

2363.

DEPOSITORIES—DUTY OF PROVIDING FOR SAFE KEEPING OF SECURITIES HYPOTHECATED BY DEPOSITORY BANKS IN COUNTY, CITY, SCHOOL DISTRICT AND TOWNSHIP.

1. *Under the provisions of sections 2715 to and inclusive of 2745 G. C., providing for county depositories, the county commissioners are chargeable with the duty of providing for the safe keeping of the securities hypothecated by depository banks to secure the deposit of county funds.*

2. *Under the provisions of section 4296 G. C. requiring the city council to provide by ordinance for the deposit of municipal funds, the person or authority designated by such ordinance as the custodian of the securities hypothecated by the depository banks, is chargeable with the safe keeping of such securities.*

3. *Under the provisions of sections 7604 to and inclusive of 7608 G. C. providing for the deposit of school district funds, the respective boards of education are chargeable with the duty of providing for the safe keeping of the securities hypothecated by depository banks, to secure the deposit of funds of the school district.*

4. *Under the provisions of sections 3320 to and inclusive of 3326 G. C., providing for the deposit of township funds, the township trustees are chargeable with the duty of providing for the safe keeping of the securities hypothecated by depository banks to secure the deposit of township funds.*

COLUMBUS, OHIO, August 24, 1921.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Your letter of recent date duly received, and reads as follows:

“We respectfully request your written opinion upon the following matter:

What official or officials are legally charged with the custody and care of securities given by the depository banks awarded the public funds of counties, municipalities, school districts and townships, and who would be held liable for the loss of any such securities? Some sections seem to be clear and some are vague and we desire your opinion so as to require proper action and to fix responsibility in the case of loss where this duty has been illegally and improperly delegated to others.”

In answer to the questions contained in your inquiry, it may be generally stated in the premises that under the various sections of the General Code, relating to county, municipal, school district and township depositories, no express provision appears to have been made for the custodianship of the securities or undertakings given by depository banks to secure the deposit of the public funds entrusted therein.

In discussing the questions submitted, it seems advisable to ascertain, if possible, the general legislative intent in this particular, as indicated by the various sections of the depository laws pertaining respectively to the political subdivisions mentioned in your communication.

(1) *County Depositories:*

Sections 2715 to 2745 G. C., inclusive, provide for the deposit of the public funds of the county, prescribing the authority which is to select such depositories, the details employed in such selection, as well as the sufficiency, and

approval of the undertakings and securities hypothecated by the depositories so selected. The following sections of the Code are cited as pertinent to the question under consideration:

Sec. 2715. The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositories, and one or more of such banks or trust companies located in the county seat as active depositories of the money of the county. In a county where such bank or trust company does not exist or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositories, the commissioners shall designate a private bank or banks, located in the county as such inactive depositories, and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositories, then the commissioners shall designate any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, as such inactive depositories. If there be no such bank or trust company incorporated under the laws of the state, or organized under the laws of the United States, located at the county seat, then the commissioners shall designate a private bank, if there be one located therein, as such active depository. No bank or trust company shall receive a larger deposit than one million dollars."

"Sec. 2716. When the commissioners of a county provide such depository or depositories, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent per annum on the average daily balance, on inactive deposits, and not less than one per cent per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

"Sec. 2723. Such undertaking shall be signed by at least six resident freeholders as sureties or by a fidelity or indemnity insurance company, authorized to do business within the state and having not less than two hundred and fifty thousand dollars capital, to the satisfaction of the commissioners, conditioned for the receipt, safe keeping and payment over of all money with interest thereon at the rate specified in the proposal, which may come under its custody under and by virtue of this chapter and under and by virtue of its proposal and the award of the commissioners, and conditioned for the faithful performance by such bank or banks or trust companies of all the duties imposed by law upon the depository or depositories of the money of the county."

"Sec. 2735. The county commissioners shall make ample provision for the safe keeping of hypothecated securities. The interest thereon, when paid, shall be turned over to the bank or trust company so long as it is not in default. The commissioners may make provisions for

the exchange and release of securities and the substitution of other securities or of an undertaking therefor."

Analyzing the provisions of the sections cited, it becomes apparent that the authority for the selection of the county depository bank or banks, is vested in the board of county commissioners, who are authorized to accept proposals or bids, for such depository contract from the bank or banks desiring the deposit of the county funds, and who are also authorized to award the contract to the bank or banks which offer the best rate of interest for the use of the same, and which tender, as well, a property security or undertaking deemed sufficient by said commissioners to secure the deposits made in such bank or banks.

It may also be noted that the various sections comprising the county depository act clearly would indicate that the county commissioners are fully charged with the duty of supervising the details incident to the selection of such depository, as well as the power to determine the sufficiency of the security in such cases tendered by the bank or banks soliciting such deposits.

Attention is likewise called to the fact that while the words "securities" and "undertakings" are frequently used in the sections cited, and the subject of the acceptance of such securities is several times repeated, it is not clearly indicated as to what authority is to receive them after their approval by the county commissioners. In fact, it may be said that seemingly no further provision is made by the statutes in this direction.

The provisions of section 2735 clearly impose upon the county commissioners the duty of amply providing for the safe keeping of the securities under discussion, and apparently fix the legal responsibility upon them for the execution of such provision. It would therefore seem in the light of this section as well as the other sections of the code which generally authorize the county commissioners to have full supervision over all the details of the awarding of the depository contract, that it was the legislative intent to charge such commissioners with the legal responsibility of executing this important detail incident to the transaction.

As a conclusion of law, therefore, it would seem to follow that when the county commissioners had lawfully discharged the duty imposed upon them by statute, by providing for the safe keeping of the hypothecated securities, and having used in the execution of such duty the ordinary diligence required of public officers in the transaction of official business, seemingly their liability, in the event of the loss of the securities, would have terminated, and the subsequent liability of the officer or person selected by the commissioners as the custodian of the securities, would depend entirely upon the circumstances peculiar in each instance as well as the nature of the contract between the commissioners and the person selected by them as the custodian for their safe keeping.

Briefly stated, it is thought that under the provisions of the statute the county commissioners are charged with the duty of providing for the safe keeping of the hypothecated securities under consideration, and would be liable in the event of any loss of the same caused by their negligence in failing to make such a provision, and further than the lawful performance of this duty, it would seem that statutory liability does not extend.

In all events, it is believed, that the liability for the loss of the pledged securities under consideration can be determined only from the facts and circumstances arising in each particular instance, since a general rule could not possibly be laid down which would cover all cases,

(2) *Municipal Depositories:*

The following sections of the General Code provide for the establishment of municipal depositories:

"Sec. 4295. The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the state of Ohio or of of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent in excess of the maximum amount at any time to be deposited. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depository laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

"Sec. 4296. In such ordinance the council may determine the method by which such bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given. Proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen. As to any deposits made under authority of an ordinance of the council, pursuant hereof, if the treasurer has exercised due care, neither he nor his bondsmen shall be liable for any loss occasioned thereby."

It may be observed, by the provisions of the two sections cited, that council is charged with the duty of providing by ordinance for the deposit of municipal funds in the hands of the treasurer, and is to determine in such ordinance the method by which bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made and all details for carrying into effect such authority.

It may be generally noted in the case of the municipal depository, council is chargeable with the similar duties of providing for such depository as are the county commissioners in the case of the county depository, with this difference, however, that the duties imposed upon council are legislative only, while in the case of the county commissioners the duties imposed are seemingly of an administrative nature. In this connection, section 4211 G. C. provides:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

By the provisions of this section, it may be noted that the powers and duties of council are limited strictly to those of a legislative nature, and in no instance may it perform administrative duties; also all contracts requiring the authority of council for their execution, shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate. Under such conditions therefore it is believed that council could not as in the case of the county commissioners be held liable in the event of loss of the securities by reason of its failure to provide for the safe keeping of the same, since its functions are purely of a legislative nature, and to which liability would not attach. Whether or not in such an event a proceeding in mandamus would lie to compel such action by council is a closely correlated proposition and would depend to a certain extent upon the circumstances and facts incident in the concrete case. However, it is thought on the other hand, that the person or authority designated by ordinance or resolution of council, if such be the case, as the custodian of the hypothecated securities, such person or authority would be chargeable generally with that degree of care for their safe keeping as is required of a bailee in such cases, and correspondingly liable for any loss occasioned by negligence or dereliction of duty.

(3) *School District Depositories:*

The following sections of the General Code pertain to the depositories created for the deposit of the funds of school districts, and are cited herewith:

"Sec. 7604. That within thirty days after the first Monday in January, 1916, and every two years thereafter, the board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer. But no bank shall receive a deposit larger than the amount of its paid in capital stock and in no event to exceed one million dollars, except that in case the board of education shall find that it will be for the best interests of any school district such bank shall be permitted to receive an amount in no event to exceed five million dollars."

Sec. 7605. In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent for the full time funds or any part thereof are on deposit. Such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond.

But no contract for the deposit of school funds shall be made for a longer period than two years."

"Sec. 7606. The board shall determine in such resolution the method by which bids shall be received, the authority which is to receive them, the time for which such deposits shall be made and all details for carrying into effect the authority herein given. All proceedings in connection with such competitive bidding and deposit of moneys must be so conducted as to insure full publicity and shall be open at all times to public inspection. If in the opinion of a board of education there has been any collusion between the bidders, it may reject any or all bids and arrange for the deposit of funds in a bank or banks without the district as hereinafter provided for in districts not having two or more banks located therein."

"Sec. 7608. The resolution and contract in the next four preceding sections provided for, shall set forth fully all details necessary to carry into effect the authority herein given. All proceedings connected with the adoption of such resolution and the making of such contract must be conducted in such a manner as to insure full publicity and shall be open at all times to public inspection."

By the provisions of the sections cited, it is apparent that the board of education is vested with power and authority to award the contract for the deposit of the school district funds, and is authorized to determine in its resolution "the method by which bids shall be received, the authority which is to receive them, the time for which such deposits shall be made and all details for carrying into effect the authority herein given."

It is thought that a similar condition prevails in the instance of the school district depository as in that of the county depository, and that the board of education is charged with the duty of providing for the safe keeping of the hypothecated securities under discussion. It is also believed, as in the case of the county commissioners previously discussed, that the liability of the board of education would extend to the execution of this duty only, and that further than the lawful performance of the same is not changed by statute. It is therefore similarly concluded that negligence or dereliction of duty in this particular, occasioning loss of the securities would render the board of education liable, and the extent of such liability could only be determined from the given facts in each particular case.

(4) *Township Depositories:*

Sections 3317 to and inclusive of 3324 G. C. provide for the township depositories. It may be likewise noted that as in the case of county, municipal and school district depositories, no person, officer or other authority is expressly designated as the legal custodian chargeable with the safe keeping of the hypothecated securities given by the depository banks to secure the deposit of township funds, although the sufficiency of such securities tendered, as well as the approval of the same, is expressly provided for in a similar manner as are those of the other depositories under consideration.

Section 3320 G. C. provides:

"That within thirty days after the first Monday of January, 1916, and every two years thereafter, the trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the hands of the treasurer of the township, and the treasurer shall deposit such money in such bank, banks or depository within the

county in which the township is located as the trustees may direct subject to the following provisions."

Section 3321 G. C. provides :

"The trustees of the township shall determine in such resolution the method by which bids shall be received, the authority which shall receive them, and time for which such deposits shall be made, and all the details for carrying into effect the authority herein given, but all proceedings in connection with such competitive bidding and the deposit of such moneys shall be conducted in such manner as to insure full publicity and shall be open at all times to public inspection. But no contract for the deposit of township funds shall be made for a longer period than two years."

Section 3324 G. C. provides :

"Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, and the treasurer of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such treasurer and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

By the provisions of section 3320 G. C. the township trustees are required by resolution to provide for the depositing of any or all moneys coming into the hands of the treasurer of the township; also, by the provisions of section 3321 G. C. the township trustees are to determine in such resolution the method by which bids shall be received, the authority which shall receive them, the time for which such deposits shall be made, and all the details for carrying into effect the authority therein delegated. By the provisions of these two sections it would also seem evident that the township trustees are empowered with functions similar to those of the county commissioners, and the board of education in the award of the contract for the deposit of the funds of the township.

Section 3324 G. C., while providing for the approval and sufficiency of the bond given by the depository bank, as in the instance of the other depositories under consideration does not designate a custodian for such hypothecated securities. It is thought, however, to be reasonably concluded that since the township trustees are charged with the duty of providing for all details incident to the transaction, they would equally be chargeable with the duty of making provision for the safe keeping of the securities under discussion, and would be liable for any loss of the same caused by negligence or dereliction of duty in this particular, further than this it is thought that statutory liability does not extend.

Since the questions presented by your inquiry involve others of mixed law and fact, it is believed that more specific answers may not be profitably attempted until the facts and circumstances in each particular instance are more fully cited, or a concrete case given from which conclusions of law may be more accurately drawn. It is also believed that there can be little or no uniformity throughout the state in the matter of the custodianship of the securities under consideration until legislative enactment more specifically designates the official or officials upon whom such duties are to be incum-

bent and who may thus be held directly responsible for the legal custody and safe keeping of the securities under consideration.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

2364.

CIGARETTE TAX—NO PENALTY PROVIDED FOR NONPAYMENT OF SAID TAX.

*The penalty provided for the non-payment of the general taxes upon real estate and personal property does not apply to unpaid cigarette taxes.*

COLUMBUS, OHIO, August 24, 1921.

HON. J. T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads:

“We are in receipt of the following letter from the auditor of Trumbull county, which is self-explanatory, and we desire your opinion upon the question submitted in same:

‘Please refer the following inquiry to the proper department. What penalty should be figured on cigarette taxes unpaid at the close of the June collection of taxes?’

We are making our cigarette settlement this year, with \$1,600.00 unpaid. Please tell me what penalty, if any, should be added. The new form book has no column for penalty; however, I am anxious to follow the law.’”

In considering your inquiry we may start with the proposition that under the existing laws of this state and the judicial interpretations thereof, a tax may not be levied except in pursuance of clear authority of law. Analogically it will follow that the collection must be in pursuance to express authority of law. It may further be considered as established that fees cannot be collected by public officers in Ohio unless there is clear statutory authority for the same.

There may be some question as to whether the so-called “cigarette tax” is a “tax” as the later term is generally understood in legal contemplation. However, it of course is clear that the cigarette tax is a special tax and should not be confused with reference to the general taxes, that is, taxes upon real estate and personal property. However, regardless of what may be the true status of such a tax as the one under consideration, the rule in reference to its levy and collection is the same, that is, it cannot be collected except in pursuance of clear authority of law, as heretofore indicated. This rule has been so frequently enunciated by the courts of this state in various decisions and opinions of the Attorney-General that no specific citation seems necessary.

In view of the foregoing discussion, it is evident that the only question requiring consideration is whether or not there are any statutes expressly creating a penalty upon such delinquent taxes.