the traffic rules and regulations as therein provided, and your county commissioners should appropriate from the road fund of the county a sufficient amount of money to equip and compensate such deputy. You state that your sheriff has appointed two deputies whose salaries consume the total amount appropriated for such purpose by the county commissioners, and that he is desirous to appoint a special deputy under Section 7251-1, General Code. This section carries no power to appoint. It does command the sheriff to detail one of his deputies for the duty prescribed in said section. The question of appointment of deputies by the sheriff is a small matter inasmuch as the sheriff can appoint as many deputies as the Judge of the Court of Common Pleas of his county sees fit to approve.

The duty to make the detail as provided by Section 7251-1, General Code, is in mandatory language, but you state that your county has no road fund from which to equip and pay such deputy. I find no other fund from which such deputy sheriff could be paid for his services as traffic officer. However mandatory the language of a statute may be, it cannot require a vain thing. A magnanimous citizen may serve the state without compensation. That is a matter of his own volition, but the courts will not require such citizen to perform a public service without reasonable compensation without his consent.

The sheriff cannot be required to detail one of his deputies for traffic duty without pay. Inasmuch as such deputy must be paid from the county road fund and there is no such fund and no other fund out of which he can be legally paid, the duty of the sheriff to make the detail provided in Section 7251-1, General Code, does not become mandatory unless and until the county commissioners create a county road fund out of which such deputy can be compensated as provided by statute.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

137.

CLEVELAND METROPOLITAN BOARD OF PARK COMMISSIONERS LIABILITY, MISAPPLICATION OF FUNDS OF BOARD—ILLEGAL DELIVERY OF FUNDS TO COUNTY AUDITOR.

SYLLABUS:

The Members of the Cleveland Metropolitan Board of Park Commissioners are civilly liable for the loss of funds resulting from the mis-

application of the moneys of the said board illegally delivered into the custody of the Auditor of Cuyahoga County.

COLUMBUS, OHIO, February 17, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: I have your inquiry of recent date, as follows:

> "Upon examination of the affairs of the Metropolitan Park District in Cuyahoga County, our examiners disclosed in their report a shortage of $896.60 in the Park Board funds.
>
> The explanation of this shortage is indicated in the enclosed copy of that part of the examiners' report relating to this deficit.
>
> Upon consideration of the complicated manner in which the deficit was created, it was determined that the Board of Park Commissioners then in office were finanancially responsible for the shortage, and findings were made against them.
>
> It is now contended by Mr. Frederick W. Green, attorney for the Board of Park Commissioners that these findings are erroneous and should not be made. Mr. Green's contentions in the matter are indicated in the enclosed copy of his letter addressed to this department.
>
> QUESTION: Were these findings properly made against the members of the board of commissioners of the Metropolitan Park District, and if not, against whom should they be made?"

The question you present for my opinion might be paraphrased as follows:

> Did the Cleveland Metropolitan Park Board, pursuant to the provisions of Section 2976-10b, General Code, have the authority to deliver funds under its control to the county auditor for transfer to the county treasurer, and if not, is the board responsible for losses resulting from this extra legal procedure?

The authority for the handling of funds under the control of the Board of Park Commissioners is found in Section 2976-10b, General Code, which reads as follows:

> "All funds under the control of said board shall be kept in depositories selected in the manner provided for the deposit

of county funds, in so far as such proceedings are applicable, and such deposits shall be secured as provided in case of county funds. The treasurer of the county wherein said district is located shall be the custodian of the funds of the board and shall be an ex-officio officer of said board. He shall pay the said funds out upon the warrant of the auditor of the county wherein said district is located. The auditor of the county in which said district is located shall be an ex-officio officer of the board and no contract of said board involving the expenditure of money, shall become effective until the auditor certifies that there are funds of said board in the county treasury and otherwise unappropriated, sufficient to provide therefor. The auditor shall issue warrants to the treasurer to disburse the funds of the board upon order of the board, evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting may prescribe. The account of said board shall also be kept in the manner to be prescribed by said bureau."

Beyond question, the first sentence in the foregoing statute refers to the funds of the Commission after they have properly come into the custody of the county treasurer. The provision of Section 2976-10b, General Code, pertinent to your inquiry, is as follows:

> "The treasurer of the county wherein said district is located *shall be* the custodian of the funds of the board and shall be an ex-officio officer of said board. * * *"

Does the foregoing statutory provision mean that it is mandatory upon the Park Board to transfer its funds directly into the custody of the county treasurer or does Section 2976-10b or any other statutory provision permit the county auditor to accept the custody of public funds even though temporarily and apparently with good intentions?

As a starting proposition, it is well settled that the powers of a county auditor are definitely circumscribed. In the case of *Zangerle, Co. Aud.* vs. *City of Cleveland, et al.,* 130 O.S., 84, the court said in the first branch of the syllabus:

> "The county auditor and county treasurer of a county are creatures of statute. They can exercise only such powers as are expressly delegated by statute, and only such implied powers as are necessary to carry into effect the powers expressly delegated."

Accordingly, the power, if any exists, for a county auditor to assume the custody of public funds, must be found in express or implied statutory authority. The duty of a county auditor in connection with the payment of all public funds into the county treasury, is found in Section 2645, General Code, which provides:

> "Except payments of taxes charged on the tax duplicate and made before the return by the treasurer of the delinquent list for unpaid taxes and except advance payments of taxes, all payments of money into the county treasury shall be on the draft of the county auditor in favor of the county treasurer. The auditor shall preserve a duplicate copy of each such draft and the auditor and treasurer shall each keep an accurate record of the number, date and amount thereof and of the fund in favor of which it is drawn, but a payment or transfer of money from the state treasury to the county treasury shall be made on the warrant of the auditor of state, who shall transmit a triplicate copy thereof to the county auditor, to be by him preserved and a record by him kept of the number, date, fund and amount of such warrant."

In the present case the Auditor of Cuyahoga County, through his duly appointed agents, complied with the provisions of Section 2645, General Code in that he issued drafts (pay-in-orders), but he also accepted physical custody of the funds of the Metropolitan Park Board without warrant of statutory authority.

Another statute defining the duties of the county auditor relative to the collection of public funds, Section 2567, General Code, provides as follows:

> "Except moneys collected on the tax duplicate, the auditor shall certify all moneys into the county treasury, specifying by whom to be paid and what fund to be credited, charge the treasurer therewith and preserve a duplicate of the certificate in his office. Costs collected in penitentiary cases which have been paid by the state or to be so paid, shall be certified into the treasury as belonging to the state."

Here again, there is no conceivable inference of authority for the county auditor to act as a conduit of public funds.

In the case of *State ex rel. Commissioners of Marion County* vs. *Allen Co. Aud.*, 86 O. S., 245, the commissioners brought an action in mandamus to compel the county auditor to certify $500.00 into the

county treasury to the credit of the pike fund. The court said at page 251:

> "It is the duty of this board and the authority of this board to determine and direct into which fund this money shall be placed, and, having so determined that question, it becomes the duty of the auditor under Section 2567, General Code, to certify this money into the fund designated by the county commissioners to the credit of that fund, and charge the treasurer accordingly. *He has no* power or authority whatever to deal with the *money of the county* except as directed by law, or those having legal authority and discretion to make such orders and directions." (Italics ours.)

State of Ohio vs. *Joseph H. Newton,* 26 O. S., 265, seems to be the first Ohio case clearly defining the functions and duties of a county auditor. This case held that a county auditor is not an officer charged with the possession of money. In spelling out the functions of a county auditor the court said:

> "* * * The county auditor is placed at the door of the county treasury and stands as a watchman or guardian upon it, without whose knowledge and consent, except in a few designated instances in which the auditor of state acts, no public money can legally either get into or out of the county treasury; * * *"

State vs. *Newton, supra,* is followed in *State* vs. *Carter,* 11 O. Dec., 546, decided in 1901, which case held that the clerk of a village, by virtue of his office, is also the auditor of the village, and as such has no right to collect village assessments or *handle* the money of the village. At page 350 of this opinion the court said:

> "* * * It is decided in *State* vs. *Newton,* 26 O. S., 265, that a county auditor is not an officer charged with the possession and custody of money belonging to the state, upon the principle that 'the county auditor is placed at the door of the county treasury, and stands as a watchman or guard upon it without whose knowledge and consent, except in a few designated instances, in which the auditor of state acts, no public money can legally either get into or out of the county treasury;' and if this principle is sound in its application to county auditors, it is just as sound when applied to village auditors. In other words, it is against pub-

lic policy to allow the same man to keep the public accounts and have the public money in his possession, whether he be the official of a small or large public community."

I also direct your attention to Section 2568, General Code, as indicating that a county auditor has no duties whatever as regards the receipt or custody of public funds. The pertinent provision of this section reads as follows:

"The county auditor shall keep an accurate account current of the treasurer of the county, showing all moneys paid into the treasury, the amount thereof, the time when, by whom, from what source and to what fund paid, and all moneys paid out, showing the amount thereof, the time when, to whom, for what purpose and from what fund paid."

It would serve no good purpose to attempt a review of the statutes outlining the duties of the county treasurer in connection with the receipt and custody of public funds. Suffice it to quote from the case of *State* vs. *Myers,* 56 O. S., 347, in which the court, in defining the duties of a county treasurer said, at page 347:

" * * * by our statutes, county treasurers are charged with the collection of the public moneys belonging to the county, and with the collection of all taxes on the general duplicate placed in their hands by the county auditors, and of all taxes and assessments on any special duplicate furnished by proper authority; and they are clothed with ample remedies for enforcing the collection of the same. They are charged with the custody and safekeeping of all public moneys received by them. * * *"

In view of the foregoing authorities, I am of the opinion that the Auditor of Cuyahoga County, through the mechanical arm of his duly appointed clerks, had absolutely no express or implied statutory authority to receive and temporarily keep in custody the funds of the Metropolitan Park Board, nor do the decisions of the courts in Ohio lend any support to the practice of the auditor under consideration. Unquestionably, this attempted short cut of the detail of depositing the funds of the Park Board with the county treasurer was an extra legal practice wholly unwarranted by authority of law.

Referring again to the provisions of Section 2976-10b, General Code, it seems perfectly clear that the language: "The treasurer of the county *shall be,*" is mandatory and places upon the board the absolute obligation

to deliver its funds only into the custody of the county treasurer. This mandatory duty is so perfectly clear that this provision of Section 2976-10b does not admit of any other construction. The authority for such an interpretation is found in *Swetland* vs. *Miles,* 101 O. S., 501, which held that where there is no real room for doubt as to the meaning of a statute there is no right to construe such statute.

Coming now to the main question, as to whether or not the Metropolitan Park Board is civilly liable for the loss incurred by its illegal delivery of funds into the custody of the county auditor I would like to cite the case of *Seward* vs. *National Surety Company,* 120 O. S., 47, as controlling the present question of liability. In this case a postmaster was held liable for the loss of funds in his custody due to the dishonesty of a minor post office employe. In fixing the liability, the court held that when the postmaster was called upon to account for money coming into his hands in his official capacity, it was not a sufficient answer to say that the funds were stolen or embezzled by others without fault or negligence on the part of the postmaster. At page 49 of this opinion the court said:

> "It has been the general policy, not only with government employes and appointees, but with state officers, county officers, township officers, and all other public officials, to hold the public official accountable for the moneys that have come into his hands as such official, and his obligation has been held to be as broad as is the obligation of a common carrier of freight received for shipment; that is to say, that when he comes to account for the money received, it must be accounted for and paid over unless payment by the official is prevented by an act of God or a public enemy; and burglary and larceny and the destruction by fire or any other such reason, have not been accepted by the courts as a defense against the claim for the lost money. The decisions to this effect are so uniform and so numerous that no useful purpose would be served by restating the law that has been so many times stated so clearly."

In *Seward* vs. *National Surety Company, supra,* there was no negligence or dereliction of duty on the part of the officer charged with the responsibility for the funds in question. But under the facts of the present inquiry, it seems that a much stronger case of liability is made out against the members of the Park Board. It has been shown that the Commission acted in direct contradiction to the clearly stated mandate of the statute in delivering funds into the temporary custody of the county auditor, and the county auditor concurred actively in this

extra legal practice by accepting the funds of the Park Board over a period of time. I might also point out that the county auditor is an ex-officio member of the Board of Park Commissioners, which fact further emphasizes the liability of the Board for the peculated funds. Here then is a case not only of active negligence but obviously illegal procedure; and since the Supreme Court of Ohio decided as it did in *Seward* vs. National Surety Company, supra, a *fortiori,* the liability for the misplaced funds is more definitely established in the present case.

Before assuming the duties of office the Commissioners of the Park Board took an oath to faithfully perform the duties of office, and posted a bond for the faithful performance of the duties of the office. Section 2976-5, General Code. One of the duties of this office was the delivery of funds into the custody of the county treasurer. This duty was knowingly and flagrantly violated, and where a pecuniary loss results from such violation the Code has provided a remedy to be found in Section 286, General Code, which reads in part, as follows:

> "* * * if the report sets forth that any public money has been illegally expended, or that any public money collected has not been found accounted for, or that any public money due has not been collected, or that any public property has been converted, or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political subdivision or taxing district to which such public money is due or such public money belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. * * *"

Pursuant to the reasoning and authorities herein outlined, I am of the opinion that the Members of the Cleveland Metropolitan Board of Park Commissioners are liable for the loss of funds resulting from the misapplication of the funds of said Board illegally delivered into the custody of the Auditor of Cuyahoga County.

Respectfully,

HERBERT S. DUFFY,

Attorney General.