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1. CLERK OF COURTS—SHALL NOT ISSUE WRIT IN CIVIL ACTION TO ANOTHER COUNTY UNTIL SUFFICIENT FUNDS ARE DEPOSITED TO PAY OFFICER FOR EXECUTION OF WRIT—FEES OF SHERIFF—CLERK NOT LIABLE TO SHERIFF FOR EXPENSES IN LEVYING OF EXECUTION—SECTIONS 2845, 2882 G. C.
2. LEVY—OFFICER MAY DEMAND OF PLAINTIFF FEES OF PRINTER FOR PUBLISHING NOTICE OF SALE—LIABILITY OF SHERIFF FOR PRINTING FEES.
3. SHERIFF—NO LEGAL AUTHORITY TO REQUIRE INDEMNITY BOND OF JUDGMENT CREDITOR BEFORE MAKING LEVY ON GOODS AND CHATTELS—EXPENSES—ADVERTISING, CUSTODIAL CARE OF PROPERTY.

SYLLABUS:

1. Under the terms of Section 2882, General Code, the clerk of courts shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it. The endorsement therein provided for to the effect that funds have been deposited for pay for the execution of said writ has reference to those fees to which the sheriff is entitled by virtue of Section 2845, General Code. Hence there is no liability on the part of said clerk to the sheriff for the payment of any expenses which the latter may incur in the performance of his duties growing out of the levying of said execution.

2. By virtue of Section 11695, General Code, the officer who makes a levy, or holds an order of sale, before giving notice of the sale, may demand of the plaintiff, his agent or attorney, the fees of the printer for publishing such notice. If a sheriff fails to make such demand and incurs an expense for advertising he may be held liable for printing fees in an instance where the goods and chattels on which execution has been levied remain unsold for want of bidders.

3. A sheriff is without legal authority, as a condition to and before making a levy on goods and chattels, to require an indemnity bond of a judgment creditor because expenses may be incurred for advertising and custodial care of said goods and chattels.

Columbus, Ohio, April 12, 1948

Hon. D. Deane McLaughlin, Prosecuting Attorney
Stark County, Canton, Ohio

Dear Sir:

Your request for my opinion reads:

“Some time ago the Sheriff of Stark County received a Foreign Execution with the indorsement as provided in Section 2882 of the General Code of Ohio, and pursuant to the command of such execution levied on personal property which he took into his possession and stored. He then proceeded to advertise sale. No bids were received and the execution was returned unsatisfied because there were no bidders at the sale. Thereafter, another and successive Foreign Executions were issued on the same judgment with the same indorsement and on several occasions the sale was called off by the plaintiff’s attorney. On other occasions no sale was made because there were no bidders.

“In the meantime the goods levied upon had remained in storage and printers’ fees have accumulated along with other costs. Upon investigation we find that the funds deposited by the execution creditor were merely nominal and are far less than the accumulated costs. A large storage bill is now due as is also considerable advertising costs.

“Buggy Company v. Cowin, 10 Ohio Appeals 16, holds that the Sheriff is required to obey a Foreign Execution which contains the necessary indorsement.

“Would you please give us your opinion on the following questions?

“1. Is the clerk who issues a Foreign Execution required to take an adequate deposit to defray the costs on the Foreign Execution?

“2. Is the clerk who issues a Foreign Execution containing the indorsement as provided in Section 2882 liable for the costs made on the execution?

“3. Is there any liability on the part of the Sheriff who makes the levy on a Foreign Execution containing that indorsement for storage fees, printers' fees, etc., made necessary in obedience to that Foreign Execution?

“4. Has the Sheriff who makes the levy on a Foreign Execution any right to require the clerk who issues that execution to insist on an adequate deposit for costs?

“5. Is there any authority for the Sheriff who receives a Foreign Execution where sufficient funds have not been deposited to require the execution creditor to put up additional costs with him or give bond to guarantee costs before he is compelled to proceed with the execution?”

The matter here under consideration can be better understood if reference is made at the outset to the statutory duties of a sheriff when execution is sought against the property of a judgment debtor.

Section 11664, General Code, should first be noted. It provides in part as follows:

“The writ of execution against the property of a judgment debtor issuing from a court of record, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels, he cause his lands and tenements to be sold for cash.”

Under the terms of Section 11668, General Code, before goods and chattels are sold, notice of sale must be given by advertisement. This section states:

“The officer who levies upon goods and chattels by virtue of an execution by a court of record, before he proceeds to sell them

shall cause public notice to be given of the time and place of sale, for at least ten days before the day of sale, which notice shall be given by advertisement published in a newspaper printed and of general circulation in the county. The court ordering such sale may, in the order of sale, designate the newspaper in which such notice shall be published."

Alias executions are authorized by Section 11669, General Code, which reads:

"When goods and chattels levied upon by execution can not be sold for want of bidders, or want of time, the officer who makes the return shall annex to the execution a true and perfect inventory of the goods and chattels remaining unsold. The plaintiff in such execution thereupon may have another execution issued, directing the sale of the property levied upon; but it shall not be sold unless the time and place of sale be advertised as directed in the next preceding section."

Quite pertinent to the matter here under consideration is Section 11695, General Code, which reads:

"The officer who makes a levy, or holds an order of sale, before giving notice of the sale, may demand of the plaintiff, his agent or attorney, the fees of the printer for publishing such notice. The officer shall not be required to make such publication until the fees are paid."

A question heretofore arose as to the applicability of this section in a case wherein the State of Ohio caused an execution to be issued to the sheriff and a levy made upon certain chattels. It was held in Opinions of the Attorney General for 1940, Vol. 1, page 120, as disclosed by the syllabus thereof, as follows:

"A sheriff who makes a levy upon property pursuant to the command of an execution, issued to him, may refuse to give notice of the sale of such property until the fees of the printer are paid, even though such execution is issued in behalf of the State of Ohio, or some officer thereof."

None of the sections that have thus far been mentioned makes reference to any fees for the sheriff for performing the duties therein prescribed. However, before passing to the matter of the compensation of a sheriff, it might be of benefit to note this statement in 36 O. Jur., Sheriffs and Constables, Sec. 91, viz.,

“In accordance with the rules governing the compensation of public officers generally, sheriffs and constables are not entitled to compensation unless so provided by law, and then only such amount as is provided by statute, either in express terms or by necessary implication from the terms used, * * *

“An early case held that the sheriff is entitled to necessary expenses in caring for property in his custody under process of law. * * *”

Section 2845, General Code, is the statute that provides for fees to be allowed a sheriff. However, it will be unnecessary to set forth herein the various services that are enumerated for which fees are authorized. For the purpose of this opinion it is sufficient to note that said section provides *inter alia*:

“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: For the service and return of the following writs and orders, namely: Execution when money is made without levy or when no property is found, seventy-five cents; * * * when levy is made on goods and chattels, including inventory, two dollars and fifty cents; * * * for furnishing copies for advertisements ten cents the hundred words; * * * 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.; * * * When any of the foregoing services are rendered by an officer or employe, whose salary or per diem compensation is paid by the county, the legal fees provided for such service in this section shall be taxed in the costs in the case and when collected shall be paid into the general fund of the county.” (Emphasis added.)

Kindly observe that the words “when rendered” have been emphasized. The significance thereof has been the subject of judicial interpretation. See *State, ex rel. Bennett v. McCafferty*, 6 O. N. P. (ns) 556, 16 O. D. (SP) 415, wherein it is stated:

“The language ‘when rendered’ it seems to me can not be construed to mean before rendered. It certainly means that after the services have been rendered he shall receive the fees therein provided. *The clerk is given the right to an execution for the collection of his costs and this is the only means provided by law for the collection of his costs.* It is true this may result in loss to the clerk. But where the duty is imposed upon a public officer by law, and no compensation is provided whatever, he is required to perform such services gratuitously. This may seem like a

harsh rule, but it is the law; and it is the duty of the court to declare the law as he finds it. If the law does not make proper provisions for the clerks of the courts then the Legislature must be appealed to, and not the courts." (Emphasis added.)

In my Opinion No. 1885 dated May 16, 1947, the conclusion was reached that the words "when rendered" as used in Section 2900, General Code, (which section provides for fees of a county clerk) and Section 2845, General Code, should be given the same interpretation as placed upon Section 1260, Revised Statutes, which was the provision of law that was construed in *State, ex rel. Bennett v. McCafferty*, supra.

Attention is now called to Section 2852, General Code, which is referred to in your inquiry. Said section reads:

"The clerk shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it, and the clerk shall indorse thereon the words, 'Funds deposited to pay for the execution of this writ'. On the return thereof, the clerk shall pay to such officer the fees for executing such writ, and no officer shall be required to serve such writ unless it is so endorsed."

Possibly also of some significance is Section 12105, General Code, which provides:

"If an officer fails to execute a summons, order, execution, or other process, directed to him, or to return it, as required by law, unless he makes it appear, to the satisfaction of the court, that he was prevented by unavoidable accident from so doing, he shall be amerced, upon motion and notice, as hereinbefore provided, in a sum not exceeding one thousand dollars, and be liable to the action of any person aggrieved by such failure. But he shall not be liable to an action or amercement for a failure to execute such process directed to him from a county other than that in which he was elected, unless his fees are deposited with the clerk who issued the process, and an indorsement is made and subscribed by such clerk thereon at the time of its issue, in these words: 'Funds are deposited to pay the sheriff on this process.'"

The application of these sections is limited to those instances where a judgment exists on which execution is issued to a sheriff of a county other than that wherein the judgment is obtained. Except for the provisions of law requiring such endorsement it would logically ensue that a

sheriff would be without authority to demand in advance of his rendition of services such fees as he may be entitled to according to law.

The sections just quoted are discussed in the case of Central Ohio Buggy Co. v. Cowin, 10 O. App. 16, to which you have also called attention. The syllabus thereof reads:

“Where a clerk of courts issues a writ of execution in a civil action to another county for service and return by the sheriff of such other county, and indorses on such writ, ‘Fees on deposit for the service of this writ,’ and signs his name thereto, such indorsement is a sufficient compliance in that regard with the requirements of Sections 2862 and 12105, General Code, and a sheriff’s failure to levy an execution in obedience to such writ renders him and his sureties liable to respond in damages for any loss resulting from such failure.”

This case does not throw any light on the fees that are to be secured or guaranteed the sheriff by virtue of the endorsement provided for by law. However, since no section heretofore set out specifically provides for any fees for the sheriff except Section 2845, General Code, I am compelled to conclude that said endorsement must therefore have reference to the fees enumerated in the section just mentioned.

It is to be kept in mind that at no place in Section 2845, General Code, will express reference be found to any fees for printing or for storing goods and chattels that have been taken into custody as the result of a levy. When those items of expense are eliminated from consideration I take it that, in view of the context of your inquiry, no serious dispute can exist as to the adequacy of the deposit that was heretofore exacted by the clerk who directed the execution in question to the sheriff of your county. In this connection I note that you speak of “costs” on the foreign execution. By the use of this term I presume that you had in mind the fees provided for by Section 2845, General Code, as well as printing and storage fees. With respect to the definition of costs this statement in 14 Am. Jur., Costs, Section 2, might be noted:

“‘Costs’ are statutory allowances to a party to an action for his expenses incurred in the action. *They have reference only to the parties and the amounts paid by them*; or as otherwise defined, they are the sums prescribed by law as charges for the services enumerated in the fee bill * * *.” (Emphasis added.)

For items that may be taxed as costs see Sections 2892 and 2893 of the General Code.

The discussion up to this point deals primarily with all of your questions except the last one. It might be of benefit, therefore, if at this time a summarization be made. By way of answer to questions one, two and four I believe the conclusion can be formulated that the clerk of courts who issues a foreign execution is not obliged to require a deposit from the judgment creditor that will be sufficient in amount to cover printing or storage fees or charges. Instead the contemplated deposit is merely one that is intended to insure payment of the fees expressly provided for by Section 2845, General Code.

In respect of question three this observation is made. If a sheriff fails to make the demand that is authorized by Section 11695, General Code, previously set forth herein, then he may be held liable if he actually incurred an expense for printing. However, no definite opinion can be formulated as to the liability of the sheriff for storage or other items of expense because your inquiry does not set forth sufficient facts on which to base an answer. In passing it might be observed there is a possibility that the custodian of the goods and chattels in question may have an enforceable lien thereon for his storage charges. In this connection I merely call attention to an article relative to such right of lien which is found in 95 A. L. R. 1529, and wherein the annotator states:

“While the authorities are not clear as to the nature or extent of the lien that a warehouseman has upon property stored by an officer who has seized it under a writ of attachment, there are cases in which the warehouseman’s lien has been recognized.”

The discussion that now follows is intended to deal essentially with your last question. In respect thereof it is noted that your inquiry concerns the right of the sheriff to seek an indemnity bond from the judgment creditor *before* proceeding with execution. It would appear that, as a general proposition, the only instance in which the sheriff may exact a bond *before* levying the execution is in a case where title to the goods and chattels may be the subject of dispute. Bearing on this proposition is the following statement in 36 O. Jur., Sec. 78, page 691:

“At the common law an officer had no right under any circumstances to demand indemnity for enforcing an execution, but the severity of this rule has been modified and remedied in many jurisdictions by legislative enactments which permit an officer

levying an execution to demand indemnity under certain circumstances. In some jurisdictions, even in the absence of statute, the courts have modified the harshness of the original rule. It is now the general rule that if a sheriff, to whom process has been given for service, *entertains a doubt as to the title to the property to be levied on*, he may demand indemnity and is under no obligation to act unless it be given. Such a bond is intended for the protection of the officer." (Emphasis added.)

See also 47 Am. Jur., Sheriffs, etc., Sec. 144, wherein it is said:

"While under certain statutory provisions the sheriff or constable is deemed to have an unqualified right to require an indemnifying bond before he makes levy, without regard to whether his demand for a bond is reasonable, and although no claim to the property has been asserted by a third person, according to most authorities he cannot arbitrarily demand an indemnity bond from the judgment creditor in every case, but is entitled to such bond *only where an adverse claim is actually made to the property upon which he has levied or proposes to levy*, or where such circumstances exist as would justify a prudent person in apprehending litigation relative thereto; and in demanding the bond the officer must act in good faith. In the absence of any claim to the property by a third party, the right to demand an indemnity bond is generally denied."

Further bearing on the right of a sheriff to demand an indemnity bond is this statement in an annotation in 95 A. L. R., page 943:

"In cases involving the right of a sheriff or constable to demand an indemnity bond as a condition of levying an attachment or execution, or seizing property, in the absence of any claim thereto by a third party, the right to demand a bond is generally denied."

This observation is followed by a citation of authority from nine states but no Ohio case is noted. However, there is no reason to believe any different rule would prevail in this state. I have been unable to find any authority to support the view that, because certain expenses *may* be incurred for advertising or for custodial care, a sheriff is authorized to demand an indemnity bond before and as a condition to making a levy on goods and chattels of a judgment debtor.

While I am mindful of the fact that you have asked five questions, it is believed that one answer will suffice for questions one, two and four. Separate answers are obviously called for with respect to questions three and five. Therefore in answer to your said inquiry you are advised as follows:

1. Under the terms of Section 2882, General Code, the clerk of courts shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it. The endorsement therein provided for to the effect that funds have been deposited for pay for the execution of said writ has reference to those fees to which the sheriff is entitled by virtue of Section 2845, General Code. Hence there is no liability on the part of said clerk to the sheriff for the payment of any expenses which the latter may incur in the performance of his duties growing out of the levying of said execution.

2. By virtue of Section 11695, General Code, the officer who makes a levy, or holds an order of sale, before giving notice of the sale, may demand of the plaintiff, his agent or attorney, the fees of the printer for publishing such notice. If a sheriff fails to make such demand and incurs an expense for advertising he may be held liable for printing fees in an instance where the goods and chattels on which execution has been levied remain unsold for want of bidders.

3. A sheriff is without legal authority, as a condition to and before making a levy on goods and chattels, to require an indemnity bond of a judgment creditor because expenses may be incurred for advertising and custodial care of said goods and chattels.

Respectfully,

HUGH S. JENKINS,
Attorney General.