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1. SHERIFF — APPREHENSION DESERTER OR SOLDIER, ABSENT WITHOUT LEAVE—MAY LEGALLY ACCEPT REWARD OFFERED BY FEDERAL GOVERNMENT — U.S.C. TITLE 10. SECTION 1431.
2. REWARD, RECEIVED BY SHERIFF, REQUIRED TO BE HELD AS PUBLIC MONEYS OF COUNTY, ACCOUNTED FOR AND SO DEPOSITED — SECTION 2977 GENERAL CODE.

SYLLABUS:

A duly elected sheriff who has apprehended a deserter or soldier absent without leave and who has otherwise fulfilled all the requirements and conditions of Title 10, Section 1431, U. S. C. may legally accept the reward offered by the federal government in accordance with the provisions of said section. Upon the receipt thereof by the sheriff, the provisions of Section 2977, General Code, require that said reward shall be held as public moneys belonging to the county and accounted for and paid over as such.

Columbus, Ohio, February 19, 1942.

Hon. Leo E. Carter, Prosecuting Attorney,
Caldwell, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Kindly furnish me with an opinion as to whether or not a duly elected and acting sheriff can accept from military authorities their customary reward for the apprehension and return of military delinquents.”

It is well settled law in this state that public officers in the discharge of their official duties may not receive remuneration or reward other than that which is allowed by law. Numerous decisions in Ohio reiterate this principle.

In the case of *Rea v. Smith, et al.*, 2 Han. 193, it was held as evidenced by the headnote that:

“A public officer, whose duty it is to arrest all persons charged with or suspected of the commission of a crime, can not claim any other or further remuneration for his services, than the fees allowed by law.”

And in the case of the Somerset Bank v. Edmund, 76 O.S. 396, the first branch of the syllabus provides:

“Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by law.”

Again, in the case of Brown v. Sandusky County (Comrs.), 14 C.D. 481, the court in the course of its opinion said:

“It seems to us that the law of this state and the law generally in other states, is against the proposition that an officer may receive a reward for the performance of an act that his duty as such officer requires him to perform.”

In Opinion No. 1569, Opinions of the Attorney General for the year 1918, Volume II, at page 1428, the then Attorney General, after an exhaustive examination of the authorities, concluded that:

“Public policy and sound morals alike forbid that a sheriff should demand or receive, for services performed by him in the apprehension of thieves of automobiles and the return of the stolen property, a remuneration or reward offered by the owners of said stolen property.”

The ratio decidendi in all of the foregoing authorities indicates clearly that the prohibition with respect to the receipt of reward or remuneration in addition to compensation fixed by law is invoked when and only when the performance of the act as consideration for the reward is enjoined upon the officer by law.

It becomes necessary, therefore, to determine whether it is the legal duty of sheriffs to arrest military delinquents or deserters.

The general powers and duties of sheriffs are set forth in Sections 2833 and 2834, General Code, as follows:

Section 2833, General Code:

“Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of

the proper county and commit them to jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other process to him directed by proper and lawful authority. He shall attend upon the common pleas court and the court of appeals during their sessions, and, when required, upon the probate court. In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of the county as may be necessary. Under the direction and control of the county commissioners, he shall have charge of the court house."

Section 2834, General Code:

"The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law."

The duties enjoined upon sheriffs by the common law are reviewed in the case of *State, ex rel. Attorney General v. Ganson*, 58 O.S. 313, 320. The court in quoting Lord Coke declared that it is the duty of the sheriff:

"To preserve the peace in his bailiwick or county. To this end he is the first man within the county, and it is incident to his office that he apprehend and commit to prison all persons who break or attempt to break the peace. He is bound, ex-officio, to pursue and take all traitors, murderers, felons and rioters. He has the safe-keeping of the county jail, and must defend it against all rioters; and for this, as well as for any other purpose, in the execution of his duties, he may command the inhabitants of the county to assist him, which is called the *posse comitatus*."

The question now arising is whether a desertion constitutes a breach of the peace, a felony, or a traitorous action.

The nature of the offense is peculiar. It is defined in the case of *Trask v. Payne*, 43 Barb. 569, 575, 576, in the manner following:

"* * * Was the act of desertion then, assuming that it existed in this case, a felony at common law, or by any statute rendering the offender amenable to any civil jurisdiction? I do not think either branch of this proposition, which is affirmed by the defendant's counsel, can be maintained. There is no authority, that I have been able to find, that holds desertion to be a felony at common law. On the contrary, Blackstone states (1 Com. 415, Phil. ed 1863) that in England an annual statute is passed to punish mutiny and desertion and other military offenses, and committing the whole matter of trial and of punishment to the jurisdiction and discretion of courts marshal.

He refers indeed, to what he calls a standing law, (18 Hen. VI. chap. 9,) which makes desertion, in time of war, felony, and says that offense is triable before a jury; but he is careful to add, that though the law remains in force, it is not intended to — in other words, it has become obsolete. So that in any aspect the whole matter of desertion in England is the subject of statutory regulation, and in practice the jurisdiction of the offense is there wholly confined to the military courts. And such is undoubtedly the rule in this country. The fifth article of the amendments to the Constitution of the United States declares that 'no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger.' This provision practically withdraws the entire catalogue of military offenses from the cognizance of the civil magistrate, and turns over the whole subject to be dealt with by the military tribunals; and except in military law, desertion is legally unknown to the tribunals of this country. It does not in the contemplation of civil law reach the grade of a misdemeanor, and no instance is known in which this alleged offense has been the subject of indictment by a grand jury, or of trial in any court of civil or common law jurisdiction."

Since the statutes of this state have not made the act of desertion a crime and since at common law it was not a felony or a breach of the peace, it follows that the apprehension of deserters is not a duty enjoined upon sheriffs unless this particular type of offender may be classed as a traitor. In common acceptation a traitor is one who joins the enemy and hence mere desertion does not constitute such an offense. While the federal government has provided by the terms of Title 10, Section 1578, U.S.C. that it shall be lawful for sheriffs to summarily arrest deserters and that, under the provisions of Title 10, Section 1431, U.S.C., compensation shall be awarded for such service of apprehension, this permissive authority does not create a legal duty. This being so the prohibition with respect to the receipt of a reward has no application.

The conclusion that a sheriff may accept a reward offered by the federal government for the apprehension of deserters and soldiers absent without leave, while technically constituting an answer to the question raised in your inquiry, does not serve as a full and complete answer for it leaves unsettled the more important determination concerning the disposition of the reward upon receipt thereof by the sheriff.

Prior to 1907 county officers, including sheriffs, received their compensation from fees, percentages, costs, allowances and perquisites. This

method of reimbursement was changed upon the enactment of the so-called "salary laws" and provision was made for the disposition of such fees, perquisites, etc. formerly retained by said officers. With respect thereto, Section 2977 provides as follows:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

It will be noted from the foregoing that moneys received by a sheriff are designated public moneys and belong to the county when collected or received by law as compensation for services rendered by such an officer. The term "received by law" was interpreted in the case of *State, ex rel. v. Horner*, 16 N.P. (N.S.) 449, to include federal law, as well as state law, and hence the moneys received in the instant case are covered by the statute unless it can be said that the officer when apprehending deserters acts as an agent of the United States and not as sheriff of the county.

This question was raised in the case of *Mulcrevy v. San Francisco*, 231 U.S. 669, wherein Justice McKenna, in delivering the opinion of the court, said:

"But it is contended by plaintiff in error that the fees having been received officially is not of importance; that nevertheless he acted as the representative of the United States in execution of the policies of the United States and being by the act of Congress invested with his powers he is entitled for himself to the compensation prescribed by the act for their execution, without any liability to act for them in the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the National Government, his relation to the city was not thereby changed. He was still its officer, receiving fees because he was, not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt."

Supporting the conclusion that remuneration or reward received by sheriffs for the apprehension of deserters is public money within the

meaning of Section 2977, supra, even though there be no duty to so apprehend, is the opinion appearing in Opinions of the Attorney General for the year 1922, at page 233, the syllabus of which reads as follows:

“Under the provisions of Sections 2977, 2988 and 2996 of the General Code, the one dollar fee authorized to be retained by clerks of state courts by U.S. federal order No. 171, may not be retained by clerks of Ohio state courts as remuneration for services in executing applications for passports, but should be paid into the proper county treasury as fees of such office under the provisions of Section 2983 G. C.”

Therefore, in specific answer to your inquiry, it is my opinion that a duly elected sheriff who has apprehended a deserter or soldier absent without leave and who has otherwise fulfilled all the requirements and conditions of Title 10, Section 1431 U.S.C. may legally accept the reward offered by the federal government in accordance with the provisions of said section. Upon the receipt thereof by the sheriff, the provisions of Section 2977, General Code, require that said reward shall be held as public moneys belonging to the county and accounted for and paid over as such.

Respectfully,

THOMAS J. HERBERT
Attorney General.