Torts—Banks and Banking—State—Cities and Towns—Bonds—Depositions—Securities.

In case of loss of securities furnished by a bank to secure public funds the only remedy open to the bank is to sue the treasurer personally and also in a proper case to recover on his official bond.

Jay G. Larson, Esq., June 12, 1925.
Superintendent of Banks,
Helena, Montana.

My dear Mr. Larson:

You have requested my opinion regarding the liability of the state, counties and cities in the event that securities furnished by a bank to secure public funds are lost by fire or other cause.

The transaction resulting from the placing of securities in the hands of the treasurer to secure public funds is, undoubtedly, under our statute, a pledge. (Section 8293, R. C. M. 1921; Goriez vs. Rock Creek Ditch Co., 216 Pac. 778.)

The care required of a pledgee in the preservation of the pledged property is stated in 31 Cyc. 827 as follows:

> "Since the pledge is a bailment for mutual benefit, it is the duty of the pledgee, in the absence of a special contract modifying his common-law liability, to exercise ordinary care in the preservation of the property; and he is liable to the pledgor in case of loss, destruction, or depreciation of the property by reason of his negligence."

In 6 C. J. 1152 it is said:

> "The bailor may sue the bailee in assumpsit where the subject matter has been sold by the bailee or otherwise converted into money or money's worth. Action in assumpsit may also be brought for breach of the bailee's express or implied contract to use due care in keeping the goods and to redeliver them at the termination of the period of bailment. Where a bailee for hire for a specific period is deprived of the use of the property for any portion of the time by a superior title, he may resort to the implied warranty of undisturbed possession for the term."

Unquestionably, therefore, if the pledgee has failed to use the proper care in the preservation and safekeeping of the pledged property, or is guilty of a conversion of the property, an action would lie against him.

Could the bank proceed against the state, county or city to recover damages?

In 5 Thompson on Negligence, section 5822, it is said:

> "Counties are not, in general, liable for injuries caused by the negligence of county officers, or of persons employed by county officers, in making or repairing county roads, bridges, or other public works, unless a right of action is given by statute.

> But the general reason of this rule is that counties are deemed to be political subdivisions of the state, for governmental purposes, and not corporations; and, hence, not suable in tort. The reason of the rule which, in many cases, charges a city, town or village with liability, and under the same conditions of fact, exonerates a county, is artificial, and is to be sought for in historical sources; it is not supported by legal reason or analogy. Under this rule, a county has been held not liable for an injury caused by the negligence of a county officer in making a careless blast, while engaged in building a bridge, in the absence of a statute creating such liability; nor for an injury from the obstruction of a highway, caused by the negligent conduct of its agents while collecting material for the repair of a bridge forming part of the highway."

This rule was recognized by our supreme court in Smith vs. Zimmer, 45 Mont. 282. This rule also applies to municipal corporations when acting in a governmental capacity.

In 8 Thompson on Negligence, secs. 5818-5839, p. 781, it is said:

> "Generally speaking, a municipal corporation is not responsible for the negligent or tortious acts of its officers and agents acting in the governmental capacity of the city. The remedy is against the persons guilty of the unlawful acts. Accordingly a city is not ordinarily liable for the torts of its police officers, health officers, firemen, pound keepers, highway officers, workhouse commissioners, sewerage commissioners, boards of education, and park commissioners. A city is not liable for the conduct of its officers in publishing and subsequently enforcing an ordinance which repeals a street railway franchise."

Hence, I do not believe the bank would have any recourse against the state, county or city whether the treasurer were negligent or not in caring for the property.

Could the bank retain the money on deposit with it for which the securities were furnished? We believe not. To do so would, in effect, hold the state, county or city, as the case might be, liable for the tort and, as above pointed out, this may not be done.

May the bank resort to the liability of the sureties on the official bond of the treasurer? The conditions of the bond of treasurers are those named in section 475, R. C. M. 1921,

Anyone injured by a breach of any condition of an official bond may bring action thereon.

> Section 489, R. C. M. 1921;
> American Bonding Co. vs. State Sav. Bank, 47 Mont. 332, 339.

It is my opinion, therefore, that the bank in case of loss of securities to secure public funds has no remedy against the state, county or city, but may, in case the treasurer has failed to use the proper care, recover

against him personally, and if he has failed to comply with the conditions of his official bond resulting in loss to the bank, recovery may be had on the official bond.

Very truly yours,

L. A. FOOT,

Attorney General.