

13, 1934, is the entire gross receipts of the company, including all sums earned or charged, whether actually received or not for business done within this state, excluding therefrom as to each of such utilities all receipts derived wholly from interstate business or business done for the federal government. The base upon which to compute such taxes on and after December 13, 1934, is the entire gross receipts of such utilities, actually received from whatever source derived, from business done within this state, excluding therefrom as to each of such utilities all receipts derived wholly from interstate business, or business done for the federal government.

3. In the case of union depot companies, in computing such excise taxes for the period on and after December 13, 1934, all money paid or advanced to such companies, by the railroad company or companies owning them, is to be excluded from the gross receipts actually received, in determining the base.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4091.

CONSTABLE—REQUIRED TO SERVE WARRANT FOR ARREST OF PERSON CHARGED WITH FELONY REGARDLESS OF FEE—O. A. G. 1934, NO. 2874, FOLLOWED.

SYLLABUS:

1. *Opinion No. 2874, rendered June 29, 1934, approved and followed.*
2. *Where a warrant is issued to a Constable for the arrest of a person charged with a felony such Constable may not refuse to serve the warrant because of the possibility that he may receive no fee for such service.*

COLUMBUS, OHIO, MARCH 25, 1935.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“B. was arrested on an affidavit filed in a Justice Court, charging a felony.

A warrant was issued on said affidavit. The prosecuting witness could not be compelled to secure costs because it was a felony. No chief of police or constable would accept the warrant unless his fees were secured.

Under the holding of Opinion No. 2874, rendered June 29, 1934, and former opinions cited therein, these fees can not be paid out of the County fund in the event no conviction was had.

In the rural counties we do not have the Grand Jury in session only a few days in each term, and it frequently happens, as in this case, that action delayed means justice defeated.

We know of no law by which a Chief of Police or Constable can be forced to accept a warrant without the assurance that he is to receive his fees for apprehending, arresting and presenting the body of the defendant in the Court issuing the warrant.

In view of the present opinions, it prevents justice in many cases where immediate action is imperative in order to hold defendant from fleeing to parts unknown.

It would seem to the writer, in cases of a felony, where the State fails either before the Grand Jury or defendant is acquitted, the costs in the magistrate Court should be paid out of the funds of the county."

Your question is prompted by virtue of my Opinion No. 2874, rendered June 29, 1934. The first three branches of the syllabus of that opinion read as follows:

"1. The allowance provided in section 3019, General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, does not find sufficient evidence to bind the defendant over to the Grand Jury.

2. The allowance provided in section 3019, General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate binds the accused over to the Grand Jury and the Grand Jury fails to indict such accused.

3. The allowance provided in section 3019, General Code, for a justice of the peace and constable may not be paid them in felony cases where the justice of the peace, as an examining magistrate, binds the accused over to the Grand Jury and the Grand Jury indicts the accused but before the trial the indictment is nolle."

Under this opinion a Justice of the Peace and a constable may not receive the statutory allowance provided in Section 3019, General Code, unless the state fails in a felony case. Section 3019, General Code, reads as follows:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be prorated on the basis of lost fees."

The above opinion holds that in those three enumerated situations the state has not failed and the Justice of the Peace and Constable are not entitled to this statutory allowance. Your inquiry amounts to a request that I review my former opinion. Since the rendition of this opinion the statutes in question have not been changed.

You refer to a possible injustice in not permitting these officers to receive their fees in all felony cases. The remedy in such a situation rests with the legislature. In this connection I call your attention to an opinion to be found in Opinions of the Attorney General for 1932, Vol. III, page 1460, the first branch of the syllabus of which opinion reads as follows:

"1. There is no way by which a justice of the peace may be paid for his services as an examining magistrate, either in misdemeanor or felony cases, where the grand jury fails to indict a person who has been charged with a crime before such magistrate, except in misdemeanor cases wherein the com-

plainant, as provided by Section 13432-20, General Code, has been required by the justice of the peace to be liable for the costs in the event that the complaint is dismissed."

From the opinion at page 1462, I quote the following:

"There is no statute authorizing the taxing of the costs of an examining magistrate against the state where a grand jury fails to indict a person bound over by a justice of the peace acting as an examining magistrate, either in a misdemeanor or felony case. The mere fact that no compensation is provided for or allowance made in those cases wherein the accused is not indicted by a grand jury after being bound over by a justice of the peace is one of the burdens which attaches to the office of a justice of the peace and which is assumed when a person is elected thereto. This is so even though the services performed in criminal proceedings by a justice of the peace as an examining magistrate are required by statute. The fact that a justice may not receive compensation for certain services rendered is not unique to the law. According to Taft, Chief Justice of the Supreme Court of the United States, in the case of *Tumey vs. State of Ohio*, 50 A. L. R. 1243, at p. 1250:

'For hundreds of years the justice of the peace of England seemed not to have received compensation for court work.'

In view of the above I see no reason for changing the conclusions reached in my former opinion.

I come now to what I consider your second question. You refer to the possibility that constables might often refuse to arrest a person charged with a felony. You intimate such a possibility might exist by virtue of the holding in my former opinion. In this connection I call your attention to Section 13432-9, General Code, which reads as follows:

"When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in Section 1 of this chapter, but if the offense charged is a violation of the ordinance or regulation of a municipal corporation such process shall be directed to and executed by the officers of such corporation."

A Constable is one of the officers named in Section 13432-1, General Code. I also call your attention to Section 3335, General Code, which reads as follows:

"Each constable shall serve and execute all warrants, writs, precepts, executions, and other process to him directed and delivered, and in all respects whatever, do and perform all things pertaining to the office of constable."

It would seem to follow in answer to your second question that if a Justice of the Peace issues a warrant for the arrest of a person charged with a felony it is the duty of the Constable to serve the writ, regardless of the fact that such Constable might not receive any fee. As stated in the 1932 opinion supra, it is one of the burdens which attaches to the office when the Constable is elected thereto.

Respectfully,

JOHN W. BRICKER,
Attorney General.