Larceny—Embezzlement—Banks and Banking—Bonds.

The act of an officer of a bank in substituting other assets for his note without paying interest on the note is not larceny or embezzlement of such interest for which the bonding company is liable.

J. G. Larson, Esq.,
Superintendent of Banks,
Helena, Montana.

December 9, 1927.

My dear Mr. Larson:

You have submitted to me a copy of your claim filed with the American Surety Company of New York covering losses to the Farmers and Merchants State Bank of Saco by reason of larceny and embezzlement of its officer, William H. Frazier.

You have requested my opinion whether the items of this claim are such as to constitute larceny or embezzlement within the meaning of the terms of the embezzlement bond.

Items 3, 6, 7, 8, 9, 10 and 11 are items of interest due on a certain note, which interest was never paid and where the note has been removed from the assets of the bank. It is my opinion that these interest charges are obligations of the maker of the note and that these obligations still exist and that the maker of the note cannot be charged with the embezzlement or larceny of the interest.

An analogous question was presented to the supreme court of Nebraska in the case of Higby v. State, 104 N. W. 748, under somewhat similar though different facts. I believe the principle of law applied in that case would also apply to this question notwithstanding that the facts in the two cases are dissimilar. The court in that case, in commenting upon an instruction given to the jury by the lower court, said:

> "The instruction also tells the jury that, if the defendant 'secured credit in his individual capacity and for his own use' for any right in action of his employer, he would be guilty of embezzlement. It is clear that, unless by securing this credit for himself he deprived his employer of the right in action, by destroying or alienating his title to the subject of that right, and unless he did this with felonious intention of so depriving his employer, he could not be guilty of embezzlement. For these reasons this instruction was erroneous, and the verdict cannot be supported."

As stated before, the obligation to pay this interest still exists and it is my opinion that the maker of the note under the circumstances can not be held to be guilty of the larceny or embezzlement of this interest.

Very truly yours,

L. A. FOOT,
Attorney General.