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CLERK OF MUNICIPAL COURT — MONEY DEPOSITED BY PRIVATE INDIVIDUALS — FUND TO PROVIDE BAIL BONDS AND FINES IN EVENT CERTAIN OTHER INDIVIDUALS ARRESTED — FUND RECEIVED BY CLERK IN INDIVIDUAL CAPACITY, NOT UNDER COLOR OF OFFICE — SUCH MONEY “PUBLIC” MONEY WHEN APPLIED TO PURPOSE FOR WHICH DEPOSITED.

SYLLABUS:

Money left with a clerk of a municipal court by private individuals to provide a fund out of which bail bonds and fines may later be provided in the event of the arrest of certain other individuals is not received by such clerk under color of office, but rather is received in the clerk's individual capacity and such money so received is not public money until applied to the purpose for which it was deposited.

Columbus, Ohio, January 27, 1942.

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

Gentlemen:

I have your request for my opinion, which is as follows:

“We are attaching hereto copy of a report or statement of facts submitted to the Auditor of State by John H. Price, State Examiner in charge of the City of Columbus examination, concerning various amounts of money found in the custody of the Clerk of the Municipal Court, without public record thereof other than notations on the envelope containers.

The said Clerk, from time to time, as arrests are made upon certain gambling charges, abstracts from said moneys contained in said envelopes, the amount equal to the cash bail required in such cases, and immediately records said cash bail in the records of the court and thereafter accounts for same according to law.

Will you kindly examine the inclosure and give us your opinion in answer to the following question:

Is the money received by the Clerk of the Municipal Court as contained in the envelopes heretofore described and used to finance the cash bail of certain defendants, received by said Clerk under color of office, as is defined in Section 286 of the General Code, or trust moneys as otherwise defined by law, which in either case must be deposited in the city treasury and accounted for as other trust funds or public money coming into the hands of city officials?”

The communication from your examiner in charge of the examination of the City of Columbus, which was inclosed with your request, provides the following information: Certain persons have placed in the custody of the clerk of the Municipal Court of Columbus sums of money ranging from \$100 to \$1,000 each. The money is kept in separate envelopes bearing the name of the person who deposited it and the amount of money inclosed. The money is left with the clerk to provide a cash bail bond should other persons be arrested. If such other person is arrested, the sum of \$100 is removed from the envelope bearing the name of the person who deposited it against the contingency of the second person concerned being arrested and the \$100 is used as a cash bail bond; either to be returned to the envelope in full or minus a deduction coming from a resulting fine or forfeited in the event of non-appearance of the arrested person. The clerk, according to your examiner's letter, has used this system since 1936 and the system was devised for the purpose of facilitating the arrangement of bond for persons arrested and to eliminate the taking of property bonds. The clerk, according to the information submitted by you, has never considered the money as public money since the arrangement was worked out between himself and the depositors of the money as a personal agreement to facilitate the securing of bond. He acknowledges no responsibility to the city and claims that he is accountable only to the persons depositing these funds.

An answer to the question you raise must come from the application of Section 286, General Code, to the fact situation involved. So much of Section 286 as is pertinent is as follows:

“The term ‘public money’ as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected.”

It will be seen that if the money so held by the clerk of the Municipal Court is “received or collected under color of office,” it must be deposited in the treasury of the municipality, there to await for the statutory period

the claim of the rightful owner. Among the various definitions found of the term "color of office" are these:

"An officer's acts are done *colore officii* when they are of such a nature that his official position does not authorize the doing of such acts although they are done in a form that purports they are done by reason of official duty and by virtue of his office." (Robertson v. Smith, 16 Ga. App. 767; 85 S.E. 991, 992)

"Color of office is a pretense of official right to do an act made by one who has no such right." (Luther v. Banks, 111 Ga. 374, 36 S.E. 826, 827)

"'Color of office' refers to an act wrongfully done by an officer under the pretended authority of his office, grounded on corruption to which the office is a mere shadow of color." (Decker v. Judson, 16 N.Y. 439, 442)

"'Color of office' has been construed to embrace all cases where the officer receives the money in his official capacity when he is not authorized or required to receive the same." (State v. Grant, 201 N.C. 211, 159 S.E. 427)

The money in question held by the clerk of the Municipal Court, from the facts supplied by you, was not collected under a right claimed to arise from the office of clerk, nor was it received in the character of the office, but on the contrary, it may be seen that the money was received by the officer concerned, not in his official capacity as clerk, but in his private capacity and as an individual. Therefore, by application of the definitions of the words "color of office" above quoted to the facts it may not be said that the money in question was received under color of office and by the terms of Section 286, *supra*, it may not be regarded as public money.

Approaching the question in a general way and apart from the particular requirements placed on public officers by Section 286, General Code, again it may be said that the money in question is not to be considered as public money. In the case of *City of Sacramento v. Simmons*, 225 Pac. 229 (Cal.), the term "public money" was referred to as follows:

"In other words, the public moneys of the City of Sacramento, as used in this section, we think means money or funds belonging to the City of Sacramento. Moneys which are owing and payable to the city in its corporate capacity, such as taxes, assessments, license fees, if any, moneys derived from sales of property, wharfage charges, and such like."

In 50 C.J., at page 845, it is said that:

"A thing may be said to be public when owned by the public and also when its uses are public."

In Opinion No. 579, Opinions of the Attorney General for 1915, Volume II, page 1183, the following statement which bears on our question is found at page 1184:

“ * * * While ‘public money’ as defined in section 286, G. C., * * * ‘includes all money received or collected under color of public office’ etc., this definition must be read in the light of the further provisions of the same section at least and particularly that provision which limits the right of recovery of such public money by public authorities to an action ‘in the name of the political subdivision or taxing district to which such public money is due.’ It is thus clearly indicated that public money comprehends only such money received or collected under color of office, etc. as is due to some political subdivision or taxing district of the State.”

Again examining the facts presented by you, it appears that the money held by the clerk is not in the general sense public money. It is not owned by the public nor is it for the use of the public; nor again is it money due to the city in the payment of taxes or assessments or the like. The letter from your examiner in charge of the examination of the City of Columbus, and which is inclosed with your request, in itself clearly shows that the money in question is not public money, or money collected under color of office when it says:

“ * * * which money is kept in separate envelopes bearing the name of the operator *to whom the money belongs* * * *.”
(Emphasis mine.)

It may be said that there is no rule of law, the application of which can change money in fact belonging to a private individual into public money or money due to a municipality. The most that may be said is that the clerk receives the money as agent for the depositor and as an individual and not, therefore, as the clerk of courts and agent of the city. It is not to be inferred from the conclusions of this opinion that the practice herein described is to be condoned or is specifically provided for by law, yet, as stated above, it must be remembered that the clerk acts here as an individual, free of the limitation that an officer's acts must be authorized by law, but the mere fact that such action is not to be condoned or is not provided for by law would not justify me in working a sort of legal alchemy to transmute money belonging to an individual into public money.

What has been said above demonstrates, and it is my opinion that money left with a clerk of a municipal court by private individuals to provide a fund out of which bail bonds and fines may later be provided

in the event of the arrest of certain other individuals is not received by such clerk under color of office, but rather is received in the clerk's individual capacity and such money so received is not public money until applied to the purpose for which it was deposited.

Respectfully,

THOMAS J. HERBERT
Attorney General.