

It was stated in my opinion to be found in Opinions of the Attorney General for 1933, Vol. III, page 1728 at page 1733:

"In an action by one political subdivision against another, for money rightfully belonging to the one but wrongfully paid to the other, being in the nature of an action *ex contractu*, the statute of limitations applicable to contracts not in writing will, in my opinion, apply."

Specifically answering your questions, it is my opinion that:

1. When there are errors made by applicants for Motor Vehicle Licenses or the officials taking such applications in the giving of the registration districts and such errors made in one year are not found until the following year or subsequent years, the Registrar of Motor Vehicles in making distribution of the license fees to the various subdivisions is not authorized to use the current year's collection to correct errors of previous years.

2. However, the state examiners of the Bureau of Inspection and Supervision of Public Offices, when proof of the errors is furnished, may make findings in their reports against one registration district in favor of another registration district, and if tax revenue which should have been distributed to a taxing subdivision has been distributed to another subdivision through a mistake of fact, the former subdivision may recover from the latter by an action in the nature of an action for money had and received, the amount which the other subdivision had been so unjustly enriched.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3056.

COUNTY TREASURER—SURETY BOND FOR FIRST TERM NOT
LIABLE FOR ACTS PERFORMED IN SECOND TERM WHEN.

SYLLABUS:

Where a county treasurer is elected for his first term of office and gives a surety bond to the state of Ohio reciting in substance that the condition of the obligation is such that the said county treasurer was elected to such office for a term of two years and until his successor is chosen and qualified, and that if such treasurer shall faithfully perform the duties of his office during the term for which he has been elected as aforesaid then the obligation shall be void, otherwise the same shall remain in full force, and such county treasurer is re-elected for another term, and continues to perform the duties of his office during the second term but fails to give a new bond to the state of Ohio to cover his second term, on or before the statutory time for the beginning of such second term, the surety bond given for his first term of office is not liable for the said treasurer's acts performed after the date of the commencement of his second term of office.

COLUMBUS, OHIO, August 18, 1934.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent communication which reads as follows:

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

A county treasurer took his office in September, 1931, for a term of two years and until his successor was elected and qualified. He gave bond in the form of the enclosed blank. He was re-elected for the term commencing in September, 1933, but has been unable, up to this time, to secure signers on his bond, although he has been performing the duties of treasurer up to this time.

QUESTION: Is the bond given for his first term liable for his acts from September, 1933, up to the present time?

Within a day or two we will furnish you with an exact copy of the bond, filled out and signed.

It is important to this treasurer that an early opinion be received."

Sections 2632, 2633, 2634, 2636, 7 and 8, General Code, are pertinent in the consideration of your question, and provide as follows:

Sec. 2632. "A county treasurer shall be elected biennially in each county, who shall hold his office for two years from the first Monday of September next after his election."

Sec. 2633. "Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more free-hold sureties having real estate in the value of double the amount of the bond over and above all encumbrances to be approved by the commissioners and conditioned for the payment, according to law, of all moneys which come into his hands, for state, county, township or other purposes. The expense or premium for such bond shall be paid by the commissioners and charged to the general fund of the county. Such bond, with the oath of office and the approval of the commissioners endorsed thereon, shall be deposited with the auditor of the county and by him carefully preserved in his office. Such bond shall be entered in full on the record of the proceedings of the commissioners, on the day when accepted and approved by them."

Sec. 2634. "If a person elected to the office of county treasurer fails to give bond as provided in the preceding section, on or before the day of the commencement of his official term, the office shall become vacant."

Sec. 2636. "When the office of county treasurer becomes vacant by death, removal, resignation, neglect to give bond or other cause, the commissioners shall forthwith appoint a suitable person to fill such vacancy. The person so appointed shall give bond and take an oath as required by law."

Sec. 7. "A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law."

Sec. 8. "A person holding an office of public trust shall continue

therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

The exact copy of the bond which you have forwarded to this office pursuant to your statement in your communication reads as follows:

"KNOW ALL MEN BY THESE PRESENTS: That we C. W. M. as principal, and National Surety Company and The Fidelity and Casualty Company of New York as sureties, are held and firmly bound unto the State of Ohio, in the penal sum of one hundred thousand dollars (\$100,000.00) to the payment of which well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents, as witnessed by our hands hereunto affixed this 21st day of April, in the year of Our Lord, One Thousand Nine Hundred and Thirty-One.

The condition of this obligation is such that, whereas, the said C. W. M. was, on the fourth day of November, in the year of our Lord one thousand nine hundred and thirty, duly elected to the office of County Treasurer of Wood County, Ohio, to hold his office for two years, beginning on the first Monday in September next after his said election, and until his successor is chosen and qualified.

Now, if the said C. W. M. shall faithfully perform the duties of his said office, and pay over, according to law, all moneys which come into his hands, for State, County, Township, or other purposes, during the term for which he has been elected as aforesaid, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue."

From the literal wording of the bond above quoted, it would appear that it covers the faithful performance of the duties of the county treasurer not only during his term of office from the first Monday in September, 1931, to the first Monday of September, 1933, but also "until his successor is chosen and qualified", and since no successor has as yet been "chosen and qualified", the bond is still in force.

However, it has been held that in determining the liability of a surety upon the bond of a public officer after the term of office has expired, provisions of the bond should be read in the light of pertinent provisions of the statutes. 46 Corpus Juris, 1071; *Perry vs. State ex rel. Blosser*, 90 O. S. 392; *American Surety Co. vs. Independent School District*, 53 Fed. (2nd) 178, 81 A. L. R. 1, decided September 29, 1931; and Opinions of the Attorney General for 1928, Vol. IV, Pages 2493, 2496.

The general rule with respect to the liability of a surety after the expiration of the term of office of a public officer is stated in 46 Corpus Juris, 1072, 1083, "Officers", section 408, as follows:

"Where the bond is conditioned for the discharge of duties by the officer until a successor has been elected or appointed and has qualified, or where it is provided by law that an officer shall discharge the duties of his office until a successor has been elected or appointed and has qualified, the general rule is that, where an officer so holds over, the liability on his bond continues until such successor has qualified, although in some jurisdictions it is held that the liability extends only for such

further time after the expiration of the term as is reasonably sufficient for the election or appointment and qualification of a successor. *The general rule does not apply where an officer, reelected or reappointed to succeed himself, has failed to give a bond for the new term.*" (Italics the writer's.)

In support of the italicized language, *supra*, cases are cited from eight states, viz., California, Iowa, Kansas, Louisiana, Massachusetts, Ohio, South Carolina and Virginia. As thus shown, Ohio is listed as one of these eight states, the case of *State vs. Crooks*, 7 Ohio, Pt. 2, Page 224, being cited. This case appears to be the leading case in Ohio involving the question raised by your communication. In this case it was stated in the second branch of the syllabus:

"A sheriff, in office, is re-elected and proceeds to do business without giving new security. The securities upon the first election are not responsible for defaults committed under the second."

After quoting provisions of the Constitution of Ohio in force at the time (1836) providing, in effect, that a sheriff shall continue in office for two years and until his successor is chosen and duly qualified, and provisions of the statutes requiring that a sheriff shall give bond within ten days after receiving his commission, and providing that upon failure to give the bond within the time prescribed by law, such sheriff shall be deemed to have resigned his office, the court stated at page 228:

"With this law before them, what would the securities of a sheriff, when about to execute the bond, suppose was the extent of their undertaking? Nothing more than that he should faithfully discharge the duties of his office during the term for which he was elected. By adverting to the constitution, they would find this term was two years, and until a successor should be elected and qualified. The constitution requires, that at the end of two years, a successor shall be elected, and the law requiring the bond which they are about to execute, provides, that if this successor fails to qualify, the office of sheriff shall be held to be vacant, and the coroner shall succeed to discharge its duties. They would be led to the conclusion that their obligation, at the furthest, could not continue beyond ten days after a successor had been commissioned. This seems to a majority of the court to be the common-sense construction of this statute, taken in connection with the constitution, and that it is not within the scope of the undertaking of the securities of a sheriff, that they shall be bound for his performance of the duties of his office beyond the term for which he is elected when the obligation is entered into."

The provisions of the statutes quoted at the beginning of this opinion are comparable with the provisions of law in force at the time the *Crooks & Shaw* case was decided. Sections 2632 and 8, General Code, provide for a term of office for the county treasurer of two years and until his successor is elected or appointed and qualified, and sections 7 and 2634, General Code, create a vacancy in the office of county treasurer if such officer does not give bond on or before the date for the commencement of his official term, and section 2636, General Code, provides that when a vacancy occurs in the office of county treasurer through

neglect to give bond, the county commissioners shall immediately appoint a successor. Consequently, the reasoning of the court in the Crooks & Shaw case would appear to be equally applicable in the case at bar.

In addition to the rule as announced in the text of *Corpus Juris*, supra, published in 1928, a recent annotation on "Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency", volume 81 *American Law Reports*, page 1-69, published in 1932, states at pages 14 and 17:

"In accordance with the view thus expressed, it may be laid down as a general rule that, in the absence of special circumstances or provisions, the sureties on the bond of a public officer are not liable for acts or defaults occurring after the termination of the office. This rule is supported by the following authorities: (Citing cases from courts of thirty-three states, including Ohio (the case of *State Irwin vs. Crooks* (1836), 7 Ohio, Pt. 2, page 221), and the United States, English and Canadian courts.)

"In accordance with the rule laid down in the preceding division of the annotation, it is generally held that, where the officer is re-elected or re-appointed as his own successor, the sureties are not liable for acts or defaults occurring during the second term. (Citing cases from courts of twenty-one states, including Ohio (the case of *State Irwin vs. Crooks* (1836), 7 Ohio, Pt. 2, page 221), and from the United States, English and Canadian courts.)"

The most recent case of *American Surety Company of New York vs. Independent School District No. 18 of Lake Park, Minnesota*, 53 Fed. Rep. 2nd Series, page 178; 81 *American Law Reports* Annotated, 1, decided by the United States Circuit Court of Appeals, Eighth Circuit, on September 29, 1931, involved a similar question to that presented by your communication, arising in the state of Minnesota. In this case, the bond of a school district treasurer was set forth in the record of the case, and such bond specifically recited that it covered "a term of one year from and after the first day of August, 1924, and until his successor is elected and has qualified."

Notwithstanding the literal wording of the bond "until his successor is elected and has qualified" the court held that the statutory provisions governing the filling of the office of school treasurer, the term thereof, the time when a newly elected treasurer must qualify and give bond, and the effect of failure to do so, all entered into the contract of suretyship as part of it, and are to be considered in determining the intention of the language used in the bond. Therefore, the said court held, after pointing out similar provisions of Minnesota statutes to those of Ohio quoted at the beginning of this opinion, as disclosed by the sixth paragraph of the syllabus: (53 Fed. 2nd s. 178)

"6. Bond covering shortages of school district treasurer during term and 'until successor is elected and qualified' held as matter of law not in force on date of qualification of himself as successor, where term had expired more than three months previous."

In addition to the reasoning employed by the court in the Crooks & Shaw case, supra, the California Supreme Court in the case of *People of the State of California vs. William Aikenhead, John Yontz and others, sureties*, 5 Calif., 106, advanced the following reasoning:

"The appointment of Aikenhead as treasurer was to continue until his successor was qualified, and until this took place, ordinarily, his sureties would be bound. But Aikenhead was elected for a new term and ought to have given a new bond. It developed upon another officer of the law to see to this, and the sureties upon the bond may well have rested in security under the impression that the obligations of the law had been fulfilled. If another than Aikenhead had been elected and failed to qualify, so as to have continued the latter in office, the defendants would have been chargeable with notice, and indeed their continued liability would have been but an incident of their contract. *The state has no right to visit upon the defendants the effects of the laches of her own officer, whose duty it was to see that a new bond was given.*" (Italics the writer's.)

In view of the foregoing authorities, I am of the opinion that the bond of the county treasurer involved herein given for his first term is not liable for the treasurer's acts from the first Monday in September 1933 up to the present time.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3057.

INDIGENT—MAY NOT RECEIVE VOUCHERS TO PAY TAXES
CHARGED AGAINST PROPERTY OCCUPIED AND OWNED BY HIM.

SYLLABUS:

1. *Where a family has been found to be indigent but is occupying real estate owned by such indigent as a house, no part of which is leased, such indigent owner may not receive vouchers, to be used in payment of taxes charged against such property, under authority of Amended Senate Bill No. 200 (115 O. L. 194) as amended by Amended Senate Bill No. 53 of the First Special Session of the 90th General Assembly.*

2. *When the board of county commissioners have otherwise complied with Amended Senate Bill No. 200 (115 O. L. 194) as amended by Amended Senate Bill No. 53 of the First Special Session, they may during any month, issue vouchers pursuant to such act in an amount of not to exceed one twelfth of the annual tax levied against such property for the payment of any rent of such indigent accruing after June 20, 1933, but prior to March 1, 1935.*

COLUMBUS, OHIO, August 18, 1934.

State Relief Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion which reads as follows:

"We request your opinion on the legality of the following:

Where a family has been accepted and placed on the relief rolls for poor relief and is the owner of real estate and is occupying such real estate as his home, is such owner entitled to receive tax warrants under the provisions of Amended Senate Bill No. 200?