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AUDITOR, COUNTY—NOT LIABLE FOR LOSS OCCASIONED TO THIRD PERSON BY ACT OF DEPUTY COUNTY AUDITOR WHO STOLE SECURITIES WHILE MAKING AN INVENTORY OF A LOCK BOX AFTER DEATH OF OWNER.

SYLLABUS:

A County Auditor is not liable for the loss occasioned to a third person by the act of a Deputy County Auditor who steals securities while making an inventory of a lock box after the death of the owner.

Columbus, Ohio, March 17, 1947

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

Dear Sir:

Your request for my opinion reads as follows:

“We seek an opinion in reference to the liability of J. Y. Stark County Auditor, on his bond, for the misconduct of his deputy, and propound these questions:

First: In the event a deputy county auditor, in his representative capacity, steals securities while making an inventory of a lock box after the death of the owner, is the auditor liable.

Second: Is the auditor liable to a third person for the loss of those securities under his bond? (Copy of which is hereto attached.)

Third: Relative to Section 2563 of the General Code, is the county auditor liable in this case on this bond to the owner whose securities were stolen by the deputy?

In this case a deputy auditor, now under arrest, charged with the responsibility of this inventory of a lock box, stole securities to the value of \$2900.00. This occurred September 25, 1945, while the enclosed bond was in full force and effect. These securities, which were negotiable U. S. Savings Certificates, were later cashed by the deputy. They were serially numbered and by reason of the deputy county auditor's theft of them were not included in the inventory which he made."

From the facts stated in your inquiry it appears that the deputy county auditor in question was acting under and by virtue of Section 5348-2, General Code, which section reads, in so far as pertinent hereto, as follows:

"No corporation organized or existing under the laws of this state, shall transfer on its books or issue a new certificate for any share or shares of its capital stock belonging to or standing in the name of a decedent or in trust for a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, without the written consent of the tax commission of Ohio. No safe deposit company, trust company, corporation, bank or other institution, person or persons, having in possession or in control or custody, in whole or in part, securities, deposits, assets or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interest in, such safe deposit company, trust company, corporation, bank or other institution, shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer; but the tax commission of Ohio may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons, from the

obligation to give such notice or to retain such portion. *The tax commission or the county auditor, personally or by representatives, may examine such securities, deposits, or other assets at the time of such delivery or otherwise.*" (Emphasis added.)

It should also be noted that under Section 5341 of the General Code, the county auditor is constituted the inheritance tax appraiser for his county, and that under Section 5348-5 of the General Code, the county auditor is empowered to appoint such number of deputies as the Tax Commission of Ohio may prescribe for him, which deputies shall be qualified to assist him in the performance of his duties as inheritance tax appraiser.

Section 2563 of the General Code, cited in your inquiry reads as follows:

"The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy, he shall record such removal in his office and file a certificate thereof with the county treasurer, who shall record and preserve it."

It is also pertinent to quote the provisions of Section 9 of the General Code, which are as follows:

"A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk."

Under the terms of Section 9 above quoted, there is no doubt that had the deputy auditor embezzled or abstracted funds of the county or of the state, both he and his principal would have been personally liable. Section 9 was so construed in 1943 Opinions of the Attorney General, No. 5755, the syllabus of which reads as follows:

"1. Under the provisions of Sections 3956 and 3958 of the General Code, the director of public service in a city is solely

charged with the management and control of the water works and with the collection of water rents, and is required by Section 3960, General Code, to deposit with the city treasurer, weekly, all moneys so collected.

2. Under the provisions of Section 9 of the General Code, the director of public service of a city is responsible for the conduct of a clerk appointed by him whose duties include the collection of water rents, and is answerable for the default of such clerk in failing to account for and pay over to the city treasurer the water rents collected by him.

3. In such case the director of public service is not relieved of his responsibility by the fact that the city council, in the ordinance providing for the appointment of such clerk by the director, provided that said clerk should collect the water rents and account to the city treasurer for the moneys so collected."

However, the misconduct in the situation outlined in your inquiry, appears to have been in fact misconduct not arising out of the actual performance of the official duties of the deputy county auditor. It is noted in particular, that the emphasized language in Section 5348-2, hereinbefore quoted, provides that the county auditor, personally or by representatives, *may examine* securities, deposits or other assets of a decedent. Nothing in Section 5348-2 or in any of the sections of the General Code which deal with the duties of the county auditor and his representatives with respect to inheritance taxes, contemplates that the county auditor or his representatives shall assume any dominion over or possession or custody of any securities or other assets of such decedent. It is, in fact, not necessary for a deputy county auditor or other person making an examination of the deposits, securities or other assets of a decedent so to assume dominion over or possession of such asset. Therefore, in the situation which you outline, the deputy county auditor went beyond his official function in taking possession of securities which were the assets of the estate of a decedent. In so taking possession and in converting such assets to his own use, the deputy county auditor went beyond the scope of his official duties and embarked on an enterprise of his own, unrelated to the performance of his official duties. The incident of his being placed in the position where he had an opportunity to convert to his own use assets of the estate, can not be deemed to be the proximate result of his performing his official duties in examining such assets.

In the case of *Fresno National Bank v. Hawkins*, 29 Pac. 233, 93 Calif. 551, the Supreme Court of California was called upon to decide the question of the liability of a superintendent of schools whose deputy had forged certain orders for the payment of money and sold them to the plaintiff. The plaintiff, a bank, sued the superintendent of schools to recover its loss on the void orders. In holding that the superintendent of schools was not liable, the court said :

“Neither the forgery of the orders by Bibby, nor his presentation and sale of them to the bank, created any liability against respondent ; for in those matters he was not acting in the line of his official duty, and by virtue of his appointment as deputy was not clothed with any such power. Respondent could only clothe his deputy with such power as the statute conferred upon himself, and those powers were not conferred. The bank knew the measure of respondent’s power, and the limitation of his official duties. If not, it should have known them, for all persons are held to know the law. It follows that the only act done by the deputy, in the line of his official duty, towards consummating the fraud alleged, was the indorsement of the date of filing upon the orders. The law requires these orders to be filed in the order in which they are presented, so that the requisitions upon the auditor will follow in the same order of time. The filing of the order in the office of the county superintendent is not a guaranty by such officer that such order is genuine and will be paid in due course of time. The filing marks do not warrant that it is not forged, but simply indicate to the world that such a paper was filed in the office at a time named. Manifestly, such fact can create no personal liability against respondent in favor of a purchaser of such orders.”

In the later case of *Neff v. Redmond*, 54 Calif. App. Rep. 754, 202 Pac. 925, the District Court of Appeal of California held that a deputy sheriff acted within the scope of his authority in releasing an attachment but was not so acting in agreeing to become custodian of certain moneys to be paid to him under the agreement whereby the attachment was released, and the sheriff was not liable where the deputy disappeared without accounting for the money received by him.

Thus, although under the provisions of Section 9 of the General Code, a public officer is responsible for the acts of his deputy, such responsibility must be held to be limited to acts of the deputy which arise out of and in the course of the performance of his official duties and any such acts as fall outside such scope of official employment can not give rise to liability on the part of the principal.

In the situation which you outline therefore, it is my opinion that a county auditor is not liable for the loss occasioned to a third person by the act of a deputy county auditor who steals securities while making an inventory of a lock box after the death of the owner.

With respect to the matter of the liability of the sureties of the county auditor, it is pointed out that such matter is an issue between the third person and such sureties, and you are not called upon in your official capacity to advise either such a surety or third party. Therefore, it is not a proper subject for my opinion whether or not such sureties would be liable to the owner of the stolen securities.

Respectfully,

HUGH S. JENKINS,  
Attorney General.