

a part of such interstate journeys are in the state of Ohio, should be included in the computation of its total assets located within the state of Ohio.

2. Likewise in computing such tax "business done within the state" includes the interstate business where a part of such journeys are within the state of Ohio.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1750.

SHERIFF—DUTY OF PROSECUTING ATTORNEY TO DEFEND ACTIONS
AGAINST SHERIFF AND DEPUTY SHERIFF FOR FALSE ARREST
WHILE PERFORMING OFFICIAL DUTIES.

SYLLABUS:

It is the duty of a prosecuting attorney to defend a county sheriff and deputy sheriff in actions brought against them for damages for false arrest if the facts and circumstances on which the actions are based show that the suits arise out of a well intended attempt on the part of such sheriff and deputy sheriff to perform duties attending their official positions.

COLUMBUS, OHIO, October 21, 1933.

HON. LOUIS J. SCHNEIDER, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

"The Sheriff of this County has required those deputies who are assigned to police duty in the County to furnish a bond, conditioned upon their faithful performance of their duties. In two or three cases suits have been brought against such a deputy, and in one case, at least, against such deputy and the Sheriff, for damages for false arrest. The Sheriff has asked me to represent him and his deputies in these matters. I desire to do whatever is proper and feel that I should like to have your opinion, first—as to whether it is or it is not my duty to defend in these cases, and secondly—if it is not my duty, whether it would be improper under the law to do so."

Section 2917, General Code, provides as follows:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. *He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party*, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal,

in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund." (Italics the writer's.)

Under the italicized language of the foregoing section, it would appear to be the duty of the prosecuting attorney to defend all suits which a county officer may direct or to which he is a party, growing out of his official duties. The section, however, seems to cover only county "officers", and does not seem to include county "employees."

It is well settled law in Ohio that deputies of county officers are not "officers" within the constitutional meaning of that term. It was specifically held in the case of *Theobald vs. State*, 10 C. C. (N. S.) 175; 30 C. C. 414, that "*deputies*, assistants, bookkeepers, clerks and other employes" of county officers are not "officers." This case was affirmed without opinion by the Supreme Court in 78 O. S. 426. For other citation of authority in accordance with the above holding, see 11 Ohio Jurisprudence, 270, 271, "Counties", section 31.

Hence, it seems clear that a deputy of a county sheriff is not an "officer" in the strict sense of that word. However, a deputy sheriff is by the terms of section 13432-1, General Code, a section of the new Code of Criminal Procedure, a "peace officer", and in view of the court decision hereinafter set forth would, I believe, come within the term "officer" as used in section 2917, General Code.

In the case of *Netarz vs. Fagan, et al.*, 257 N. Y. Supp., 610; 143 Misc., 893, decided June 6, 1932, an action had been instituted by one Frank Netarz against one Robert J. Fagan who was a deputy sheriff of Monroe County, New York, and others, for damages for an assault alleged to have been committed by defendants against the said plaintiff. The defendant Fagan claimed that it was necessary to use force in arresting and detaining plaintiff, Netarz, upon a charge of having committed a felony. The county attorney of Monroe county, New York, appeared as attorney for the defendant, Fagan, pursuant to a resolution of the board of supervisors of Monroe county, New York, authorizing him so to do. The plaintiff, Netarz, made a motion to strike out the appearance of the said county attorney as attorney for the defendant, Fagan. The court denied the motion. The syllabus of the case reads as follows:

"Deputy sheriff held 'county official' within local law providing that county attorney shall defend actions against county officials.

Board of supervisors' resolution authorizing county attorney to appear for deputy sheriff sued for assault held not reviewable on motion to strike out county attorney's appearance."

The court stated in its opinion at page 611:

"The board of supervisors is authorized to prescribe the duties of the county attorney. County Law, § 210, as amended by Laws 1931, c. 485.

In 1907 the board of supervisors passed a local law (Proceedings of Bd. of Suprs. of Monroe County (1907), pp. 163, 188) prescribing the duties of the county attorney, and providing that he should act as attorney for any county official in any action or proceeding to which such official should be a party. By an amendment to such local law, adopted in 1932, the county attorney may appear for a county official only when

request therefor is made to the board of supervisors and granted by that body. The county may bear the expense of defending an official 'against accusations growing out of his official duties,' but the law authorizing such expenditure may not be retroactive, but must have been adopted before the acts complained of were performed. Matter of *Guarino vs. Anderson*, 259 N. Y. 93, 181 N. E. 60, 61.

The plaintiff claims that the defendant Fagan is an employee and not an official of the county, and that therefore this local law does not apply to him. However, a deputy sheriff is declared by law to be a peace officer. Code of Criminal Procedure, § 154.

(2) It appears from the answer in this case that the defendant claims that the acts upon which this action is based were done in the performance of his duties as deputy sheriff. Therefore the discretion exercised by the board of supervisors in authorizing the county attorney to appear for him will not be reviewed upon this motion. *Briggs vs. Lahey*, 101 App. Div. 136, 91 N. Y. S. 576; *Tracy vs. Pendleton*, 134 App. Div. 940, 118 N. Y. S. 1146."

In the above case the evidence showed that the assault was committed in the performance of Fagan's duties as deputy sheriff. In the facts set forth in your letter, it does not appear whether or not the actions for false arrest arose out of acts done in the performance of the duties of the deputy sheriff and sheriff. I assume, however, that the facts in your situation will disclose that the actions for false arrest arose out of acts done by the sheriff and deputy sheriff in the line of their duties as sheriff and deputy sheriff, respectively. Thus, it would appear that the above case is parallel to the case at hand, and so requires you, as prosecuting attorney, to defend the sheriff and deputy sheriff in the actions set forth in your communication.

The conclusions herein expressed would seem to find support also from an opinion of a former Attorney General, found in Annual Report of the Attorney General for 1912, volume II, page 1107. The syllabus of such opinion reads:

"An assistant prosecutor employed by county commissioners to defend them in a suit against them for malicious prosecution, may be compensated from the county treasury if the suit arises out of a well intended attempt on the part of the commissioners to perform duties attending their official position."

The request for the foregoing opinion reads as follows:

"A prosecuting attorney retiring from office is employed by the county commissioners as a special assistant to his successor for the purpose of defending them in a suit brought against them as individuals for malicious prosecution.

May the person so employed be paid out of the county treasury under a resolution approving his bill or must the individual commissioners pay him personally?"

The Attorney General stated in his opinion at pages 1107 and 1108:

"While there is no direct statutory authority for so holding I am of the opinion that it is the duty of the legal officer of a county, a city or the state, to defend some actions brought against other executive officers

of the subdivision or state, as the case may be, for damages for the alleged wrongful use of their official powers. One instance of this sort that occurs to me is that in which the action which constitutes the alleged abuse of power is taken under the advice of the legal officer himself. In general, whenever the circumstances would indicate to the prosecutor, the solicitor or the attorney general, as the case might be, that the officer against whom the action has been brought in committing the official act complained of has proceeded with due caution and in good faith and has consulted with his official legal adviser under circumstances under which he ought to consult with him, he ought to serve the officer in his official capacity. In such cases public officers ought not to be subjected to suits by private individuals at the peril of being obligated to defend themselves.

To hold otherwise would be to encourage captious or meaningless litigation and discourage the acceptance of public office on the part of those who might be apprehensive of such litigation.

The rule which I have mentioned is one which has been followed by this department within reasonable limits. It is generally advisable, in my judgment, for a public officer who is privately sued to have his own counsel; and if privately employed such counsel should, of course, be privately compensated. The facts of each case ought to determine the question as to whether a special assistant to a prosecuting attorney for example, employed for the purpose of defending such an action, should be paid out of the public treasury. For this reason I would rather not advise you categorically in this matter."

If the facts of your cases show that the false arrest arose out of well intentioned attempts on the part of the sheriff and deputy sheriff to perform duties attending their official positions, I feel that it is your duty to defend them. A more explicit answer to your first question can obviously not be expressed, in view of the lack of knowledge on my part as to the facts and circumstances of the cases involved in your communication.

As for your second question, it may be pointed out that the prosecuting attorney is not prevented by the statutes from acting in private cases while serving as prosecuting attorney. Therefore, if the facts do not show that the false arrest arose out of well intended attempts on the part of the sheriff and deputy sheriff to perform duties attending their official positions, I would feel that it would not be improper for you to defend them, but, of course, in such case there could be no compensation payable to you from the county treasury.

Respectfully,

JOHN W. BRICKER,
Attorney General.