1053.

APPROVAL, BONDS OF CELEVLAND CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$750,000.00.

COLUMBUS, OHIO, July 20, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1054.

FIREMEN—PENSION FUND—MONEYS THEREOF DEPOSITED IN BANK BY TREASURER OF MUNICIPALITY ARE PUBLIC FUNDS.

SYLLABUS:

Moneys deposited in a bank by the treasurer of a municipality which constitute the firemen's pension fund are public funds.

COLUMBUS, OHIO, July 20, 1933.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

> "General Code Section 4610 provides as follows:
>
> 'The treasurer of the municipality shall be the custodian of the firemen's pension fund, and shall pay it out upon the proper order of the trustees thereof.'
>
> When the present treasurer of the City of Ashtabula was appointed, the firemen's pension fund, amounting to between twenty and twenty-five thousand dollars, was paid over to him by virtue of his appointment and he has been the custodian of this fund ever since. He has furnished bond to the City which provides that he shall 'honestly and impartially perform the duties of said office imposed by law, and shall honestly account for all monies that may come into his hands in his official capacity during his continuance therein'.
>
> These funds are on deposit in The M——— Savings Bank Company of A——— and they have adopted a plan for reopening which would release 55% of their deposits, providing a majority of the depositors agree to this. The conservator of the bank is endeavoring to have the trustees of the pension fund sign such an agreement, and is treating this fund as a private fund. Under the plan, all public funds of the bank are to be released in toto. The pension fund has been created, of course, through the collection of taxes, and it would be my opinion that it is a public fund and should be released in its entirety.
>
> I would appreciate very much your opinion covering this matter."

As I understand your question, it is whether a deposit of the firemen's pension fund comes within the term "public funds" as used in a plan for the re-opening of a bank. It does not appear from your letter how these funds have been treated in the past. It does not appear whether or not the city council has by ordinance provided for the deposit of all public moneys under sections 4295 and 4296 of the General Code, or, if a depository has been so designated, whether or not the funds in question have been deposited therein.

Section 4600 provides that a municipal corporation may establish a firemen's pension fund and provides for a board of trustees to administer it. The sections immediately succeeding contain further provisions pertaining to the board of trustees of the fund. Section 4605 reads:

> "In each municipality availing itself of these provisions, to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, shall levy tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in such municipality, but sufficient in amount within the three-tenths of a mill to provide funds for the payment of all pensions granted to firemen under existing laws. In the matter of such levy, the board of trustees of the firemen's pension fund shall be subject to the provisions of law controlling the heads of departments in the municipality, and shall discharge all the duties required of such heads of departments."

Section 4607 provides that certain fines, penalties and license fees shall belong to the fund. Section 4608 empowers the trustees to receive donations. Section 4609 reads:

> "The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the fire department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries."

Section 4610, quoted in part in your letter, makes the treasurer of the municipality the custodian of the fund and provides that he shall execute a bond conditioned for the faithful performance of his duties with respect thereto.

As to that part of the fund derived from taxation, there can be no doubt of its public character. Moneys coming into the public treasuries from taxation can only be used for a public purpose. The creation of a pension fund is such a purpose. Part of the fund in question, however, comes from voluntary contributions made by members of the fire department. In my opinion when such contributions come into the custody of the treasurer of the municipality to be used for a public purpose they lose their character as private funds and become public funds. Dillon on Municipal Corporations (5th Ed. paragraph 431 is as follows:

> "The fund from which municipal pensions are paid is usually created by setting aside certain sources of public income, and frequently provision is made that a stated sum per month shall be retained or deducted from compensation of each of the officers in the department who may become entitled to a pension. Although the sum so deducted from the

officer's compensation is called a part of the officer's compensation in the statute, yet the officer never receives it or controls it, and he cannot prevent its appropriation to the fund in question. He has no power of disposition over it such as always accompanies ownership of property. A statute providing for such a deduction in legal effect says that the officer shall receive as compensation each month the net amount payable to him, and that in addition thereto the State or municipality will create a fund by appropriating the amount retained each month for that purpose from which, upon his resignation for bad health or bodily infirmity or dismissal after long and meritorious service, a certain sum shall be paid to him, or at his death to his widow and children where the statute so provides. *Being a fund raised in that way, it is entirely at the disposal of the government until, by the happening of one of the events stated,—the resignation, retirement, or death of the officer,—the right to the specific sum becomes vested in the officer or his representative.*

In making a change in the disposition of a fund of that character previous to the happening of one of the events mentioned, the State impairs no absolute right of property in the officer. The direction of the State that the fund should be one for the benefit of the officer or his representative under certain conditions is subject to change or revocation at any time at the will of the Legislature. There is no contract on the part of the State that its disposition shall always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, is to be paid, there is no vested right in the officer to such payment. His interest in the fund is, until then, a mere expectancy created by the law and liable to be revoked or destroyed by the same authority. But when the particular event has happened upon which the money or a part of it is to be paid, the beneficiary of the pension under the pension system acquires, it has been held, a vested right and it is not competent for the Legislature or any other authority to deprive him of that vested right. But the existence of a vested right is dependent upon statutory provisions conferring the pension without qualification and without any reserved right to terminate it. If the statute reserves the power to the local authorities to discontinue the pension in their discretion, the beneficiary does not acquire a vested right in it." (Italics the writer's.)

In *State ex rel.* vs. *Maher,* 88 O. S. 165, it was held that moneys derived from special assessments for the construction of a county ditch were "public moneys" under section 2921 authorizing the prosecuting attorney to bring an action for misapplication of public funds. The court said at pp. 175, 176:

"Conceding for the purpose of this case that the fund out of which the warrant was paid was a fund raised by ditch assessment (though neither the petition nor the warrant discloses whether it was ditch funds raised by general taxation or taxation of the persons benefited in the neighborhood of the ditch), what was each contributor's interest in said fund after he had paid his assessment into the county treasury?

Had such contributor not fully and eternally lost all control, dominion and interest in said fund? Had he not absolutely parted with his property in the same? Indeed, has it not been repeatedly held by courts without pumber that if after payment of the assessment the law under which the ditch was constructed or the assessment made was held unconstitutional the assessment cannot be recovered back unless payment was made under a proper protest? 30 Cyc., 1315.

Title to those moneys must be somewhere and in somebody. It is not in the contributors to the fund. Where else can it be than in the county or its agent, the county treasurer?"

In case of the firemen's pension fund, those who make voluntary contributions lose all dominion over the money. Until the happening of certain contingencies, these contributors have no title to or control over any portion of the fund. While the part raised by contributions as well as the portion derived from taxation are in the hands of the municipal treasurer, they are public funds.

In the light of the foregoing, it is my opinion that moneys deposited in a bank by the treasurer of a municipality which constitute the firemen's pension fund are public funds.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1055.

DISAPPROVAL, NOTES OF PULTNEY TOWNSHIP RURAL SCHOOL DISTRICT, BELMONT COUNTY, OHIO—$5,500.00.

COLUMBUS, OHIO, July 20, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

Re: Notes of Pultney Twp. Rural School Dist., Belmont County, Ohio, $5,500.00.

I have examined the transcript relative to the above purchase of notes which have been authorized in anticipation of the August, 1933, tax settlement, under the provisions of Section 2293-4, General Code. The certificate of the budget commission issued to this school district recites that the estimated amount to be received from the August, 1933, real and public utility tax settlement, other than taxes then to be received for the payment of debt charges and other than any advances, is $5,500.00. Section 2293-4, General Code, limits the amount which may be borrowed in anticipation of any semi-annual tax settlement to 50% of the amount so certified by the budget commission.

It is obvious that the board of education of the above school district has authorized notes in excess of the amount which may be authorized under the provisions of Section 2293-4, General Code, and it is accordingly my opinion that you should not purchase this issue.

Respectfully,
JOHN W. BRICKER,
Attorney General.