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A CLERK OF COURT MAY NOT DEPOSIT MONEY HELD OR CONTROLLED BY HIM IN HIS OFFICIAL CAPACITY IN A BUILDING AND LOAN ASSOCIATION—§1101.01, R.C., 131.11, R.C.

SYLLABUS:

A clerk of courts may not deposit money held or controlled by him in his official capacity in a building and loan association.

Columbus, Ohio, April 7, 1961

Hon. Earl W. Allison, Prosecuting Attorney
Franklin County, Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“This office has been presented a question by the Franklin County Clerk of Courts which we consider a matter of state wide concern. Accordingly, we are requesting your opinion on the following matter.

“During the course of the administration of the office of Clerk of Courts sizable sums of money are deposited by various litigants. Under the statutes of Ohio, may the Clerk deposit such monies in Building and Loan Associations or must said monies be deposited in a normally constituted bank.”

Under the statutes of Ohio, there is no specific authority either permitting or forbidding the clerk of a court from depositing funds in his custody in banks, trust companies, or building and loan associations. However, in *Busher, Clerk of Courts v. Fulton, Supt. of Banks*, 128 Ohio St., 485 (1934), a clerk of court had deposited certain funds in a trust company and upon the liquidation of the company he claimed a preference as to such funds. The court in paragraph five of the syllabus held as follows:

“5. In the absence of authority forbidding it, and pursuant to prevailing custom in harmony with modern business practice, the clerk of a court in his official capacity possesses a right to public or other trust funds in his custody, in a reputable bank. Such a deposit is not wrongful or illegal within the proper meaning of those terms. Where there is no mutual intention or agreement, express or implied, between the clerk and the bank, that such funds shall be segregated and kept separate and apart, and the bank takes such funds and uses them in its general business, a general deposit results, and upon the insolvency of the bank, the clerk cannot successfully claim a preference for such deposit.”

In the year following the *Busher* decision, *supra*, the legislature enacted a statute (116 Ohio Laws 409) concerning the deposit of funds in banks and trust companies by certain public officials. That statute as amended is now Section 131.11, Revised Code, reading in part as follows:

“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.”

(Emphasis added)

While Section 131.11, *supra*, does not specifically grant authority to a clerk of court to deposit funds, the implication, nevertheless, is that the clerk has the authority, if he complies with the conditions in that section, to deposit funds in *banks* and *trust companies*.

It is significant that both the *Busher* decision, *supra*, and the statute, Section 131.11, *supra*, refer to banks and trust companies and not to building and loan associations. A "bank" is defined in Section 1101.01, Revised Code, as follows:

"(A) '*Bank*' includes, unless the context otherwise requires, any person, firm, association, or corporation soliciting, receiving, or accepting money or its equivalent on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or any other writing, and also includes commercial banks, savings banks, *trust companies*, special plan banks, and unincorporated banks. *Such chapters do not apply* to money left with an agent pending investment, in real estate or securities, for or on account of his principal; to *building and loan associations* or title guarantee and trust companies incorporated under the laws of this state; or to money or its equivalent received for transmittal by an incorporated railroad, steamship, express, or telegraph company.

"All banks, including the trust department of any bank, organized and existing under laws of the United States, unless such laws prohibit inspection, examination, and regulation of such banks, or trust departments, shall be subject to inspection, examination, and regulation as provided by law." (Emphasis added)

In the absence of some clear authority permitting a clerk of court to deposit funds in a building and loan association, I am constrained to find that such a deposit is not authorized.

Accordingly, it is my opinion and you are advised that a clerk of court may not deposit money held or controlled by him in his official capacity in a building and loan association.

Respectfully,
MARK McELROY
Attorney General