6383

1. ADMINISTRATIVE OFFICERS — JUDICIAL OFFICERS — SECTION 3.06 RC—APPLICABLE ONLY TO ADMINISTRATIVE OFFICERS.

2. JUDGE, COURT OF COMMON PLEAS — CLERK APPOINTED IN PROBATION DEPARTMENT — JUDGE NOT LIABLE FOR FUNDS EMBEZZLED BY CLERK—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—NO AUTHORITY TO MAKE FINDING AGAINST JUDGE FOR AMOUNT OF FUNDS EMBEZZLED—SURETY BOND—SECTION 2301.27 RC.

SYLLABUS:

1. Section 3.06, Revised Code, is applicable only to administrative officers, and has no application to judicial officers.

2. A judge of the court of common pleas who has, pursuant to Section 2301.27, Revised Code, appointed a clerk in the probation department, is not liable for funds embezzled by such clerk, and the Bureau of Inspection and Supervision of Public Offices would have no authority to make a finding against such judge for the amount of the funds so embezzled.

Columbus, Ohio, March 22, 1956

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion on a situation growing out of the embezzlement of funds in the probation department of a certain county. I quote a part of your letter, as follows:

> "Section 3.06 of the Revised Code (Section 9, General Code), contains the following material language:
>
> " 'The principal may take from his deputy or clerk a bond with sureties, conditioned for the faithful performance of the duties of appointment. The principal is answerable for the neglect or mistakes in the office of his deputy or clerk.'
>
> "The Supreme Court of the state of Ohio in the case of Seward vs. The Surety Company, 120 O. S., p. 47, in an

unanimous opinion rendered by Judge Kinkade, at page 50 stated:

"'* * * that it would open the door very wide for the accomplishment of the grossest frauds if a public official were permitted to present as a defense, when called upon to disburse money according to the law that it has been purloined or destroyed by some deputy or other subordinate connected with the public office.'

"We respectfully ask your official opinion as to the proper application of the principles of Ohio law expressed in the foregoing language with the following established circumstances:

"A state examiner in the Bureau of Inspection and Supervision of Public Offices, pursuant to his assignment, was working in 'X' county in the examination of the Probation Department, created pursuant to statutory authority by the Court of Common Pleas of 'X' county. He uncovered a discrepancy of approximately $11,000.00. In his further investigation he obtained a confession of embezzlement of the money by a clerk in said department who had been appointed by the Court of Common Pleas as assistant to work under the 'Chief Probation Officer.'

"The investigation further disclosed that the moneys received by said clerk in the Probation Department were paid into said Department under orders of the Court of Common Pleas.

"Before the clerk commenced work in the Probation Department, said clerk was required to give a $5,000.00 bond upon which the examiner collected the amount of the bond, leaving a shortage due the 'public fund' of the Probation Department of over $5,000.00.

"In a subsequent investigation, denying any responsibility for the deficit, a member of the Bench stated that he had not known the clerk, nor had he, to his knowledge, seen the clerk; that all he had done was sign, as a member of the court, the appointment which had been handed to him by some one.

"We respectfully, in the interest of the taxpayers of the state of Ohio, request your official advice so that the law can be uniform in its application to all officials."

Your letter does not make it entirely clear as to the point on which you desire advice, but I infer that the question is as to the possible liability of the judge or judges who had appointed the unfaithful clerk. In the case presented, I understand that there was a three judge court and that all of them joined in the appointment.

The establishment of a probation department is governed by Section 2301.27 to 2301.32, inclusive, Revised Code. Section 2301.27 provides in part:

"The court of common pleas may with concurrence of the board of county commissioners establish a county department of probation. The establishment of such department shall be entered upon the journal of said court and the clerk of the court of common pleas shall thereupon certify a copy of such order to each elective officer and board of the county. Such department shall consist of a chief probation officer, and such number of other probation officers and employees, clerks, and stenographers, as are fixed from time to time by the court. The court shall make such appointments, fix the salaries of appointees within the amount appropriated therefor by the board and supervise their work. * * *"

Section 2301.29, Revised Code, authorizes the court to supervise the department of probation and to make rules and regulations therefor.

Section 2301.30, Revised Code, provides that the court, in making such rules and regulations, shall require the department, among other things, to do the following:

"(9) Keep detailed records of the work of the department, accurate and complete accounts of all moneys collected from persons under its supervision or in its custody, and keep or give receipts therefor;" * * *

I have no precise information as to the source or character of the funds that may come into the hands of a probation officer or into his department. I note your statement that in the present case "the moneys received by said clerk in the probation department were paid into said department under orders of the court of common pleas."

From information which you have furnished, I understand that the court, in sentencing a person convicted of such crimes as robbery, frequently placed the person on probation on condition that he would make payments periodically to the probation officer to reimburse the victim, and that the accumulation of such moneys constituted the bulk of the fund embezzled by the clerk. In other cases the money may be ordered paid for the support of a dependent. So far as I can see, these were not funds that could be said to be in technical custody of the court. I do not know of any circumstances in which the court, as such, is authorized to receive and hold moneys, for whose safe keeping the court is held responsible and for which it is required to account.

The situation differs radically from that presented in the case of Seward v. Surety Co., 120 Ohio St., 47, to which you refer in your

letter. In that case a postmaster was held liable for the loss of funds which were in his hands as such officer, and which were stolen or embezzled by a subordinate employee in his office. The court held, as shown by a portion of the syllabus:

> "1. It is the duty of a postmaster to keep safely all moneys that may come into his hands by virtue of his official position, and to account for and to disburse the same as required by law and by rules of the United States Post Office Department, promulgated pursuant to authority conferred by acts of Congress.
>
> "2. When called upon to account for moneys that have come into his hands in his official capacity, it is not a sufficient answer to say that the moneys have been stolen or embezzled by others, without fault or negligence on the part of the postmaster.
>
> "3. The official bond given by a postmaster, with surety, obligating him to faithfully perform all the duties of the office to which he has been appointed, embraces the duty to account for and disburse the moneys that have come into his hands according to law."

I do not find in the statutes any provision requiring that the appointees in the probation department give bond. Undoubtedly it is good business practice to require them to give such bond. You refer to Section 3.06, Revised Code, which reads as follows:

> "A deputy, when duly qualified, may perform any duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. The principal is answerable for the neglect or misconduct in office of his deputy or clerk."

The question at once arises whether the court, or a judge thereof who speaks for the court in making appointment of a probation officer or clerk, pursuant to Section 2301.27, supra, is such an officer as is within the purview of said Section 3.06, which imposes a personal liability on the appointing officer fo. the "neglect or mistake" of his deputy or clerk.

There is a distinction between a "court" and a "judge!" As stated in 14 Ohio Jurisprudence, page 430:

> "A distinction is recognized between courts and judges. The court is a tribunal organized for the purpose of administering

justice, while the judge is the officer who presides over that tribunal. The terms are sometimes used interchangeably and synonymously, but they are never technically the same in meaning.

"The judges of courts, while an indispenable part thereof, are not the courts, although provided for by the same constitution, but are public officers, selected to administer the law in, and preside over, the courts."

In this connection it is to be noted that under the provision of Section 2301.27, above quoted, the appointments in the probation department are made *not by a judge* of the court, *but by the court.* I do not believe that *a court, as such,* could incur a money liability under any circumstances. If any liability is to be found in connection with the action of a judge of a court, it must certainly be against him personally.

Is a judge of the court of common pleas such an officer as is contemplated by Section 3.06, supra? He certainly has no authority to appoint a deputy. And I cannot see that he has any authority to appoint a clerk who has such a relationship to him that the judge becomes personally responsible for his conduct. Certainly no probation officer or clerk in that department could under any circumstances perform any act or execute any document in the name of the court or a judge thereof. In my opinion, Section 3.06, supra, relates to administrative officers, and not to judicial officers.

Generally speaking, a judge is not subject to personal liability so long as he acts within the bounds of his constitutional or statutory jurisdiction. This proposition is stated in 23 Ohio Jurisprudence, 461, as follows:

"The principal is well settled, both by authority and by reason, that no civil action can be maintained against a judicial officer for the recovery of damages by one claiming to have been injured by his judicial action within his jurisdiction. From the very nature of the case the officer is called upon, by law, to exercise his judgment in all matters before him, and the law holds his duty to the individual to have been performed when he has exercised it, however erroneous or disastrous in its consequences it may appear to be, either to the party or to others. Such protection is essential to the honest and independent administration of justice, and is based on sound public policy. * * *"

Citing Truesdell v. Combs, 33 Ohio St., 186; Brinkman v. Drolesbaugh, 97 Ohio St., 171; Bradley v. Field, 13 Wall. 335, and other cases.

No facts are presented in your letter indicating that the judges in

question acted illegally, maliciously, or even carelessly in making the appointment referred to. Unless it is concluded that they were responsible for the safekeeping of the funds embezzled by the clerk, I know of no theory under which they could be held liable for the loss. As already indicated, they are not so responsible.

Accordingly, it is my opinion that:

1. Section 3.06, Revised Code, is applicable only to administrative officers, and has no application to judicial officers.

2. A judge of the court of common pleas who has, pursuant to Section 2301.27, Revised Code, appointed a clerk in the probation department, is not liable for funds embezzled by such clerk, and the Bureau of Inspection and Supervision of Public Offices would have no authority to make a finding against such judge for the amount of the funds so embezzled.

Respectfully,
C. WILLIAM O'NEILL
Attorney General