4056.

CLERK OF COURTS—LIABLE FOR MONEY IN CLOSED BANK—INSURER OF FUNDS RECEIVED IN HIS OFFICIAL CAPACITY.

SYLLABUS:

1. *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, 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.*

2. *When a clerk of the common pleas court deposits money placed with him as security for costs and moneys received for fines, etc., in a bank until his regular monthly settlement, and if before such funds are withdrawn such bank is taken over by banking authorities for the purpose of liquidation the clerk of the common pleas court is liable for any loss of funds suffered thereby.*

COLUMBUS, OHIO, February 15, 1932.

HON. GWYNN SANDERS, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—Your request for opinion reads:

> "If the clerk of the common pleas court deposits the money placed with him as security for court costs and the money received by him for fines, etc., in a bank, until his regular monthly settlement, and during this time the bank should be taken over by either the state or by national authorities for liquidation; would the clerk of courts be liable for the deficiency which might occur?"

The decisions of the various states are irreconcilable on the question presented by your inquiry. The law in some states is to the effect that the liability of the county officer is to be determined by the law of bailments or of a trustee. In others the courts hold that the liability of an officer turns upon the terms of his bond and is construed as having been enlarged and made an absolute obligation to pay over the money in every event and under every contingency. In some states it is held that a county official becomes a debtor for the funds as soon as they come into his hands and in still others he is held liable on the broad grounds of public policy and the obligations resting upon him are made absolute and unconditional under the reasoning that to adopt a different construction would open the door for fraudulent practice and evasion by public officials.

The Ohio courts in construing the liability of a county treasurer for funds received by him in his official capacity during the year 1856 in the case of *State ex rel* vs. *Harper,* 6 O. S. 608, held as stated in the first paragraph of the syllabus:

> "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 contract, and not on the law of bailment."

In the case just cited the court reasoned that since the bond of the county

treasurer was specifically "conditioned for the paying over of all moneys which shall come into his hands" and further, since it was the statutory duty of the treasurer to make a full settlement of accounts with the county commissioners on the first Monday in June, annually, and on going out of office it was his duty to deliver to his successors all public money in his possession belonging to the office, and further, since the statute authorized a suit against the county treasurer and his sureties, if he should fail to pay over such moneys, as above set forth, and authorized a judgment for the amount of such unpaid funds together with a penalty thereon of ten percent that the bond constituted a contract between the county treasurer and the county for the unconditional payment over of such moneys and the county treasurer was estopped from setting up any defense to a suit to compel him to pay over any funds that come into his hands. See also to same effect *Loesier* vs. *Alexander,* 176 Fed., 270, decided by the Sixth Circuit Court of Appeals, February 8, 1910. While in the aforementioned case the court had before it the liability of a county treasurer, similar language must be contained in the bond of a clerk of the Court of Common Pleas.

Section 2868 of the General Code, in so far as material, reads:

> "Before entering upon the discharge of the duties of his office, the clerk of the court of common pleas shall give bond * * * * to the state in a sum not less than $10,000 nor more than $40,000, to be fixed by the county commissioners * * * * and conditioned that he will * * * * pay over all moneys by him received in his official capacity. * *"

Section 2983, General Code, reads as follows:

> "On the first business day of each month, and at the end of his term of office, each of such officers shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding month or part thereof for official services, provided that none of such officers shall collect any fees from the county; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which have been due in his office, and unpaid for more than one year prior to the date such statement is required to be made."

Section 2805, General Code, provides for the collection of a penalty by the county commissioners in the event such funds are not so paid over by the clerk of the common pleas court and for his removal from office by reason of such default.

It is therefore evident that the reasoning of the court in the case of *State* vs. *Harper, supra,* is equally applicable to the case of a clerk of the common pleas court under a similar set of facts. See *Shaw* vs. *Baughman,* 34 O. S., 25; *Northern Pacific Ry. Co.* vs. *Owens,* 86 Minn., 188.

In *the case of Ikert* vs. *Wells,* 13 O. C. C., N. S., 213, decided by the Circuit Court of Columbiana County, in April, 1909, it was held as stated in the syllabus:

> "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 case was affirmed by the Supreme Court without opinion in 82 O. S., 401. The distinction between this case and the liability of a clerk of the court of common pleas is stated by the court in that case at page 215:

> "The bond of a sheriff in this case does not provide for the unconditional payment of any moneys which might come into his hands, but simply provides that he shall faithfully discharge the duties of his office. Nor do we think that the statute imposes upon him an unconditional liability. The statute defines his duty with reference to the money, but does not attempt to fix any liability except for a misapplication or misappropriation of the fund."

It thus appears that there is no distinction in Ohio between the liability of a clerk of the Court of Common Pleas and that of a county treasurer.

I am therefore of the opinion that:

1. 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, 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.

2. When a clerk of the common pleas court deposits money placed with him as security for costs and moneys received for fines, etc., in a bank until his regular monthly settlement, and if before such funds are withdrawn, such bank is taken over by banking authorities for the purpose of liquidation, the clerk of the common pleas court is liable for any loss of funds suffered thereby.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4057.

DISAPPROVAL, ARTICLES OF INCORPORATION OF THE GEM CITY LIFE INSURANCE COMPANY.

COLUMBUS, OHIO, February 15, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my approval the Certificate of Amendment to the Articles of Incorporation of the Gem City Life Insurance Company.

The resolution adopted by the shareholders reads as follows:

> "BE IT RESOLVED, that the officers of this company are authorized to take such steps as may be necessary to change the corporate name of this company from The Gem City Life Insurance Company to Union National Life Insurance Company, and to transfer the executive offices to Charleston, West Virginia, * * * *."

There is no provision in the insurance laws providing for the amendment of the articles of incorporation of such a company except as to the increase of