

496.

PUBLIC MONEY—WITNESS FEES DEPOSITS FOR COSTS—
 COLOR OF OFFICE—TRUST FUNDS—SECTIONS 3041,
 3042, 3043, and 286 NOT REPUGNANT—TITLE TO UN-
 CLAIMED MONEYS—RECOVERY BY LAWFUL OWNER.

SYLLABUS:

1. *Moneys received by the Clerk of Courts and Probate Judges for witness fees and desopits for costs and by the Sheriff in partition proceedings together with all other moneys received or collected under color of office are public moneys and should be disposed of as provided by Section 286, General Code.*

2. *Sections 3041, 3042 and 3043 and Section 286, General Code, are not repugnant. Section 286, General Code, is a substantial replica of Sections 3041, 3042 and 3043 and is supplemented thereto to the extent that all moneys received or collected under color of office, regardless of their source, are public moneys, shall be paid into the proper treasury, credited to a trust fund and if not claimed in five years, shall be passed to the general fund.*

3. *Such procedure does not carry the title to unclaimed moneys to the subdivision wherein they are collected and ultimately carried into the general fund. Such money can be pursued into the general fund and recovered by the lawful owner upon the establishment of his right thereto.*

COLUMBUS, OHIO, April 20, 1937

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

GENTLEMEN: I acknowledge receipt of your communication of recent date as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Sections 3041, 3042 and 3043, General Code, relate to the payment of moneys which have been paid into the county treasury by the clerk of courts, probate judge, and sheriff.

Section 286, General Code, defines public moneys as including all money received or collected under color of office.

QUESTION 1: Are moneys received by the clerk of courts and/or probate judge, for witness fees and deposits for costs, by the sheriff in partition proceedings, public money, as defined in Section 286, General Code.

QUESTION 2: If such moneys are not paid to the person to whom due, and are paid into a special trust fund in the county treasury under the provisions of Sections 3041, 3042, and 3043, General Code, will same be paid into the general county fund after the expiration of five years, in accordance with the provisions of Section 286, General Code; or must such moneys remain in the special trust fund in the county treasury indefinitely, to be paid to the persons to whom due, upon demand of such persons, regardless of the length of time they remain in the trust fund?"

Next to the last paragraph of Section 286, General Code, reads 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 special trust fund, such money shall revert to the general fund of the political subdivision where collected."

For convenience I am setting out Sections 3041, 3042 and 3043, General Code.

Section 3041:

"On the first Monday of January in each year, the clerk of each common pleas and circuit court, each probate judge, and sheriff, shall make two certified lists of causes in which money has been paid, and which have remained in his hands, or of a former clerk, probate judge or sheriff, for one year next preceding such first Monday of January, designating the amount and in whose hands. One list shall be by such officer set up in a conspicuous place in his office for the period of thirty days, and the other at or on the door of the court house, on the second Monday of January, for the same period of time."

Section 3042:

“All such advertised moneys, fees, costs, debts and damages, remaining in the hands of such clerk or probate judge, and all unclaimed moneys, other than costs, remaining in the hands of the sheriff from expiration of thirty days from the ending of such time of advertisement, shall be, by such officer, or successor of either, paid to the treasurer of the county, on the order of the county auditor, indicating in each item in his cash book and docket the disposition made thereof. Upon ceasing to be such officer, each clerk, probate judge, and sheriff immediately shall pay to his successor all money in his hands as such officer.”

Section 3043:

“A person entitled to money so turned into the treasury, upon demand, shall receive a warrant therefor from the auditor, payable to the order of the person named in the list furnished the auditor as hereafter provided, upon the certificate of the clerk, probate judge or sheriff, in office at the time demand is made.”

Section 286, General Code, confers no title upon the State or any political subdivision thereof to moneys belonging to natural or artificial persons as such even though such moneys may have found their way into the county treasury. It subserves no other purpose than to subject them to the jurisdiction of the Bureau of Inspection and Supervision of Public Offices and afford a remedy for their recovery in case of their dissipation.

Title III, Division 1, Chapter 3, beginning with Section 235, General Code, and ending with Section 291, General Code, is an enumeration of the duties of the Auditor of State.

Sections 274 to 291, General Code, inclusive, deal with the inspection and supervision of public offices.

Section 286, General Code, is the most comprehensive section of them all. It was necessary to use one-half of page 93, all of page 94 and part of page 95 of Volume 1 of Page's Annotated General Code to set this section out together with its annotations. It provides in short, what the report of the examiners shall set forth, where copies shall be filed, how the amounts found against officials shall be collected, requirements as to criminal proceedings, provisions against abatement or compromise, a definition of public money, and a final provision to the effect that no judgment or final order shall be entered in any civil action begun under the section, without submission to the Attorney General. It is only necessary to deal with sub-division seven (7) of the section in the light of the

other sub-divisions thereof in order to answer the question herein involved.

It is well to consider the title, division and chapter under which this section is found, as above indicated, in order to divine its purpose.

It was necessary to define "public money" in view of the decision of the Supreme Court of Ohio in the case of *Loe vs. The State, ex rel*, 82 O.S., 73 (1910), wherein it was held that :

"Moneys which are paid into the county treasury by virtue of proceedings for the location and construction of a county ditch in conformity with Section 4447 and cognate sections of the revised statutes are not funds of the county nor public moneys in the hands of the county treasurer belonging to the county within the meaning of Section 1277 Revised Statutes."

The effect of this decision was to ham-string the Bureau of Inspection and Supervision, so in April, 1913, the General Assembly passed an Act defining "public money" (103 O.L. pages 506, et seq. See page 509).

In June, 1913, and before this law became effective, the Supreme Court of Ohio upset the *Loe* case, *supra*, but the bill was in the hopper and it became the law in August, 1913, and has been the law ever since, in substance. For the overruling of the *Loe* case, *supra*, see *State, ex rel. Maher vs. Baker*, 88 O.S., 165.

I note the definition of "public money" as provided by Section 286, General Code, viz :

"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."

The term "public money" is not given a universal, unlimited application by force of this statute. It is limited by the words "as used herein." Why was it necessary to use this limitation in view of the general, liberal language that followed?

The Bureau, from the time of its inception has been embarrassed in actions to recover shortages by the defense that the money sought to be recovered was not public money. The *Baker* case, *supra*, relieved the situation and Section 286 was enacted to remove all doubt as to the right to recover all moneys that found their way into the hands of public officers that had been dissipated. Section 286, General Code, was con-

strued in 1918 in the case of *State, ex rel. vs. Maharry*, 97 O.S. 272, wherein it was held:

“1. All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law.

2. Sections 274, 284 and 286, et seq., General Code, creating the bureau of inspection and supervision of public offices; defining its powers and providing for the short form of pleading are constitutional statutes.

3. Said sections are remedial statutes and therefore should be liberally construed and applied to effect this clear and controlling purpose.

4. These statutes are comprehensive enough to warrant actions against either public officers or private persons.”

While this decision removed all the debris from the path of the Bureau, it did not construe the term “public money” as used in Section 286.

“All money received under the color of office and not otherwise paid out according to law, shall be due to the political subdivision 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 owners; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected.”

Public money as a matter of fact is money that comes into the treasury of the state or a political subdivision thereof by reason of a public activity authorized by law, but there is nothing in our constitution that precludes the General Assembly from characterizing all moneys that come into the hands of public officers as “public money” and this is particularly true where the natural tendency of the enactment is to conserve such moneys, and that is just what was done when Section 286 was enacted.

The state or subdivision has the right to place a reasonable limitation as to the time in which claims against such moneys shall be presented for payment, and if not claimed within such time it likewise has the right to provide for its coverage into a particular fund. It is fundamental that

public funds belong to the public, subject to all valid claims that may be asserted against them.

The allowance of a claim to be satisfied out of public funds does not operate as an equitable assignment *pro tanto*. To so hold could subserve no purpose other than to plague and harass public officials.

Public money belongs to the public until it is paid into the hands of a claimant holding a valid claim thereto. Money collected generally by the state and its political subdivisions, unless specifically directed by law passes as a matter of custom, good sense and right, to the credit of the general fund of the state or political subdivision, and in case of reverter it should go back to the general fund. The treasurer and auditor of the state and political subdivisions know generally of claims against the state and political subdivisions, and they are required to maintain a trust fund for the claimants for five years after which time they *revert to the general fund* of the political subdivision where collected. I am of the opinion that the use of the word "revert" was a bit unhappy.

Webster defines "revert" as "to cause to return; to restore." Ballentine tells us that "The word is derived from the Latin word 'revertere' meaning to turn backward. Its legal or technical signification imports that property is to go back or return to a person who formerly owned it."

It would seem that a more general, if not a more correct definition, could be coined. Lawyers know that the word "revert" in legal contemplation, means the return of property to where it legally belongs. The General Fund is the fund into which all moneys go unless ear-marked otherwise, and it is likewise the fund from which the expenses of government are paid, unless otherwise designated. The General Assembly probably reasoned that in as much as the moneys when collected were properly covered into the General Fund, the General Fund was the home to which it should be returned when the World had no further use for it. Such money had never as yet been in the General Fund and it could not return to a place it had not been. I am of the opinion that the General Assembly intended to provide that such moneys should be paid into or covered into the General Fund. The General Assembly did not say in so many words that after the expiration of the five-year limitation such money should escheat to and become the property of the state or political subdivision, and until such specific provision is made, such money remains the property of the lawful claimant, regardless of the fact that five years has elapsed and the money has been paid into the proper treasury to the credit of the General Fund, and that the rightful claimants may pursue the money into the General Fund and reclaim it. In the reclamation of such money, in my opinion, it is not necessary that any fiscal board or body make an appropriation from the General Fund for its satisfaction,

although such would be the logical and orderly way to take care of the situation.

The Supreme Court of Ohio in the Maharry case, *supra*, has said that Section 286 was constitutional and the most I can do is to try to determine the legislative intent, and that I have already indicated, namely, that in the enactment of Section 286, the General Assembly sought to label all moneys coming into the hands of public officers under color of office as public moneys in so far as the Bureau of Inspection and Supervision of Public Offices was concerned; that the Bureau by reason of the law that all such moneys were public moneys could make findings relative to all such moneys and actions could be maintained for their recovery.

Unclaimed witness fees in civil actions, unclaimed deposits for costs and unclaimed distributive shares in partition proceedings are not public moneys in fact, Section 286, General Code, to the contrary notwithstanding, as they are not within its contemplation except to the extent that the Bureau is authorized to make findings relative thereto and the proper officer maintain actions to recover moneys coming into the hands of public officers in any manner, without regard to how they were received, who paid them to the officers, or to whom they rightfully belonged. The state has no property right in these moneys, never did have and never will have, until the General Assembly is able to pass a law that will stand the test applied to all enactments involving forfeitures, which the law abhors.

Witness fees in civil actions do not get into the treasury because of any activity of the state or a political subdivision thereof. Neither the state nor a subdivision thereof have any rights against an unsuccessful party litigant in actions in which they are not parties. Witness fees are taxed in the cost bill in the name of and for the use of the witness and under the status of our law today, neither the state nor a subdivision can acquire the right or property thereto, but that does not affect the right of the state to denominate them public moneys as a matter of law.

What has been said relative to witness fees in civil cases applies equally to unclaimed deposits for costs and unclaimed distributive shares in partition cases. I grant you that these moneys are paid to the clerk, sheriff or probate judge of the county and are received by them under color of office, but they are so received as a matter of convenience and not because the state has any right of property in the money. These officers are merely the conduits through which the moneys pass on their way to get into the hands of the persons who are entitled to them as a matter of right. These officers are, as I take it, trustees of the money for those ultimately entitle to receive it.

As I view it, Section 286 does not antagonize Sections 3041, 3042 and 3043, General Code. They are perfectly harmonious. Sections 3041, 3042 and 3043, General Code, are, comparatively speaking, ancient sec-

tions, dating back to the days of Swan and Critchfield; decades before a Bureau of Inspection and Supervision of Public Offices was dreamed of. When our forbears enacted these sections, they were mindful of the sanctity of private property. Under the legal set-up at that time, the clerk, probate judge and sheriff were the only county officials authorized to receive moneys against which claims could be asserted, and they provided that such unclaimed moneys should be paid into the county treasury to await the pleasure of the person or persons entitled thereto, and no limitations were placed thereon.

As has been indicated, when the Bureau of Inspection and Supervision of Public Offices came into existence, it was necessary to define *public money*. This was done by the enactment of Section 286, General Code, which was a substantial replica of Sections 3041, 3042 and 3043, with the further provision that when such moneys are paid into the treasury, they shall be placed to the credit of a trust fund until claimed by the lawful owners and if not claimed within five years they shall pass into the General Fund of the subdivisions where collected. So that in effect, Section 286 merely supplements Sections 3041, 3042 and 3043, General Code, and in nowise repeals them or any of them.

Section 3041, 3042 and 3043, General Code, deal with moneys coming into the hands of probate judges, clerks of courts and sheriffs. Section 286, General Code, encompasses not only all the moneys enumerated in these sections, but goes farther and makes all moneys coming into the hands of public officers under color of office, public moneys, and the procedure provided by Section 286 for the disposition of such moneys should be followed, inasmuch as it is the latest statute, but in no event does such money become the property of the state because there is no provision to that effect.

After payment into the General Fund as provided in Section 286, General Code, the lawful claimant may pursue the money into the General Fund and upon establishing his right thereto, reclaim it.

I cannot agree with the informal opinion rendered by my predecessor as of date of January 9, 1937, a copy of which is enclosed with your communication, to the extent that after five years and after such moneys have gone into the General Fund of the county, that they may not thereafter be reclaimed by the rightful owner, and to that extent such informal opinion is overruled.

I take it that this holding answers all your questions.

Respectfully,

HERBERT S. DUFFY,
Attorney General.