

7456

CLERK RECEIVES MONEY PURSUANT TO ORDER OF DOMESTIC RELATIONS COURT—PAYS OUT TO PERSONS NOT ENTITLED THERETO—CLERK IS LIABLE FOR LOSS. PERCENTAGES COLLECTED UNDER SECTION 2303.20 R. C. ARE PUBLIC FUNDS—MUST BE PAID TO COUNTY TREASURER—NO AUTHORITY FOR REIMBURSEMENT FROM SUCH FUNDS FOR ERRONEOUS PAYMENT TO PERSONS NOT ENTITLED THERETO.

SYLLABUS:

1. Where moneys have been paid into the hands of a clerk of the court of common pleas or his deputies, pursuant to the order of a court of domestic relations, and have by mistake been paid out to persons not entitled thereto, the clerk is liable for losses thereby incurred.

2. The percentages collected by a clerk of courts pursuant to Section 2303.20, Revised Code, are public funds, which must be paid in to the county treasurer, and the clerk of courts has no authority for reimbursement out of such funds for losses arising from the erroneous payment to persons not entitled thereto, of moneys which have come into his hands by virtue of orders of the court of domestic relations.

Columbus, Ohio, November 28, 1956

Hon. Samuel L. Devine, Prosecuting Attorney
Franklin County, Columbus 15, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“We have been asked to render an opinion by the Franklin County Clerk of Courts concerning the cashier’s office located in the Court of Domestic Relations Building. This cashier’s office issues approximately seventy-five hundred (7500) checks to

various persons each month. The checks are for disbursements of moneys paid into the cashier's office pursuant to orders of the Court of Domestic Relations and they generally relate to support moneys and alimony payments.

"Quite often the payees of the checks have similar names and as a consequence the clerk's office on occasion has issued checks to the wrong parties because a support money payment which was made to the cashier's office was posted under the wrong account.

"It is further our understanding that the clerk's office charges a poundage fee for this service of one per cent (1%) of the amount that is paid in. This, we understand, is in conformity to the procedure used by other counties which have a separate Court of Domestic Relations and a separate cashier branch of the Clerk of Courts Office. However, we have been unable to find any statutes, cases, or opinions which would indicate whether or not the Clerk of Courts is liable for the loss which occurs because of these erroneously issued checks. We further feel that this question is one that might be of interest throughout the state.

"Therefore, would you please render your opinion upon the following questions:

"(1) Is the Clerk of Courts personally liable for losses occurring due to the issuance of checks to the wrong parties because of the duplications and similarity of names on the clerk's record of accounts in the cashier's office of the Division of Domestic Relations of the Common Pleas Court?

"(2) If the Clerk of Courts is authorized and does collect poundage on all moneys paid into the cashier's office pursuant to an order of court and disbursed thereafter, may the clerk deduct the losses occurring from the erroneous issuance of checks from this poundage fee prior to its being turned into the general fund of the county?"

1. Your first question concerns the personal responsibility of the clerk of courts for moneys collected by him or his deputies and disbursed by mistake. Section 2303.02 Revised Code, provides that the clerk of courts before entering upon the duties of his office shall give a bond in a sum not less than \$10,000 nor more than \$40,000, to be fixed by the board of county commissioners, one of the conditions of said bond being that said clerk will "pay over all moneys received by him in his official capacity."

Such clerk is authorized by Section 2303.05 to appoint one or more deputies to be approved by the court of common pleas.

A provision of the law of general application to all officers is found in Section 3.06, Revised Code, reading 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.*”

(Emphasis added.)

The court of domestic relations is established for certain counties in the state by Sections 2301.02 et seq. Revised Code. Section 2301.02 stipulates the number of common pleas judges for the several counties of the state and Section 2301.03 specifies that certain of said common pleas judges are to be known as judges of the division of domestic relations. As to Franklin County it is provided in paragraph (A) of said section, that the judges of the court of common pleas whose terms began on January 1, 1953 and January 2, 1953 shall be assigned to the division of domestic relations and that they shall have all the powers relating to juvenile courts and that there shall be assigned to them all bastardy cases and all divorce and alimony cases.

The clerk of the court of common pleas is responsible to this division the same as to any other branches of that court, and the deputy clerks assigned to work in the domestic relations division are of course his deputies, and under the law he is responsible for their “neglect and misconduct” in the performance of the duties which may be assigned to them.

It appears that the duty cast upon the clerk by the statute above referred to, to account for all moneys coming into his possession, is absolute. In Opinion No. 4056, Opinions of the Attorney General for 1932, page 205, it was held :

“By reason of the terms or conditions of the bond of a clerk of the court of common pleas, required by the provisions of Section 2868 of the General Code, (Sec. 2303.02, R. C.) and by reason of the terms of the statute defining the duties of such officers, he is an insurer of all funds coming into his hands as such officer.”

In the course of that opinion the case of *State ex rel. v. Harper*, 6 Ohio St., 607, was cited, the first paragraph of the syllabus reading as follows :

“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 the contact, and not on the law of bailment.”

While that case related to the bond and the responsibility of the county treasurer, its principle seems just as clearly applicable to the county clerk because in each case the bond was conditioned for paying over all moneys that should come into his hands.

The Harper case was cited as an authority in the case of Seward v. National Surety Company, 120 Ohio St., 47, where it was held :

“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 disburse the same as required by law and by the 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.”

If, therefore, a county clerk is to be held to this strict degree of accountability for all moneys that come into his hands or into the hands of his deputies by virtue of the provisions of the law, even to the extent of responsibility in case they are stolen, it appears to me that there can be no question of his liability, in the event that the moneys are paid out by mistake, either by him or his deputies to persons not entitled thereto.

My answer to your first question, therefore, must be that the clerk of courts is personally liable for losses occurring due to the issuance of checks and funds in his official custody, to persons not entitled thereto because of duplications and similarity of names on the clerk's records.

2. Your second inquiry is as to the right of the clerk to reimburse himself for moneys which have been paid to wrong persons out of fees collected by the clerk as poundage. Section 2303.20 of the Revised Code, provides in part as follows :

“The clerk of the court of common pleas shall charge the following fees and no more :

* * *

* * *

“(K) A commission of one per cent on the first one thousand dollars and one-fourth per cent on all exceeding one thousand dollars for receiving and disbursing money, other than costs and fees, *paid to such clerks in pursuance of an order of court* or on judgments, and which has not been collected by the sheriff or other proper officer on order of execution, to be taxed against the party charged with the payment of such money.”

(Emphasis added.)

In Opinion No. 4723, Opinions of the Attorney General for 1942, page 25, it was held:

“1. Clerks of Courts are required to accept all payments for the support of children or as alimony, when ordered by the court, and in connection therewith are required to charge and collect from the persons making such payments, a commission of one percentum on the first one thousand dollars and one-fourth of one percentum on all sums exceeding one thousand dollars.

“2. If such commissions are not paid, it is the duty of Clerks of Courts to make a report thereof to the prosecuting attorney in accordance with the provisions of section 2979, of the General Code.”

In Opinion No. 1362, Opinions of the Attorney General for 1950, page 21, it was held:

“A clerk of courts is required under Section 2901, General Code, to collect a commission of one percentum on the first one thousand dollars, and one-fourth of one percentum on all sums exceeding one thousand dollars, from the party charged with the payment of such money, when he receives and disburses alimony payments. Commissions when collected from other than the proper party are ‘public money’ as that term is defined in Section 286, General Code.”

Section 325.27 of the Revised Code, reads as follows:

“All the fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, or county recorder, shall be received and collected for the sole use of the treasury of the county in which such officers are elected, and shall be held, accounted for, and paid over as public moneys belonging to such county in the manner provided by sections 325.30 and 325.31 of the Revised Code.”

This statute leaves no doubt that the so-called “poundage” referred to in your letter, constitutes a public fund no part of which could inure

to the benefit of a clerk of courts under any circumstances. I certainly cannot find any theory upon which the clerk would have a right to retain part of that fund to reimburse himself for losses sustained by him on account of the erroneous payments referred to in your letter.

Accordingly, in specific answer to the questions which you have submitted, it is my opinion :

1. Where moneys have been paid into the hands of a clerk of the court of common pleas or his deputies pursuant to the order of a court of domestic relations, and have by mistake been paid out to persons not entitled thereto, the clerk is liable for losses thereby incurred.

2. The percentages collected by a clerk of courts pursuant to Section 2303.20, Revised Code, are public funds which must be paid in to the county treasurer, and the clerk of courts has no authority for reimbursement out of such funds for losses arising from the erroneous payment to persons not entitled thereto, of moneys which have come into his hands by virtue of orders of the court of domestic relations.

Respectfully,

C. WILLIAM O'NEILL
Attorney General