

part, of the work involved in the removal of the five trees is ordered omitted, that fact will prove immaterial to the county, since, as already pointed out, that work is being done without cost to the county.

Upon the whole, then, notwithstanding the objections indicated, we get back to the proposition that in the present instance the commissioners were within the exercise of a sound discretion in treating as the lowest and best bid, the lowest lump sum bid submitted.

Since the foregoing was dictated, you have, in a personal call at this office, stated that the difference between the lowest bid submitted, on which the award has been made, and the next higher bid, is about sixteen hundred dollars; while the estimated cost of the removal of the five trees is about fifty dollars. These facts strengthen the conclusion which this office has above stated.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3222.

“PUBLIC MONEY” AS DEFINED IN SECTION 286 G. C. PASSED UPON
 —THE TERMS “REWARD”, “GRATUITY” AND “COLOR OF OFFICE”
 CONSIDERED—PAYMENT OF \$2,500 BY OWNER OF STOLEN
 PROPERTY UPON RECOVERY TO DEPUTY SHERIFF.

1. *Whether or not the payment of the sum of \$2,500 by the owner of stolen property, upon recovery and return, to a deputy sheriff, whose services have been instrumental in the return of the property to the owner, may be considered as a “reward”, “gratuity” or as “public money” in the hands of the officer under the provisions of section 286 G. C., are questions of mixed law and fact to be determined from a consideration of all the surrounding circumstances.*

2. *Definitions of terms “reward”, “gratuity” and “color of office” briefly considered in their significance and application to the acts of public officials.*

COLUMBUS, OHIO, June 16, 1922.

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

GENTLEMEN:—Receipt is acknowledged of your letter of recent date which reads as follows:

“We respectfully request you to render your opinion upon the following matter:

Two truck loads of whisky were being transported from Lynchburg, Ohio, to New York City when in the neighborhood of Elyria, Ohio, the drivers and those in charge of the trucks were held up and trucks and whisky taken from them. The owner of the whisky was with one of the trucks and he immediately reported the hold-up to the sheriff of Lorain county and police of the city of Elyria. The sheriff and the police attempted to locate the trucks the same night in which the hold-up took place but were unable to do so. Sometime during the night the owner of the whisky, who had gone on to Cleveland, called up either the sheriff or the police department and stated that he had information that the trucks

were found at a certain place. A deputy sheriff and two policemen then went to the place where the trucks were found and by following the trucks discovered where they thought the whisky had been stored. They then called the police department of Elyria for reinforcement and found the whisky practically intact. Upon advice of the prosecuting attorney the whisky was taken to Elyria and stored in the jail. It is stated that the owner of the whisky at the time he called up about the trucks had offered to pay \$2,500.00 for the recovery of the whisky. After it had been determined that the whisky was being legally transported, it was turned over to the owner, whereupon he paid to the deputy sheriff \$2,500.00. The deputy sheriff then paid \$400.00 to each of the policemen who were with him and retained \$1,700.00.

Question 1. Is this money in the hands of the deputy sheriff public money collected under color of his office, which by the provisions of section 286 G. C., he is required to pay into the county treasury?

Question 2. Are the policemen who each received \$400.00 required under the law to pay the same into the police pension fund?

We might add that it is contended on the part of the sheriff and his deputy that the payment of the \$2,500.00 was a mere gratuity and was not a reward offered. If this were a fact, would it in any way modify your opinion as to the status of the money?"

It is noted that your statement of facts does not conclude that a reward was in fact offered by the owner of the stolen property for its recovery and return, at the time he is alleged to have called up about the trucks, since you say "It is stated that, etc". The statement standing alone is not thought to be conclusive as to fact, and under the circumstances it is only presumable that evidence would be necessary to establish or disprove its existence.

Although a determination of the question as to whether or not a reward was offered, may not under all circumstances be considered essential to a solution of your question, if it may otherwise be shown that the money in question is in fact such as may be termed "public money", in the hands of the deputy sheriff under the provisions of section 286 G. C. yet it would seem evident in the instance considered, that the fact of a reward offered, when shown, would have a tendency to establish or disprove the further and important fact, as to whether or not the payment of the money in question, may or may not be considered in the light of a gift or gratuity, (such a claim being made in the present instance by the officer receiving the money) since it is thought to logically follow, that if the latter fact should be definitely established, and the money paid considered as a gift or gratuity it would be difficult to conclude that the same could be said to be "public money" in the hands of the officer under the provisions of section 286 G. C. Section 286 G. C. partially provides as follows:

"The term 'public money' as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said trust

fund, such money shall revert to the general fund of the political subdivision where collected."

It is observed that the provisions of the partially quoted section, define the term "public money" as including all money received or collected under "color of office", whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials shall be liable therefor. It apparently becomes necessary to more particularly consider the meaning and significance of the term "color of office" as used herein. Bouvier's Law Dictionary defines "color of office" as follows: "A pretense of official right to do an act made by one who has no such right. 9 East 364, such person must be at least a de facto officer. "An act wrongfully done by an officer under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color. Griffith vs. Hardenbergh, 41 N. Y., 464. Corpus Juris (c. j.) 1225 considers the term "color of office" as follows:

"Color of office. A wrong committed by an officer under the pretended authority of his office, an act evilly done, by the countenance of an office; an act unjustly done by the countenance of an office; a pretended, not a real exercise of an officer's jurisdiction; a pretense of official right to do an act, made by one who has no such right; a claim or assumption of right to do an act by virtue of an office, made by a person who is legally destitute of any such right; the use of official authority as a pretext or cover for the commission of some corrupt or vicious act; the mere semblance, shadow, or false appearance of official authority; the dissembling face of the right of office; a fraudulent act of an officer in the line of his duty; having the appearance, especially the false appearance of right; corruptly or with wicked and vicious motive; color of official authority; champerty. The term is a technical expression, and implies bad faith, corruption, breach of duty."

It would seem obvious upon consideration of the definitions applied to the legal term "color of office" that the principle obtaining therein, may be said to be such as is based upon an evil act, or one grounded upon suspicion and corruption, connoting a breach of duty or trust by a public officer in the conduct and discharge of the duties of his office. It is apparent therefore that to come within the provisions of section 286 G. C., the money in question paid by the owner of the property to the deputy sheriff must be such as to come within the meaning and comprehension of the term "color of office" as therein used, and whether or not the facts in the present instance will or will not establish the conclusion, apparently must be determined from all the surrounding circumstances.

While the fact of a reward offered in the case under consideration is not established, yet brief consideration of this feature of the matter may be attempted in view of your hypothetical question. Bouvier's Law Dictionary defines the word "reward" as follows: "The offer of recompense given by authority of law for the performance of some act for the public good, which when the act has been performed is to be paid; the recompense actually so paid."

If then a "reward" may be said to be a recompense for the performance of an act inuring to the public good, it would seem conclusive that a public officer charged with the duty of performing certain acts imposed upon him by law, could not lawfully receive double compensation for the performance of the same, since it is presumed that a public officer is sufficiently and adequately compensated for the service he renders the public by the lawful salary or fees paid him in such

cases. Thus it is concluded, and the view is thought to be supported by unquestionable authority, that a public officer in the discharge of his official duties is not entitled to receive a reward for the performance of the duties which the law imposes upon him. Viewed in the light of a contract, the promise to pay an officer a reward for the discharge of his official duty, has universally been held void and against public policy. See *Gilmore vs. Lewis*, 120, 281, 87 Mass. 352, 23 Mo., 74, 24 Iowa 79, 19 La., Ann. 275.

Relative to your second question as to whether or not the money received by the policemen in the instance is such as the law requires payable into the police pension fund, depends for answer upon whether or not the same may be considered a portion of the fund of "public money" received by the officer by "color of office" under section 286 G. C. or as a reward or funds received in the hands of the police officer under section 4623 G. C. and it is obvious that these facts must be established before specific answer may be rendered your second question.

In the latter portion of your inquiry statement is made that it is contended by the sheriff and his deputy that the payment of the \$2,500.00 was a mere gift or gratuity and was not received as a reward offered or as compensation for the services rendered, and relative thereto it is asked if this was a fact, would it modify the opinion as to the status of the money? It is thought an affirmative answer may be given this question, since it is believed that if the payment of the money in question by the owner of the property to the deputy sheriff may be shown to be a gift or gratuity, as previously pointed out, it would be difficult to construe the same as "public money" in the hands of the officer under color of office as defined in section 286 G. C.

Upon such considerations therefore, it is believed that all the questions contained in your inquiry are intimately associated and depend for answer upon the legal interpretation placed upon the circumstance of the payment of the money by the owner of the property to the deputy sheriff, and whether such payment may be considered in the light of a reward, gratuity, or such as may be considered "public money" in the hands of the officer under the term "color of office" as defined in section 286 G. C. are questions of fact thought to be determinable only from all the circumstances surrounding the transaction. In consequence whereof it obviously follows, that more specific consideration cannot be given the question submitted, until all the material facts relevant to the particular case are fully and definitely established.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3223.

ROAD MACHINERY—WHERE TOWNSHIP TRUSTEES ENTER INTO
 CONTRACT PURPORTING TO LEASE MACHINERY BUT IN REAL-
 ITY CONTRACT OF SALE—SUCH SPECIFIC CONTRACT VOID.

A contract purporting to have been entered into by a road machinery company with township trustees which is in form a lease, but which is in substance and practical operation a contract of sale, in that at the end of the third year of the lease the township trustees have the option of purchasing the machinery for a trivial sum in addition to the three years rental which they already will have paid in yearly installments under the contract, is not authorized by the terms of section