

2504.

PROPERTY—PERSONAL—SEIZURE AND SALE UNDER SECTION 6212-43,
GENERAL CODE—SECTION 3347, GENERAL CODE, NOT APPLICABLE

SYLLABUS:

The provisions of Section 3347, General Code, have no application to sales of property seized and sold under the provisions of Section 6212-43, General Code.

COLUMBUS, OHIO, August 29, 1928.

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

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

"We are enclosing herewith a letter from one of our state examiners submitting two questions in connection with the right of a constable to charge a fee of six per cent. on money made from the sale of an automobile seized and sold under the provisions of Section 6212-43, General Code.

You are respectfully requested to render this department your written opinion upon the questions submitted."

The questions submitted by your examiner are as follows:

"1st. Would a constable be entitled to the fee of 6% prescribed by Section 3347, G. C., for money made on execution against property, when ordered by the court to sell a conveyance seized under the provisions of Section 6212-43, G. C.?"

2nd. Would a constable be entitled to the fee of 6% prescribed by Section 3347, G. C., for money made on execution against property, when ordered by the court to sell a conveyance seized under the provisions of Section 6212-43, G. C., providing the mortgagee bids in the conveyance at a price insufficient to cover his lien and no money is actually made?"

On April 6, 1921 (109 v. 95), the Legislature passed an act entitled:

"An Act—To provide further for the enforcement of laws prohibiting the liquor traffic, by seizure and sale of conveyances unlawfully transporting intoxicating liquors."

This act became Section 6212-43, General Code, and, in so far as pertinent to your inquiry, provides:

"* * * Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer named herein, he shall take possession of the* * * automobile * * *, and shall arrest any person in charge thereof. * * * *The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure and the cost of the sale, shall pay all liens, according to their priorities * * * and shall distribute the balance as is distrib-*

uted money arising from fines and forfeited bonds under the law of the state prohibiting the liquor traffic. * * *” (Italics the writer’s).

This section and particularly the portion quoted is practically identical with Section 26 of the Volstead Act (The National Prohibition Act).

Section 23 of the Volstead Act provides *inter alia* that:

“* * * For removing and selling property in enforcing this act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court. * * *”

and the words of Section 26 “the fee for the seizure, and the cost of the sale” relate to the above quoted part of Section 23. However, the Legislature, when adopting and enacting Section 26 as a part of the General Code of Ohio, did not adopt and enact Section 23 of the Volstead Law, or pass any other statute making provision for fees to be paid to an officer selling a confiscated car.

The forfeiture of articles illegally used is an ancient remedy and the procedure provided for forfeiture is *in rem*. The act denounced by this section is the transportation of liquors in violation of law, and requires that when a person is discovered in the act, the liquor being transported shall be seized, the vehicle in which they are being carried taken into possession by the officer, and the person in charge arrested. The vehicle used in transportation of the liquors becomes the offending thing, as the person discovered in the act is the offender. The forfeiture of the vehicle is not a part of the penalty prescribed for doing the act for which the defendant is convicted; it is a thing that is to follow from the fact of conviction. Therefore the order of forfeiture need not be entered as a part of the conviction, as such forfeiture and sale is ancillary and may be made subsequently.

It is stated in Blakemore on Prohibition, Third Edition, 1927, at page 715 (Section 1129):

“A proceeding for the forfeiture of liquor under state law is commonly not criminal, but *in rem*, and is not a punishment for crime, but is a simple and effective method designed to abate and prevent the continuance of a nuisance, and the seizure of an automobile because unlawfully used in the transportation of liquor is a proceeding *in rem*, and not criminal and the state need only prove its case by a fair preponderance of the evidence, but is criminal in nature, although civil in procedure, so that a criminal court may have jurisdiction. The forfeiture of an automobile is not part of the sentence imposed under state laws, but is an incident of the conviction of the owner.”

Section 3347, General Code, of which you inquire, in so far as pertinent, provides:

“For services actually rendered and expenses incurred, regularly elected and qualified constables shall be entitled to receive the following fees and expenses, to be taxed as costs and collected from the judgment debtor, except as otherwise provided by law; * * * serving and making return of execution against property or person, eighty cents, and six per cent. of all money thus collected * * *.”

Costs were unknown to the common law, and no costs whatever were recoverable. The right to recover costs is purely statutory; and the term “costs” has a legal sig-

nificance and includes only "taxable costs." The only costs which shall be carried into a judgment (Section 3026, General Code), are "Taxable" costs.

You will note that the fees and expenses provided by Section 3347, *supra*, are "to be taxed as costs and collected from the judgment debtor." Obviously the provisions of this section have no application whatsoever to forfeiture cases which are proceedings *in rem*, and I know of no statute authorizing or fixing fees in such cases.

In view of the foregoing it is my opinion that the provisions of Section 3347, General Code, have no application to sales of property seized and sold under the provisions of Section 6212-43, General Code. Therefore, both of your questions must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2505.

APPROVAL, BONDS OF THE VILLAGE OF SOUTH ZANESVILLE,
MUSKINGUM COUNTY—\$3,945.30.

COLUMBUS, OHIO, August 29, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2506.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
CRAWFORD, CUYAHOGA AND PORTAGE COUNTIES.

COLUMBUS, OHIO, August 29, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

2507.

APPROVAL, LEASE FOR ROOMS AT 180 EAST LONG STREET, COLUMBUS, OHIO, FOR USE BY TRADES TRAINING DEPARTMENT FOR THE OHIO COMMISSION FOR THE BLIND.

COLUMBUS, OHIO, August 29, 1928.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and opinion a lease between the State of Ohio acting by the Director of Public Welfare as lessee, and George L.