

527.

COUNTY COMMISSIONERS — UNAUTHORIZED TO PURCHASE
BURGLARY OR HOLD UP INSURANCE OR INSURANCE AGAINST
FORGERY FOR COUNTY OFFICERS.

SYLLABUS:

County commissioners have no authority to purchase and pay for burglary or hold-up insurance for the county treasurer or for any other county officer, nor have they authority to pay for insurance against forgery for the county treasurer.

COLUMBUS, OHIO, May 24, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your communication requesting my opinion in answer to two questions as follows:

“Question 1. May the county commissioners legally pay for burglary or hold up insurance for the county treasurer or for any other county officer?”

Question 2. May the county commissioners legally pay for insurance against forgery for the county treasurer?”

The Constitution of Ohio in Article X, Section 5, provides that:

“No money shall be drawn from any county or township treasury, except by authority of law.”

It follows from this constitutional provision that unless there be some authority of law for the payment from county funds for burglary insurance or hold up insurance or insurance against forgery for the county treasurer such expenditures cannot be made.

The law is too well settled to admit of discussion that county commissioners are vested with only such powers as have been granted to them. As administrative boards created by statute their powers are necessarily limited to such powers as are clearly and expressly granted by the statute, and such implied powers as are necessary to carry into effect the powers expressly granted. In considering this principle of law the Supreme Court of Ohio in the case of *State ex rel Locher, Prosecuting Attorney vs. Menning*, 95 O. S. 97, says:

“The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the court is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.”

The liability of the county treasurer rests on his contract with the county as provided by the statutes and his bond. This liability being absolute the county itself incurs no risk on account of public funds collected by or passing into the hands of the treasurer.

The law with reference to the duties and liabilities of county treasurers is set out in Sections 2632, et seq., General Code. The treasurer is therein charged with the duty of collecting, handling and disbursing the receipts from taxes collected within his county and other public moneys coming into his hands. The question of the relation that a public officer bears to moneys coming into his custody in his official capacity, whether his liability for their loss is to be measured by the law of bailments or whether he is an insurer has been before the courts in a number of cases.

In the case of *Ikirt vs. Wells*, 13 O. C. C. (N. S.) 213, it was held that a sheriff who had received moneys arising from the sale of lands in a partition suit and had in good faith deposited them in a certain bank which bank afterwards failed without any fault on his part was not liable to amercement for the money. This case was affirmed by the Supreme Court without opinion in 82 O. S. 401. In the course of the opinion the Circuit Court said:

"Of course it cannot be disputed that a public officer may not be made liable by statute or by the provisions of his bond to pay over moneys which come into his possession by virtue of his office, even though they may be lost without his fault. But it hardly seems consonant with sound principles of equity and justice to hold over a public officer a rule so strict unless the *statute or the bond* of the officer require it." (Italics the writer's.)

As to public moneys belonging to the county the liability of the treasurer is fixed by statute and the bond which the county commissioners are required to exact from him before he enters upon the performance of his duties as county treasurer. Section 2633, General Code, requires a county treasurer to give bond conditioned that he shall pay over according to law the public moneys which shall come into his hands. By the provisions of Section 2683, General Code, the county treasurer is required to make settlement with the county auditor for taxes collected by him on or before the 15th day of February and the 10th day of August of each year. Section 2688, General Code, requires that after each such semi-annual settlement with the county auditor he shall pay into the state treasury all moneys belonging to the state. Section 2689 provides that immediately after each semi-annual settlement with the county auditor he shall pay to all boards and local subdivisions all moneys in the county treasury belonging to them. Section 2694 provides certain penalties for failure to comply with the provisions of law with reference to the paying over of moneys when due, and Section 2695 provides that if the county treasurer fails to make settlements or pay over moneys as prescribed by law suit shall be instituted for the recovery of such moneys.

It is provided by Section 2639, General Code, as follows:

"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, and 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."

To insure the faithful performance of his duty he is required to give, and the county commissioners are required to exact, a bond guaranteeing and securing the faithful performance of his duties. (Section 2633, General Code,) Provision is made whereby if at any time in the opinion of a majority of the county commissioners more money has passed into, or is about to pass into, the hands of the treasurer than is or would be covered by his bond they may demand and

receive an additional bond to cover the liability for such additional moneys. (Section 2635, General Code.)

It will be observed from the provisions of the statutes to which I have referred that when the county treasurer accepts the office of treasurer and executes the bond which he is required to furnish before assuming the duties of the office, he assumes the duty of receiving and accounting for all moneys belonging to the county, and if he permits or suffers the loss of any of these funds by reason of burglary or forgery he is nevertheless responsible to the county to account for the funds and make up the loss.

In the case of *State of Ohio vs. Harper, et al.*, 6 O. S. 608, it is held, as set out in the syllabus:

"The felonious taking and carrying away of 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."

This case was decided in 1856. The statutes with reference to the contract between the treasurer and the 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 in the Loeser case 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."

Inasmuch as the county itself incurs no risk if the county commissioners as their duty requires, have received from the treasurer a proper and sufficient bond to cover the liability of such treasurer, it would clearly follow that unless they were specifically authorized so to do, which they are not, they could not expend county funds for the protection of the treasurer against possible loss to him.

It is the duty of the county commissioners to protect the county by securing this bond from the treasurer, but the treasurer himself, if he feels the necessity therefor, may take such means as he thinks proper to protect himself against the dangers incident to possible forgery or burglary.

A former opinion of this department which may be found in Opinions of Attorney General for 1923, page 489, holds that county commissioners cannot legally pay for burglary insurance for the county clerk. This holding will apply as well to all county officers as to the county clerk and it is therefore my opinion that there is no authority in law for the county commissioners to pay for burglary or hold up insurance for the county treasurer or for any other county officer and that the county commissioners cannot legally pay for insurance against forgery for the county treasurer.

Respectfully,
EDWARD C. TURNER,
Attorney General.