

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."

The question arises as to whether the words "township funds" as used in Section 2917, General Code, mean only the general fund or can such words be interpreted to include the township road fund.

In an opinion found in the Annual Report of the Attorney General for 1912, Vol. I, p. 283, the then Attorney General held, in interpreting the words "township treasury" as used in Section 3294, that the same connotes the general fund and it follows that in the instant case, the words "township fund" should be so construed.

This is apparent from a consideration of the fact, as evidenced by Section 3374-2, that when the legislature intended that the payment of expenses for certain services be paid from the road fund, it expressly so indicated.

The argument may be made that Section 3374-2, above quoted, authorizes the expense of the employment of legal counsel by the township as an expense incurred in the cutting of briars, brush, noxious weeds, etc., along a public highway. It should be noted, however, that the legislature has specifically authorized the procedure by which a township may engage legal counsel and also has indicated that the expense of the same should be payable from the general fund.

In view of the foregoing and in specific answer to your inquiry, I am of the opinion that the compensation of legal counsel employed by a township to assist the prosecuting attorney in defending a suit involving the cutting and burning of brush on one of the township roads, should be paid from the township general fund and not from the township road fund.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4232.

APPROVAL, BONDS OF BEDFORD CITY SCHOOL DISTRICT, CUYA-HOGA COUNTY, OHIO—\$4,000.00.

COLUMBUS, OHIO, April 4, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4233.

SHERIFF—LIABLE FOR MONEYS RECEIVED IN HIS OFFICIAL CAPACITY UNLESS PREVENTED BY ACT OF GOD OR PUBLIC ENEMY—EXCEPTION IN REGARDS PARTITION MONEYS.

SYLLABUS:

1. *In view of the provisions of Section 2842, General Code, and the bond required in Section 2824, General Code, as interpreted by the case of Seward vs.*

Surety Co., a sheriff of a county is liable for the return of moneys received by him in his official capacity unless the same is prevented by an act of God or a public enemy.

2. *By authority of the case Ikert vs. Wells, 13 O. C. C. (N.S.) 213, affirmed 82 O. S. 401, partition moneys arising by operation of Sections 12039, et seq., General Code, are private moneys and a sheriff is not personally liable for loss caused thereto by reason of their deposit in a solvent bank which bank later became insolvent.*

COLUMBUS, OHIO, April 5, 1932.

HON. FREDERIC V. CUFF, *Prosecuting Attorney, Napoleon, Ohio.*

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

“In order to satisfy my sheriff and at his request I am writing to you for an opinion as to the personal liability of a sheriff for funds carried by such sheriff in a bank in a checking account and as ‘A, Sheriff of Henry County, Ohio’, in the event of failure of the bank.

I have tried to reassure my sheriff by citing General Code section number 12039 and the case of *Ichert vs. Wells*, 13 O. C. C. (N. S.) 213, otherwise reported 32 C. D. 82, and followed and affirmed without report in 82 O. S. 401.

However, he insists that he wants an opinion of the Attorney General as to what his liability might be under the circumstances as above set forth.”

Section 2824, General Code, relating to the bonds of the sheriff and coroner, reads in part as follows:

“Within ten days after receiving his commission and before the first Monday of January next after his election, the sheriff and coroner shall each give bond signed by a bonding or surety company authorized to do business in this state, or, at his option, by two or more freeholders having real estate in the value of double the amount of the bond over and above all encumbrances to the state in a sum not less than five thousand dollars nor more than fifty thousand, to be fixed by the county commissioners, the surety company to be approved by the county commissioners, *conditioned for the faithful performance of the duties of his office. * * **” (Italics the writer’s.)

Section 2842, General Code, reads:

“Upon retiring from office, the sheriff shall pay over to his successor in office all moneys received by him and remaining in his hands. He shall deliver to his successor all notes, mortgages, evidences of indebtedness and all books, blanks and stationery belonging to his office. Each sheriff shall demand and receive from his predecessor such books and papers.”

In the case of *Seward vs. Surety Company*, 120 O. S. 47, the court held as disclosed by the third branch of the syllabus:

“The official bond given by a postmaster, with surety, obligating him to faithfully perform all the duties of the office to which he has been

appointed, embraces the duty to account for and disburse the moneys that have come into his hands according to law."

On page 49, the court stated:

"It has been the general policy, not only with government employees and appointees, but with state officers, county officers, township officers, and all other public officials, to hold the public official accountable for the moneys that come into his hands as such official, and his obligation has been held to be as broad as is the obligation of a common carrier of freight received for shipment; that is to say, that when he comes to account for the money received, it must be accounted for and paid over, unless payment by the official is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire, or any other such reason, have not been accepted by the courts as a defense against a claim for the lost money. The decisions to this effect are so uniform and so numerous that no useful purpose would be served by restating the law that has been so many times stated so clearly. * * * * The authorities hold that it is no defense of the public officer, when called upon for the money, to establish that he has deposited it in a bank that was financially sound when the deposit was made, but has since become insolvent." See also 46 C. J. 1039, 1040.

It would follow that as a general rule a sheriff would be liable for the return of moneys received by him in his official capacity. *King, et al. vs. Nichols, et al.*, 16 O. S. 80; *Sidner, et al. vs. Alexander*, 31 O. S. 378. See also *State, ex rel. vs. Harper*, 6 O. S. 607; *Loeser vs. Alexander*, 10 O. C. C. A. 89; *State vs. Ferris*, 12 O. N. P. (N. S.) 171.

You do not state in your communication the character of funds in question but refer to Section 12039. Such section was formerly R. S. 5767 and was originally enacted by the 29th General Assembly, found in 29 O. L. 254, entitled An Act "to provide for the partition of real estate." Such section reads:

"The money or securities arising from a sale of, or an election to take the estate, shall be distributed and paid, by order of the court, to the parties entitled thereto, in lieu of their respective parts and proportions of the estate, according to their rights therein. All receipts of such money or securities by the sheriff are in his official capacity, and his sureties on his official bond shall be liable for any misapplication thereof."

It should be noted that the last sentence of the above section specifically limits the liability of the sureties on the official bond of the sheriff to the misapplication of such moneys.

The case of *Ikert vs. Wells*, 13 O. C. C. (N. S.) 213, affirmed without opinion 82 O. S. 401, held that a sheriff is not liable to amercement for money received by him under the provisions of R. S. 5767, now G. C. 12039, when the money is deposited to the account of "W, as sheriff" in a bank and the bank fails, the reasoning in this decision being that money received by the sheriff under the authority of Section 12039 is not public moneys but private funds belonging to parties who own the property.

In the *Ikert* case, *supra*, the court stated at p. 214:

"Of course it can not be disputed that a public officer may not be

made liable by statute or by the provisions of his bond to pay over moneys which come into his possession by virtue of his office, even though they may be lost without his fault. But it hardly seems consonant with sound principles of equity and justice to hold over a public officer a rule so strict unless the statute or the bond of the officer require it."

Since the holding in this case has not been altered or modified by subsequent decisions of the Supreme Court, it follows that the law as therein established controls as to the liability of a sheriff for loss of money in his hands arising from the operation of Sections 12039, et seq., General Code, relative to partition suits.

In view of the provisions of Section 2842 and the bond required in Section 2824 as interpreted by the case of *Seward vs. Surety Co.*, I am of the opinion that a sheriff of a county is liable for the return of moneys received by him in his official capacity unless the same is prevented by an act of God or a public enemy.

By authority of the case of *Ikert vs. Wells*, 13 O. C. C. (N. S.) 213, affirmed 82 O. S. 401, partition moneys arising by operation of Sections 12039, et seq., General Code, are private moneys and a sheriff is not personally liable for loss caused thereto by reason of their deposit in a solvent bank which bank later became insolvent.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4234.

APPROVAL, NOTES OF RUSHCREEK RURAL SCHOOL DISTRICT, FAIRFIELD COUNTY, OHIO—\$7,000.00.

COLUMBUS, OHIO, April 6, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4235.

APPROVAL, NOTES OF STOW TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, April 6, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4236.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE STRUCK CONSTRUCTION COMPANY, FOR EXTERIOR WORK FOR THE STATE OFFICE BUILDING, AT AN EXPENDITURE OF \$159,900.00—SURETY BOND EXECUTED BY THE SEABOARD SURETY COMPANY.

COLUMBUS, OHIO, April 6, 1932.

HON. F. W. MOWREY, *Executive Secretary, State Office Building Commission, Columbus, Ohio.*