

3280.

COUNTY COMMISSIONERS—AUTHORITY TO ACCEPT AS COLLATERAL, DEPOSITARY BANK'S ASSIGNMENT OF RECEIPT FOR BONDS DEPOSITED WITH ANOTHER BANK, DISCUSSED.

SYLLABUS:

*The board of county commissioners which accepts securities from a depository bank as security for county deposits therein, in lieu of an undertaking therefor, by authority of section 2732, General Code, should receive said securities, by a proper legal transfer thereof, to such an extent as to have complete and exclusive control of and dominion over the same.*

COLUMBUS, OHIO, June 1, 1931.

HON. GEORGE S. MIDDLETON, *Prosecuting Attorney, Bellefontaine, Ohio.*

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

“Would the assignment of a receipt for bonds deposited with another bank be sufficient compliance with Section 2732 and Section 2734, General Code, which provides for the hypothecation of securities in lieu of a depository bond?”

The commissioners of each county are directed by the terms of sections 2715 et seq. of the General Code, to select depositories for county funds in the manner therein prescribed. The banks and trust companies so designated are required to secure the county funds received on deposit by the execution of a proper undertaking. The commissioners are authorized, however, by the terms of section 2732, General Code, to receive as security for deposits placed in a duly designated county depository, certain securities enumerated in the statute.

Section 2734, General Code, referred to by you, sets forth the form of hypothecation of those securities when received by the commissioners, in lieu of an undertaking, and the manner of releasing those securities, after the purpose for which they had been hypothecated is served. Said section reads as follows:

“The hypothecation of such securities shall be the proper legal transfer thereof as collateral which shall stipulate that such securities shall be the property of the county in case of any default on the part of the bank in its capacity as depository, and that the negotiation or release thereof, by the commissioners shall require the signature of at least two members of the board of county commissioners.”

Section 2735, General Code, provides as follows:

“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.”

The purpose of the commissioners' receipt of securities by way of hypothe-

cation as provided for in section 2734, supra, is to secure the deposits placed with a bank or trust company, and for that reason, if for no other, the securities should be under the exclusive control of the commissioners after their hypothecation, so that they may be available at once upon default of payment of the funds deposited with the depository bank. This requires, in my opinion, an actual delivery of the securities into the custody of the board of commissioners.

An actual delivery of the securities so as to place them in complete custody of the commissioners, and under the absolute control of the commissioners is apparently contemplated by the statute, Section 2735, supra, inasmuch as it provides that the commissioners shall make ample provision for the safekeeping of the hypothecated securities and shall pay any interest that may be earned upon them to the bank or trust company which had hypothecated them. The commissioners could not do this unless they had custody and control of the securities. The further fact that the commissioners are authorized to release the securities and under certain circumstances to exchange them for other securities further fortifies the conclusion, in my opinion, that the statutes contemplate complete custody of the securities on the part of the commissioners.

The question therefore arises whether or not a mere assignment of a receipt for securities which had been deposited with some third party is "a proper legal transfer thereof" as contemplated by section 2734, General Code.

It is possible under some circumstances that the mere presentation of a signed receipt would be sufficient to entitle the commissioners to the actual physical possession of securities which had been deposited with a third party but this is not necessarily so. It depends entirely on the terms of the deposit when made with the third party. The receipt for the deposit of securities with a bank or trust company is a non-negotiable instrument. When assigned the assignee takes the instrument subject to any equities that may exist against the assignor and unless circumstances be such that the mere possession of the assigned receipt would entitle the commissioners to the immediate and complete possession of the securities upon presentation to the bank with which they had been deposited by the assignor of the receipt, I am of the opinion that the commissioners are not authorized to receive such a receipt as a hypothecation of the securities which the receipt purports to represent. Even if there are no conditions attached to the original deposit with the third party bank and the receipt for such deposit is assigned to the commissioners as security for deposits of a county depository bank in lieu of giving a statutory undertaking therefor, it would be the duty of the commissioners to forthwith present the receipt to the bailee bank and take possession of the securities and provide for their safekeeping as provided in section 2735, General Code.

In this connection your attention is directed to two former opinions of this office, to wit: Opinions of the Attorney General for 1927, page 990, Opinions of the Attorney General for 1928, page 1460. In each of these opinions questions somewhat similar, although not precisely the same, with reference to the hypothecation of securities to secure deposits of school moneys by a school depository bank, were considered. In the first of these opinions it is held, as stated in the syllabus:

"Securities deposited with a board of education by a depository of public funds should be kept at all times under the control and dominion of such board."

The syllabus of the second opinion reads as follows:

"School depository banks which, at the instance of the board of education whose funds they receive on deposit, are permitted to furnish security for said funds by the hypothecation of certain securities, may not designate another bank as trustee for the holding, and disposal in case of default, of the securities so hypothecated, but must place them under the complete and exclusive control and dominion of the board of education whose deposits are to be thus secured."

The statute relating to the hypothecation of securities by a school depository bank, to secure deposits made by a board of education, reads somewhat differently than the statute relating to county depositories. A school depository bank is authorized to "deposit" certain enumerated securities whereas the statute relating to county depositories permits the commissioners to "accept" certain enumerated securities in lieu of an undertaking.

This fact does not, in my opinion, change the situation. If anything, the county depository statutes more clearly require the commissioners to exercise full, complete and exclusive control of the hypothecated securities than do the school depository statutes. I am of the opinion that when the commissioners accept securities in lieu of an undertaking as security for county deposits in a county depository bank, by authority of section 2732, General Code, these securities should pass into the complete and exclusive control of the board of commissioners.

The mere assignment of a receipt for these securities which had been deposited, with a third party, is not sufficient, although, if the deposit made with the third party, which deposit is represented by the receipt, has no conditions attached to it and no equities exist in said securities in favor of the depository bank, so that the commissioners may upon presentation of the receipt secure the actual physical custody of the securities the receipt may be accepted. In that case, however, the commissioners must forthwith, before any intervening equities may attach thereto, secure actual physical possession of the securities and provide for their safekeeping as directed by section 2735, General Code, else the deposits are not properly secured.

I am therefore of the opinion, in specific answer to your question, that the board of county commissioners which accepts securities from a depository bank as security for county deposits therein, in lieu of an undertaking therefor, by authority of section 2732, General Code, should receive said securities, by a proper legal transfer thereof, to such an extent as to have complete and exclusive control of and dominion over the same, and that the mere taking and holding of a receipt from a third party, who has custody of the securities, is not a proper compliance with the law.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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REALTY—MAY BE CERTIFIED AS DELINQUENT FOR UNPAID  
SPECIAL ASSESSMENTS ALONE.

**SYLLABUS:**

*Lands may be certified as delinquent under the provisions of section 5712, General Code, and for foreclosure under the provision of section 5718, General Code, for the non-payment of special assessments for such periods of time as bring the*