March 21, 1933.

FILED
28-33

Hon. William E. Stewart,
Prosecuting Attorney - Knox Co.,
Edina, Missouri.

Dear Sir:

You have written me as follows:

"First, some members of a telephone line were in to see me. They state that several member (shareholders) refuse to pay their switch board fees. These members or shareholders claim they have a right to use the line without going through the switchboard. The switchboard refuses to give switchboard service unless all of the members pay their dues. Can the switchboard refuse service unless all members pay their dues and if so can the members who do pay their dues cut off those who refuse to pay their dues?

Second, the Home Bank of Knox City, Mo., closed sometime ago. The night before they closed their doors they brought to the County Seat several thousand dollars of County money. They took this money to the County Treasurer who refused to accept the money. They then took the money to a bank in Edina, who accepted the money. This was all done after banking hours and after night. There is no doubt that the officers of the Home Bank were on the bond to secure the county, however, I do not know who was on the bond. Did the officers of the Home Bank violate any of the criminal laws of the State when they took this money out of the Home Bank, knowing that they were not going to open on the following morning?

Third, Knox County has two terms of court a year, June and December. Under the law we must have a Grand Jury once a year. We always have a Grand Jury in December. A Grand Jury was called in December, 1932. Paul Higbee was Judge of this Circuit and died sometime before the December Term of our Court. Phillip Fowler was appointed to serve until the first of the year. Judge Fowler adjourned the December Term of Court until the blank day of blank, 1933. The Grand Jury adjourned until the 6th day of February, was in session several days and adjourned until the 2nd day of March, 1933, then adjourned until the 28th day of April, at which time they intend to make their report. Now, I would like to know, in the event that the Grand Jury returns a true bill what term of court should

it be returned to and if they have jurisdiction? Judge Rouse, who was elected to fill the unexpired term of Judge Higbee, ruled that there was no December Term of Court, but did under Section 1852 R.S. call a special session for the 2nd day of March, 1933, and adjourned that special session until the 28th day of April, at which time the Grand Jury intends to make their report."

Telephone questions - Your letter does not state whether or not the telephone line is an unincorporated mutual county line operated by owners for their own convenience and maintaining a switch board and keeping up expenses by small monthly contributions from each owner of a 'phone and possibly having connection through the local switch board for long distance service furnished by some other company for which service fixed long distance rates are paid the company supplying the long distance service, but I will assume for purposes of this reply conditions I describe covers conditions of line your question relates to.

Assuming the telephone line you describe is unincorporated and a mutual asscciation operated for mutual service, it is apparent if the owners of the line have any Articles of Agreement or written form of contract of any kind, I could not tell you without examining whatever contracts their line owners may have, first - whether members can use the lines without going through and thereby using the switch board service; second - whether on account some members of line refusing to pay their dues switchboard service can be denied all members including those who pay their dues; third - whether the members paying their dues can cut off non-paying members. I direct your attention to the case of

> State ex rel Lohman and Farmers Mutual Telephone Co. v. Brown, et al, 19 S.W. (2d) p.1048

where the Supreme Court of Missouri said:

> "From what has been said, it is apparent that the Public Service Commission is without jurisdiction of the company, in so far as its relations with its members are concerned; its order is too broad in other respects."

From this decision it is clear the Public Service Commission could afford no relief if the telephone line you write about furnishes same kind of service to same class of patrons described in the quoted part of the above named Missouri court decision. If you supply me data above suggested, I will give you my opinion on questions hereinabove asked by you.

The question relating to criminal liability of certain officers of "Home Bank" of Knox City, Mo. - The county was a depositor in the "Home Bank" and its account was an open checking one and it had the right to have the bank pay its checks on demand. The county deposit of money the bank was entitled to possession of against every one except the county and county had right to check on it the same as any other depositor. The county money was part of the liquid assets of the bank and bank officials had custody thereof and hence lawfully in possession of the county deposit funds.

I am of the opinion if any offense was committed by bank officials by removal of county money from bank night prior to bank closing, it was embezzlement. Embezzlement is a purely statutory offense and is a kind of statutory larceny. At cannon law the crime of embezzlement did not exist.

It differs from larceny in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

State v. Burgess, 268 Mo., l.c. 415

In Hanna v. Insurance Co., 241 Mo., l.c. 401

the court said:

> "Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come."

An examination of Sections 4079 and 4080 R.S. Mo. 1929 discloses that these two sections each creating a statutory offense of embezzlement creates each two district classes of offense. On this question our Supreme Court said in

State v. Lentz, 184 Mo., l.c. 238:

> "It substantially provides that the embezzlement or conversion of money or property by an agent, without the assent of the employer, shall constitute the offense. It will be noticed in that subdivision, that the offense consists of the actual embezzlement or conversion of the money or property. The other subdivision refers to a different state of facts in order to constitute an offense by its terms. It provides, not that the offense shall consist of the actual conversion or embezzlement of the property, but the doing of certain things, that is to say, "To take, make away with or secrete the money or property, with the intent to embezzle or convert to his own use." It is too plain for discussion that the terms, "Intent to embezzle or convert to his own use," have no application to the first subdivision of the statute, which makes the offense the actual commission of the act of embezzlement or conversion to his own use. It is illogical to say with the intent to do an act when the act itself is done. ***"

What acts after the bailee receives the property will constitute embezzlement under the first division of these statutory offenses? Now, the bank officials had the possession lawfully of all the deposits in the bank, including the county money. In

Bishop's New Criminal Law, Vol. II, Secs. 372-373-379
(quoted by our Supreme Court in 184 Mo. l.c. PP.239-240)

it is said:

> "The gist of common law larceny is the felonious taking of what is another's with the simultaneous intent in the taking of misappropriating it; but in statutory embezzlement there is no felonious taking for the thing comes to the servant by delivery, either by the master or a third person, so that the question now is, by what act after it is received does the servant commit the embezzlement? The rule of law appears only indistinctly in the books. Still we may infer from the authorities and from the reasons inherent in the question, that if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing less is sufficient. Or assuming the needful intent to exist he must and need only to do what in our civil jurisprudence is termed 'conversion' defined to be any dealing with the thing, which impliedly or by its own terms excludes the owners dominion.
>
> To illustrate: If the servant instead of delivering the property to his master or another as required by his duty, pledges it for his own debt, or runs away with it, or neglects or refuses to account for it, or otherwise wrongfully diverts its course toward its destination to make it his own, he embezzles it."

And again, in defining what acts constitute embezzlement, our court said: (130 Mo., l.c. 463)

> "When the agent or servant takes his employer's money with the intent to convert it to his own use without the master's knowledge, that moment he is guilty of the criminal intent denounced by the statute. The law will not enter upon the inquiry with him as to his further intention of returning the money at a later period or making good his shortage when called to account. It suffices for the state to prove an intent on the part of the defendant to do that which the law forbids. The effort of counsel to have the court require the jury to find some other or further intent was to open the door for argument that the defendant might knowingly and intentionally do the very act, which the law denounced as criminal and yet not be guilty, provided he did not intend to keep the money permanently or intended to return it in the future. But when an act forbidden by law is intentionally done the intent to do the act is the criminal intent which imparts to it the character of the offense, and no one who violates a law which he is conclusively presumed to know can be heard to say he had no criminal intent in doing it."

Apply these rules to the facts as outlined in your letter. The money was it is true county money; but the bank had given the statutory bond for its safe return to the county. The money was in the bank and the bank held it as part of its funds against which checks could be drawn. The bank was entitled to the money as against every one but the county just the same as the bank was entitled to the possession of all the funds of all its other depositors as against every one except the owners of those deposits. The bank as a legal entity had the right to possession of the county funds as against any possession thereof personally by the bank officials. For all practical uses it was a part of the liquid assets of the bank. Now the bank entrusted the bank officials with the county money just as it did with all the money of all its other depositors.

I infer from your statement that the bank never opened its doors again for business after this money was removed. I also infer you mean to say in your letter the bank was insolvent at the time the officials of the bank removed this money.

Of course, it is true in embezzlement the money must be taken without consent of the employer, because the statute so provides and it may be suggested the officials were authorized either by virtue of their official position with the bank or may be with the assent of the stockholders to remove the money and give it to the county through the County Treasurer. If the bank had been solvent the argument would be sound. But being insolvent the statutes of Missouri applicable to insolvent banks became operative and forbids any transfer of the funds or bank assets upon insolvency accruing and makes such transfer void. Section 5318 R.S. of Mo. of 1929, provides:

> "All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any corporation or private banker, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to it, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another shall be utterly null and void. ***"

The bank officials had the custody of the bank's money. They received the bank's money in the course of their employment. The bank officials were agents of the bank. If the bank officials knew the "Home Bank" was insolvent and these officials were on the county depository bond given by the bank and under these conditions took the amount of the county money from the insolvent bank's funds and took same and attempted to give it to the county through the County Treasurer, evidence reasonably tending to show these facts would carry the case to the jury, and if the jury found these facts existed, the defendants would be guilty under the provisions of Section 4079 R.S. of Missouri, 1929, declaring:

> "If any agent *** of any person or *** any agent of any incorporated company *** shall take *** with intent to convert to his own use without the assent of his *** employer any money *** or effects whatsoever belonging to any other person which shall have come into his possession or under his care by virtue of such employment or office, he shall upon conviction be punished in the manner prescribed by law for stealing property of the kind or the value of the article so *** taken ***"

And it may be the courts might hold the facts above assumed being proven the bank officials are guilty under the first sub-division of Sec. 4079 on the ground that the moment the money was removed from the custody of the bank by the officials the conversion occurred and the dominion of the bank over the property ceased and the offense was complete.

The rule of the law is if a bank official puts the money of the bank out of the bank's control with a fraudulent intent, it is a conversion to the bank officials' own use, and the law is the state need not show the bank officials received any personal benefit from the money taken because if the bank officials take the bank's money and give it to others, the courts hold it is a conversion of it to the use of the bank officials and so if the money removed was so taken with intent to protect the bondsmen of the bank, such act was a conversion to the use of the bank officials.

State v. Meininger, 306 Mo., l.c. pp. 686-687-688

Right of Grand Jury to return indictments in April where December preceding court had been adjourned without fixing a definite day to which it was adjourned.

In your letter you state the Judge in office in December, 1932 adjourned the December term of court until "the blank day of blank, 1933". In

State ex rel v. Ross, 118 Mo., l.c. pp. 46-47

our court held only at stated times and places can court be convened, and the court said:

> "The judicial power in this state can only be exercised at the times and places prescribed by law. Accordingly the statutes have, with great particularity, specified the day on which each court, whether Circuit, County, Probate or Supreme Court, shall meet. Out of abundant caution it is provided that, if the Judge shall be detained, the Sheriff may adjourn the court till the third day when if the Judge is still absent he may adjourn to the next regular term, and it is provided that the courts may upon notice call special terms, but the whole scope of the legislation on this subject as well as the common law is to the effect that only at stated times and at the places specified can a court lawfully meet. Revised Statutes 1889, Sections 3248, 3249, 3250.

> "The mere coming together of the Judge, and the other officers of the court, unless at a time fixed by law or on a day to which the court has been lawfully adjourned, does not constitute a court under our laws. Freeman on Judgments, Section 121, and cases cited. This is so clear that we doubt whether any court or lawyer ever questions it."

The New York court holds if record shows court has no unfinished business before it and adjourns without fixing a definite day to convene, the term of court is ended.

> Reynolds v. Cropsey, 150 N.E., l.c. 30
> L & T Co. v. Roberts, 227 N.Y., 188

In State v. Brown, 195 M.A. 590, a Judge ordered a grand jury for an adjourned term, convened court on day named, organized the jury, and adjourned to court in course without discharging the jury, which continued its investigation and at the regular term reported indictments against B, who was tried and convicted before he objected to the authority of the grand jury to indict him, and the Court of Appeals held his objection was too late, but the court also held the authority of the grand jury expired when the court adjourned to court in course because that ended the term of the court and the Appeal Court said (195 Mo., lc. 591-592):

> "But the adjournment of the court for the term involves a different consideration. A grand jury is summoned to serve at a certain term of court and during that term, unless sooner discharged, its period of official life is limited to the term for which it is summoned and when that term ends, so ought the existence and organization of the grand jury."

You state a grand jury was regularly called for December Term, 1932; that the Judge of the court died; that Judge Fowler was appointed to serve until the first of the year, and he adjourned the December Term of court until the blank day of blank, 1933; that the grand jury adjourned to February 6, 1933, was in session several days and adjourned to the 2nd of March, 1933, and then adjourned until the 25th day of April, at which time they intended to make their report.

In view of these facts and the authorities hereinabove cited, my suggestion is that the court when it convenes on April 28, 1933 direct the Clerk to enter an order for convening a new grand jury and order the records of the December Term to show that the grand jury had been discharged as to the December Term of court. This procedure was upheld in

> State vs. Gowdy, 307 Mo., l.c. 360.

It is to say the least doubtful whether or not the power of the grand jury and its term of service end when the order was made by

Judge Fowler adjourning court to the blank day of blank, 1933.

I am inclined to the view that order ended the December, 1932 Term of the Circuit Court. At any rate, no chance should be taken by having a grand jury act whose authority is open to question and the course I suggest obviates all difficulty because under Section 8753 R.S. of Mo., 1929, the court has power to order the grand jury, as I suggest.

Yours very truly,

EDWARD C. CROW

APPROVED:

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Attorney General

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