

3420.

COUNTY FUNDS IN HANDS AND POSSESSION OF COUNTY TREASURER — WHERE LOST OR DISAPPEAR DURING FLOOD — COUNTY COMMISSIONERS WITHOUT JURISDICTION TO RELEASE AND DISCHARGE TREASURER AND SURETIES FROM LIABILITY IN ABSENCE OF SHOWING LOSS RESULTED FROM FIRE, ROBBERY, BURGLARY, OR INABILITY OF BANK TO REFUND PUBLIC MONEY — COUNTY COMMISSIONERS WITHOUT AUTHORITY TO REIMBURSE TREASURER IN AMOUNT OF SHORTAGE — SECTIONS 2303 TO 2306, 2633, 2639 G.C.

SYLLABUS:

*Under the provisions of Sections 2303 to 2306, General Code, read in the light of Sections 2633 and 2639, General Code, where county funds have come into the hands and possession of a county treasurer, and such*

*funds are lost or disappear during a flood, the county commissioners are without jurisdiction to release and discharge such treasurer and his sureties from liability for such funds, in the absence of a showing that such loss resulted from fire, robbery, burglary, or inability of a bank to refund public money lawfully in its possession belonging to the public funds of the county. It necessarily follows that where such shortage has been paid in, the county commissioners are without authority to reimburse the treasurer in the amount of such shortage.*

Columbus, Ohio, February 14, 1941.

Hon. Marvin A. Kelly, Prosecuting Attorney,  
Portsmouth, Ohio.

Dear Sir:

I have your letter of January 10, 1941, requesting my opinion, which letter reads as follows:

"I quote from the county commissioners' letter and resolution the following, and respectfully ask that you render your opinion on same at your earliest convenience:

**'RESOLUTION**

WHEREAS, in January, 1937, the flood waters of the Ohio River reached a depth of approximately four feet in the office of the Scioto County Treasurer; and

WHEREAS, the County Treasurer, at that time, G. Wesley Shela, was restricted from entered (sic.) the City of Portsmouth by authorities during said flood; he was therefore unable to remove cash and script from his vault to a place of safety; and

WHEREAS, upon the receding of the flood waters, it was necessary for the County Commissioners to secure WPA workmen to remove mud and clean the offices of the court house including the Treasurer's office; thereby creating a hazardous condition in the safe keeping of public funds; and

WHEREAS, after the flood it was established by the Bureau of Inspection of the State of Ohio that there was a shortage of county funds amounting to \$3,550.68 as reported by the Bureau; and

WHEREAS, the County Treasurer, upon learning of the shortage of funds, reimbursed the county of Scioto for said shortage; and

WHEREAS, the Scioto County Commissioners are of the opinion that this shortage was caused by circumstances beyond the control of the County Treasurer; and

WHEREAS, the Scioto County Commissioners are of the

opinion that the County Treasurer at that time, G. Wesley Shela, should be reimbursed in the amount of \$3,550.68;

THEREFORE, BE IT RESOLVED, by the Board of County Commissioners of Scioto County that Marvin A. Kelly, Prosecuting Attorney of Scioto County be and he is hereby requested to give his written opinion as to whether or not this board has the authority to reimburse the former treasurer of Scioto County, G. Wesley Shela in the amount of the finding as reported by the Bureau of Inspection.'

Your consideration of this request will be greatly appreciated."

In order correctly to resolve your question, the provisions of Sections 2633, 2639 and 2303 to 2306, General Code, must be considered. These sections respectively provide as follows:

Section 2633:

"Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more freehold sureties having real estate in the value of double the amount of the bond over and above all encumbrances to be approved by the commissioners and conditioned for the payment, according to law, of all moneys, which come into his hands, for state, county, township or other purposes. The expense or premium for such bond shall be paid by the commissioners and charged to the general fund of the county. Such bond, with the oath of office and the approval of the commissioners endorsed thereon, shall be deposited with the auditor of the county and by him carefully preserved in his office. Such bond shall be entered in full on the record of the proceedings of the commissioners, on the day when accepted and approved by them."

Section 2639:

"At the expiration of his term of office or on his resignation or removal from office, the county treasurer shall deliver to his successor all moneys, books, papers and other property in his possession as treasurer, and in case of the death or incapacity of the treasurer, they shall in like manner be delivered over by his legal representatives."

Section 2303:

"When a loss of public funds, entrusted to a county, city, village, township, or school district treasurer, by virtue of his office, heretofore or hereafter results from *fire, robbery, burglary, or inability of a bank to refund public money lawfully in its possession belonging to such public funds*, the county commissioners,

township trustees, a city or village council or a board of education, respectively, may release and discharge such treasurer and the sureties upon his official bond, from all liability to or demands of such county, township, city, village or school district, for loss so created and arising." (Emphasis mine.)

Section 2304:

"Before such release and discharge shall be effected, the board of county commissioners, township trustees, city or village council or board of education shall find that the treasurer was entrusted by law with the care of such public funds, and that the loss thereof was not occasioned by his fault or negligence, and an entry of such findings shall be made upon the record book of the proceedings of such council or board."

Section 2305, General Code, inter alia makes provision for an appeal by a taxpayer to the common pleas court of the county from a "finding and discharge" by the county commissioners, while Section 2306, General Code, provides that in the case of such an appeal the "common pleas court shall proceed to try and determine the question whether such public funds were lost by the fault or negligence of the treasurer" and if "it be found that the funds were so lost," the finding of the commissioners ordering the discharge shall be vacated.

The provisions of Sections 2633 and 2639, supra, which are obviously in pari materia and must, therefore, be read together, were passed upon by one of my predecessors in office in opinion No. 1214, Opinions, Attorney General, 1927, Vol. III, page 2144. The syllabus of that opinion reads:

"1. A county treasurer and his bondsmen are liable for all funds which come into his hands for the use of the public.

2. The fact that funds were stolen from the county treasurer is no defense to an action for the recovery of such funds."

In the opinion, after quoting the two sections last above mentioned, it was said as follows at page 2145:

"It will be noted that this section requires the county treasurer to give bond to secure to the county the payment, according to law, 'of all monies which come into' the treasurer's hands for state, county, township or other purposes.

In construing the required provisions of the treasurer's bond, the Supreme Court of Ohio, in the case of State of Ohio vs. Harper, 6 O.S. 608, at 611, said that such 'bond is a contract

that he will not fail upon any account to do those acts.' In that case the court specifically held:

'The felonious taking and carrying away the public monies 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*.'

Our Ohio statutes relative to the treasurer's obligation were also construed by the United States Circuit Court of Appeals in the case of *Loeser vs. Alexander*, 176 Fed. Rep. 270, which was decided in 1910. In the opinion in that case the Court of Appeals said:

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

With reference to the provisions of Sections 2303 to 2306, *supra*, the Court of Appeals for Hamilton County held in the case of *The State, ex rel. Bolsinger v. Swing, et al.*, 54 Oh. App. 251, 7 O.O. 438, 23 Abs. 1005, 6 N.E. 795 (1936, motion to certify overruled, December 23, 1936), as follows:

"1. A board of county commissioners, under Sections 2303 to 2306, General Code, relative to the discharge of a county treasurer from liability for loss of public funds, being a tribunal of limited jurisdiction, the jurisdictional facts set forth in the above sections must be found to exist before the commissioners may act, and such facts will not be presumed to exist.

2. Sections 2303 to 2306, General Code, do not change the rule that officers intrusted with public funds are liable as insurers for the loss of such funds except where caused by act of God or the public enemy, but merely give to the county commissioners the power to relieve from such liability in certain specific cases where the treasurer can show that he was without fault or negligence.

3. Evidence that public money was stolen from the office of the county treasurer during the daytime does not constitute the crime of 'robbery or burglary' within the meaning of Section 2303, General Code, so as to give the county commissioners jurisdiction to discharge the county treasurer from liability for loss of such funds. The terms 'robbery' or 'burglary' as used in such section were intended to have their common-law meaning."

In the opinion by Judge Matthews, in which Judges Ross and Hamilton concurred, it was said as follows at pages 253 to 256, inclusive, and at page 261:

“There is abundant evidence in the record that the treasurer was without personal fault or negligence. \* \* \*

It is a fair inference that someone reached through the window with some sort of an instrument and pulled the money within reach of his hands. There is also evidence that it could have been knocked to the floor by something inserted from an adjoining cage. The former is probably the stronger inference.

On this state of the record we must assume that this money was lost as the result of larceny or theft, as found by the county commissioners.

The jurisdiction of the county commissioners was dependent upon the existence of one of the causes of loss — fire, robbery, burglary, or inability of a bank — recited in the statute. Before they could inquire into the question of the treasurer’s fault or negligence, one of these jurisdictional facts must exist. \* \* \*

In this case, however, we are not required to rely on this rule because the record affirmatively shows that the jurisdictional fact did not exist. The Legislature did not confer jurisdiction upon the county commissioners to release the county treasurer for loss occasioned by theft. It is true that the Legislature could release under such circumstances, but it has not delegated such authority. The Legislature evidently intended to reserve to itself the power in such cases, to be determined by it in accordance with its view of the facts of the specific case. \* \* \*

The finding of the Common Pleas Court that the treasurer was without fault or negligence, was, therefore, beyond its jurisdiction, and is therefore void. \* \* \* ”

I concur in the reasoning and conclusions of Opinion No. 1214, supra, and am of course obligated to follow the decision of the Court of Appeals in the Bolsinger case above quoted. In the situation presented in your request, the treasurer made payment in full of all monies found to be due. Obviously, if the county commissioners were without jurisdiction to release and discharge in the first instance, they cannot now return the monies paid in after a finding by the Bureau of Inspection and Supervision of Public Offices.

I am accordingly of the opinion, both upon principle and upon the authorities cited, that:

Under the provisions of Sections 2303 to 2306, General Code, read

in the light of Sections 2633 and 2639, General Code, where county funds have come into the hands and possession of a county treasurer, and such funds are lost or disappear during a flood, the county commissioners are without jurisdiction to release and discharge such treasurer and his sureties from liability for such funds, in the absence of a showing that such loss resulted from fire, robbery, burglary, or inability of a bank to refund public money lawfully in its possession belonging to the public funds of the county. It necessarily follows that where such shortage has been paid in, the county commissioners are without authority to reimburse the treasurer in the amount of such shortage.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.