

PUBLIC FUNDS: A deputy magistrate clerk of a third
MAGISTRATE CLERK: class county who loses public funds
DEPUTY MAGISTRATE CLERK: in his possession is primarily liable
for the loss. In the event of his
default in payment his surety is liable for said loss. Liability
for the loss of the public funds also lies with the magistrate clerk
and his surety.

OPINION NO. 233

July 1, 1970

Honorable James N. Foley
Prosecuting Attorney
Macon County Court House
Macon, Missouri 63552



Dear Mr. Foley:

This is in reply to your request for an official opinion from this office in answer to the following questions:

1. Of the following persons who is to bear the loss of the \$3,493.00 allegedly stolen from the possession of the deputy magistrate clerk of Macon County?
 - a. The Probate-Magistrate Judge?
 - b. The Probate-Magistrate Clerk?
 - c. The Deputy Magistrate Clerk?
 - d. The County of Macon?
 - e. The securities on the bond for the above mentioned persons?

You state that the Magistrate Clerk has given a bond provided for in Section 483.025, RSMo 1959.

Under Chapter 483, RSMo 1959, dealing with Clerks of Courts of Record and Court Records, Section 483.025, RSMo 1959, provides as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who

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shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, except as otherwise provided by law, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation.

"2. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all the moneys which may come to his hands by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

Section 476.010, RSMo 1959, provides that magistrate courts are "Courts of Record."

Furthermore, Section 483.485, Mo. 1967 Supp., dealing with magistrate courts states in part as follows:

". . . Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the state of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of one thousand dollars, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. In the event a surety bond is given by a surety company authorized to do business in this state, the cost thereof shall be paid by the state from the magistrate fund upon the requisition of the magistrate. For breach of any of the conditions of such bond suit may be brought as upon other penal bonds. Any magistrate or clerk of the magistrate court failing or refusing in his receipts for fees to give an itemized account of such charge, with date, shall upon conviction be deemed guilty of a misdemeanor. In

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all counties where magistrates organize into a court with divisions there shall be but one clerk of the magistrate court who may act as clerk for one of the magistrates. There shall not be more than one deputy clerk for each magistrate and all deputies shall be under the direction of the clerk but shall be appointed by the court."

Each of these bonds is conditioned among other things on the faithful discharge of all the duties of the bonded official.

Section 483.075(1), RSMo 1959, sets out the duties of clerks of courts of record. It provides in part:

"1. Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same."

Section 438.080, RSMo 1959, provides:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

In the case of State of Missouri, to the use of the City of St. Louis v. Thornton, 8 Mo.App. 27 (1897), the plaintiff sued defendant and the sureties on his official bond for defendant's failure to pay over all the fees for which he was responsible. The court held that where the statute makes it the duty of the clerk to pay over to the county treasurer all public funds in his possession, his failure to do so is a breach of his bond for the faithful discharge of his

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duties, and the sureties on his bond are concluded by the order of the court.

Opinion No. 49, issued by the Attorney General on January 20, 1951, and enclosed herewith, holds that a custodian of public funds is liable as an insurer for any loss thereof. Furthermore, in that opinion it was held that "if for any reason he [officer in question] should default, the sureties on his bond could be held liable to make good the loss."

In the case of State ex rel. Courtney v. Callaway, 237 S.W. 173, 208 Mo.App. 447 (K.C. Ct.Apps. 1922), the court held that where funds come into the hands of the clerk in his official capacity, "he may be held liable as an insurer of the funds." Furthermore, where the funds were received and held by the clerk as part of his official duties, the bond is valid.

Therefore, the Deputy Clerk is primarily liable as custodian of the funds in question. In the event the Deputy Clerk defaults in payment, his sureties are liable. Furthermore, since the Probate-Magistrate Clerk appointed the Deputy Magistrate Clerk, the Probate-Magistrate Clerk along with his surety is ultimately liable for the conduct of his deputy. In view of the fact that the bonds of the deputy magistrate clerk and magistrate clerk are at least \$6,000.00 (\$1,000.00 minimum for the deputy clerk under Section 483.485 and \$5,000.00 minimum for the magistrate clerk under Section 483.025), an amount greatly in excess of the alleged shortage, we believe it unnecessary to determine whether the magistrate judge could be held liable for such loss.

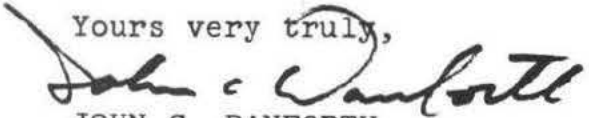
CONCLUSION

It is the opinion of this office that when cash from fines and costs in magistrate county were allegedly stolen from the desk of the deputy magistrate clerk:

1. The Deputy Magistrate Clerk is primarily liable for the loss of such public funds. In the event of his default in payment, his surety is liable for loss in the amount of the bond extended by such deputy clerk.
2. The magistrate clerk is also liable for such loss of public funds. In the event of default in payment by such clerk, his surety is also liable for such loss in the amount of the bond executed by the magistrate clerk.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harvey M. Tettlebaum

Yours very truly,


JOHN C. DANFORTH
Attorney General