

Note from the Attorney General's Office:

1961 Op. Att'y Gen. No. 61-2720 was overruled in part by
1982 Op. Att'y Gen. No. 82-054.

2720

CLERK OF COMMON PLEAS WHO HOLDS MONEY, SUCH AS FEES AND TRUST FUNDS, MAY DEPOSIT SUCH IN A BANK, AND ANY INTEREST EARNED ON SAID DEPOSIT ACCRUES TO THE FEES OR TRUST FUNDS COMPRISING THE DEPOSIT—§ 131.11, 2219.02, R.C.

SYLLABUS:

Where the clerk of the court of common pleas holds money, such as fees and trust funds, by virtue of his office, such money not belonging to the county, the clerk may deposit such funds in a bank, subject to the provisions of Section 131.11, Revised Code; and under the provisions of Section 2919.02, Revised Code, any interest earned and paid upon said deposits should be apportioned to, and become a part of, said fees or trust funds.

Columbus, Ohio, December 27, 1961

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

In your request for my opinion, the following question is presented:

“May that portion of funds in the custody of the Clerk of Courts, to which he and the Sheriff are entitled, but cannot receive,

be deposited in interest bearing bank accounts, and the interest so earned turned into the county treasury?"

It appears that the funds mentioned in your letter are those which come into the possession of the clerk of courts as security for costs, cash bonds, and in attachment and other proceedings where there is a possibility that some or all of the money held will be refunded to persons by whom it has been paid. Regarding the duty of the clerk, Section 2335.25, Revised Code, provides in part:

"* * * Each such clerk shall be the receiver of all moneys payable into his office, whether collected by public officers of the court or tendered by other persons, and on request, shall pay such moneys to the persons entitled to receive them."

Referring to such moneys, one of my predecessors, in Opinion No. 496, Opinions of the Attorney General for 1937, Volume I, page 797, at 803, stated:

"Witness fees in civil actions do not get into the treasury because of any activity of the state or a political subdivision thereof. Neither the state nor a subdivision thereof have any rights against an unsuccessful party litigant in actions in which they are not parties. Witness fees are taxed in the cost bill in the name of and for the use of the witness and under the status of our law today, neither the state nor a subdivision can acquire the right or property thereto, but that does not affect the right of the state to denominate them public moneys as a matter of law.

"What has been said relative to witness fees in civil cases applies equally to unclaimed deposits for costs and unclaimed distributive shares in partition cases. I grant you that these moneys are paid to the clerk, sheriff or probate judge of the county and are received by them under color of office, but they are so received as a matter of convenience and not because the state has any right of property in the money. These officers are merely the conduits through which the moneys pass on their way to get into the hands of the persons who are entitled to them as a matter of right. *These officers are, as I take it, trustees of the money for those ultimately entitled to receive it.*" (Emphasis added)

There appears to be no provision of law stating what the clerk should do with such money while he is holding it. It appears, however, that the money may be deposited. In this regard, Section 2919.02, Revised Code, reads in part:

"It is not unlawful under section 2919.01 of the Revised Code, * * * for a county auditor, county treasurer, probate judge,

sheriff, clerk of the court of common pleas, or county recorder to deposit fees and trust funds coming into their custody as such officers, until such time as said officers are required to make payment of the official earnings of their offices into their respective fee funds under section 325.31 of the Revised Code, and until such time as the trust funds, held by them in their official capacities, may be paid to the person, firm, or corporation entitled to same, and any interest earned and paid upon said deposits shall be apportioned to, and become a part of, said fees or trust funds, and shall in no instance accrue to, and be received by, the official making said deposits, for his own use."

Also, Section 131.11, Revised Code, implies that such deposits may be made, reading in part:

"No money held or controlled by any probate court, juvenile court, clerk of the court of common pleas, sheriff, county recorder, director of a county department of welfare, clerk or bailiff of a municipal court, prosecuting attorney, resident or division deputy directors of highways, or treasurer of a university receiving state aid, in excess of that covered by federal deposit insurance as hereinafter described shall be deposited in any bank, banks, or trust company or trust companies until there is a hypothecation of securities as provided for in section 135.16 of the Revised Code, or until there is executed by the bank, banks, trust company or trust companies selected, a good and sufficient undertaking, payable to the depositor, in such sum as said depositor directs, but not less than the excess of the sum that is deposited in such depository or depositories, at any one time over and above such portion or amount of such sum as is at any time insured by the federal deposit insurance corporation created pursuant to the act of congress known as 'The Banking Act of 1933,' or by any other agency or instrumentality of the federal government, pursuant to said act or any acts of congress amendatory thereof.

"* * *

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And in the case of *Busher, Clerk v. Fulton, Supt.*, 128 Ohio St., 485, it is stated at page 496:

"Other authorities sustain the general proposition that where public funds or other trust funds come into the hands of a public official, and the law makes no specific provision as to what shall be done with them, such official has the right to place such funds on deposit in a reputable bank. Such deposit is not illegal or wrongful, the deposit is general in the absence of any sufficient agreement making it otherwise, the relation of debtor and creditor is created between the bank and the official, and upon the insolvency of the bank the deposit is not entitled to preference. *City of Sturgis v. Meade County Bank*, 38 S.D., 317, 161 N.W.,

327; *Incorporated Town of Conway v. Conway*, 190 Iowa, 563, 180 N.W., 677; 7 Corpus Juris, 634.

“Of course where a public official makes a deposit of public funds in direct contravention of law, the result is exactly opposite, as is illustrated by the case of *Board of Commissioners of Crawford County, Ohio*, v. *Strawn* (6th C.C.A.), 157 F., 49, 84 C.C.A., 553, 15 L.R.A. (N.S.), 1100.

“Where there is no express denial of the right, the practice of public officials in making general deposits of public or other trust funds coming into their official custody and control is customary and in accord with modern business usages.”

In view of the foregoing, therefore, I am of the opinion that the clerk may deposit moneys such as herein discussed in a bank account, and that such deposit is then subject to the provision of Section 2919.02, *supra*, reading:

“* * * any interest earned and paid upon said deposits shall be apportioned to and become a part of, said fees or trust funds, and shall in no instance accrue to, and be received by, the official making said deposits, for his own use.”

Such deposits are, of course, also subject to the provisions of Section 131.11, *supra*, as to security for deposit.

In conclusion, it is my opinion and you are advised that where the clerk of the court of common pleas holds money, such as fees and trust funds, by virtue of his office, such money not belonging to the county, the clerk may deposit such funds in a bank, subject to the provisions of Section 131.11, Revised Code; and under the provisions of Section 2919.02, Revised Code, any interest earned and paid upon said deposits should be apportioned to, and become a part of, said fees or trust funds.

Respectfully,
MARK McELROY
Attorney General