SHERIFFS - Liability of sheriff and sureties for embezzlement, and method of proceeding against same, particularly as to escheats. - Time when breach of bond occurs where more than one sheriff involved.

February 4, 1937.

FILED 57

Hon. G. Logan Marr,
Prosecuting Attorney Morgan County,
First National Bank Building,
Versailles, Mo.

Dear Sir:

Request for an opinion has been received from you under date of January 20, 1937, such request being in the following terms:

"When A. S. Ball, took office as Sheriff of Morgan County, Mo., he received from the outgoing sheriff about $1706.63 which has been passed on from sheriff to sheriff for years. The books and the accounts of the sheriff were audited and this amount was set up against the sheriff in the report of the auditor of 1934. Under the escheat law sec. 620-1929 $158.34 escheated to the State of Missouri, and that amount was sent to the State of Missouri, leaving a balance of $1,548.29.

A. S. Ball on account of his mental derangement brought about by his excessive drinking of intoxicating liquor was adjudged insane by the county court Dec. 5, 1936, and Sheriff Ball was confined in the state institution for treatment by the county court.

After Jan. 1, 1937, Met Hughes took over the office of sheriff, and of course nothing was turned over to Sheriff Hughes by Ex-sheriff Ball.

Sheriff Ball's accounts has not been audited since he went out of office. The balance in his account as sheriff is about $165.00. Which seems to make his shortage about $1,383.29.

Sheriff has a very good bond. Are his bondsmen liable on the bond for this fund? This fund consisted of $829.40 remaining in hands of sheriff for old tax sales, where the surplus was never claimed by interested parties, and $718.89, left in hands of sheriff from old partition, execution and judicial sales. (As an afterthought -

it is very apparent that the tax surplus should have escheated under sec. 9959-1929, and the balance unclaimed from judicial sales escheated under sec 620-640-1929.)

If the bondsmen are liable, who should order action against the bondsmen? Who should pursue the bondsmen? What would be the best remedy?"

R. S. Mo. 1929, section 620 provides in part as follows:

"* * * if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are non-residents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed * * *, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

Section 622 provides as follows:

"The court having the settlement of the accounts of such executor or administrator, assignee, sheriff or receiver upon the production of the receipt of the state treasurer, shall give credit for the amount thereof; but, if said moneys, as aforesaid, are not paid into the state treasury, the prosecuting attorney of the county in which such executor or administrator, assignee, sheriff or receiver resides shall, upon giving ten days' previous notice of his intention so to do, move the court to enter judgment against such executor or administrator, assignee, sheriff or receiver, and his sureties, or either of them, for such moneys in his possession, together with eight per cent per annum thereon from the time the same should have been turned into the state treasury until the rendition of the judgment. The court shall determine the case in a summary manner, and if it finds the facts as stated in the motion to be true, and no valid and reasonable excuse for the delay is offered, shall enter judgment accord-

ingly and adjudge the said executor or administrator, assignee, sheriff or receiver to pay all costs of the proceedings."

Section 640 provides, in part, as follows:

"All moneys realized from the sale of any real estate, after paying all costs of such proceedings, and such compensation to the prosecuting attorney as shall be allowed by the court in which such order of sale is made, shall be paid by the sheriff into the state treasury within ninety days after the receipt thereof; and if said sheriff fail to pay said money into the state treasury within ninety days after the receipt thereof, he shall be proceeded against in the same manner as is provided in section 622 of this chapter."

From the foregoing statutes it is apparent that the proper procedure with respect to the funds which were in the hands of the sheriff and derived from the sources mentioned in such statutes, would be for you as prosecuting attorney to move the court in which the settlements of the sheriff were made or should have been made to enter judgment against such sheriff and his sureties in accordance with the provisions of section 622.

There is some question about the liability of Sheriff Ball under the facts mentioned in your letter. Although in attachment suits the liability of a sheriff for failure to turn over the attachment proceeds does not accrue until the court orders them turned over, in an execution or partition sale the breach of the sheriff's bond for failure to turn over the funds in his hands is not postponed until the court orders them turned over. This conclusion is based on the case of State ex rel Knapp, Stout & Co. v. Finn, 23 Mo.App. 290 (1886), in which the court said:

"The defendants contend that the cause of action accrued when the sheriff made his return showing what funds were in his hands, and claim that the point is thus decided by the ruling of this court and of the supreme court in analogous cases of sales on execution and in partition. The State ex rel. v. Minor, 44 Mo. 373; Kirk v. Sportsman, 48 Mo. 353; The

> State ex rel. v. Lidwell, 11 Mo. App. 567. There is, however, a marked difference between the two cases. In the latter the execution creditor, or the distributee in partition, has a vested interest in the fund, which gives him a right in one case to demand its immediate payment to him, and in the other to intervene at once for its protection. It is not so in attachment proceedings. The interest of parties to the attachment suit is contingent upon the termination of the controversy." 23 Mo.App. 294.

To the same effect is State to use of Blacker, Gerstle & Co. v. O'Neill, 114 Mo. App. 611, 90 S.W. 410 (1905).

It should be noted that under the attachment statutes involved in the foregoing cases, it was provided that the sheriff should turn over the proceeds of the attachment to the court or to such persons as the court should order, and the theory of the court was that no breach of a sheriff's bond could occur until the court had made such an order and it had been disobeyed by the sheriff. It might also be noted that section 621 of R. S. Mo. 1929 provides that "within one year after the final settlement of any * * * sheriff * * *, all moneys in his hands unpaid or unclaimed, as provided in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury". From this section it might be inferred that no breach of the bond of a sheriff for failure to turn over money held by him as proceeds of a partition suit, could occur until an order of court might be made, but the contrary has been held in the case of State ex rel Adkins v. Crugett, 228 Mo. App. 8, 63 S.W. (2d) 413 (1933), the opinion in which contains the following:

> "It is urged that this suit cannot be maintained because there was no final order of distribution in the original partition suit. The decree of the circuit court in that case set forth the interest of the minors; the sale by the sheriff was ordered, and after the sale his report thereof was approved. The sale was therefore legal and binding on all parties to the suit, and the money in the hands of the sheriff derived from that sale was the property of the parties to that suit in proportion to their respective interests, as determined by the court. The fund in controversy was the property of these minor plaintiffs and was paid

> out by the sheriff to other persons. He is in no position to raise the point that no order of distribution was made, since he admits he has disbursed this particular fund. The judgment should be affirmed. It is so ordered." 63 S.W. (2nd) 416.

If the meaning of the case last cited is that the sheriff and his sureties become liable prior to an order of distribution of the court, so that section 863 of R. S. Mo. 1929 fixing a three year statute of limitations on sheriffs' bonds, begins to run even though the court has made no order of distribution, then under the facts in your letter it may be that a predecessor of Sheriff Ball and the sureties of such predecessor were the persons liable for failure to turn over this fund to the state treasury, and that the statute of limitations has run with respect to this liability. Under the decision in State ex rel Knapp, Stout & Co. v. Finn, 23 Mo.App. 290 (1886) only the sureties who were on a sheriff's bond at the time of the defalcation are liable.

> "No principle of law is better established than that where an officer proves a defaulter, and has held the office under different appointments, with several sets of sureties, the sureties will be responsible who were on the bond at the time the defalcation occurred."

State to use of Pace v. McCormack, 50 Mo. Rep. 568 (1872).

In this last case a suit was brought against a sheriff and his sureties for the proceeds in a partition sale. During the sheriff's first term of office he had sold the lands by order of court, but the money sued for was not collected by him until his second term as sheriff, and there was no order of court made transferring the business touching the matter of this partition suit to the new sheriff as his own successor, and the defense was made that the sureties on the sheriff's first bond only were liable and not the defendants who were sureties only on his second. The court said, at page 571:

> "Had a new sheriff come into office, instead of the old one being re-elected, it is manifest that he could not have received the money, and his sureties would not have been bound for it if he did, unless the court by an order had directed the business to be transferred to him." (Emphasis ours)

You make no mention in your letter of whether or not the courts in which the settlements involved were due had ordered the funds and business touching these suits turned over by earlier sheriffs to their predecessors and ultimately to Sheriff Ball. In this connection R. S. Mo. 1929, sec. 1588, in the article dealing with partition suits, becomes pertinent. This section provides as follows:

> "If any sale be made by any sheriff before he goes out of office, and the business be not completed when he ceases to be sheriff, he may do all subsequent acts, collect and pay over the money, and make the deed, in the same manner as if he continued to be sheriff, unless the court shall by order direct the business to be transferred to the next sheriff; in which case all acts remaining to be done by the sheriff, at the date of such order, shall be done by the sheriff then in office."

This section and the case of State to use of Pace v. McCormack, supra, might justify the conclusion that if no such orders have been made transferring the business from sheriff to sheriff, that Sheriff Ball and his sureties are not liable even though Sheriff Ball did get this money. However, it is clear that a sheriff who does receive money by virtue of his official capacity and embezzles it, is not faithfully performing his duties as sheriff in the common usage of those terms, and in view of the fact that the statute of limitations has doubtless run against the predecessor sheriff whose duty it originally was to turn over these moneys to the state treasurer, and against his sureties, it would seem to be best to attempt to proceed in the manner above suggested against Sheriff Ball's guardian and his sureties.

As to the proceeds of tax and judicial sales, R. S. Mo. 1929, section 9959 as repealed and re-enacted by Laws of 1933, page 428, provides in part as follows:

> "When real estate has been sold for taxes or other debt by the sheriff * * * and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents, cannot be found * * * the sheriff * * * making the same shall pay the said surplus money into the county treasury, * * * and there-

upon the court shall charge said treasurer with said amount."

The county treasurer, therefore, would be the person to bring suit for the failure of the sheriff to turn over these moneys to him, and R. S. Mo. 1929, section 2855 provides for suits in the name of the state at the relation and to the use of the person entitled. It might be noted that section 11507, providing for the giving of bond by a sheriff, requires said bond to be given "to the state".

A suit by the county treasurer to recover proceeds of tax or judicial sales might under the facts stated in your letter be subject to the same difficulties as to the statute of limitations as are involved and suggested with respect to the partition suit proceeds mentioned above, but it would seem in this case also that the best method of proceeding would be against Sheriff Ball and his sureties.

If any of the funds stated in your letter as constituting Sheriff Ball's shortage were not subject to escheat, then, in our opinion, the person entitled to such funds could pursue the same remedy as suggested for the county treasurer under section 2855.

In conclusion it is our opinion that where a sheriff is liable for the embezzlement of funds collected as the proceeds of tax, judicial and partition sales, his sureties at the time of his defalcation are liable, and that the person entitled to such funds can bring a suit against the sheriff and his sureties in the name of the state at the relation and to the use of the person so injured; that where the state treasury is entitled to such funds by escheat, the prosecuting attorney of the county in which such sheriff resides can move the court for judgment against the sheriff and his sureties as provided in R. S. Mo. 1929, section 528; that where the county treasurer is entitled to receive such funds under R. S. Mo. 1929, section 9959 as repealed and re-enacted by Laws 1933, page 428, that a suit can be brought in the name of the state at the relation and to the use of such county treasurer against the sheriff and his sureties at the time of the defalcation.

Very truly yours,

APPROVED:

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EDWARD H. MILLER,
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