Opinion No. 322

Public Officers—Funds—Stolen Funds, Liability for.

HELD: A public officer is at least a bailee of public funds charged with the highest degree of care and diligence and must take every precaution which "a very prudent and cautious man" would have taken before he can escape liability for loss of funds.

August 24, 1933.

Mr. Stafford's letter of August 9 to the Board of Examiners, concerning which you have asked our opinion, states: "This is to inform you that on August 3rd during the noon luncheon period someone took advantage of the absence of all employees and broke into the desk of our accountant, Mark Rowan, and secured and robbed us of an amount of cash to the extent of $252.00."

Mr. Stafford then asks the Board to inform him as to whom this loss should be charged.

" * * * All moneys received by the department of agriculture, labor and industry, in the administration of all laws and management of the institutions under his control, belonging to or for the use of the state, shall be deposited with the state treasurer on the 10th and 25th days of each month without deduction of any sort, on account of salaries, fees, costs, charges, or expenses, or otherwise, and shall be credited to the general fund of the State of Montana." Section 3645, R. C. M. 1921, as amended by Chapter 165, Laws of 1923.

Section 3557 requires the Commissioner of Agriculture to give a surety company bond in the sum of $5,000.00 conditioned upon the faithful performance of his duties. Section 475 declares that, "The principal and sureties upon any official bond are also in all cases liable for the neglect, default or misconduct in office of any deputy, clerk, or employee, appointed or employed by such principal."

The question then becomes, "Is Mr. Stafford, Mr. Rowan, or any appointee or employee of Mr. Stafford chargeable with neglect, default, or misconduct in office by leaving this amount of money in a desk drawer and leaving a means of entrance to the office unlocked during the noon hour?"

If this question is answered in the affirmative, there can be no doubt that the amount stolen may be recovered from Mr. Rowan, Mr. Stafford or his sureties under Section 474, supra. (County of Silver Bow v. Davies, et al., 40 Mont. 418, 427; Erickson v. Anderson, 77 Mont. 517, and cases cited therein. See also note in 1 A. L. R. 222.)

If this question is answered in the negative, the weight of authority is to the effect that Mr. Rowan, Mr. Stafford or his sureties may nevertheless be held responsible on his bond. "According to the more general rule, the liability of a public officer for public funds and property in his custody is that of an **insurer** rather than that of an ordinary bailee, and he is liable for loss resulting from theft, robbery, fire, or the failure of depositary." 46 C. J. 1039, Sec. 314. See also: Throop on Public Officers, No. 221 et seq.; Mecham on Public Officers, No. 297 et seq.; 22 R. C. L. pp. 468, 469; note 22 L. R. A. 449; note 7, L. R. A. (NS) 1084; note 36 L. R. A. (NS) 285; note 18 A. L. R. 982; note 59, A. L. R. 69.

In a leading case, the Supreme Court of the United States said:

"Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers, and the duty of a receiver, **virtute officii,** is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an **insurer** by express contract and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforseen by the contracting party, and not within his control, he will not be excused. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in even though the money may have been lost without fault on their part."

Boyden v. U. S. 13 Wall. (U. S.) 17, 21, 20 L. ed. 527.

This doctrine has been followed in the two latest cases on the point, Board of Education v. Whisman, 229 N. W. 522; State v. Huxtable, 12 S. W. (2d.) 1, as well as in the following cases: Chicago v. Southern Surety Co., 239 Ill.

A. 628; Leachman v. Prince William County, 124 Va. 616, 98 S. E. 656; U. S. v. Dashiell, 4 Wall. 182, 18 L. ed. 319; U. S. v. Prescott, 3 How. 578, 11 L. ed. 734; State v. Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Thompson v. Township, 16, 30 Ill. 99; Morbeck v. State, 28 Ind. 86; Pine Island Board of Education v. Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. SR 586; Redwood v. Tower, 28 Minn. 45, 8 N. W. 907; McLeod County v. Gilbert, 19 Minn. 214; Hennepin Co. v. Jones, 18 Minn. 199; New York v. Fox, 232 N. Y. 167; 133 N. E. 434; New York v. Fox, 189 App. Div. 440, 178 N. Y. S. 805 (Aff. 232 N. Y. 167, 133 N. E. 434); Johnstown v. Rodgers, 20 Misc. 262, 45 N. Y. S. 661, (Aff. 20 App. Div. 637, mem. 47 N. Y. S. 1132 mem.); State v. Ferris, 12 Oh. NPNS 171; Commonwealth v. Comly, 3 Pa. 372; Taylor v. Morton, 37 Iowa 550; Hancock v. Hazzard, 12 Cush. (Mass.) 112, 59 Am. D. 171; State v. Nevin, 19 Nev. 162, 7 P. 650, 3 Am. SR 873; U. S. v. Watts, 1 N. M. 553; Smythe v. S., 188 U. S. 156, 23 Sup. Ct. 279, 47 L. ed. 425; Union Dist. Tp. v. Smith, 39 Iowa 9; 18 Am. R. 39; Clay County v. Simonsen, 1 N. Dak. 403, 434, 46 N. W. 592.

However, in the cases which adhere to a contrary rule, that a public officer is not an insurer but a bailee and is not responsible for funds in his hands taken from him by irresistible force which he could not have foreseen or guarded against (Healdsburg v. Mulligan, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461; Cumberland County v. Pennell, 69 Me. 357, 31 Am. R. 284) he is charged with the highest degree of care and diligence, and must take every precaution which "a very prudent and cautious man" would have taken. (State v. Houston, 78 Ala. 576; U. S. v. Boyden, supra).

We are inclined to follow the second rule until our courts hold otherwise. In that case it is for the board as a whole to determine whether there has been such neglect.