

OFFICIAL BOND: BREACH: Every person injured by the breach of the bond of a public official is entitled to share in funds recovered for the breach of such bond.



February 25, 1953

Honorable Gordon C. Shaffer, Jr.  
Assistant Prosecuting Attorney and  
Legal Advisor to the County Court  
Buchanan County  
St. Joseph, Missouri

Dear Mr. Shaffer:

This will be the opinion you requested with reference to the disposition of funds derived from the collection of the penalty of a bond given by the Clerk of one of the Magistrate Courts of Buchanan County, Missouri, growing out of the alleged failure of such Magistrate Court Clerk to account for all of the monies coming into his official custody. Your letter requesting the opinion of this office on the question reads as follows:

"Shortages have appeared in the funds of the Clerk of the Magistrate, Second District. These shortages appear to effect both State and County funds. The practice has been for the Clerk of the Court to collect the total amount of the fine and court costs in the case of misdemeanors. The Clerk in turn would send the State its fees and turn the balance over to the Sheriff for distribution, taking a receipt for same.

"The bonding company has contacted this office with reference to the amount of liability. It appears that the shortage will exceed the amount of the bond, i.e. \$1,000.00, which was entered into pursuant to Section 483.485, Revised Statutes of Missouri, 1949.

"Would you please advise as to whether or not the above mentioned bond covers both the County for its' fines and court

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costs collected by the Magistrate Clerk, or just the fees collected pursuant to Section 483.610, Revised Statutes of Missouri, 1949, which are paid directly to the State.

"In the event it is the opinion of your office that both County and State funds are covered, can we settle with the bonding company and send the Director of Revenue the proportionate part of the shortage?"

Section 483.485, RSMo 1949, under the title of Magistrate Courts, respecting the bond of the clerks of such courts reads, in part, as follows:

"\* \* \* Each clerk of the magistrate court shall take the oath required of other clerks of courts in this state. Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the state of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of one thousand dollars, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. \* \* \*."

It is disclosed in your letter that the Clerk of the Magistrate Court, Second District of your county in compliance with the terms of said Section 483.485, supra, entered into a bond to the State of Missouri for the faithful performance of the duties of his office in the sum of \$1,000.00. Your letter further states that the shortage or defalcation of said clerk will exceed the amount of his bond. The questions you submit are, first, whether said bond covers both the county for fines and court costs collected by the Magistrate Court Clerk and State funds, or just the fees collected pursuant to Section 483.610, RSMo 1949, and, second, in the event that both County and Ste

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funds are covered by the bond may the County Court settle with the bonding company and send the Director of Revenue the proportionate part of the shortage due the State, the county retaining the balance for the loss of its funds to the exclusion of other persons who may have suffered loss or damage by reason of such shortage.

Section 483.610, RSMo 1949, defining the duties of Clerks of Magistrate Courts reads as follows:

"1. There shall be charged and collected by the clerks of the magistrate courts fees for certain of their services as follows:

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| "For issuing each execution in civil cases . . . .  | \$0.35 |
| For each renewal of execution in civil cases . .  | .25    |
| For making certified copies on appeals or certiorari, in civil cases, for each one hundred words ...                                    | .10    |
| For copies of records, pleadings or instruments on file in the office of such clerks, for every one hundred words and figures . . . . . | .10    |

"2. In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto.

"3. All such fees shall be charged on behalf of the state or county paying salary of such clerk or magistrate and shall be paid and accounted for in the same manner as magistrate fees."

It appears from the terms of said Section 483.610, supra, and the terms of said Section 483.485, supra, requiring the clerk to enter into a bond to the State of Missouri for the faithful discharge of the duties of his office, and Section 483.615 when read together, as they must be, that the Clerk of the Magistrate Court has, and in this case had, duties to perform involving both State

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and the county funds, and, as well, fees of officers of the Magistrate Court, witnesses and jurors who may have been upon attendance and performed duties in the administration of the business of said Court in its orderly sessions. It may be, from the recitals in your letter, that the State of Missouri, the County of Buchanan and individuals, such as officers, witnesses and jurors, if any such individuals there be, are injured beneficiaries of the bond, on account of the delinquencies of the clerk, under Section 522.010, RSMo 1949. Section 522.010, permitting persons injured by the neglect or misfeasance of any officer to proceed against such officer and his sureties for such injury, reads as follows:

"Persons injured by the neglect or misfeasance of any officer may proceed against such principal or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury."

It is clear, we believe, under the terms of said Section 522.010, supra, that it should be definitely determined who are the injured persons, if any, along with the State and County, including witnesses, officers and previously serving jurors, if any, who may be beneficiaries of this bond before a settlement with the bonding company and a distribution of the funds collected from the surety may be made, and then only after due notice to and the consent of all of such injured beneficiaries is obtained. Under the terms of said Section 483.485, the bond in this case is a penal bond. In the case of Goffee vs. National Surety Company, 9 S.W. 929, the Supreme Court of this State defined a penal bond, l.c. 939, where the Court said:

"\* \* \* A penal bond is 'a bond promising to pay a named sum of money (the penalty) with a condition underwritten that, if a stipulated collateral thing, other than the payment of money, be done or forborne, as the case may be, the obligation shall be void.' \* \* \*."

The question as to who are the real beneficiaries under a penal bond and who may sue the principal and surety for damages for a breach of such bond was before our St. Louis Court of Appeals in the case of State ex rel. Dale vs.

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Ashbrook, et al., 40 Mo. App. 64. The bond in that case was an attachment bond. That case holds that the beneficiaries of a penal bond may be officers of the Court, witnesses, and others, including, as in this case, the State and County for loss of fees and fines due the State or County, respectively, collected and held in the official custody of said clerk at the time of the occurrence of the shortage. The Court holding that the real beneficiaries under a bond are those to whom funds are due, and are held by the officer for which the bond is liable, l.c. 67, said:

"\* \* \* According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due. This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. Garrett v. Cramer, 14 Mo. App. 401. The party in whose name the costs are recovered is, in respect of them, at most, a trustee of a dry trust--so dry that he is not allowed to handle any of the trust fund. His name in the judgment and execution is a mere naked name of record. The use of it by the officers of the court, in securing their dues, saddles him with no responsibility and endangers his rights in no way. As this portion of the judgment nominally recovered by him belongs to others, and not to him, he cannot satisfy it, or bargain it away with the other party to the record without their consent. He can waive his own rights, but he cannot waive the rights of others."

We believe the rule thus established by the Court in the Ashbrook case is applicable to the conditions we are advised exist in this case with respect to who are and may be the injured parties by reason of the alleged breach of the bond.

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The bond given by the clerk in this case is, under said Section 483.485, for the faithful "discharge of all the duties of his office." 46 C.J. 1067, respecting the liability on such a bond, states the following text:

"A bond conditioned for the discharge of the duties of an office covers not merely duties imposed by existing laws, but duties belonging to, and naturally connected with, the office, as from time to time, fixed and regulated by law, \* \* \*."

The same volume of the same work, page 1068, states the further applicable text, to-wit:

"Where an officer, acting in a matter in which he is authorized to act, is guilty of official misconduct, he is not faithfully performing his official duties, and he and his surety are liable on his official bond for resultant damages. \* \* \*."

It may be readily observed, we believe, that by the terms of Section 483.610, supra, and the terms of Section 483.615 (not quoted here in the interest of reducing the length of this opinion) that the Clerk of a Magistrate Court is required to perform, and does perform, duties respecting monies belonging to both Buchanan County and the State of Missouri. We believe this will answer the first question you submit.

If any person injured by default of a public officer under his bond desires to sue for redress as is authorized under Section 522.010, supra, he must then proceed under Section 522.020, RSMo 1949, which reads as follows:

"In all cases where, by the law of this state, any person is authorized to prosecute a suit to his own use, on any official bond, he shall sue in the name of the state, or other obligee named in the bond, stating in the process, pleadings, proceedings and record in such action, that the same is brought at the relation and to the use of the person so suing."

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If such suit is instituted by the parties injured in their own individual capacities, respectively, according to the decision in the Ashbrook case, supra, such action would then proceed to a final determination under Sections 522.130 and 522.140, RSMo 1949. These two sections, while not undertaking to limit the right of an injured person to sue within three years after the breach of a bond as is provided in Section 516.030, do, as a matter of procedure, require each of the injured parties suing on the breach of the bond to be diligent, and specifically provide that, if several judgments be obtained at the same term upon an official bond for damages amounting to more than the amount of the bond, the Court shall order the money levied upon such judgments to be distributed to the relators, respectively, according to the amount of the recovery of each, and if executions be issued upon such several judgments obtained at the same time and sufficient money shall not be made to satisfy all the executions, the Court shall distribute the money collected thereon to the relators, in proportion to their respective recoveries. This means, as we understand these sections, that if some injured beneficiaries sue and obtain judgments at one term of Court, but others, or the remaining injured beneficiaries do not sue and obtain judgments at the same term of Court they would not be able to participate on execution in the distribution ordered by the Court if sufficient money be not recovered to satisfy all executions. We here give the further consideration to your second question respecting the right of settlement by the county with the bonding company as set forth in your letter.

There was a breach of the bond of the Clerk in the Magistrate Court in this instance. It was a duty he should faithfully perform to pay over to each and all entitled to the same, monies collected by him and held in his official capacity. This, we are advised, he failed to do. In the early case of Marney, et al. vs. State Use of Vance, 13 Mo. 7, the Supreme Court held upon a suit against a sheriff and his bondsman that failure to pay over monies in his hands due different persons, constituted a breach of a bond given for the "faithful discharge of the duties of his office." The beneficiaries of the bond recovered judgment in the Circuit Court. Upon an appeal, l.c. 10, the Court asked its own question, to-wit:

"Was it the duty of the sheriff, in virtue of his first election, to complete the business of collecting the money and transferring the land? If so, he did not 'faithfully discharge all duties imposed on him by his office,' and his securities are liable for his default. \* \* \*."

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The Court answered the question by affirming the judgment of the Circuit Court for damages against the bond of the sheriff for such dereliction of duties. We believe there is no question but that the injured parties, all of them participating, may settle the controversy over the distribution of the funds recovered for the breach of this bond like any other controversy may be settled. The law itself encourages settlements of disputes in order that litigation may be avoided, but all parties interested as injured beneficiaries must participate in and agree to a settlement. Under no circumstances would it be lawful for the county, through the County Court in this case, to distribute the funds recovered for the breach of this bond to the State and Buchanan County to the exclusion of any other injured beneficiaries who may be covered by the bond.

It is well settled by both text and judicial decisions that no person who has a just cause of action may be precluded from the recovery of his rights in a settlement of a controversy in which he has a claim and no settlement of such controversy may preclude his claims if he did not participate in and consent to such settlement. On this well established principle of law 15 C.J.S. 747, 748, states the following text:

"The parties and those who claim under them with notice cannot go behind a compromise made in good faith as a settlement of prior disputes but they are bound thereby, \* \* \*.

"On the other hand, such an agreement is not binding on those not parties thereto, or in privity with some party to it; \* \* \*."

In the case of Burnham vs. Williams, et al., 198 Mo. App. Rep. 18, the St. Louis Court of Appeals in a case involving the settlement of a claim against an insurance company ignoring Burnham who had an interest in the controversy, holding that the settlement was invalid so far as Burnham was concerned, l.c. 26, said:

"\* \* \* We therefore hold that the settlement made between Quinn and the insurance company--which under the evidence Burnham had no hand in, being in fact forbidden



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by his contract to interfere with negotiation for settlement of claims-- cannot bind him and estop him from asserting a claim for damages to his property, \* \* \*."

We believe under the facts here considered and the above-cited authorities that the County Court of Buchanan County may not order the distribution of funds collected growing out of the breach of a Magistrate Clerk's bond to the State and the County of Buchanan to the exclusion of any other person who may be injured by the breach of such bond.

CONCLUSION.

It is, therefore, the opinion of this office that all persons who may be covered by the bond of a public official given for the faithful performance of his duties have the legal right and may maintain an action to enforce such right to share in the distribution, according to their interests, of funds collected from a breach of a bond given by the clerk of a magistrate court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON  
Attorney General

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