

1471

LIQUOR PERMIT HOLDERS—BONDS FILED—TAX COMMISSIONER—SECTION 12924-8 G.C.—NOT APPLICABLE, UNDER SECTION 6064-18 G.C.

SYLLABUS:

The provisions of Section 12924-8, General Code, are not applicable in the case of bonds filed by liquor permit holders under the provisions of Section 6064-18, General Code.

Columbus, Ohio, June 5, 1952

Hon. John W. Peck, Tax Commissioner
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Section 6064-18 of the General Code of Ohio requires that holders of permits issued by the Ohio Department of Liquor Control shall furnish bond. Such bonds are filed with the Ohio Department of Taxation.

“Are such bonds and the name of the surety thereon matters of public record open to public inspection, or are they to be considered included as falling within the provisions of Section 12924-8 of the General Code, which prohibits the divulgence of information by the Tax Commissioner and other designated public employees?”

Section 12924-8, General Code, to which reference is made in your inquiry, reads as follows:

“Whoever, being or having been an expert, clerk or employe of a county auditor or county board of revision, or the tax commissioner, or a deputy, assistant, agent or employe of the tax commissioner, divulges, except in the performance of his duties or in his report to the county auditor or to the county board of revision, or to the tax commissioner, as the case may be, or when called upon to testify in any court or proceeding, any information acquired by him in the exercise of the powers vested in him by any provision of law, or while claiming to exercise such powers in respect to the transactions, property or business of any person, company, firm, corporation, association or partnership, shall be fined not less than fifty dollars nor more than one thousand

dollars, and shall thereafter be disqualified from acting in any official capacity whatsoever in connection with the assessment or collection of taxes. The names of officers and directors of any corporation shall not be considered to be within the prohibition of this section."

The special statutory provisions relative to the bonds required of holders of retail liquor permits is found in Section 6064-18, General Code, which reads in part :

"No permit other than a class C-1, class D-1 and class F permit shall be issued unless and until the applicant therefor shall have furnished a bond to the state of Ohio, with surety to the satisfaction of the commission, conditioned on the faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto, and the payment of all permit fees, taxes and penalties levied under the provisions of the liquor control act, and amendments and supplements thereto, upon sales made by him of any kind of non-intoxicating or intoxicating beverages or liquor, whether under authority of such permit or otherwise. * * *

* * * "Such bonds shall be filed with the commission and kept in its office. * * *"

The word "commission" in this language refers, of course, to the tax commission of Ohio. The functions, powers and duties of that agency have been transferred to the department of taxation, such department including the office of tax commissioner. Section 1464, General Code.

If we should conclude that any information relative to such a bond is "information acquired by him (the tax commissioner) in the exercise of the powers vested in him by any provision of law," it would then follow that he is forbidden to divulge it, except in judicial or quasi-judicial proceedings, to any person whatever, even to the director of liquor control. However, by reference to the plain provisions of Section 6064-18, supra, it will be observed that that officer, representing the state of Ohio, is one of the obligees under the bond. This is so for the reason that such bond is conditioned, among other things, on "payment of all permit fees * * * levied under the provisions of the liquor control act," such fees being payable, of course, to the department of liquor control. Such a conclusion would, therefore, amount to a construction of this language leading to

absurd consequences, injustice and great inconvenience, none of which can be presumed to have been within the legislative intent. *Moore v. Given*, 39 Ohio St., 661.

Here it may be objected that the director, in any judicial or quasi-judicial proceedings instituted by him, could, by the use of interrogatories or depositions, ascertain from the adverse party, who is also the principal on the bond, the identity of the surety and the amount of such bond. This, however, would certainly result in great inconvenience, and, in circumstances where the adverse party could not be found, would virtually render ineffective the security which the bond was designed to provide. This result, too, we may presume not to have been within the legislative intent.

It may be said at this point that it is seriously to be doubted whether the General Assembly intended, by the enactment of Section 12924-8, *supra*, to make confidential any information acquired by the commissioner in the performance of his official duties except such as relates to the valuation, nature, and identity of the property of a taxpayer, or of the nature and extent of the business operations of a taxpayer. In short, the protection afforded is quite evidently for the benefit of a taxpayer, as a taxpayer. The bonds here in question do not appear to relate, directly or indirectly, to any information relative to property valuations or the identity of the taxpayer's property, nor to the fact or amount of any taxes assessed against him. Certainly it cannot be said that the disclosure of the amount of the bond, or of the identity of the surety, would result in the disclosure of information relating to a taxpayer's property or business with respect to which we might reasonably suppose the General Assembly perceived a need to afford the protection of secrecy. In this view of the matter, I am inclined to the notion that such bonds are ordinary public records and, as such, are subject to the inspection of any and all persons who choose to examine them, regardless of whether they have any definite interest in their subject matter. 35 Ohio Jurisprudence, 44, Section 41.

It is not necessary, however, to base this conclusion entirely on the grounds already noted. If, as observed above, absurd consequences beyond the presumed legislative intent would result from a construction which would withhold information concerning these bonds from one of the obligees thereunder, the director of liquor control, then it must follow

that the same conclusion must be reached with respect to any other persons possessing the rights of an obligee under such bonds. We may, therefore, inquire to what extent any other persons possess such rights.

It would not be necessary ordinarily to inquire regarding the purported conditions in a bond of this kind for the reason that "a statute which provides for the giving of a bond becomes a part of the bond and imports into it omitted conditions prescribed by statute." *Cusack v. McGrain*, 136 Ohio St., 27 (29). See also *Surety Co. v. Chambers*, 115 Ohio St., 434, and *Bank v. Roos*, 134 Ohio St., 359.

In the case at hand, the form of bond currently in use is quite clearly descriptive of a contract executed by the principal and surety *for the purpose of complying with the requirements of Section 6064-18, General Code*. It contains a provision, however, which purports to limit the surety's liability to fees, taxes and penalties for which the principal may become liable, and by implication seeks to avoid liability on the surety's part with respect to the statutory requirement that the principal execute a bond conditioned on "faithful observance" of the terms of his permit and compliance with "all laws * * * with respect thereto." This, of course, goes well beyond a mere omission. It represents a positive effort to limit the bond coverage.

In *Surety Co. v. Chambers*, 115 Ohio St., 434, the syllabus reads:

"Under Section 2365-1 et seq. of the General Code, a bond given by a compensated surety in connection with a contract for the erection of a public building, which agrees to indemnify a board of education of a municipality for loss occasioned in the erection of the school building in question, but fails to comply with the provisions of Section 2365-3 et seq., that such a bond shall contain an additional obligation for the payment by the contractor and by all subcontractors for all labor performed or materials furnished in the construction, erection, alteration, or repair of such building, works, or improvements, *is available for recovery* by materialmen and subcontractors for all labor performed or materials furnished in the construction erection, alteration or repair of such building, works or improvements, *regardless of the terms and conditions written into the bond by the contracting parties.*"
(Emphasis added.)

In the opinion in this case by Allen J., it is said (pp. 444, 445):

"It has been heretofore held by this court with regard to a liability insurance policy that legislative provisions became a part of every contract covered by the statute. This was the express

holding in the case of *Verducci v. Casualty Co. of America*, 96 Ohio St., 260, 117 N.E. 235. In that case the action was brought upon an employer's liability insurance policy, which provided that no action could be brought upon the policy except by the employer. The statute then in existence, Section 9510-1, General Code, subrogated an injured workman to the rights of his employer under the policy. The surety company relied upon the face of the policy and claimed that the injured workman had no right of recovery. It was held by this court that the provisions of the statute giving an injured workman the right of subrogation became a part of the contract of indemnity regardless of the contract between the parties. To the same effect is *National Union Fire Ins. Co. v. Wanberg*, 260 U.S., 71, 43 S.Ct., 32, 67 L.Ed., 136.

"The same doctrine is announced in a number of the recent decisions of influential courts of last resort in this country, such as *Lorando v. Gethro*, 228 Mass., 181, 117 N.E., 185, 1 A.L.R., 1374, which held that the legislative provision that indemnity insurance policies subsequently written should not require payment of the loss by the insured as a condition to the liability of the insurer, and that the injured person may look to the insurer for compensation, is read into contracts of indemnity insurance written after the statute took effect.

"*Globe Indemnity Co. v. Barnes* (Tex. Civ. App.), 281 S.W., 215, holds that where specifications of a contract for school buildings require a surety bond acceptable to school trustees, guaranteeing payment of all labor and material, *a clause in the bond purporting to limit the liability of the surety to the obligee named is not effective* in view of the statutory provisions upon that subject.

"*Duke v. National Surety Co.*, 130 Wash., 276, 227 P., 2, holds that the provisions of the statute are read into a statutory bond, and that *conditions in the statutory bond repugnant to the statute are to be treated as surplusage*. This is a case of surety bond."
(Emphasis added.)

The Chambers case has been cited with approval by the Supreme Court of Ohio on numerous occasions and the rule therein would appear to be settled law in this state. For this reason I conclude that the purported limitation in the bond form presently in use by your department is ineffective to restrict the liability of the surety to a coverage less than that contemplated by the plain language of Section 6064-18, General Code.

It will be observed that the bond here prescribed by statute is one of a dual nature. First, it is a surety bond in the usual form designed to cover "payment of all permit fees, taxes and penalties levied under the provisions of the liquor control act." Second, it is "conditioned on the

faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto." Accordingly, with regard to the "faithful observance" and "compliance" provision, the contract is not actually a suretyship agreement, but is more properly a fidelity bond, and as such is analogous to the usual fidelity bond of an employe or public official conditioned on faithful discharge of duty and compliance with provisions of law applicable to the office concerned. Fidelity bonds, it may be noted in passing, are regarded as being more nearly a contract of insurance than one of suretyship. 50 American Jurisprudence, 1117, Section 324.

In determining who are the possible obligees under a bond of this sort, as to the coverage of "fees, taxes and penalties levied under the provisions of the liquor control act," it would appear that only the state could be deemed to possess the rights of an obligee. There is, however, a reported judicial decision to the contrary in *Laird v. Columbia Casualty Co.*, 19 Ohio Opinions, 338, the headnote in the reported decision being as follows:

"A person injured as a direct and proximate result of the unlawful act of a retail liquor dealer in selling him intoxicating liquor, when he was intoxicated, in violation of section 6064-22(2) and 6064-65, General Code, can recover under the bond of the retail liquor dealer."

In the course of the opinion by Watters, J., it is said (p. 339):

"The Ohio statute provides for payment of 'all permit fees and penalties imposed under the provisions of the State Liquor Control Act and the laws of this state.'

"The word 'penalties' in the Ohio statute is not used in the narrow sense of fine or punishment but in the broader sense of damages, judgment or recovery.

"Under the law as it is a person injured as a direct and proximate cause of the intoxicated condition of a minor auto driver could recover under the bond of a retail liquor dealer who in violation of law sold the minor intoxicating liquor."

It is to be observed, however, in the first paragraph above quoted from the opinion, that the statute is incorrectly quoted. The statute then in effect (presently identical in pertinent part) referred only to "penalties levied under the provisions of the liquor control act" and made no refer-

ence to "penalties imposed * * * under the laws of this state." Moreover, the statement is made in the opinion that "The Ohio statute conditions the bond not only upon violations of the Liquor Control Act but also covers any violation of the laws of Ohio." A contrary view was expressed in a later decision by the Supreme Court of Ohio in *State ex rel Herbert v. Bonding Co.*, 142 Ohio St., 189, the syllabus in which reads:

"When a bond is furnished under the requirements of Section 6064-18, General Code, a section of the Ohio Liquor Control Act, the surety is not liable thereunder for retail sales taxes upon beverages or other merchandise sold by the holder of a permit."

In the opinion in this case Weygandt, C.J., said (p.191):

"Part of the above-quoted statutory language requires that the bond shall be 'conditioned on the faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto, * * *.' The chief source of difficulty is the phrase 'with respect thereto.' Correctly viewing it as a problem in plain, old fashioned grammar, the relator applies the general rule of 'last antecedent' and contends that this phrase modifies the earlier phrase 'all the laws of the state of Ohio.' He insists that this language is all-inclusive and therefore connotes also the laws relating to taxes on retail sales. But the respondent disagrees with this and urges instead that the phrase 'with respect thereto' modifies the still earlier word 'permit.' Although any sentence containing as many as ten 'ands' is almost certain to be confusing, a close study of these provisions discloses that the General Assembly has gone no farther than to require a bond covering compliance with the terms of the permit and compliance with all laws with respect to the *permit*. The laws relating to the permit are silent as to the retail sales tax."

In view of this language we are obliged to regard as invalid the reasoning in the *Laird* case, *supra*, although it does not necessarily follow that the decision therein could not have been reached on other grounds.

Moreover, it appears that the reported decision in the *Laird* case was reversed on subsequent consideration in the same court in an unreported decision on the motion of the defendant (surety) for judgment notwithstanding the general verdict of the jury, the reported decision, *supra*, having been rendered on defendant's demurrer to the petition.

The later decision in this case seems to be based on two principal considerations. The first of these is that the plaintiff was himself the vendee of liquor in an illegal sale to a minor, and under the common law rule no right of action was recognized in such vendees.

The second consideration is that the provisions of a bond must be strictly construed and not extended beyond the clearly expressed intent of the statute. It was pointed out that the statute contains no such clear expression and, the state being in the liquor business, and thus bound to have financial claims against permit holders from time to time, it is to be presumed that such bonds are to afford security in connection therewith; and such security would be prejudiced by allowing third parties to invoke the benefit of such bonds.

We may assume, without concluding, that the first consideration set out above is a valid one. As to the second, however, it is significant to observe that the actual terms of the bond in the Laird case purported to limit its coverage to "payment of all permit fees and penalties imposed under the provisions of the liquor control act and * * * all taxes levied under the provisions thereof * * *." Accordingly, since the court omitted any mention whatever of the "faithful observance" and "compliance" provision of the bond, already discussed herein, it would appear that the court regarded the limitation on the coverage in the contract which we have just described, as being fully effective. This view, in my opinion, is wholly untenable in view of the rule that the statute requiring the giving of a bond becomes a part of the bond. See Chambers case, *supra*. For this reason, I cannot regard this decision as a statement of the settled law in Ohio on this point.

With the exception of the Laird case, I do not find that the courts in Ohio have considered the precise question here presented. However, because the bond in question is in part essentially a fidelity bond, it is appropriate to note the decisions with respect to contracts of this nature. In *American Guaranty Co. v. McNiece, et al.*, 111 Ohio St., 532, the syllabus reads:

"The sureties on a bond of an official, conditioned upon the faithful performance of his duties, are liable to all persons unlawfully injured by nonfeasance, misfeasance or malfeasance perpetrated by such officer, either by virtue of his office or under color of his office."

In *Cusack v. McGrain*, 136 Ohio St., 27, the syllabus is as follows:

"1. Where, under the provisions of Section 6064-6, General Code, the Director of the Department of Liquor Control requires bond from an employee in that department, there will be read into such bond, if the same is omitted, a condition for the faithful performance of duty in conformity with Section 6, General Code.

"2. Such condition inures to the benefit of one who is unlawfully arrested by a bonded inspector while acting within the scope of his employment and, by virtue of Section 11242, General Code, the person arrested may maintain an action in his own name against the surety on such bond."

In the opinion by Zimmerman, J. (p. 31), after quoting the syllabus in the *American Guaranty* case, *supra*, it is said:

"Applying this rule to the present case in connection with Section 11242, General Code, providing that when one renders his sureties liable on a bond, the injured person may bring action thereon in his own name to recover the amount to which he is entitled by reason of the delinquency, the instant action is maintainable. Compare, *Maryland Casualty Co. v. McDiarmid*, 116 Ohio St., 576, 157 N.E., 321; *United States Fidelity & Guaranty Co. v. Samuels*, 116 Ohio St., 586, 157 N.E., 325, 53 A.L.R., 36."

Section 11242, General Code, to which reference is made, reads as follows:

"When a person forfeits his bond, or renders his sureties liable thereon, a person injured thereby, or who is entitled to the benefit of the security, may bring an action thereon, in his own name, against the person and his sureties, to recover the amount to which he is entitled by reason of the delinquency, which action may be prosecuted on a certified copy of the bond; and a judgment for one delinquency shall not preclude the same or another person from bringing an action on the instrument for another delinquency."

This statute, of course, refers to procedural matters and adds nothing to the substantive rights of an injured person who claims to be "entitled to the benefit of the security."

We may well inquire, however, what possible objective the General Assembly has sought to attain by the requirement of a bond conditioned on "faithful observance" by a liquor permit holder of the conditions of

his permit and "compliance with all laws * * * with respect thereto." In the event that any of such laws are violated, it would seem that the state would be limited to action to suspend or revoke the permit under the provisions of Section 6064-25, General Code, unless a claim were inserted with respect to fees, taxes or penalties. In the latter case, of course, a proceeding against the surety would certainly be proper, but it is difficult to perceive the logic of a requirement of a fidelity bond conditioned on compliance with the laws relating to a liquor permit, i.e., the liquor control act, unless it were intended that such bond should be for the benefit of such members of the public who are injured as a proximate result of the acts of the permittee which constitute a violation of such act.

That members of the public could readily be so injured is clear from an examination of the several statutory restrictions on permit holders as set out in Section 6064-22, General Code. Here we find provisions which forbid the sale of intoxicants to minors, intoxicated persons, or to persons who habitually consume intoxicants to excess. Moreover, this section prohibits the sale of intoxicants to any individual to whom the department has determined to prohibit such sale because of cause shown by any of certain near relatives, a person dependent upon, or in charge of such individual, or by certain local authorities. With respect to illegal sales to such individuals we find the following provisions in Section 6203, General Code:

"A husband, wife, child, parent, guardian, employer or *other person* injured in person, property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of a person, after the issuance and during the existence of the order of the department of liquor control prohibiting the sale of intoxicating liquor to such person, shall have a right of action in his or her own name, severally or jointly, against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person."

(Emphasis added.)

Whether third parties generally should be held to have a right of action against a permit holder by reason of an injury, the proximate cause of which is the intoxication of minors and habitual consumers where the sales to them were illegally made, it is not necessary here to decide. It is obvious, under the provisions of Section 6203, supra, that the law

expressly recognizes such right in a limited class of cases. Here, then, is a situation in which the General Assembly might logically be expected to provide the security of a bond for the benefit of members of the public; and in view of the virtual uselessness of the "faithful observance" and "compliance" feature of the bond where the state alone is deemed to possess the benefits of an obligee, an inference arises that it was not the legislative intent so to limit the coverage of such bonds.

Accordingly, it is my conclusion that such provision was made by the General Assembly primarily for the purpose of constituting the state the obligee under the contract for the use and benefit of those parties whose injuries are proximately caused by acts of the permit holder amounting to a violation of the liquor control act. Moreover, this view is given substantial support by regard to the essential nature of the contract as a fidelity bond, and the judicial decisions in this state defining the beneficiaries under fidelity contracts.

Having thus concluded that injured third parties of a certain class, at least, may enjoy the rights of beneficiaries under such bonds, it follows that absurd consequences, injustice, and great inconvenience is to be avoided with respect to them as well as with respect to the director of liquor control; and this can be done only when the statute is so construed as to permit the free examination of such bonds by persons claiming the rights of obligees thereunder.

Because I find nothing in the literal language of Section 12924-8, General Code, which restrains the adoption of a view which will avoid absurdity, injustice, or great inconvenience, I conclude that this section is not applicable in the case of bonds filed by liquor permit holders under the provisions of Section 6064-18, General Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General