

4785.

APPROVAL, BONDS OF EUCLID VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, October 10, 1935.

State Employes Retirement Board, Columbus, Ohio.

4786.

CRIMINAL LAW—NON-SUPPORT—RECOVERY AGAINST SURETIES WHERE CONVICTED PERSON VIOLATES BOND.

SYLLABUS:

Where a bond is given in the penal sum of \$500.00 under the provisions of Section 13010, General Code, conditioned that the convicted person shall make payments of \$4.00 weekly, a recovery in the full amount of \$500.00 may be had against the sureties where the amount owing is \$500.00 or more despite the fact that during such period some weekly payments were made by the convicted person.

COLUMBUS, OHIO, October 11, 1935.

HON. JOHN M. KIRACOFÉ, *Prosecuting Attorney, Eaton, Ohio.*

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

“Will you give me your opinion on the following statement of facts as to the liability of the surety on the bond and as to the amount of liability thereon? The facts are as follows, to-wit:

On the 6th day of October, 1931, D. W. was indicted by the Grand Jury of this County for non-support of his minor daughter. Later, on the 14th day of December, 1931, the defendant entered a plea of “Guilty” to the charge and, by virtue of Section 13010 General Code, gave bond in the sum of five hundred dollars conditioned that he pay four dollars each week to the Clerk of Courts for the support of the minor daughter, and the sentence of the Court was suspended by virtue of the bond having been given.

Since the filing of the bond, this defendant has paid as weekly

stipends, as ordered by the Court, the sum of Two hundred forty-eight dollars and there is now delinquent payments due in the sum of five hundred forty-one dollars which amount exceeds the amount of the bond.

The sureties on the bond admit liability on this bond but claim credit for the amount of payments he has made since the bond was given, thus making the amount they are willing to pay at this time, the sum of Two hundred fifty-two dollars.

I have contended that they are liable for the sum of Five Hundred Dollars and that they should have no credit for any amount he might have paid, and that now we are entitled by suit to recover that amount.

We would appreciate very much your early opinion as to the extent of liability of these sureties under these facts."

The pertinent provisions of the bond read as follows:

"* * *

And whereas this day, and before any sentence had been pronounced against him by said Court, said D. W. appeared before said Court and offered to give bond according to law, and asked the Court to fix the amount to be furnished by him for the support of said minor child.

And the Court upon consideration thereof, having ordered that said D. W. for the purpose of furnishing said child with necessary and proper home, food, care and clothing, pay to Clerk of Courts, Eaton, Ohio, named as Trustee by said Court, promptly every week the sum of Four (\$4.00) dollars, payable on Tuesday of each week, and beginning 15th of December, 1931, and continuing until said minor arrive at the age of sixteen years, or until further order of the Court. Now if the said D. W. shall faithfully perform and discharge the above obligation and comply with the above order, then these presents shall be void; otherwise to remain in full force and effect."

Section 13008, General Code, provides that a parent who neglects to provide necessaries for a minor under the age of 16 years shall be imprisoned, etc. However, Section 13010, General Code, provides for the giving of a bond and the suspension of the sentence. This section reads as follows:

§13010:

"If a person, after conviction under either of the next two preceding sections and before sentence thereunder, appears before the

court in which such conviction took place and enters into bond to the state of Ohio, in a sum fixed by the court at not less than five hundred dollars nor more than one thousand dollars, with sureties approved by such court, conditioned that such person will furnish such child or woman with necessary and proper home, care, food and clothing, or will pay promptly each week for such purpose to a trustee named by such court, a sum to be fixed by it, sentence may be suspended."

In the case of *Seaman vs. State of Ohio*, 106 O. S. 177 which involved Sections 13008 and 13010, General Code, the following observations were made by Clark, J.:

"* * *

The intent of this legislation was to compel persons charged by law with the support of designated dependents to meet the full measure of their obligation to such dependents and society. The converse of the proposition may be stated that it was the purpose to relieve society of a burden that properly belonged to one charged by law with its obligation. * * *

The purpose of Section 13010, General Code, is to provide method whereby one who has been adjudged guilty of a violation of Section 13008 shall secure to the dependent the support necessary for its comfort and welfare, and thereby relieve society of the burden that it would otherwise have charged upon it. * * *

When a person shall have been convicted of a violation of Section 13008, General Code, and after conviction and before sentence thereunder appears before the court in which such conviction took place, and the court proceeds as in Section 13010, General Code, provided, and such person gives bond and pays to the trustee under the order of the court the sum fixed by it, or, as the order may provide, proceeds forthwith to furnish such child or woman with necessary and proper home, care, food and clothing, it is our conclusion that the sentence provided for in Section 13008, General Code, stands suspended so long as such convicted person shall respond to the order of the court or any modification thereof. * * *"

In the question presented by you, D. W. has made payments of \$248.00 up to the present time. However, there is owing from the said D. W. the sum of \$541.00, which sum, in addition to the \$248.00, which has already been paid, should have been paid by the said D. W. under his agreement with the court at the time his sentence was suspended. There is no question that

the amount of recovery may not be in excess of the penal sum of \$500.00. However, you raise the question as to whether or not the money which has been paid (\$248.00) should be deducted from the sum of \$500.00 in order to arrive at the extent of the liability of the sureties on the bond in question.

An analogous question to the one presented by you was decided in the case of *Sherwood vs. Sherwood*, 22 O. App. 507. The third branch of the syllabus in that case reads as follows:

“3. Judgment on pleadings for amount of obligation on indemnity bond held proper, notwithstanding defendant’s answer claimed payments in excess of obligation of bond, where, after he had been credited for all payments claimed, there still remained default on required payments in excess of obligation of bond.”

A bond in the sum of \$1500.00 was executed in that case, the pertinent conditions of the bond being as follows:

“* * *

Whereas, on the 24th day of February, 1916, after a hearing the court among other things granted the said Peter V. Sherwood a divorce as prayed for and ordered said Peter V. Sherwood to pay the sum of Ten Dollars (\$10.00) each and every week into this court for the care, support, maintenance and education of his minor child, Jocelyn E. Sherwood, until said Jocelyn E. Sherwood reaches the age of seventeen years, except in case of the prior decease of the said Peter V. Sherwood, in which event the obligation under this bond shall cease and be determined:

‘Now, therefore, if the said Peter V. Sherwood shall well and truly pay \$10 each and every week into this court, as hereinbefore provided, * * * then the obligation shall be void, otherwise it shall remain in full force and virtue in law’. * * *”

The trial court rendered a judgment in favor of the plaintiff for the full amount of \$1500.00. From that judgment error was prosecuted to the Court of Appeals. Because of the similarity of the question presented in that case, to the one presented by your inquiry, I quote at length from the opinion by Hamilton, J. at page 509:

“* * *

That brings us to the question of the right to enter judgment on the pleadings.

The obligation to pay the sum of \$10 per week until the minor child reaches the age of 17 years would require that payment for

a period of 406 weeks, or a total of \$4,060.00. The obligation of the bond is \$1,500. The answer sets up that in obedience to the order of the court, and the requirements of the bond, he paid into court the sum of \$960.00, and, in addition thereto, he had paid for the support and maintenance of the child, to her custodian, a further sum of \$600, making a total payment of \$1,560. Defendant's further allegation states that the sum total of his payments has exceeded the sum of \$1,500, the amount of the bond.

Counsel for defendant evidently was of the opinion that the obligation of the bond required him to only pay \$1,500, and that, when he had paid an amount in excess thereof, the obligation of the bond was complied with, and there would be no default. That is not the point. The bond is to require the payment of \$10 per week until the child arrives at the age of 17, which would amount to approximately \$4,000. Allowing the payments claimed in the answer, there would still be an obligation of \$2,500, to secure payment of which the bond would stand.

The trial court, on the pleadings, gave credit for all payments claimed in the answer, and was therefore warranted in rendering the judgment on the pleadings that it did. * * *

The Sherwood case was cited with approval in the case of *State, ex rel., vs. McCloskey*, 34 O. App. 30 at p. 34. The following quotation, which appears in 9 *Corpus Juris*, p. 132, supports the conclusion reached in the Sherwood case, *supra*.

"As long as any portion of the debt, for the payment of which the bond is conditioned, remains unpaid, plaintiff may recover to the full extent of the penalty, if necessary, even though such unpaid balance, when added to the payments previously made, exceeds the penalty."

In the present situation, D. W. has agreed to make payments to the Clerk of Courts in the sum of \$4.00 per week. The sureties have agreed that if he does not make such payments, they will be liable in the penal sum of \$500.00. Since the said D. W. is in arrears in his payments to the extent of more than \$500.00 from the time he entered into the above agreement, it would follow that a recovery in the sum of \$500.00 can be had against the sureties on the bond.

The principles in the Sherwood case, *supra*, are directly applicable to the present inquiry. Taking into consideration the purpose in adopting Section 13010, General Code, as well as the plain language of this bond, it