4421.

APPROVAL, BONDS OF CITY OF AKRON, SUMMIT COUNTY, OHIO, $80,000.00.

COLUMBUS, OHIO, July 15, 1935.

Industrial Commission of Ohio, Columbus, Ohio.

4422.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO, $45,000.00.

COLUMBUS, OHIO, July 16, 1935.

State Employes Retirement Board, Columbus, Ohio.

4423.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO, $5,000.00.

COLUMBUS, OHIO, July 16, 1935.

State Employes Retirement Board, Columbus, Ohio.

4424.

ASHTABULA—MUNICIPAL COURT THEREOF MAY NOT ENTER INTO DEPOSITORY CONTRACT WITH BANK ON FUNDS HELD BY CLERK OF SAID COURT AND PAY SERVICE CHARGES OF SAID BANK.

SYLLABUS:

The municipal court of Ashtabula may not enter into a depository contract with a bank covering funds in the hands of the clerk of such court and agree to pay the usual service charges made by such bank.

COLUMBUS, OHIO, July 16, 1935.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "We are inclosing correspondence relative to the legal right of municipal courts to enter into depository contracts for the deposit of court funds, which contracts provide that the court shall be charged the usual service charges made by the bank, and would appreciate your opinion on the three questions contained in the letter signed by H. H. Brainard, Clerk of the Municipal Court of Ashtabula.
>
> We ask that you also consider the question of the legal right of municipalities to accept bids from banks for the deposit of public funds, when the bids contain the stipulation that a certain rate of interest will be paid on the account, but a charge will be made for checks handled, in accordance with the fixed service charges made by the bank against all other depositors."

The enclosed correspondence reads in part as follows:

> "Under the act creating this court, the court is required to designate some bank as depositary of court funds.
>
> Some time ago the banks in this county formed an organization or a working agreement whereby the members thereof charge a so-called service fee in the nature of an assessment on each check drawn upon said bank, which is based on the size of the account and the number of checks drawn in any monthly period. As you are aware our court funds are divided into three divisions. First, the criminal branch, which is composed of fines and costs paid into court for violation of criminal laws and ordinances, and which are later paid out by check to the city, county, state, state departments, and so forth, as provided by law. In this division the costs and fines are usually controlled by statute or ordinances and we are probably prohibited from assessing any additional costs such as the charge upon the above mentioned bank checks.
>
> Second, the civil branch, which is composed mostly of funds paid into court upon judgments obtained therein and which are later checked out to the individuals entitled thereto. The costs, of course, are paid into the city treasury by check to the credit of the municipal court fund.
>
> Third, the trustee account, in which is kept money paid into court

by debtors for distribution among all their creditors, under the provisions of the attachment or garnishee laws recently enacted. In connection with this fund, the statute seems to be mandatory that no additional costs may be charged upon the debtor paying this sum into court and no provision seems to be made for the charge of any additional cost upon the creditor entitled to his share of the fund.

Query A: In as much as these funds are paid into court under direction of statute and the sums and court fees thereof are fixed by law, are they not of such a nature that they become public funds upon which the so-called service charge may not be made by the banks?

Query B: Is it not true that these funds become trust funds the moment they are paid into court, upon which no one can place an additional charge except such as prescribed by statute?

Query C: If not, how can this additional charge placed thereon by the bank be collected without reducing the amount to which the beneficiaries of any of said funds are entitled or placing an additional charge upon the person paying same into court, when same is not prescribed or designated by statute or rule of court under statutory authority?"

Section 1579-851, General Code, relative to the depositing of funds of the Municipal Court of Ashtabula reads in part as follows:

"All moneys paid into the Municipal Court shall as soon as practicable be deposited by the clerk in such banking institutions as shall be designated by the judge of the court, there to abide the order of the clerk and to bear interest at the best rate obtainable."

As pointed out in your letter, it has become the custom among banks to charge persons having checking accounts a certain service fee. At first the banks charged a small monthly fee. In recent months this has been felt to be inequitable since some persons wrote more checks upon the same average account than did other depositors. The custom is now to charge a small fee for each check. The legality of this practice in so far as it pertains to the general public, was passed upon by my immediate predecessor in an opinion to be found in the Opinions of the Attorney General for 1929, Vol. I, page 606. The syllabus of that opinion reads as follows:

"The rules proposed to be adopted by the members of the county bankers association, to charge their patrons a small monthly service charge, would not be in violation of either the state or federal anti-trust laws."

With reference to the present inquiry, a still further question presents itself; namely, may a municipality expend public funds for such service charges? While a private individual may expend money for any purpose not expressly prohibited by law, it is necessary to find statutory authority for the expenditure of public money. Public officers have only those powers expressly granted by statute, together with such implied powers as are reasonably necessary to effectuate those expressed powers.

Peter vs. *Parkinson,* 83 O. S. 36;
State ex rel vs. *Pierce,* 96 O. S. 44;
Frisbie Co. vs. *East Cleveland,* 98 O. S., 266.

Furthermore the right to expend public funds is strictly construed. The third branch of the syllabus in the Pierce case, supra, reads as follows:

"3. In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

A somewhat analogous question to the one presented by you was passed upon by me in an opinion to be found in the Opinions of the Attorney General for 1934, Volume 2, Page 1206. The first branch of the syllabus of that opinion reads as follows:

"1. A county may not legally pay to a depository bank a collection fee on checks drawn upon other banks and received by the county treasurer for taxes, where the depository bank accepts such checks for collection only."

The following statement appears at Page 1208:

"Furthermore, public funds may be expended only in compliance with constitutional and statutory authority. I find no statutory authority for the county treasurer, or any other officer of the county, to pay to depository banks from public funds a collection fee on checks drawn upon other banks and accepted in payment of taxes."

The conclusion and reasoning of this opinion would seem to be applicable to the present inquiry, inasmuch as there exists no statutory authority for the payment of these service fees. The only question remaining is whether or not there is implied power to expend public funds for such purposes. This office, in an opinion to be found in Opinions of the Attorney General for 1934, Vol. 2, Page 1184, held as disclosed by the syllabus:

"A board of Education may lawfully pay a bank with which it does not have a depository contract, or a bank with which it has a depository contract, after the limitations of its deposit under said contract is reached, for the cashing of checks and warrants, if it is unable to have them cashed without charge."

The following language appears at Page 1186:

"Clearly, however, they have a right to receive money from the County Treasurer by way of advances and settlements. They cannot demand that these funds be transmitted to them in cash and it is not the usual and ordinary method to pay such advances and settlements in cash. If they receive checks or warrants representing advances and settlements, these checks and warrants are of no use to them until they are cashed. They clearly have power to get them cashed that they may with the money carry out the express powers granted to them and enjoined upon them by law, to maintain the schools in their districts. If no other way exists to get them cashed than by paying for the service which the cashing of the warrants entails, they clearly have the power, in my opinion, to expend public funds in their possession for that purpose. This is a necessary power under such circumstances, to carry out the express powers granted to them. Such an expenditure is justified because of the exigencies of the situation, when it is impossible for the Board to function and perform its duties without making the expenditure, but it would be justifiable in such cases only."

I feel that this last opinion should rest upon the peculiar facts presented in that question. It should not be extended to cover a situation like the one presented in your inquiry. As stated in the Pierce case, supra, all doubt should be resolved against the existence of power to expend public funds.

In view of the above and without extending this discussion, it is my opinion that the municipal court of Ashtabula may not enter into a depository contract with a bank covering funds in the hands of the clerk of such court and agree to pay the usual service charges made by such bank.

Respectfully,

JOHN W. BRICKER,

Attorney General.