

3234.

APPROVAL—RESERVOIR LAND LEASE FOR TRACT OF LAND IN
LICKING AND PERRY COUNTIES, OHIO, FOR THE RIGHT TO
USE FOR NECESSARY RIGHT-OF-WAY PURPOSES—THE BALTI-
MORE AND OHIO RAILROAD.

COLUMBUS, OHIO, September 20, 1934.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a recent communication over the signature of the Chief of the Bureau of Inland Lakes and Parks of the Division of Conservation in your department, submitting for my examination and approval a reservoir land lease, in triplicate, executed by the Conservation Commissioner, under the authority of section 471, General Code, to The Baltimore and Ohio Railroad Company of Newark, Ohio.

This lease, which is one for a stated term of fifteen years, and which provides for an annual rental of \$100.00, payable semi-annually, grants and demises to the lessee above named, the right to use for necessary right-of-way purposes only, four tracts of land located in Licking County and four in Perry County, Ohio, as described in said lease.

Upon examination of this lease, I find that the same has been properly executed by the Conservation Commissioner and The Baltimore and Ohio Railroad Company, the lessee therein named.

I further find upon examination of the provisions of this lease and of the conditions and restrictions therein contained, that the same are in conformity with the provisions of the sections of the General Code above referred to, and with those of other statutory enactments relating to leases of this kind.

I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3235.

TREASURER OF STATE—HOLDING STATE FUNDS IN TREASURY BY
CASHIER'S CHECKS AND DRAFTS NOT ILLEGAL WHEN IMPOS-
SIBLE TO PLACE SUCH FUNDS IN STATE DEPOSITORIES.

SYLLABUS:

1. *When bids for the award of state funds have been submitted in accordance with the provisions of Sections 328 and 329, General Code, and certain applications accompanying such bids have been duly approved, the Treasurer of State has no authority to receive additional bids of such nature during the two year bidding period provided therefor by law.*
2. *During a period when the Treasurer of State is unable to deposit state funds in duly approved state depositories on account of such depositories having*

the maximum amount of such fund they are authorized to receive, or on account of such depositories being unwilling or unable to secure the deposit of such funds as required by law, the practice in good faith of holding such funds in the state treasury in the form of cashiers' checks and drafts does not constitute an illegal disposition of such funds so long as it is impossible to place such funds in state depositories in accordance with law. Opinions of the Attorney General for 1916, Vol. I, page 525 followed.

COLUMBUS, OHIO, September 20, 1934.

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

DEAR SIR:—Your letter of recent date is as follows:

“We respectfully request your written opinion upon the following question, growing out of the statutory examination of the State Treasury as of April 14, 1934.

There was found in the Treasury on said date:

6 Cashier's checks, dated March 20, 1934, amounting in the aggregate to \$3,000,000.00.

17 Drafts on Federal Reserve Bank, dated at various times from January 3, 1934 to April 10, 1934, totaling \$5,750,000.00.

3 Drafts on New York banks, dated January 3 and 4, 1934, amounting to \$1,150,000.00.

These items were being carried in the cash accounts and not as deposits by the Treasurer of State, and no interest was received on said moneys.

Question: In view of the depository laws governing the deposits of state moneys, were these transactions a legal disposition of the public funds to the credit of the State of Ohio on said date?”

My opinion upon two questions of law bearing upon this same condition existing in the state treasury has also been requested by Hon. Harry S. Day, Treasurer of State, as set forth in the following letter:

“In view of the limitations placed on the Treasurer of State by the provisions of Section 328, G. C., I respectfully request your opinion on the following questions:

When the eligible state depositories designated by the State Board of Deposits in accordance with the provisions of Section 325, G. C., have received all of the funds for which they have qualified and a surplus of undeposited money still exists, may the Treasurer of State receive additional bids from banks in the State of Ohio who did not bid at the preceding date set by law for the reception of bids?

If such additional bids are not permissible, in what manner shall the Treasurer of State carry the surplus of undeposited money?”

Since these inquiries bear upon the same situation, I shall take the liberty of herein expressing my opinion upon all of these questions.

While circumstances giving rise to present conditions resulting in the Treasurer being confronted with the problem of the proper disposition of state funds are not controlling in determining the Treasurer's statutory duties in respect there-

to, for the purpose of clarification it might be pertinent to set forth these circumstances as viewed by the Treasurer. These are set forth in his letter to the Governor of September 5, copy of which is attached to his request and which reads as follows:

"Your attention is respectfully directed to a condition which has come about in the State Treasury and which is entirely beyond my control as Treasurer of State.

Commencing with the bank holiday and its attendant bank failures, it has become increasingly more difficult for this office to deposit all of the funds received, as a great number of the banks which were designated in 1933 as legal depositories, have since failed or have refused to qualify for state funds resulting in large amounts accumulating and remaining undeposited in this office.

This condition has been aggravated by the following changes in the laws relating to the collection of various taxes:

First—The Motor Vehicle Registration license fees are now collected and remitted directly to the Bureau of Motor Vehicles who deposit their receipts with this office daily, and the districts' share of seventy-three per cent is remitted back to them but not until the registrations are carefully checked and recorded which requires considerable time. Previously the districts collected the registration fee and remitted to the state only their share.

Second—The change in the intangible tax law provides for the collection by the Treasurer of State of the intangible tax on financial institutions, public utilities, dealers in intangibles, domestic insurance companies and inter-county corporations which funds increase the flow of receipts by over \$6,000,000.00.

Third—The Liquor Control Board Act has opened up another source of revenue which resulted in almost \$7,000,000 being received this year.

Fourth—The cosmetic, beer, beverage and malt taxes have likewise added millions of dollars to the constantly increasing flow of revenues into this office.

In addition to these changes, the cash balances of the Workmen's Compensation Fund and the State Teachers' Retirement System now amounting to over \$5,000,000.00 are higher than at any time since their origin.

Under the present depository law with which you are no doubt familiar, we are prohibited from carrying more than \$50,000.00 in currency in our vaults at any one time. We are also prohibited from placing state funds with any bank in the state that does not have a bid on file, and we are prohibited from giving any bank which does have a bid on file any amount in excess of the amount for which they have bid or any amount over any limitations imposed by the depository law.

Under present conditions, a number of banks of the State of Ohio who already have state funds are requesting that they be permitted to return them because of the fact that they have no use for them, and also that the State Banking Department insists that they reduce expenditures by returning these deposits on which they are paying interest if possible, but even if every bank in the State of Ohio were willing to accept every dollar which could be allotted to them under their bid,

this office would still have several million dollars over and above the amount required for such purpose.

The question arises as to what can be done with the surplus funds all of which belong to specific funds rather than the general revenue fund of the state when the total amount of moneys thereof received at this office amount to several million dollars more than the law permits us to either carry in our vault or than it is possible to deposit legally with the banks of the state.

Our attention has recently been called to a decision wherein Mr. Henry Morgenthau, Secretary of the Treasury, affirms an opinion by counsel for the Chicago Federal Reserve Bank in the case of the City of Milwaukee that the carrying of large surpluses of public funds in cash would be 'hoarding' under President Roosevelt's Emergency Executive Order of March 10, 1933. In the exercise of our best judgment, we have taken drafts on the Federal Reserve Banks as a means of safekeeping these additional funds.

At first it was felt that this condition would only be temporary but as it has persisted with no relief in sight, we wish to respectfully urge you to take the necessary steps to present this problem to the legislature recommending that the existing depository laws be changed to correct the situation."

I shall first consider the question of authority to receive additional bids during the running of a two year bidding period.

The award of state funds by the Treasurer of State is required to be made to banks which are eligible to be state depositories, that is to say, those banks which have bid for the deposit of such funds and whose bids have been endorsed "approved" by the State Board of Deposits, consisting of the Treasurer of State, the Director of Finance and the Attorney General. Sections 325 and 321, General Code. The authority to receive bids and the time when they may be received is set forth in Section 328, General Code, in the following language:

"All awards for the deposit of state funds shall be made upon competitive bidding; bids shall be received by the treasurer of state every two years, beginning between one o'clock p. m. on the first Monday in March and closing at one o'clock p. m. on the third Monday in March, 1911, and every two years thereafter."

Under Section 329, General Code, these bids shall be publicly opened by the Treasurer of State "beginning at one o'clock p. m. on the third Monday in March of each bidding period". Section 330, General Code, provides for the award of state funds as follows:

"After bids have been opened the treasurer of state shall on or before the first Monday in April of each bidding period award the state funds to the highest bidders.

The treasurer of state shall deposit the state funds in such banks and trust companies after such applications have been approved by the board of deposit. Should additional state funds become available at any time during the two years or until the next bidding period, it shall be awarded to the highest bidders; first to the banks and trust companies

from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award, and then the next highest bidders.”

It is observed that the foregoing sections prescribing the time when bids shall be received and opened are couched in mandatory language. It is an established rule of statutory construction that statutes so worded must be construed as mandatory in the absence of any indication of a contrary legislative intent. This rule of construction is, however, subject to many variations and exceptions. In applying it, the fundamental rule of all statutory construction, that its purpose is to ascertain the intention of the legislature, must not be overlooked. Among the cases where courts will construe mandatory language as directory is the case where such language relates to time. The Supreme Court held in the case of *Schick vs. Cincinnati*, 116 O. S. 16, as set forth in the first branch of the syllabus:

“Statutes which relate to the manner or time in which power or jurisdiction vested in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, may be construed to be directory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated.”

In *Alcorn vs. Mittendorf*, 102 O. S. 229, it was held:

“By virtue of Section 5696, General Code, the duty to publicly read the list of persons delinquent in the payment of taxes on personal property is mandatory.

The requirement of that section that the reading of the list occur at each September session of the board of county commissioners is directory merely, and the board of commissioners having failed to read the list during the September session it is their duty to read the list at a later date.”

Under authority of this last cited decision, it might be contended that if bids were not received at the beginning of a biennium between one o'clock p. m. on the first Monday of March and closing at one o'clock p. m. on the third Monday in March in the odd numbered years, as required by Section 328, General Code, such bids could be received at a later date. In the case here, however, since bids were received at the beginning of the present biennium, it does not follow under the rule of construction adhered to in the *Schick* case, *supra*, that additional bids may be received during the biennium whenever the Treasurer might be desirous of receiving the same or a bank might be desirous of submitting the same. There is no provision to the effect that the Treasurer shall publish a notice requesting the submission of bids at any time. The privilege of submitting bids is conferred by the statute itself which is apparently self-executing. It seems obvious that the voluntary submission of a bid for the deposit of state funds by a bank during the two year bidding period after the statutory time for the receipt of bids had elapsed and awards had been duly made pursuant to the statute, would be unauthorized.

Consistent with the absence of any authority having been conferred upon the Treasurer of State to request the submission of bids as indicative of a leg-

islative intent that bids may only be received biennially, is the provision of Section 330, supra, with respect to what disposition shall be made of additional state funds which become available for deposit at any time during the two year bidding period. It follows in my opinion that when bids for the award of state funds have been submitted in accordance with the provisions of Sections 328 and 329, General Code, and certain applications accompanying such bids have been duly approved, the Treasurer of State has no authority to receive additional bids of such nature during the two year bidding period and prior to the next bidding period provided therefor by law.

The question as to the legality of the disposition of public funds of the state as set forth in your letter and the question submitted by the Treasurer as to how such undeposited money may be carried, are co-related and will be considered together. There have been no representations or evidence submitted indicating the fact that it has been possible during the period referred to in your letter to deposit these moneys in approved banks determined by the Board of Deposit to be eligible to be depositories of state funds and I therefore assume that the deposit of these funds in such banks has been impossible due either to the fact that all such approved banks having during this interval of time had on deposit amounts equal the amount for which they submitted a bid or such banks have refused to secure the deposit of such funds as required by law. This opinion shall accordingly be based upon that assumption.

The situation thus presented is not entirely new. Various possible dispositions of state funds under such circumstances as are here under consideration were discussed at length by this office in an opinion rendered more than eighteen years ago. I refer to an opinion appearing in Opinions of the Attorney General for 1916, Vol. I, Page 525. The fourth branch of the syllabus reads as follows:

"The treasurer of state, as incidental to the proper discharge of his duties, is authorized, during the heavy collection periods of each year when active depositories are filled to capacity, and until he is able to place the state funds in inactive depositories, to create a collection account in some local bank, which properly secures him and the state funds, for the purpose of depositing therein and securing the collection of checks and drafts received by him."

The reasoning of the opinion in support of the foregoing conclusion is comprehensive and I quote therefrom at length:

"The period commencing about November 15th and ending about January 1st, is the heaviest collection period of each year in the office of the treasurer of state. The collections during this period, amounting at times to more than \$1,000,000.00 per day, are far in excess both of the amount which the treasurer is obliged to pay out upon warrants of the auditor of state and of the amount which he can lawfully place with the depositories of active funds. It therefore follows that until the excess over expenditures can be placed with depositories of inactive funds he must keep such collections, which are made largely in the shape of checks and drafts, in his safe, or he must convert such checks and drafts into cash and keep this cash in his safe, or he must create a temporary collection account with some bank until he is able to place the money so collected with depositories of inactive funds, or until the daily

expenses have so reduced the active deposits that a transfer can be made to the depositories of such funds.

The first of these plans results in keeping checks and drafts in the safe of the treasurer of state for days, and sometimes weeks, before the same are presented for payment. This plan is contrary to every accepted principle of good business, and subjects the treasurer to liability for loss by reason of the possible failure, during the time such checks and drafts are so held, of the drawer of a check or draft or the bank upon which it is drawn, or both, for which the treasurer has no security of any kind. I therefore cannot approve its adoption.

The second plan, i. e., to convert the checks, drafts, etc., into cash and keep such cash in the safe until it can be placed in qualified depositories, is subject to the objection that the collection of a large number of such checks and drafts if done directly by the treasurer would entail an enormous amount of extra work, and occasion additional administration expense, while if done through the agency of a bank employed simply to collect, and not in the ordinary course of business as a depository, would naturally result in the necessity of paying the bank a commission to take care of its collection expenses. Since the treasurer receives several thousand checks and drafts per day during this period, and the average amount of each check is small, (more than three thousand checks each of \$5.00 or less having been received in a single day), it follows that this collection expense would be unusually high and exceed by many times the interest which the amount so collected would earn, even if the treasurer were able to immediately find place for it in a properly qualified depository. This plan would also take out of circulation and place in the vaults of the state treasurer at certain periods several million dollars of currency. The state would reap no benefit from this course, because no interest would be received on such sums, and it would in addition be contrary to the plain provisions of section 326 of the General Code, which section is as follows:

'The treasurer of state shall not keep at any one time more than fifty thousand dollars (\$50,000) as a reserve in the treasury vault, and all other moneys of the state shall be deposited as hereinafter provided.'

By the last of these three plans, which is the one adopted by the present treasurer, all checks and drafts are immediately deposited and collected in the usual course of business, and the account is withdrawn as rapidly as the funds can be placed in any qualified depository, the bank carrying the collection account secures the treasurer of state from loss by depositing with him securities other than those required by section 330-3 of the General Code, but which are of ample value.

It is true that the state receives no interest from this collection account until the funds therein can be placed in a qualified depository, but the same is true of either of the other plans. If the checks and drafts are carried and not cashed, the state loses the interest, and the banks upon which the same are drawn profit by the use of the money, and without giving any security; if the cash is kept in the safe no interest is received. The state is, therefore, in the same position so far as interest receipts are concerned under all of the three plans. The treasurer's books show that during the entire time this collection account was maintained, the depositories of active funds were filled to the amount permitted by the securities deposited by them. His correspondence shows

that honest effort was persistently made to place this money with depositories of inactive funds, but with little success, because money during that period was plentiful and not worth to the banks qualified as inactive depositories the amount of interest bid by them; they, therefore, upon various pretexts refused to receive funds offered them.

Although there is no provision of the General Code directly authorizing the creation and use of such collection account deposit, yet by reason of the exigency resulting from the unusual situation existing during the period of time referred to, I believe that the treasurer of state was justified in following the plan adopted by him. It was in accordance with accepted business methods, and was apparently an honest endeavor to solve the situation which was not anticipated and not provided for in the depository law. It is true that any of the several possible methods of solving the difficulty is liable to abuse in the hands of a dishonest treasurer, but so long as an honest effort is made to place such funds as rapidly as possible with qualified depositories of inactive funds, and so long as the active depositories are filled to capacity the state does not suffer and the treasurer is able to secure himself and the funds of the state."

In holding that the Treasurer of State is authorized under such circumstances as are here under consideration to create a collection account in a bank "which properly secures him and the state funds" for the purpose of depositing therein such funds, it of course follows that the foregoing opinion is authority for the statement that such practice is not illegal. This practice, which the then Attorney General held to be authorized, was the third plan suggested in the opinion. It is possible that under existing conditions the adoption of this plan may not be possible due to the refusal or failure of banks to secure the Treasurer of State from loss by depositing with him securities of ample value. The first plan discussed in this 1916 opinion is substantially, in so far as any question of law is concerned, the plan of which you inquire as to legality. This first plan, which the then Attorney General did not approve as a matter of good business practice for the reason that the Treasurer might be subjected to possibility of loss as therein set forth, is in the same category with the third plan which was held to be authorized, in that there is complete absence of statutory authority for any one of the plans discussed in the opinion. Under authority of this opinion, it must follow that this office has taken the position that the adherence to any one of the three plans is not in and of itself illegal, so long as it is impossible to deposit state funds in accordance with the depository law, and in the absence of any showing of gross abuse of discretion or fraud, neither of which latter elements are presented to me in the instant case. It is obvious that it is the duty of the Treasurer to accept the funds paid to the state. When the legal depositories are filled and the maximum amount of cash which is permitted by law is on hand, then there is no statutory direction as to the disposition of the surplus. Certainly it is the duty of the Treasurer to safely keep such funds. So long as the Treasurer in good faith provides for the safekeeping of said funds, it is believed no legal objection can be made to the method adopted. The law does not require impossible things.

Summarizing, it is my opinion that:

1. When bids for the award of state funds have been submitted in accordance with the provisions of Sections 328 and 329, General Code, and certain applications accompanying such bids have been duly approved, the Treasurer of State has no authority to receive additional bids of such nature during the two

year bidding period and prior to the next bidding period provided therefor by law.

2. During a period when the Treasurer of State is unable to deposit state funds in duly approved state depositories on account of such depositories having the maximum amount of such fund they are authorized to receive, or on account of such depositories being unwilling or unable to secure the deposit of such funds as required by law, the practice in good faith of holding such funds in the state treasury in the form of cashiers' checks and drafts does not constitute an illegal disposition of such funds so long as it is impossible to place such funds in state depositories in accordance with law.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3236.

APPROVAL, CONTRACT COVERING STATE HIGHWAY NO. 502, SECTION YOUNGSTOWN, (PART OF SOUTH AVENUE).

COLUMBUS, OHIO, September 21, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This acknowledges receipt of your letter of recent date submitting for my examination and approval contract covering the following:

City—Youngstown
State Highway No. 502
Section—Youngstown
(Part of South Avenue)

Finding said contract proper as to legality and form, I have endorsed my approval thereon and return the same herewith to you.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3237.

CEMETERY—TOWNSHIP TRUSTEES MAY USE GIFT OF MONEY FOR UPKEEP OR IMPROVEMENT OF CEMETERY WHEN.

SYLLABUS:

Where a gift of money is made to township trustees for a named township cemetery with no conditions attached thereto as to the particular uses for which the fund may be expended, such trustees may legally use the entire amount for the upkeep of the cemetery or for any improvement in connection with such cemetery, in their discretion.