"In the State of Ohio the statute now provides that adjoining landowners must build and maintain the partition fence in equal shares, making no provision as to whether the lands be enclosed or not, or used in any particular manner. * * * If the owner does not build the portion of the fence required by him, the township trustees may have it built, and certify its cost to the tax assessing official and it is put on the tax duplicate and collected as ordinary taxes. This statute has been assailed in the Supreme Court, as to its constitutionality, three times. First in the case of *Alma Coal Co.* vs. *Cozard* (79 O. S. 34). Here the law was not held to be generally unconstitutional, but only in its application to the facts in this case, and as the coal company's land was uninclosed, and it would reap no benefit from the fence, and there was no such use of the coal company's property as to indicate probable injury to its neighbors or the community in absence of a fence, its land could not be assessed for construction of one-half of the fence on its boundary line. The next case was that of *McDorman* vs. *Ballard* (94 O. S. 183). Here it was held that as the facts did not show that the lands were uninclosed, the law was not unconstitutional and a valid assessment on the land could be made. Unless such fence will be of no benefit to their lands adjoining land owners must build partition fences. (*Jennings* vs. *Wilson,* 32 O. C. A. 453, 1922); 15 O. App. 395."

In the case of *David Jennings* vs. *Fred W. Wilson et al.,* reported in 32 O. C. A., page 453, the court held that land owners must build partition fences as required by Sections 5908, et seq., unless such fences will be of no benefit to their land. In this case the court reviews extensively the authorities as to the constitutionality of Sections 5908, et seq.

From the decisions cited above, it appears that the courts have not declared Sections 5913, et seq., unconstitutional. You are therefore advised that the trustees are to follow the procedure set forth in Sections 5908, et seq., of the General Code, in the building of partition fences and collection of costs incurred thereby.

Respectfully,
GILBERT BETTMAN,
Attorney General.

278.

APPROVAL, NOTES OF SPRINGFIELD CITY SCHOOL DISTRICT, CLARK COUNTY—$250,000.00.

COLUMBUS, OHIO, April 8, 1929.

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

279.

INSURANCE—BURGLARY—NO AUTHORITY FOR COUNTY TO PAY FOR SUCH FOR PROTECTION OF FUNDS IN CUSTODY OF INSOLVENCY COURT JUDGE.

SYLLABUS:

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 or burglary is unauthorized and unlawful.

COLUMBUS, OHIO, April 9, 1929.

HON. RAY T. MILLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your communication with which is enclosed a copy of a letter to you from the chief clerk of the Court of Insolvency for Cuyahoga County. My opinion is requested with reference to the matters contained in this letter, which reads as follows:

> "We have in our possession daily, sums of money ranging from three to six or seven hundred dollars, which sums are sent to the bank for deposit by a deputy clerk.
>
> I believe it would be advisable to have robbery insurance to protect the court against loss of any of these funds by reason of a holdup of the clerk who makes the deposit, while on the way to the bank.
>
> Will you kindly advise whether or not robbery insurance can be provided and the premium paid by the county? I will appreciate it very much if you will be kind enough to get an opinion of the Attorney General in this matter."

By the terms of Sections 1620, et seq., General Code, there is established in Cuyahoga County a Court of Insolvency consisting of one judge. The said judge is required to give a like bond, be qualified, and receive the same compensation as the probate judge of said county. He is to receive no fees or perquisites from the county except his salary. The bond of said judge shall be in the sum of $5,000, approved by the commissioners of the county and deposited with the county treasurer.

The said judge of the Court of Insolvency shall have the care and custody of the files, books and records of the court and may perform all duties as clerk of his court. He may appoint a deputy clerk or clerks each of whom must take an oath of office before entering upon the duties of his appointment and may be required by the judge to give a bond to secure the faithful performance of his duties as such deputy clerk. Section 1626, General Code. The requirement that the judge of the Court of Insolvency give a bond is embodied in Section 1622, General Code, which reads in part as follows:

> "The judge of the Court of Insolvency shall give a like bond, be qualified, and receive the same compensation as the probate judge of such county. * * * "

Section 1581, General Code, provides, with reference to the bond to be given by a probate judge, as follows:

> "Before entering upon the discharge of his duties, the probate judge shall give a bond to the state in a sum not less than five thousand dollars, with sufficient surety, approved by the board of county commissioners or by the auditor and recorder, in the absence from the county of two of the commissioners and conditioned that he will faithfully pay over all moneys received by him in his official capacity, enter and record the orders, judgments and proceedings of the court, and faithfully and impartially perform all the duties of his office. * * * "

Sections 2977, 2983 and 1635, General Code, provide as follows:

"Sec. 2977. "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Sec. 2983. "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; * * * "

Sec. 1635. "All laws now in force or hereafter enacted, regulating the fees of the Probate Court and the manner of making out, filing and recording itemized accounts of fees received by the Probate Court shall be applicable to the Court of Insolvency."

Moneys coming into the hands of the Court of Insolvency are of several classes: Fees and costs paid in court; moneys deposited as security for costs; and moneys paid into court in connection with the proceedings for the administration of assignment, in trust for the benefit of creditors, for the appropriation of land for public uses, and for the assessment of damages occasioned by a public improvement.

Not all of these moneys belong to the county, or are ever paid into the county treasury, but all are covered by the terms of the judge's bond and all come within the definition of "public money" as the term is defined in Section 286, General Code.

The moneys representing the proceeds of fees and costs collected on account of proceedings had in the Court of Insolvency are county moneys and should be deposited in the county treasury, and thereafter disbursed by the county commissioners according to law. It is from these and similar moneys that appropriations are made for the payment of the judges' and clerks' salaries, the purchase of supplies for county offices, and the furnishings for county offices, including those of the Court of Insolvency. The judge of the Court of Insolvency has nothing to do with the disbursement of this money or any dealings with reference thereto, other than to collect it and pay it into the county treasury according to law. While the statute, Section 2983, supra, does not specifically refer to the Court of Insolvency of Cuyahoga County in providing that fees should be paid into the county treasury monthly, I am of the opinion that by the terms of Section 1635, supra, the judge is not required to pay these fees into the county treasury oftener than once a month. If Section 1635, supra, does not apply, he would be required under the general statute, Section 289, General Code, to pay these fees into the county treasury every twenty-four hours. Even if Section 1635 does apply, there is nothing in the statute to prevent him from paying such moneys into the treasury oftener than once a month and if he sees fit to hold them until the end of each calendar month he does so at his own risk.

Other moneys than those belonging to the county must be paid to litigants and other persons to whom they belong, and of course, in the meantime, the judge must carry these moneys at his own risk. The county treasurer, as such, is not interested in the safekeeping of these moneys, nor is the public generally, except as it is interested in the faithful performance by public officials of the duties of their offices.

The proper and prompt payment of any money, which the judge of the Court of Insolvency may come into possession of in his official capacity, is secured by the giving of a bond to "faithfully pay over all moneys received by him in his official

capacity." Having given this bond, he and his bondsmen are liable if he fails to pay over all such moneys according to law, no matter what may be the reason for his failing to do so. It has been held in a number of cases that this liability exists even though the money is lost for any reason.

In *State vs. Ferris, et al.,* 24 O. N. P. (N. S.) 171, where a shortage existed in the accounts of a probate judge in Cincinnati, the shortage having been brought about by reason of the failure of the Commercial Bank of Cincinnati which at the time of the failure had on deposit a large sum of money deposited by the Probate Judge of Hamilton County, it was held that the judge was responsible for the payment of this money according to law, even though it had been lost by reason of the failure of a bank over which the judge had no control. In the course of the opinion, the court said:

> "It has been repeatedly held in Ohio and elsewhere that a public officer cannot escape a statutory liability through theft, the failure of a bank, or other circumstances beyond his control. When through his official bond he contracts 'to faithfully pay over all moneys received in his official capacity,' he makes a binding contract permitting of no exceptions not strictly provided for in the bond itself. The bond being plain and unambiguous in its terms should be treated as any other written contract."

In an early case, *State* vs. *Harper,* 6 O. S. 608, it is held:

> "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 cannot 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."

In a recent case, *Seward* vs. *National Surety Company,* decided by the Supreme Court on February 27, 1929, 7 O. L. Abs. 173, the court said:

> "It is the duty of a postmaster to keep safely all moneys that may come into his hands by virtue of his official position, and to account for and disburse the same as required by law and by the rules of the United States Post-Office Department, promulgated pursuant to authority conferred by acts of Congress.
>
> When called upon to account for moneys that have come into his hands in his official capacity, it is not a sufficient answer to say that the moneys, have been stolen or embezzled by others, without fault or negligence on the part of the postmaster.
>
> The official bond given by a postmaster, with surety, obligating him to faithfully perform all the duties of the office to which he has been appointed, embrace the duty to account for and disburse the moneys that have come into his hands according to law."

The bond which the judge of the Court of Insolvency must give in compliance with Section 1622, supra, secures the county to the extent of $5,000, and whether the judge is robbed or not, he must account to the county for all the funds which belong to the county, and the bondsmen can be held to the extent of the amount of the bond.

Although there is no direct authority for county commissioners to effect insurance against any kind of loss, yet in my opinion their right to insure against possible losses in the same manner as prudent business men would effect insurance would

be upheld by the courts; and for that reason I believe they might lawfully insure against the possible failure of the judge of the Court of Insolvency to account for county funds not covered by his bond.

To insure against his failure to account for other moneys than those belonging to the county or to insure against a possible loss to the judge himself by reason of bank failures, robberies or burglaries would be a diversion of public funds to a private use and would therefore be an unlawful expenditure of public funds.

If the judge should give a surety bond the premium on the bond should be paid by the county. Section 9573-1, General Code. The bond, however, which the judge might require his clerk to give is not given to secure the county for the faithful performance of the duties of the clerk but to secure the judge himself, who is primarily responsible to the county, and the premium on such a bond could not lawfully be paid by the county.

If the county were to insure the county funds in the custody of the court after paying the premium on his bond for that purpose, it would be paying twice for the same thing.

I am therefore of the opinion, that it would be unlawful for the county commissioners to pay from county funds the premium on an insurance policy to insure a judge of the Court of Insolvency or his clerk against possible losses by reason of robbery or burglary.

Respectfully,
GILBERT BETTMAN,
Attorney General.

280.

VILLAGE SCHOOL DISTRICT—NOT CONTAINING WITHIN BOUNDARIES A VILLAGE OF 3,000 PEOPLE—COMPLIANCE WITH SECTION 4688-1, GENERAL CODE, NECESSARY TO BECOME EXEMPTED VILLAGE SCHOOL DISTRICT.

SYLLABUS:

A village school district, which does not contain within its boundaries a village with a population of 3,000 *or more, according to the last census, must comply with the terms of Section* 4688-1, *General Code, in order to become an exempted village school district.*

COLUMBUS, OHIO, April 9, 1929.

HON. MICHAEL B. UNDERWOOD, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "The Ada Rural School District situated in Liberty Township, Hardin County, Ohio, contains a village, namely, the village of Ada, with a tax duplicate of over $500,000; therefore by virtue of Section 4681 is a village school district, and the name Ada Rural School District is a misnomer.
>
> Sections 4688 and 4688-1 set forth methods by which a village school district having a population of over 3,000 may be exempted from the supervision of the county board of education.
>
> Section 4688, General Code, provides that when the population of a village school district is 3,000 or more as shown by the last census it may by majority