

2. Section 5527, General Code, providing that the sale of motor vehicle fuels to the United States Government or any of its agencies by a dealer as defined in the act imposing the two cent gasoline tax in Ohio, became effective April 17, 1925; and the provisions thereof exempting such sales from the imposition of the gasoline tax were incorporated by reference in the act of March 3, 1927 (112 O. L. 508), effective May 25, 1927, imposing an additional one cent gasoline tax. See Section 5541-1, General Code.

3. Moneys in the rotary fund created by Sections 5537 and 5541-7 of the General Code, which sections were respectively enacted in the act imposing the two cent gasoline tax (111 O. L. 294) and the act imposing the one cent gasoline tax (112 O. L. 508) may only be paid in accordance with the provisions of Section 5534 of the General Code.

4. A claim for the refunding of taxes erroneously paid on motor vehicle fuels sold to the United States Government or any of its agencies may be presented to the sundry claims board, together with such evidence as will satisfy such board, for recommendation as to the allowance or disallowance of such claim to the General Assembly of Ohio. Such claim cannot be paid unless money therefor is specifically appropriated by the General Assembly of Ohio.

Respectfully,

EDWARD C. TURNER,

Attorney General.

2946.

JUSTICE OF THE PEACE—EMBEZZLEMENT OF STATE AND TOWNSHIP FUNDS—BOND INSUFFICIENT—PROCEEDS PRORATED—BOND RELEASED BY PROSECUTING ATTORNEY.

SYLLABUS:

1. *Where a justice of the peace embezzles funds belonging to both the state treasury and a township, and his bond is not sufficient to cover said defalcation, the amount recovered upon the official bond should be distributed in proportion to the respective claims of the state and township.*

2. *Under such circumstances, the prosecuting attorney of the county may lawfully collect said moneys and execute a receipt therefor in the name of the State of Ohio, and distribute said moneys to the state and township in the proportion that their respective claims bear to the amount collected.*

COLUMBUS, OHIO, November 30, 1928.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads as follows:

“I desire your opinion on the following set of facts:

The State Examiner examining the justices of the peace of Mahoning County, Ohio, for the period between 1925 to December, 1927, made a finding against F. B. R., Justice of the Peace in and for ----- Township, in the amount of \$6,207.80; \$3,553.90 to the State Treasury, \$2,653.90 to ----- Township.

As a result of said finding, F. B. R. was sent to the Ohio State Penitentiary for embezzlement of public funds.

A thorough investigation discloses the fact that F. B. R. had no assets, so this office immediately communicated with the bonding company which bonded him in the amount of \$2,000.00.

The bonding company expressed their willingness to pay the full amount of their bond, at which time I suggested they pay the State and ----- Township on a percentage basis an amount totaling \$2,000.00. They, however, expressed a desire to pay the full amount to the State of Ohio, insofar as the bond was made payable to the State, but before doing so they desire to have your office on behalf of the State, draw up a release for the full amount.

If this conforms with your procedure in such cases, I would appreciate your drawing such a release as soon as possible and forwarding the same to this office, at which time a check in the amount of \$2,000.00, made payable to the State of Ohio will be turned over to this office.

On the above statement of facts, I desire to have an opinion regarding the right of ----- Township to secure a portion of the amount received from the bonding company."

Section 1721, General Code, which provides for the bond to be given by a justice of the peace, reads :

"Within ten days after taking the oath, each justice of the peace so qualified, before he is authorized to discharge the duties of his office and within ten days after taking the oath, shall give a bond to the state of not less than one thousand dollars nor more than five thousand dollars, at the discretion of the trustees, with at least two sufficient sureties. Such bond shall be approved by the trustees of the township and deposited with the township treasurer or with the township clerk if the township treasurer is the justice elect. Such bond shall be conditioned that the justice shall well and truly pay over according to law all money which may come into his hands by virtue of his commission, and faithfully perform every ministerial act enjoined upon him by law. On refusal or neglect to give such bond, the office shall be vacant and the trustees shall give notice of a new election to fill the vacancy."

There seems to be no doubt but that the State of Ohio is a proper party to institute suit to recover upon the bond of a justice of the peace.

As pointed out in my Opinion No. 1773, rendered on February 27, 1928, the cases of *Hunter vs. Commissioners*, 10 O. S. 515, *State vs. Kelly*, 32 O. S. 421, and *Kelly vs. State*, 25 O. S. 567, clearly indicate that the State of Ohio is a proper party to recover upon official bonds. However, it may be mentioned that while said bonds are payable to the State, and while the State may maintain an action to recover thereon, the proceeds thereof are for the benefit of the state, subdivisions or individuals who have been wronged financially by the acts of the justice.

In the event that state funds are wrongfully appropriated the state of course would be a beneficiary. In a case in which the bond is not sufficient to reimburse all of the subdivisions or parties who have been injured, it is believed that the proceeds of the bond should be prorated among the claimants.

In the case under consideration a finding has been made by the Bureau of Inspection and Supervision of Public Offices and it follows that the sections governing proceedings in pursuance of such finding will be applicable and pertinent to consider herein. Section 286, General Code, in so far as the question herein presented is con-

cerned, in substance, provides that the report of an examination shall be filed in the office of the Bureau of Inspection and Supervision of Public Offices, and a certified copy thereof filed with the Attorney General and Prosecuting Attorney. If the report sets forth that public property has been converted or misappropriated, the Attorney General or Prosecuting Attorney may within ninety days after the receipt thereof, institute or cause to be instituted, civil action in the proper court in the matter of the political subdivision or taxing district to which such public money is due, etc.

Without attempting to discuss all of the detailed provisions of the lengthy section above referred to, it may be stated that there is ample power under said section for the prosecuting attorney to institute civil action in a case such as is presented against the official who has defaulted. Section 286-4, General Code, which must be considered in connection with the provisions of Section 286, General Code, provides :

"In addition to any and all liability of any officer or employe for which he may be sued under the provisions of Section 286 and the succeeding sections of the General Code, the sureties on any official bond given by any such officer or employe shall be liable to the same extent as the principal and such actions may be brought upon such official bonds."

There appears to be no doubt but that the prosecuting attorney is authorized and required to institute a suit to recover upon the bond of the justice of the peace for the benefit of the state and township. Undoubtedly, if such a suit were instituted and the judgment recovered, the prosecuting attorney could accept payment on behalf of the state and distribute the money to the state and subdivision in the proportion they are entitled to receive it. It would seem reasonable that the prosecuting attorney would not be required to institute a suit to recover when the bonding company is voluntarily offering to pay the amount of the bond.

It is therefore believed that in the case under consideration, the bonding company may properly pay the amount of said bond to the prosecuting attorney who may execute a release in the name of the State of Ohio and distribute the amount so recovered to the state and township.

In view of the foregoing, you are specifically advised that :

1. Where a justice of the peace embezzles funds belonging to both the state treasury and a township, and the bond is not sufficient to cover said defalcation, the amount recovered upon the official bond should be distributed in proportion to the respective claims of the state and township.
2. Under such circumstances, the prosecuting attorney of the county may lawfully collect said moneys and execute a receipt therefor in the name of the State of Ohio and distribute said moneys to the state and township in the proportion that their respective claims bear to the amount collected.

Enclosed herewith you will find a form of release which I have suggested as being proper under the circumstances.

Respectfully,
EDWARD C. TURNER,
Attorney General.