Pennsylvania Railroad Company, as lessee of the P. C. C. & St. L. R. R. Company, for the elimination of the grade crossing over the tracks of the Pennsylvania Railroad on S. H. (I. C. H.) No. 415, located at a point on Pilling Street, in Newcomerstown, Ohio.

I have carefully examined said proposed contract and find it legal in form, and hereby approve the same.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1572.

MUNICIPAL COURT OF CLEVELAND—PAYMENT OF PREMIUM FROM PUBLIC MONIES, FOR ROBBERY INSURANCE TO PROTECT FUNDS IN BALIFF'S CUSTODY UNAUTHORIZED.

SYLLABUS:

Inasmuch as the Legislature has, by Section 1579-45, *General Code, provided the means whereby the public is fully protected against any loss that might arise by reason of the robbery of the baliff of the Municipal Court of the city of Cleveland, Ohio, to-wit; by requiring the said baliff to give a bond, the premiums on which, if a surety bond is given, are paid from public funds, the said Municipal Court of the city of Cleveland is not authorized to procure robbery insurance at public expense for the protection of funds in the custody of the said bailiff.*

COLUMBUS, OHIO, February 28, 1930.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following question:

> "May premiums for robbery insurance covering funds in the custody of the bailiff of the Cleveland Municipal Court, be legally paid from the General Fund of the city of Cleveland?"

Enclosed with your inquiry are copies of the bond given by the bailiff of the Municipal Court of Cleveland, dated February 1, 1918, and a bond given by him to replace the former bond, on May 17, 1929.

You also enclose a letter from the Chief Justice of the Municipal Court of Cleveland, addressed to the Attorney General which letter reads as follows:

> "As you know, the bailiff of this court is daily collecting large sums of money on executions, attachments, judicial sales, etc. This money is handled through a cashier who makes daily deposits in the Cleveland Trust Company. The distance from the City Hall to the bank is about one-half mile. The cashier sometimes has in his possession several thousand dollars in currency and checks. In these days of specialized hold-ups and robberies, there is, of course, considerable risk involved, and we thought it prudent to take out hold-up and robbery insurance. The state examiner, Mr. Heck, has ruled that we have no authority to take out this kind of insurance and pay the premiums out of our appropriation.

Of course, practically all the money collected by the bailiff is payable to litigants. The state examiner has ruled, however, the funds are public funds to the extent that the bailiff can be compelled, by action in the name of the city or state, to pay any shortage that may be disclosed by the state examiner's audit regardless of the fact that the bailiff is able to meet his obligations to litigants. In other words, his ruling is that if an audit should disclose that $50,000.00 is payable to litigants as a result of judgments and the bailiff has only $45,000.00 in the bank, the city can maintain an action against him for $5,000.00. Under this theory the bailiff is practically an insurer and it is no more than fair that he should be protected. The law expressly authorizes the requirement of bonds from deputy bailiffs, the premiums for which are paid out of our appropriation. Of course a deputy bailiff would not be liable on his bond if he were held up and robbed of money intrusted to him for deposit in the bank or collected by him under a writ of execution or attachment.

Will you kindly advise me at your early convenience as to whether or not, in your opinion, the state examiner is correct in his ruling as to these premiums and whether or not the premiums for this insurance against hold-up and robbery can be paid out of our appropriation?"

The bond given by the bailiff of the Municipal Court of the city of Cleveland on May 17, 1929, contained among its recitals the following:

"NOW IF THE SAID J. Martin Thumm shall faithfully, honestly and impartially perform and discharge the duties of said Chief Bailiff while he shall hold the same, in accordance with the laws of the State of Ohio, and the charter and ordinances of the city of Cleveland, and the rules of said court, and shall duly account for and pay over all monies or other things of value that shall come into his possession for the account of said city or state or any officer or department thereof, then this obligation shall be void, otherwise to remain in full force and virtue in law. This bond takes effect as of February 1, 1929."

A former bond of the bailiff dated February 1, 1918, and which was in effect until the bond noted above became effective was conditioned as follows:

"Now, therefore, the condition of the foregoing obligation is such that if the principal shall faithfully perform such duties as may be imposed on him by law and shall honestly account for all money that may come into his hands in his official capacity during the said term, then this obligation shall be void; otherwise it shall remain in force."

Both of the above bonds were duly executed and approved.

Section 1579-45, General Code, pertaining to the duties, compensation and bond of the bailiff of the Municipal Court of Cleveland, reads in part, as follows:

"A bailiff and deputy bailiffs shall be designated as hereinafter provided for in this act (G. C. 1579-2 et seq.). They shall perform for the Municipal Court services similar to those usually performed by the sheriff for Courts of Common Pleas and by the constable for Courts of Justice of the Peace * * * * Before entering upon his duties, the bailiff shall make and file in the office of the auditor of the city of Cleveland a bond in the

amount of not less than ten thousand dollars to be determined by the judges with two or more sureties to be approved by the chief justice. The terms of said bond shall be subject to the approval of the judges of the court. The said bond shall be given for the benefit of the city of Cleveland and of any persons who shall suffer loss by reason of a default in any of the conditions of said bond. The bailiff may require any of the deputy bailiffs to give a bond of not less than one thousand dollars, the terms whereof shall be subject to the approval of the judges of the court. The sureties on said bonds shall be approved and said bonds shall be filed in the manner prescribed for the approval and filing of the bailiff's bond. * * * "

Although there is no express statutory authority for the expenditure of public funds to pay premiums for procuring burglary or robbery insurance, except that contained in Section 2638-1, General Code, authorizing county commissioners to procure such insurance to protect public funds in the custody of the county treasurer, there are instances in which such insurance would no doubt be justified and might lawfully be procured. The courts undoubtedly would hold it to be within the power of administrative officials in a proper case, to protect the public against risks incident to burglaries or robberies.

In cases where the power of public authorities to effect fire or liability insurance, in the absence of express statutory authority therefor, has been questioned, the courts have upheld the power on the theory that it existed as an incident to the ownership of property, or as an incident to the power to use and manage property in a proprietary way, and thus incur the possibility of loss against which prudent business practice would justify protection. McQuillan on Municipal Corporations, Second Edition, Section 1228; *Travellers Insurance Company* vs. *Village of Wadsworth,* 109 O. S. 440; *Davidson vs. Baltimore,* 96 Md., 509; *French* vs. *Melville,* 66 N. J. L. 392. These cases could only arise however, where there is a risk to protect, where there is a possibility of loss through burglary or robbery, the burden of which loss would in the absence of such protection, fall on the public. Unless there is a possibility of loss which must be borne from public funds, that is unless there is a risk to insure against, there certainly would be no implied power to procure insurance at the expense of the public. Such an expenditure would not be for a public purpose, and in my opinion, would be unauthorized.

One of the reasons stated by the court in the Travellers Insurance Company case, supra, in justification of the right of a municipality to effect liability insurance upon the operation of a municipal waterworks is the following:

> "Such insurance is often written upon business operated by individuals and by private corporations, and making contracts therefor is generally considered to be the act of a prudent business man."

Manifestly, no prudent business man would pay out money for insurance against a contingent loss that could not by any possibility arise either because the risk had no existence in the first place, or if it did exist, because it had been fully taken care of otherwise.

Surely, if the Legislature or the authorities had provided a means of protection against a risk, no authority would exist to provide protection against the risk otherwise at public expense. Obviously, no implied power at least could be said to exist in a public officer or board to pay from public funds for protection against a possible loss that had been already protected against. Especially would this be so if the protection afforded by legislative command or by adminis-

trative order involved the expenditure of public funds. It would in my opinion be contrary to every principle of implied powers of public officials to permit those officials to expend public funds twice for precisely the same thing.

In determining, therefore, whether the Municipal Court of Cleveland may lawfully expend public funds for insurance against the possible robbery of its bailiff it becomes important to inquire whether or not the robbery of the bailiff would result in a loss that would in any event necessarily be borne from public funds. If the robbery of the bailiff would not under any circumstances result in a loss that would have to be borne from the public treasury, or even if it did result in such a loss and the Legislature had directed another means of protecting the treasury against such risk, it would be an unauthorized expenditure of public funds, in my opinion, to procure insurance for that purpose.

Moneys coming into the custody of the bailiff, and which might be lost by robbery, are of two classes; those collected on judgments for court costs, for which the bailiff must account after collection, to the municipal treasury, and those collected on judgments, by execution, the proceeds of judicial sales or otherwise, and which the bailiff must, in the performance of his duty, pay to judgment creditors. The statute does not detail these duties of the bailiff, but refers to them in a general way by stating that he shall perform for the Municipal Court similar duties to those performed by sheriffs for Courts of Common Pleas. The duty of a sheriff with reference to the proceeds of judgments collected by him is set out in Section 11686, General Code, which reads as follows:

> "If the sheriff collects any part of a judgment by virtue of an execution without the sale of real estate, he shall pay it to the judgment creditor, or his attorney, upon demand made therefor at his office. If the execution be fully satisfied, he shall return it within three days after he collected the money thereon."

See also Section 11689, General Code.

It will be observed from the terms of Section 1579-45, supra, that the bailiff is required to give a bond the terms of which bond are subject to the approval of the court. Ont imperative condition of the bond it that it "shall be given for the benefit of the city of Cleveland and of any person who shall suffer loss by reason of a default in any of the conditions of the bond."

The first bond given in 1918 specifically provided as a condition thereof that the principal, that is the bailiff, "shall faithfully perform such duties as may be imposed upon him by law and shall honestly account for all moneys that may come into his hands in his official capacity during said term." The second bond given in 1929 is not so specific as to the accounting for all moneys coming into the hands of the bailiff in his official capacity. It is specific as to the accounting for and paying over all moneys or other things of value that shall come into his possession, "for the account of said city, or state, or any officer or department." The accounting for moneys coming into his hands and due to judgment creditors is not mentioned in terms. It does provide, however, that "he shall impartially perform and discharge the duties of said chief bailiff while he shall hold the same, in accordance with the laws of the State of Ohio and the charter and ordinances of the city of Cleveland and the rules of said court," else the obligation of the bond shall "remain in full force and virtue in law."

One of the duties of the bailiff is to account to judgment creditors for all moneys coming into his hands, due to them, and in my opinion, the bond should be so construed as to cover such defalcations, as the failure to account to judgment creditors for moneys collected on their judgments by execution or judicial sales

no matter what may have caused the defalcation. That is to say that the bond read in the light of the statute constitutes a contract on the part of the bailiff to account for moneys received by him and that he and his bondsmen are held accountable for the payment of such moneys to the persons to whom they are due, even though the moneys are lost through no fault of the bailiff. This conclusion is fortified by the language of the statute itself which specifically requires the bond to be given for the benefit of the city of Cleveland and of any person who shall suffer loss by reason of a default in any of the conditions of the bond.

One of the duties of the bailiff, as fixed by statute, is to account for all moneys coming into his custody, whether due to the city or state or to litigants, and a failure to do so would not be faithfully performing and discharging the duties of the office.

The liability of the bailiff and his bondsmen is controlled in my judgment by the doctrine of the case of *State* vs. *Harper et al.,* 6 O. S. 608 where it is held with reference to a county treasurer:

> "The felonious taking and carrying away the public moneys in the custody of a county treasurer, without any fault or negligence on his part, does not discharge him and his sureties, and can not be set up as a defense to an action on his official bond. The responsibility of the treasurer in such case depends on his contract, and not on the law of bailment."

In the course of the opinion in the above entitled case, the court said:

> "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do those acts. It is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and dispursement of the money. Hence it is not a sufficient answer when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law, and of his contract, he is bound to make good any deficiency which may occur in the funds which come under his charge."

The Harper case, supra, was quoted with approval, by the United States Circuit Court of Appeals in the case of *Loesser* vs. *Alexander,* 176 Federal 270, where, in the course of the opinion, the court said:

> "Under the law of Ohio the county treasurer is an insurer of the safekeeping of the public moneys, and his bond is security therefor. Even the fact that public moneys have been stolen from him is no defense of an action upon his bond for failure to account for and pay over such moneys."

The terms of the statute fixing the duties of a county treasurer and of the bond which the statutes prescribe must be given by a county treasurer and which were under consideration in the Harper and Loesser cases, supra, are perhaps more specific in requiring the treasurer to account for all moneys coming into his hands than is the statute relating to the duties of the bailiff of the Municipal Court of Cleveland and the bond given by him, but the effect of the statute and the bailiff's bond is in my judgment the same as that pertaining to a county treasurer.

The Legislature having provided that the risks of the public incident to a possible robbery of the bailiff of the Municipal Court of the city of Cleveland are to be met by requiring the bailiff to give a bond which covers those risks, and requiring by Section 9573-1, General Code, that the premium on such bond if the bond be of a duly licensed surety company, shall be paid from the public treasury, it is not within the power of the Municipal Court to protect the public against that risk by some other means than that prescribed by the Legislature, especially as to do so would result in paying from the public treasury twice for precisely the same protection.

In reaching this conclusion, I am not unmindful of the case of *Ikert, Administrator* vs. *Wells, Sheriff of Columbiana County,* 13 C. C. N. S. 213, which case was affirmed by the Supreme Court without opinion in 82 O. S. 401. It was held in the above case as stated in the headnote:

> "A sheriff who receives money in his official capacity is a bailee, and his liability for the loss thereof is to be determined by the law of bailment."

This action arose upon a motion to amerce the sheriff. The sheriff had sold certain real estate on the order of the court in a partition suit and had deposited the money with the Lisbon Banking Company, which later failed. It was not necessary in the decision of the case to pass upon the question of the civil liability of the sheriff and his bondsmen for the full amount of the moneys received from the sale of the property, although the Circuit Court did discuss that question and decided the question of amercement as though it turned upon the question of the civil liability of the sheriff, and the court held that in its opinion the sheriff was not liable because the money was not public money and belonged to the parties who owned the property form the sale of which it arose.

The case was no doubt correctly decided, so far as the question of amercement was concerned, and the Supreme Court, in affirming it without opinion went no further than to put its stamp of approval upon the conclusions of the Circuit Court on the pleadings and the questions involved, but did not by so affirming the decision of the court necessarily approve the court's reasoning.

The Circuit Court, in its opinion referred to the case of *State* vs. *Harper, supra,* and admitted that if the bond of a public officer made him liable to pay over moneys which came into his possession by virtue of his office, even though they be lost without his fault as was the situation under consideration in the case of *State* vs. *Harper,* its conclusions in the immediate case would probably have been different, but held that in the case under consideration, the bond of the sheriff simply provided that he should faithfully discharge the duties of his office and that that did not constitute a contract for the unconditional payment of any moneys which might come into his hands by virtue of his office. I am inclined to disagree with the doctrine stated by the Circuit Court in the above case, and do not think that it was necessary for the court to so hold in order to decide the case and for that reason do not believe it is controlling. In my opinion, where a statute requires a public officer to account for moneys coming into his possession and he gives a bond to the effect that he shall faithfully discharge the duties of his office it amounts to a contract for the unconditional payment of that money in strict accord with the duties of the office as fixed by statute, and that he and his bondsmen are liable for the payment of the money, even though it is lost without his fault.

Respectfully,
GILBERT BETTMAN,
Attorney General.