

and liabilities of the persons concerned. There is also a provision in the supplemental agreement where reference is made to the pension trust agreement for certain definitions, duties, etc. As in the pension trust agreement, the compensation of the engineers is left to be determined by the trustee, the engineers and the department.

I have examined both agreements and find that they are valid and legal and drawn pursuant to chapter 54 of the Acts of 1937.

ACCOUNTS, STATE BOARD OF: Release of officers from liability for loss of funds in bank failures. Ch. 121, Acts of 1937, includes clerks of circuit courts.

June 18, 1937.

Hon. W. P. Cosgrove,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of recent date concerning chapter 121 of the Acts of 1937 and submitting the following questions:

1. Do the provisions of chapter 121 of the Acts of 1937 apply to Clerks of the Circuit Court?
2. In case the law applies to Clerks of the Circuit Court, is the municipal corporation assuming the liability of the county?
3. Should a claim for the recovery of a trust fund due an individual from the clerk's office be filed with the Board of County Commissioners under section 3 of the Act?
4. In case only part of the funds in the hands of the Clerk of the Circuit Court are lost in a closed depository, what portion of each fund becomes an obligation of the county?
5. Is the county liable to the State of Indiana for that portion of fees and funds lost in closed depositories that have been on hand longer than 10 years?

The answer to your first question is in the affirmative. Section 1 of the Act specifically provides:

“That every officer and former officer of and in any municipal corporation in this state who, in his official capacity, deposited any funds payable to any municipal corporation, or who deposited any public funds or any trust funds received by or coming into the possession of such officer, by virtue of his office, in any bank or trust company *which had been designated, as provided by law, as a depository of public funds, and which at such time was such a depository, but when such funds could not be deposited under the terms and provisions of the depository act,* be and is hereby relieved, released and discharged from any and all personal liability on account of the loss of any such money caused by the failure or insolvency of any such bank or trust company, and such liability shall be assumed by the municipal corporation for or in which such officer served or is serving in an official capacity. Such municipal corporation shall have the right to receive any dividends arising from the liquidation of such bank or trust company, to the extent of its interest.”

The Act by section 4 defines the term “municipal corporation” to mean a *county, township, civil city or town.* This being the case, the question remains whether the Clerk of a Circuit Court is an officer within the meaning of the Act. There can be no doubt that the Clerk of a Circuit Court is a county officer as such position is designated an office by the Constitution of the State of Indiana, by legislative enactment, and judicial determination.

Article 6, section 2, Constitution of Indiana;
 Section 49-2701, and following, Burns 1933;
 Taylor v. State, ex rel., Ogle, 166 Ind. 294;
 Bolds v. Woods, 9 Ind. App. 657.

The Clerks of the Circuit Courts being county officers and a municipal corporation being defined under the Act to include a county, it follows that the Clerk of a Circuit Court is included under the provisions of the Act as applicable to officers of a municipal corporation. (Our italics.)

By the foregoing paragraph it is determined that a Clerk of a Circuit Court is included within the definition of officers relieved of liability by the Act, but it is likewise necessary for

the answering of this question to determine whether such clerk meets the conditions of the first section of the statute. An examination of the italicized portion of the above set out statute reveals that the only officers relieved of liability under this Act are those who lost money they had deposited by virtue of their office in "any bank or trust company which had been designated, as provided by law, as a depository of public funds, and which at such time was such a depository, but when such funds could not be deposited under the terms and provisions of the depository Act." It thereby appears that, to meet the conditions of this Act the officer to be relieved of liability must have lost public money not under the protection of the provisions of the depository Act because he was omitted from such Act's provisions. To determine what officers are therefore included hereunder, and especially the provisions applicable to clerks of the courts it is necessary to examine the depository Act. The Acts of 1907, Ch. 222, sections 1-25, p. 391, as amended Acts of 1932, Ch. 38, Sec. 1, p. 157 provide for the depositories for public funds. The Act provides for boards of finance for the state, county and municipal divisions of government. Section 16 of said Act provides what banks shall be public depositories and in part is as follows:

"The board of finance shall meet at the time and place fixed in said notice, and shall open such proposals and consider the same, and any bank, banks, or trust companies within the state tendering security as provided for in this Act, and agreeing to pay the interest provided herein, *shall be constituted depositories for public funds.*"

Section 10 of said Act, as amended, provides for the deposit of public funds by certain state, county and municipal officials and in part reads:

"Immediately upon the organization of said several boards of finance and the designation by them of public depositories, as by this Act provided, *the Treasurer of State, the several county treasurers, the several city treasurers, the several town treasurers, the several treasurers of the Board of School Commissioners of the several school cities, the several treasurers of Board of School Trustees of school cities, the several township*

trustees, who receive, or have on hand any public funds by virtue of such office, and subject to deposit, shall make deposit of such funds in the depository or depositories selected by said boards of finance respectively, and file with the secretary of the said respective boards a verified statement of the funds deposited."

It will be noted that nowhere in the Act are the boards of finance authorized to designate public depositories for any other officers than those set out in the italicized portion of the above quoted section of the Act, and conspicuous by its absence is the office of Clerk of the Circuit Court. Such officers as omitted in the above Act obviously are included in scope of the conditions of section 1 of the Act herein in question especially when those relieved of liability are those who deposited public funds in a bank designated as a public depository, "but when such funds could not be deposited under the terms and provisions of the depository Act." Much weight is added to this contention by the provisions of section 25 of the depository Act wherein it is provided:

"When the public funds of the state, county, city, town, township, or school corporation are deposited by the officers having control thereof, as provided herein, such officer and his bondsmen shall be exempted from all liability thereon by reason of loss of any such funds from failure, bankruptcy or any other act of any such depository or depositories, to the extent of the funds in the hands of any such depository or depositories at the time of such failure or bankruptcy: Provided, This Act shall be in effect and full force on and after December 1, 1907."

Those officers included within the provisions of the depository Act being already exempt from liability, it is apparent that the Act herein in question is not another legislative statement of their freedom from liability, but is rather an enlargement of the offices to be included within the scope of the Act, especially since the only officers being exempt herein are those who had deposited in banks designated as public depositories.

It will be noted that the provisions of the above discussed Depository Act are only applicable to losses sustained

prior to July 1, 1935 when such Act was repealed and the provisions of the Depository Act of 1935 went into effect. This Act, however, is very similar to the former Act, but includes under its provisions a larger group of public officers and likewise provides for the payment of losses out of the State Sinking Fund for Public Deposits rather than from surety bonds. This new Act by its definitions includes Clerks of the Circuit Courts and provides for the repayment of loss of their public funds lost in the failure of a public depository, except that by the definition of public funds the following exception is made:

“The term ‘public funds’ means all funds coming into the possession of the Treasurer of State, treasurer of the board of trustees of any state benevolent, penal, or educational institution, or of any state officer by virtue of said office, and all funds coming into the possession of any local officer by virtue of his office, except trust funds paid the clerk of any court for repayment to any person other than an officer of the same municipal corporation of which such clerk is an officer. The term ‘public funds’ shall be limited to mean only that part of firemen’s pension funds, policemen’s pension funds, municipal pension funds, public improvement assessment (Barrett law) and delinquency and deficiency funds that is deposited pursuant to the provisions of this Act, and shall not include such funds when deposited in accordance with the provisions of the Act or Acts creating such funds.”

Acts of 1935, Ch. 70, Sec. 1, part (c), p. 174.

In view of the foregoing, it is therefore my opinion that Clerks of the Circuit Courts not having been subject to the provisions of the Depository Act, and not now entitled to full protection under the 1935 Act, that provisions of chapter 121 of the Acts of 1937 apply to such clerks.

Your second question, likewise, must be answered in the affirmative. A reading of section 1 of the Act, in my opinion, leaves no other possible interpretation. The section provides that when any officer of a municipal corporation deposited municipal or public funds in a bank which later failed, such officer is relieved of personal liability, “*and such liability shall*

be assumed by the municipal corporation for or in which such officer served or is serving in an official capacity." As set out in the answer to your first question, the Clerk of the Circuit Court is a county officer and under the italicized part of section 1, as set out above, the municipal corporation for which such clerk was an officer must assume the liability from which the Act released him. (Our italics.)

The answer to your third question is also in the affirmative. The Act makes no provision for any special method of presenting claims for recovery of trust funds due an individual which were lost in a bank failure. In view of the fact that section 1 requires the county under the facts of this question to assume all claims against officers defaulting within the provisions of this Act, then under the provisions of Sec. 26-520, Burns 1933, such claims must be filed with the Board of County Commissioners. The applicable parts of said section read as follows:

"Such commissioners, in their respective counties, shall have power at their meetings:

1. * * *
2. To allow all accounts chargeable against such county not otherwise provided for; and to direct the raising of such sums as may be necessary to defray all county expenses."

Section 3 of the Act provides that "any person who may have money due and owing from such fund may file his claim therefor with such municipal corporation taking over such deposits," etc., but makes no provision for the filing of such claim with any county officer, board or commission. Therefore, in my opinion, these claims are ones that fall within part 2 of Sec. 26-680, Burns 1933, as "an account chargeable against such county not otherwise provided for."

Your fourth question cannot be answered definitely, i.e., it cannot be answered that the county will in any specific case be liable for lost trust funds in a definite per cent or proportion of the amount of the trust funds lost in the closed bank. In other words, the proportion of each trust fund that becomes an obligation of the county is not and cannot be determined until all trust fund money at hand which was not lost has been exhausted, as under the provisions of the statute, the county is only liable to the person to whom such

trust fund is due and is in no way liable for the refunding of any specific trust fund as a separate res. Therefore, the liability of the county being to make the recipient of any trust fund whole, it cannot be said that any portion of each trust fund becomes the obligation of the county.

In explanation, it may be said that if only part of the funds in the hands of a clerk was lost in a bank failure covered by the provisions of this statute, the clerk would under the provision of the Act pay all trust fund claims as presented until the money at hand for such payments was exhausted. Thereafter the county assumes the liability for all further claims to such trust funds and the claim would have to be paid by the county commissioners as per answer to your third question. It will, therefore, appear that until money at hand for trust purposes is paid out, the county is not liable, and regardless of the fact that trust money was lost in a bank failure, it cannot be said the county is liable for any portion of each trust fund because certain specific trust obligations may be completely retired out of the money at hand and the county never be liable for any part thereof, and on the other hand all money at hand may be exhausted and the county will thereby become liable to the person or municipal corporation entitled thereto in the entire amount of that trust fund.

Your fifth question is likewise answered in the affirmative. Acts 1933, Ch. 138, Sec. 1, p. 766 provides:

“All money of whatsoever kind or character which remains in the office of the clerks of the various circuit courts of this state for a period of ten (10) years, which money has not yet been claimed or demanded by the party or parties entitled thereto during such ten-year period, shall be collected by the attorney-general and turned over by the attorney-general to the state as hereinafter provided.”

The unclaimed money is under the above statute due the attorney general after the expiration of ten years and until paid over to the attorney general the clerk would be liable to the state for the safe-keeping of such funds as he would be liable to any individual cestui que trust. Section 2 of the Act herein in question makes specific provision for the payment of funds held by such officer due any person or municipi-

pal corporation, and by the including of the liability to a municipal corporation, the Act expressly includes liability to the State of Indiana. The portion of the section applicable reads as follows:

“Any person or any municipal corporation to whom or to which such funds, or any part hereof, may be due and owing, is hereby authorized to prosecute his claim for the recovery of such funds in his name or its corporate name, or otherwise, against such municipal corporation charged with liability for such funds,
* * *”

The definition of municipal corporation as defined in section 5 of the Act includes the state or any subdivision thereof and, applying the same to the provision making the municipal corporation, the county in case of a Clerk of the Circuit Court, liable to any person or other municipal corporation entitled to such funds, it is clear that the statute contemplates the state recovering what funds are due it as beneficiary of funds held in trust by any officer as may be relieved of liability under the provisions of this Act.

TAX COMMISSIONERS, STATE BOARD OF: County recorders, allowance of fees and manner of paying same.

June 21, 1937.

Hon. C. R. Benjamin,
State Board of Tax Commissioners,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of June 17 submitting the following question:

“Please give your opinion * * * as to the proper method of securing the fees made legal by the 80th Session of Indiana Legislature, and from the date fees may be retained thereafter.”

In answer to this question your attention is first directed to section 9, chapter 21 of the Acts of the Indiana General Assembly, 1933, which provided that,