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INSURANCE — TRANSPORTATION, MONEYS TO AND FROM DULY DESIGNATED DEPOSITORY, RECEIVED BY COUNTY RECORDER, COUNTY CLERK, PROBATE JUDGE OR COUNTY TREASURER — FUNDS MAY NOT BE EXPENDED FROM COUNTY TREASURY FOR SUCH PURPOSE.

COUNTY COMMISSIONERS NEITHER ALONE NOR JOINTLY WITH RECORDER, CLERK OR PROBATE JUDGE MAY CONTRACT WITH CORPORATION FOR SUCH TRANSPORTATION OF MONEYS, NOR PAY COST FROM COUNTY TREASURY.

SYLLABUS:

1. *Moneys may not be legally expended from the county treasury for the payment of insurance and transportation of moneys received by a county recorder, county clerk, probate judge or county treasurer to and from a duly designated depository.*

2. *The county commissioners neither alone nor jointly with the county recorder, county clerk or probate judge may lawfully enter into a contract with a corporation to transport moneys, received by such officials by way of fees, costs and payment of judgments, and to provide insurance covering such transportation to and from designated depositories, the cost of which is to be paid from the county treasury.*

Columbus, Ohio, March 1, 1941.

Hon. Frank T. Cullitan, Prosecuting Attorney,
Cleveland, Ohio.

Dear Sir:

I am in receipt of your request for my opinion reading:

“The County Recorder, County Clerk, and Probate Judge each, from day to day, receive moneys in payment of fees, costs and judgments. On the first business day of each month such officers are required to pay to the County Treasurer all public moneys received by them in the course of the previous month (General Code Section 2983). Such officers are authorized by General Code Section 2288-1c to deposit moneys received by them in the bank upon receiving security therefor. The daily or occasional transportation of money from the public offices to the bank involve some risk which the officers feel should be safeguarded. For that purpose they propose that a contract for

the transportation of such moneys from the public offices to the respective banks and providing insurance to cover any loss, be entered into with a corporation authorized to engage in such business, at a stipulated compensation.

Your opinion is requested as to whether such officers, severally or jointly, may enter into such contract or whether such contract may be entered into by the County Commissioners making such service available to the public officers, the compensation to be paid out of the County Treasury."

It is fundamental that county officers have such powers and such only as have been granted them by the statutes which create their offices. *Jones, Auditor, v. Commissioners of Lucas County*, 57 O.S., 189; *Peter v. Parkinson, Treasurer*, 83 O.S., 36. It is also well established that when the statute grants authority to a public official to perform an act and in such act specifies the manner for the exercise of the power, the mode specified is likewise the measure of the power and it can be performed in no other manner. *Frisbee v. East Cleveland*, 98 O.S., 266; *Anderson v. C. W. Madsen Investment Company*, 72 Fed. (2d), 768.

By reason of such rules, we must examine the statutes which grant to the county recorder, county clerk and probate judge authority to deposit and care for the moneys received by such officers.

Section 2983 of the General Code, referred to in your inquiry, makes provision for the deposit of moneys received by county auditors, probate judges, sheriffs, clerks of courts, surveyors and recorders in the county treasury. Such section reads:

"On the first business day of each month, and at the end of his term of office, each of such officers shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding month or part thereof for official services, provided that none of such officers shall collect any fees from the county; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which have been due in his office, and unpaid for more than one year prior to the date such statement is required to be made."

Section 2288 of the General Code makes further provision for the deposit of moneys into the county treasury and reads:

"As often as may be so required, each receiver of the public

works of the state, register or receiver of a school land office, and other collector or receiver of revenue of the state, except state and county treasurers, shall pay into the nearest convenient county treasury or the state treasury, as the treasurer of state shall direct, all moneys by him collected or received, since making the last payment."

From an examination of the statutes and decisions with reference to county treasurers, it would appear that if it were not for the statutes specifically authorizing county treasurers to deposit moneys in banks pursuant to depository laws, a treasurer would have no power so to do, and would be personally liable if any loss resulted from such deposits. See *State v. Newman*, 26 O.S., 265.

By reason of the express provisions of Section 2638, General Code, it is apparent that the county treasurer has no authority even to deposit public moneys received by him in a bank, except where specifically authorized by law. The pertinent part of such section reads: "Except as otherwise specifically provided by law, all public moneys and property in his (county treasurer's) possession shall be at all times in the county treasury." Section 2748, General Code, provides that the county treasurer may deposit moneys temporarily in local banks for purposes of transportation to the treasury. The "Uniform Depository Act" (Sections 2296-1 to 2296-25, General Code) grants to county treasurers authority to deposit public funds in banks which have been established as public depositories pursuant to such act, however, such deposits are "governed strictly by the provisions of this act" with respect to amounts. Except to the extent of such authority, the county treasurer may not lawfully deposit public moneys at any other place than the county treasury. *Re Osborn Bank*, 1 O.App., 140; *State, ex rel. Campbell, v. National Banks*, 4 O.N.P.(N.S.), 245; *Crawford County v. Strawn*, 16 O.F.D., 46, 15 L.R.A.(N.S.), 1100.

I believe that it may be stated as an established proposition that public officers authorized to receive and having custody and safekeeping of public moneys by virtue of their offices, are mere custodians of such funds, have no legal title thereto and may deal therewith only as provided by statute. See 11 O.Jur., 193, and cases there cited.

While in Section 2638-1, General Code, specific authority is granted to the county commissioners to provide burglary insurance for the county treasurer, such section was enacted in the year 1929. A few years prior

to such enactment, the question was asked of the then Attorney General, viz.: "May the county commissioners legally pay for burglary or hold up insurance for the county treasurer or for any other county officer?" Such inquiry was answered in an opinion under date of May 24, 1927 (Opinions of the Attorney General for 1927, Vol. II, page 874) in the negative. Such answer was founded upon the proposition that in the then Section 5 of Article X of the Constitution (since repealed) there was contained the mandate that "no money shall be drawn from any county or township treasury, except under authority of law," that no express power had been granted to county commissioners to spend moneys for such purpose, and also upon the general rule stated by the court in *State, ex rel. Locher, v. Menning*, 95 O.S., 97:

"The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

If we apply similar reasoning to the question at hand, it would seem that, although Section 5 of Article X of the Constitution has since been repealed, we must determine whether there is any provision of law authorizing the payment of public funds for the cost of transportation of county funds as suggested in your letter.

In Section 2638, General Code, the room or rooms provided by the county commissioners for the office of the county treasurer constitute the county treasury. The public moneys received by the treasurer must be kept there "except as otherwise specifically provided by law." (Section 2638, General Code.) I am unable to find any provision of law specifically authorizing the moneys to be taken therefrom and placed in any other custody than a public depository established under the provisions of the "Uniform Depository Act." It should be borne in mind that the bond of the county treasurer is conditioned for the safekeeping of public moneys coming into his custody. He and his bondsmen are liable for any loss of such funds after they have reached the treasury. *State v. Harper*, 6 O.S., 608; *Loeser v. Alexander*, 176 Fed., 270. It would therefore seem that since the county could not legally suffer any loss during the transfer of the funds to the depository from the county treasury, there could be no

authority on the part of the county commissioners to expend public funds to insure against a risk which could not legally exist. It is therefore my opinion that with respect to the transfer of funds from the county treasury to the depository, and vice versa, there is neither a duty imposed upon nor authority given to the county commissioners to insure funds being so transported or to pay the premiums thereon from county funds.

In view of the provisions contained in Section 2983, General Code, requiring the public officials mentioned in your inquiry, other than the county treasurer, to deposit their funds in the county treasury on the first business day of each month, a question might well arise as to whether such officials have any authority to deposit any public moneys coming into their possession at any other place than in the county treasury.

In the case of *Busher, Clerk, v. Fulton*, 128 O.S., 485, the question arose as to whether a deposit of moneys received as a deposit in an appropriation case, in a bank by a clerk of a court of common pleas pending a decision of the appropriation case, was entitled to a preference in a liquidating proceedings. It was contended that such deposit was illegal and for such reason the county clerk was entitled to a preferred claim with reference to such moneys. The court held that since in the statutes there was neither an express grant of power to make such deposit nor an express denial of such right, the clerk was not entitled to the claimed preference. It is to be noted that such decision is specifically limited to trust funds and does not concern itself with deposits of court costs and other moneys payable into the county treasury. Similarly, in the case of a sheriff, see *State, ex rel. Fulton, v. Main, Sheriff*, 128 O.S., 457.

In Section 2288-1c, General Code, enacted after the decision of the cases just cited, the legislature has authorized the officers mentioned in your inquiry to make certain deposits in banks. Such section reads:

“No money held or controlled by any probate court, juvenile court, clerk of courts, sheriff, county recorder, clerk or bailiff of municipal court, prosecuting attorney, or resident division or district deputy directors of the state highway department, in excess of that covered by federal deposit insurance as hereinafter prescribed shall be deposited in any bank, banks, trust company or trust companies until the hypothecation of the securities hereinafter provided, or until there is executed by the bank, banks, trust company or trust companies selected, a good and sufficient undertaking, payable to the depositor, in such sum as said depositor directs, but not less than the excess of the sum that shall be deposited in such depository or depositories at any

one time over and above such portion or amount of such sum as shall at any time be insured by the federal deposit insurance corporation created pursuant to the act of congress known as the banking act of 1933, or by any other agency or instrumentality of the federal government, pursuant to said act or any acts of congress amehdatory thereof.”

While such statute authorizes such officials to deposit in depositories moneys received by them in a fiduciary capacity — as moneys paid on judgments, and deposits awaiting the outcome of litigation (see Opinions of the Attorney General for 1935, Vol. II, page 1184) —, it would not necessarily follow that it authorizes such deposit of county moneys. However, even if it were to be held that it does authorize the deposits of such funds, I am unable to find any authority therein for the payment of moneys from the county funds for the transportation of such moneys to and from the depository nor for insurance while in transit.

In Opinions of the Attorney General for 1936, Vol. II, page 785, one of my predecessors in office ruled that the county commissioners were without authority of law to pay service charges imposed by banks for the handling of checks, for the reason that there was then no clear grant of such power to them by statute. It would seem that like reasoning would impel the conclusion that since there is no clear grant of power to the county commissioners for the provision of insured transportation of funds of the county recorder, probate judge and county clerk to and from depositories, no such power exists; especially would this be true concerning moneys received in payment of fees and costs which belong to the general fund of the county. As stated in the third branch of the syllabus of State, ex rel. The A. Bentley & Sons Co., v. Pierce, 96 O.S., 44:

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

Specifically answering your inquiry, it is my opinion that:

1. Moneys may not be legally expended from the county treasury for the payment of insurance and transportation of moneys received by a county recorder, county clerk, probate judge or county treasurer to and from a duly designated depository.

2. The county commissioners neither alone nor jointly with the county recorder, county clerk or probate judge may lawfully enter into a contract with a corporation to transport moneys, received by such

officials by way of fees, costs and payment of judgments, and to provide insurance covering such transportation to and from designated depositories, the cost of which is to be paid from the county treasury.

Respectfully,

THOMAS J. HERBERT,
Attorney General.