

897.

COUNTY TREASURER—AUTHORIZED TO PROVIDE BURGLARY INSURANCE BY SECTION 2638-1, GENERAL CODE.

SYLLABUS:

Insurance may lawfully be procured by a county treasurer against any loss of public funds or securities in his custody by burglary or robbery, as provided by the terms of House Bill No. 79 of the 88th General Assembly.

COLUMBUS, OHIO, September 21, 1929.

HON. E. B. UNVERFERTH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

"In Attorney General's Opinion No. 279, rendered under date of April 9, 1929, you hold that 'To pay, from county funds, for insurance to protect funds in the custody of the judge of the Court of Insolvency for Cuyahoga County against robbery and burglary is unauthorized and unlawful.'

The last Legislature of the State of Ohio passed House Bill No. 79, giving the county treasurer the power to take out burglary and robbery insurance and to have the premium for the same paid out of the county funds. The treasurer, of course, gives his bond for the payment of all moneys according to law and it seems to me that his bond is similar to the one given by the judge of the Court of Insolvency of Cuyahoga County.

Your argument in the above cited opinion appears quite logical and I was just wondering whether it might apply by analogy to county treasurers. Therefore, I have two questions to ask:

First. May a county treasurer take out burglary and robbery insurance and have the premium for the same paid out of the general fund of the county?

If your answer is 'No' to question No. 1, then,

Second, Does House Bill No. 79 give the county treasurer the right to take out such insurance and have the premium for the same paid from the general fund of the county?

If the bond of the county treasurer is similar to that of the judge of the Court of Insolvency of Cuyahoga County, then it would seem to me that it would be impossible for the Legislature to pass a valid law giving such treasurer the right to take out burglary and robbery insurance when the county is already protected."

In several prior opinions of this office it is held that county commissioners are without authority to expend public funds for the purchase of holdup, burglary or forgery insurance for the county treasurer or any other county officer. See Opinions of the Attorney General for 1927, pp. 874, 916 and 2160. The conclusions reached in the foregoing opinions are based on the fact that provision is made by law for securing to the public the public funds in the custody of the county treasurer and other county officers.

If the provisions of law securing the public against the loss of public funds in the custody of a county treasurer or other county officers, whether such losses are occasioned from burglaries or robberies, are complied with, there is no necessity for providing against the same by the taking out of insurance. There was no author-

ity, therefore, for the expenditure of public funds for what obviously would be a vain and unnecessary expense.

A county treasurer is required by the terms of Section 2633, General Code, to give a bond conditioned that he will account for, according to law, all public money and property which shall come into his hands as such county treasurer. He is required by the terms of his contract, as embodied in his bond, to account for this public money and property according to law, even though he loses it without any fault or negligence on his part.

In the case of *State vs. Harper, et al.*, 6 O. S., 608, it is held, as stated in the headnotes:

“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.”

This case was decided in 1856. The statutes with reference to the contract between the treasurer and county have not been materially changed since that time.

A like question was before the United States Circuit Court of Appeals in the case of *Loeser vs. Alexander*, 176 Fed. Rep., 270, decided February 8, 1910. In the course of the opinion the court said:

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

The bond which a county treasurer is required to give in accordance with Section 2633, General Code, shall be in such sum as the commissioners direct, with two or more bonding or surety companies, as surety thereon, or with four or more freehold sureties approved by the commissioners. If a proper bond is given, and the commissioners have no right to accept or approve any other, the public is fully secured and will not suffer by reason of any loss to the treasurer on account of burglary or robbery. Said Section 2633, General Code, further provides:

“If bond with bonding or surety companies, as surety, be given, the expense or premium of such bond shall be paid by the commissioners and charged to the general fund of the county.”

A similar provision is made in Section 9573-1, General Code, which reads as follows:

“The premium of any duly licensed surety company on the bond of any public officer, deputy or employe shall be allowed and paid by the state, county, township, municipality or other subdivision or board of education of which such person so giving such bond is such officer, deputy or employe.”

By the terms of said Sections 2633 and 9573-1, General Code, the cost of the protection afforded to the public by the treasurer's bond is borne by public funds. It would seem to be inconsistent with good public policy to expend public moneys

for the purpose of providing other insurance against burglary or robbery which might be suffered by a county treasurer.

It was pointed out in the 1927 opinions referred to that in effect the procuring of such insurance amounted to the use of public funds for private purposes to the extent of the premiums paid for the insurance and was, therefore, an unwarranted and unlawful public expenditure and against public policy, and for that reason no authority existed for such expenditure.

Since the rendition of the aforesaid opinions, the 88th General Assembly enacted House Bill No. 79, which reads as follows:

"AN ACT To provide for the insuring of public funds or securities in custody of the county treasurer against theft.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. Upon request of the county treasurer of any county, the county commissioners of such county may authorize the county treasurer to procure insurance against any loss of public funds or securities, in the custody of the county treasurer, by burglary or robbery. The amount of insurance to be procured shall be in such sum as may be agreed upon by the county treasurer and the county commissioners. All costs of such insurance shall be paid by the county as provided in Section 2460 of the General Code."

Inasmuch as said House Bill No. 79 directly and expressly authorizes the procuring of burglary or robbery insurance for a county treasurer, the holdings of the 1927 opinion are no longer tenable. Since the expression of the Legislature is the last word on questions of public policy, it cannot now be said that the protection of the public funds in the custody of a county treasurer, by insurance against burglary or robbery at public expense, is against public policy.

I am of the opinion, therefore, that insurance may now lawfully be procured by a county treasurer against any loss of public funds or securities in his custody by burglary or robbery, as provided by the terms of House Bill No. 79 of the 88th General Assembly.

Respectfully,
GILBERT BETTMAN,
Attorney General.

898.

APPROVAL, BONDS OF LORAIN COUNTY—\$84,000.00.

COLUMBUS, OHIO, September 23, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

899.

APPROVAL, BONDS OF PORTAGE TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY—\$100,000.00.

COLUMBUS, OHIO, September 23, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.