annual Report of the Attorney General for 1912, Vol. I, page 318, where a similar question was under consideration, the Attorney General, after setting out the provisions of Sections 2850 and 2997, of the General Code, which were so far as pertinent the same then as now, as were also the provisions of Section 2917, General Code, said:

“The term ‘prisoners’ as used in each of the foregoing sections is not qualified. It is not limited to prisoners of the county or of the state of Ohio. It may include any prisoner who is lawfully confined in the county jail. It does not, however, include federal prisoners, because the manner of paying their subsistence is specially provided for in Section 3179,”

and concluded:

“The county commissioners cannot make an allowance for boarding federal prisoners in the county jail.”

Specifically answering your questions which may be answered together, I am of the opinion that there is no authority in law for making a charge to the federal government for keeping federal prisoners in the county jail on the basis of a flat rate per day and that charges should be made to cover the cost of the subsistence of federal prisoners in county jails at the actual cost of such subsistence. That no charge can be made other than that of one dollar per month for each prisoner for the use of the jail and its permanent furnishings nor for the fuel necessary for heating the same, but that the sheriff may charge not only for food consumed by the

prisoners and the cost of preparing it, but for such other items of expense as are personal to the prisoner himself, such as clothing, laundry work, medical attendance and nursing when necessary, and the cost of providing for the personal cleanliness of the prisoner, and that such charge must be on the basis of the actual cost of the things provided. The subsistence of federal prisoners in county jails calls for the furnishing of not only food, but all other things to properly support such prisoners. The sheriff is charged with the duty of providing this subsistence and the adjustment of the accounts for the cost of such subsistence is a matter between the sheriff and the federal government, acting through the Attorney General of the United States, pursuant to Section 699 of the Federal Code, which section provides as follows:

“The Attorney General shall contract with the managers or proper authorities having control of prisoners confined in state or territorial jails or penitentiaries under Section 696 of this title, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined.”

Respectfully,
EDWARD C. TURNER,
Attorney General.

612.

TRUSTES OF OHIO STATE UNIVERSITY—WITHOUT AUTHORITY TO DISBURSE MONEYS APPROPRIATED UNDER SECTION 9921-6, GENERAL CODE, FOR PAYMENT OF ADDITIONAL SALARY TO THE COUNTY AGRICULTURAL AGENT OR FOR OFFICE EXPENSES OF SUCH AGENT.

SYLLABUS:

The trustees of Ohio State University are without authority to disburse moneys, appropriated under authority of Section 9921-6, General Code, out of the agricultural extension fund for the payment of additional salary to the county agricultural agent or for payment of a stenographer or other office expenses of such agent.

COLUMBUS, OHIO, June 13, 1927.

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

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

“You are respectfully requested to furnish this department your opinion on the following question:

Question: In view of the provisions of Section 9921-4 of the General Code may an appropriation made by the county commissioners under the provisions of Section 9921-6 G. C., be used, first, in the payment of additional salary to the county agricultural agent; and second, for the payment of the