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BOND; PUBLIC OFFICIAL—ACTION FOR DEFAULT—
JOINDER OF PRINCIPAL AND SURETY, §2307.06 R.C.—AC-
TION TO BE BROUGHT IN COUNTY WHERE DEFAULT OC-
CURRED, §2307.35 R.C.

SYLLABUS:

An action to recover against a defaulting officer the amount of his default, and against his bondsman in the amount of the bond, may, under Section 2307.06, Revised Code, be joined in the same action and such action, under the provisions of Section 2307.35, Revised Code, must be brought in the county where the default occurred.

Columbus, Ohio, July 2, 1958

Hon. Robert E. Culbert, Prosecuting Attorney
Sandusky County, Fremont, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

"Mr. M had been justice of the peace of Fremont Township, Sandusky County, Ohio up until December 31, 1955, when his term of office expired. During the latter part of the year 1956 and the first part of January 1957 Mr. M's justice of the peace records were examined by Mr. H. A. Parrish of the Department of Auditor of State, Bureau of Inspection and Supervision of Public Offices and a finding was had against Mr. M on the report of said bureau on April 3, 1958 in the amount of \$8,473.73 due solely to Sandusky County.

"Prior to this finding, however, Mr. Parrish contacted me, as Prosecuting Attorney of Sandusky County, and I presented the case to the January Term of the Grand Jury, which said Grand Jury brought forth an indictment. Upon arraignment Mr. M. entered a plea of guilty and is now an inmate of the Ohio Penitentiary.

"Mr. M posted a bond, as required by statute, in the amount of \$1000.00, the whereabouts of which is completely unknown, however, I believe I know the name of the bonding company who furnished the bond and after a verification of this information I shall endeavor to secure payment from the bonding company. For your information Fremont Township is a fictitious township for the purpose of electing a justice of the peace and consists of the City of Fremont, Ohio, which, in fact, is composed in part of two townships. There being no board of township trustees, consequently the bond could not be filed with the clerk of said board as provided by statute and long practice in this community consisted of filing the bond with the auditor of the City of Fremont, Ohio who disclaims any knowledge of this bond.

"My problem is now one of venue. Section 117.10 R.C., as you are aware, places a duty on the prosecuting attorney to proceed civilly against Mr. M. within 90 days of the certification of the finding (April 3). Mr. M., at the time of being justice of the peace and for a short while thereafter resided in Sandusky County. He moved to Toledo, Ohio and was a resident of Lucas County, Ohio at the time of the discovery of the shortage and as previously stated is now an inmate of the Ohio Penitentiary. If

I am able to join the bonding company with the defendant, of course, my problem is solved. However, as statute makes it my duty to bring this action within 90 days I may not be able to locate the bond within that time limit. I do not, of course, relish filing this action in Lucas County or Franklin County if the same can be avoided.

“Sub. B of Section 2307.35 R.C. authorizes the bringing of an action ‘against a public officer, for an act done by him in virtue or under color of his office, or for neglect of his official duty’ in the county in which the cause of action arose, however, I am a little skeptical as to the exact meaning of the legislature under this section and I have been unable to find any cases or attorney generals’ opinions covering this specific problem.

“In view of the fact that you, as Attorney General, have a decided interest in this action under Section 117.10 et seq., I would like to request an informal opinion as to where this suit should be filed, in Sandusky County Common Pleas Court, Lucas County Common Pleas Court, or Franklin County Common Pleas Court.

“As July 2nd is my statutory dead line I would appreciate the earliest convenient answer you may give. The petition is prepared and awaiting your decision in this matter.”

I note your statements as to the difficulty in locating the bond, from which I assume you are uncertain as to the identity of the bonding company as well as the whereabouts of the bond. However, I infer from your letter that you hope to be able to establish these points and proceed to a suit to recover both from the bonding company and from the defaulting officer. The one question which you present for my consideration is as to the county in which your suit should be brought. As to this I call your attention to Section 2307.35, Revised Code, reading, in so far as pertinent, as follows:

“Actions for the following causes must be brought in the county where the cause of action or part thereof arose:

“* * *

“(B) Against a public officer, for an act done by him in virtue or under color of his office, or for neglect of his official duty;

“(C) On the official bond or undertaking of a public officer.”

This would appear to settle the matter so far as the defaulting officer is concerned. Since the bond is only in the sum of \$1,000.00, it is evident

that you will undertake to recover against the bonding company up to that amount, and against the defaulting officer for the amount of his default.

Section 2307.06, Revised Code, makes it clear that in an action of this character the principal and his surety may be joined in the same action. That section reads in part 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. * * *” (Emphasis added)

Section 11242, General Code, which was the predecessor of the section last quoted, was under consideration by the Superior Court of Cincinnati in the case of *Warren v. Howard*, 24 O.D., 32. Said Section 11242 then read:

“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.”

In the course of the opinion it was said:

“Counsel for defendant, Somhorst, contends that as a condition precedent to bringing an action against the bonding company there must first be an award by way of judgment by a competent tribunal against Somhorst, and second that in an action sounding in tort the bonding company can not be made a party defendant on its bond because it can be liable only ‘ex contractu’.”

The court quoted Section 11306, General Code, which now appears in substantially the same language as Section 2309.05, Revised Code, and reads in part as follows:

“The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes:

“(A) The same transaction;

“(B) Transactions connected with the same subject for action;”

The holding of the court as shown by the headnote was as follows:

“Sureties of a patrolman may be joined with him in an action for damages for maliciously and unlawfully imprisoning plaintiff; a breach of duty as patrolman and execution and delivery of a bond for faithful performance are transactions connected with the same subject of action within the meaning of Gen. Code 11306, 11307, nor is an award of judgment against the patrolman a condition precedent to bringing an action against the sureties on his bond.”

See also, to like effect, *Neff v. Palmer*, 66 Ohio Law Abs., 590.

I can see no basis for bringing the actions in Lucas County, where you say the defendant resided after his default, nor any basis on which the action should or could be brought in Franklin County.

Service on the defendant, who is confined in the Ohio Penitentiary, could be had under Section 2703.04, Revised Code, which in so far as is pertinent, reads as follows:

“When the action is rightly brought in any county, according to sections 2307.32 to 2307.40, inclusive, of the Revised Code, a summons may be issued to any other county against one or more of the defendants at the plaintiff’s request; * * *”

It will be noted that Section 2307.35, Revised Code, to which I have already referred, falls within the scope of the section from which I have last quoted.

Accordingly, and in specific answer to your question, it is my opinion that an action to recover against a defaulting officer the amount of his default, and against his bondsman in the amount of the bond, may, under Section 2307.06, Revised Code, be joined in the same action and that such action, under the provisions of Section 2307.35, Revised Code, must be brought in the county where the default occurred.

Respectfully.

WILLIAM SAXBE
Attorney General