of Highways and as one of the contracting parties to this proposed agreement, can bind the state in the assumption of such liabilities with respect to the operation of the side track here in question, imposed by the provisions of paragraph 8 of this contract above referred to. However, I do not deem it necessary to discuss this question at length for the obvious reason that any limitations upon your authority with respect to the matters set out in paragraph 8 of this contract would not affect in any way the validity of the other and, perhaps, more pertinent provisions of the lease in their application to the maintenance and operation of this side track. It is to be assumed that the railroad company in submitting this paragraph, which is a part of the standard form of contracts of this kind, well knew and rightly appreciated the limitations imposed upon you as a state officer with respect to the assumption on behalf of the state of liabilities of this kind. However, as above indicated, the most that can be said of this provision in its relation to this particular contract with the state or one of its governmental departments as one of the contracting parties is, that it is ineffective for any purpose and does not in any wise affect the other provisions of the contract with respect to this side track.

Upon these considerations and finding that said agreement is otherwise in proper form, I am inclined to the view that no adequate reasons appear why this contract should not be approved by me as to the form thereof. I am accordingly approving this lease as to the form thereof; and I herewith return to you all of the files forwarded to me in this matter.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2872.

COUNTY — DEPOSITORY CONTRACT — COMMISSIONERS UNAUTHORIZED TO COMPROMISE OR RELEASE BANK FROM REPAYMENT OF COUNTY FUNDS—PLAN RESUMPTION OF BUSINESS BY COUNTY DEPOSITORY BANK.

SYLLABUS:

1. *When the deposits in a county depository bank, made by a county treasurer of funds in his possession, consist of undivided tax moneys, which upon proper settlement by the county treasurer would become due to the state, county and other taxing subdivisions, the county commissioners of the county are without authority to compromise or release, in whole or in part, the obligation of the bank and its bondsmen to repay, or account for, any portion of the said funds, except that portion which upon settlement of the county treasurer would be due to the county. Opinions of the Attorney General,* 1931, *Vol.* II, *p.* 1245, *approved and followed:*

2. *Where there is a plan for resumption of business by a county depository bank, whereby depositors are to receive 40% of their deposits upon resumption of business, and debenture notes issued by a mortgage loan company for the other*

60%, it may not be said, as a matter of law, to be an abuse of discretion for the county commissioners, acting under section 2416, General Code, to agree to release the bank from all liability on account of that portion of the county deposit actually due the county, and to accept in lieu thereof such debenture notes for 100% of such portion of the deposit, secured by a personal bond signed by the present sureties on the depository bond, when such release would result in full payment to the other subdivisions of their respective shares in the undivided tax moneys on deposit in the name of the county.

COLUMBUS, OHIO, June 29, 1934.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

"A plan has been formulated for the resumption of normal banking functions by the Liberty Banking Company, Fremont, Ohio, which was placed in charge of a conservator April 17, 1933, and has been so operated on a restricted basis since that time. Under the proposed plan 40% of the deposits are to be released immediately, and, in lieu of the bank's liability to pay the remaining 60%, the depositors are to receive debenture notes issued by a mortgage loan company, to be organized for the purpose of liquidating the assets not eligible to go into the resuming bank.

The Liberty Banking Company became a depository for the inactive fund of Sandusky county to the extent of $100,000 and depository of the entire active fund of said county by virtue of three contracts duly made, each for a term of three years. The personal bond filed by the Liberty Banking Company was approved June 6, 1930, by the county commissioners and recited that the bank had been chosen as a county depository 'for the term of three years from the 10th day of March, 1930, to March 10, 1933, and until its successors shall be duly chosen and qualified.'

The county has on deposit in the Liberty Banking Company in both its active and inactive accounts approximately the sum of $207,000. I am informed that an examiner of the Bureau of Inspection and Supervision of Public Offices has ascertained that of this sum approximately $106,000 is actually county money, whereas the remaining $101,000 represents undistributed tax money due various other political subdivisions.

Because of the size of the county deposit, in order for the bank to resume business under the proposed plan, it will be necessary for the county commissioners to consent to a waiver of 60% of the bank's liability on the entire deposit of $207,000, and accept therefor the debenture notes referred to above, in which case 40% of the deposit will be released at once. If this is impossible, it will be necessary, in order to reopen the bank under the proposed plan, for the county to accept debenture notes in full for its deposit of $106,000, in which case the sum of $101,000 due the other subdivisions will be released upon the resumption of business by the bank.

In view of this situation, I respectfully request your opinion upon each of the following questions:

1. Can the county commissioners sign a waiver in which they agree to accept 40% of the entire amount on deposit, both in the active and inactive funds, and for the other 60% to accept debenture notes secured by the bond which they now have or by a new one signed by the same persons.

2. If your answer to this question is in the negative, could the county commissioners agree to accept debenture notes for the entire share of the county in both the active and inactive funds on deposit."

In a former opinion of this office, reported in Opinions of the Attorney General for 1931, Vol. 1, p. 579, it was held, as disclosed by the syllabus:

"*Under proper circumstances,* county commissioners have authority under section 2416 of the General Code, to enter into a compromise of claims due the county for money deposited in a county depository, which depository is in course of liquidation." (Italics the writer's.)

In Opinion No. 2320, rendered by me February 27, 1934, I discussed the former opinion as follows:

"The situation then before my predecessor was that a closed depository proposed to assign most of its assets and liabilities to another bank, which was to pay $78,000 of the county deposit in cash. The question was, whether the county commissioners could agree to release the bank from paying the remaining $100,000 and accept the obligation of a holding company which acquired the non-liquid assets, such obligation to be secured by a lien upon those assets and also by a bond.

While under the holding in that opinion a board of county commissioners might consent to the plan in question, it is clear that the former opinion was based upon Section 2416 of the General Code, which has no application to the subdivisions in question. Section 2416 provides that a board of county commissioners 'may compound or release, in whole or in part, a debt * * * due the county, and for the use thereof * * *.' The deposit of county funds under Sections 2715, et seq., General Code, creates a debt. *State* vs. *Executor of Buttles,* 3 O. S. 309; *Fidelity and Casualty Co.* vs. *Bank, supra; In re Liquidation of Osborn Bank,* 1 O. A., 140. Thus Section 2416, General Code, applied to the situation in question."

The syllabus of another opinion, reported in Opinions of the Attorney General, 1933, Vol. III, p. 1780, reads:

"Boards of township trustees and boards of education do not have the power to settle and compromise claims due to their respective subdivisions similar to that granted to boards of county commissioners by Section 2416, General Code."

The first two branches of the syllabus of Opinion No. 2320, supra, are in the following language:

"Where a surety bond constitutes the security for the deposit of public funds, boards of education and boards of township trustees may not, on behalf of school districts or townships, consent to the resumption of business by a closed depository bank under a plan whereby the public depositors are to relinquish a portion of the deposit liability and accept in lieu thereof participation certificates issued against certain segregated assets.

Such boards do not have the power to compromise claims due their respective subdivisions similar to that granted to boards of county commissioners by Section 2416, General Code, and cannot effect a compromise with sureties on a defaulted depository bond after bringing action against such sureties or otherwise. Opinions of the Attorney General for 1933, No. 1890, approved and followed."

In another former opinion of this office, reported in Opinions of the Attorney General for 1931, Vol. II, p. 1245, it was held, as appears from the syllabus:

"When the deposits in a county depository bank, made by a county treasurer of funds in his possession, consist of undivided tax moneys which upon proper settlement by the county treasurer would become due to the state, county and other taxing subdivisions, the county commissioners of the county are without authority to compromise or release in whole or in part, the obligation of the bank and its bondsmen to repay, or account for, any portion of the said funds, *except that portion which upon settlement of the county treasurer would be due to the county.*" (Italics the writer's.)

In the course of this opinion my predecessor said at p. 1247:

"The powers of county commissioners are limited strictly to those extended to them by statute, and statutes extending power to cancel a debt owing to the public, should, in my opinion, be strictly construed and not extended beyond their clear and plain import as expressed by the language used in granting the power. *State ex rel Locher* vs. *Menning et al.,* 95 O. S., 97; *State ex rel* vs. *Pierce,* 96 O. S. 44; Lewis' Sutherland Statutory Construction, 2nd Ed., Sections 542 and 632."

It is proposed that the county commissioners agree to accept 40% of the deposit, which consists in part of funds due subdivisions other than the county, and to release the bank from liability as to the other 60%, accepting in lieu thereof debenture notes, secured by certain segregated assets, and in addition a bond signed by the same persons who signed the original depository bond. A legal deposit of public funds creates the relationship of debtor and creditor. *Fidelity & Casualty Co.* vs. *Bank,* 119 O. S., 124; *Ward* vs. *Fulton,* 125 O.S., 382. When the liability of the bank to repay the deposit is released in part and something in lieu thereof accepted, a compromise is effected. Under section 2416, General Code, as construed in the 1931 opinion, last cited, the county commissioners are without authority to compromise or release in whole or in part the bank's obligation to repay that portion of the county deposit which is due the state or political subdivisions other than the county. It follows that the commissioners of Sandusky County could not legally agree to accept 40% of the $101,000 on deposit in the Liberty Bank-

ing Company which represents undistributed tax money due subdivisions other than Sandusky County.

You next inquire whether the county commissioners could agree to release entirely the liability of the bank to repay the sum of $106,000, which represents the county's portion of deposit, and accept in lieu thereof debenture notes, secured by segregated assets and a bond executed by the present signers of the depository bond. If this is done the share of the other subdivisions on deposit, in the amount of $101,000, will be withdrawable at once upon the resumption of business by the bank.

As above noted, section 2416, General Code, provides that the commissioners "may compound or release, *in whole* or in part, a debt * * * due the county * * *." It is proposed that the debt due from the bank be released "in whole" and that an obligation of another corporation, secured by a personal bond be substituted. Looking at the bare words of the statute, it would appear that the commissioners have power to take such action.

In one of the opinions above cited (Opinions of the Attorney General, 1931, Vol. I, p. 579) it was held that the commissioners could compromise claims due the county "under proper circumstances." Compromising claims under improper circumstances would constitute an abuse of discretion.

Under the plan in question, all consenting depositors will have 40% of their deposits available immediately. Under the proposal in question the county would not receive this withdrawable deposit but would receive only debenture notes. In addition it would have the security of a bond signed by the present signers of the depository bond. As a matter of policy, it is argued that if the county can accept the proposal, the other subdivisions having a share in the county deposit will be paid in full at once. Furthermore, it is argued that since these other subdivisions cannot legally consent, it is necessary for the county to take the proposed action in order for the bank to resume business, which event will greatly benefit the inhabitants of the county.

In determining whether in taking the proposed action the commissioners would be abusing their discretion, it may be argued that such action is merely a means of circumventing the law. If the other subdivisions could legally waive 40% of the deposit liability, the bank could resume business upon like waiver by the county. The fact that the other subdivisions cannot legally waive and must be paid 100%, constitutes a legal impediment to the resumption of business by the bank. Removal of that impediment at the sacrifice of the county would be an abuse of discretion. I am not entirely persuaded as to the soundness of this argument, in view of the broad powers conferred upon the county commissioners to compromise debts. It may well be that if the bank does not resume business and goes into liquidation, the county will ultimately receive less than if it consents under the proposed conditions.

There is a presumption that public officers have exercised a sound discretion. *A. H. Pugh Printing Co.* vs. *Yeatman,* 22 C. C., 584; 12 C. D., 477. There are numerous cases in this state holding that in the absence of fraud or collusion, a court will not control the discretion of public officers, nor substitute its judgment for their discretion. *Hocking Valley R. Co.* vs. *Public Utilities Commission,* 92 O. S., 362; *Board of Education* vs. *Moorehead,* 105 O. S., 237; *State ex rel* vs. *Board of Education,* 105 O. S., 438. Furthermore, it has been held that in case of doubt as to the propriety of the exercise of official power, it will be presumed that such power is exercised properly. *Rowland* vs. *State,* 104

O. S., 366. Equity will, of course, intervene to prevent arbitrary action which amounts to a manifest abuse of discretion. *Butler* vs. *Karb*, 96 O. S., 472; *Yee Bow* vs. *Cleveland*, 99 O. S., 269.

I cannot say that as a matter of law it would be an abuse of discretion for the county commissioners to release in full the bank's liability for the county's share of the deposit, and to accept the debentures and the bond. Whether an officer has abused his discretion is a question of fact to be decided in the light of the surrounding circumstances. If the facts were sufficiently clear that reasonable men would necessarily be impelled to the conclusion that the proposed action would not be an abuse of discretion, I could say that as a matter of law the commissioners might properly exercise the power. However, I am of the view that reasonable men might differ upon the proposition and that a jury or a court of equity, sitting as a determiner of facts, might conclude that the proposed action would amount to an abuse of discretion on the part of the commissioners of Sandusky County. It is thus manifestly impossible for me to give a categorical answer to your second question.

In the light of the foregoing, it is my opinion that:

1. When the deposits in a county depository bank, made by a county treasurer of funds in his possession, consist of undivided tax moneys, which upon proper settlement by the county treasurer would become due to the state, county and other taxing subdivisions, the county commissioners of the county are without authority to compromise or release in whole or in part, the obligation of the bank and its bondsmen to repay, or account for, any portion of the said funds, except that portion which upon settlement of the county treasurer would be due to the county. Opinions of the Attorney General, 1931, Vol. II, p. 1245, approved and followed.

2. Where there is a plan for resumption of business by a county depository bank, whereby depositors are to receive 40% of their deposits upon resumption of business, and debenture notes issued by a mortgage loan company for the other 60%, it may not be said, as a matter of law, to be an abuse of discretion for the county commissioners, acting under section 2416, General Code, to agree to release the bank from all liability on account of that portion of the county deposit actually due the county, and to accept in lieu thereof such debenture notes for 100% of such portion of the deposit, secured by a personal bond signed by the present sureties on the depository bond, when such release would result in full payment to the other subdivisions of their respective shares in the undivided tax moneys on deposit in the name of the county.

Respectfully,

JOHN W. BRICKER,
Attorney General