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BANK, TAKEN OVER FOR LIQUIDATION — COUNTY TREASURER RECEIVED SUM OF MONEY, PAYMENT OF NOTE AND INTEREST FOR USE AND BENEFIT OF SUBDIVISIONS, OWNERS OF UNDIVIDED TAX FUNDS, ON DEPOSIT, TIME BANK CLOSED — SUCH MONEYS SHOULD BE PLACED IN UNDIVIDED TAX FUND OF COUNTY — UPON SETTLEMENT WITH COUNTY AUDITOR, MONEYS SHOULD BE DISTRIBUTED TO SUBDIVISIONS, OWNERS OF FUNDS DEPOSITED IN CLOSED BANK AT TIME TAKEN OVER FOR LIQUIDATION — IN YEAR 1933, MONEY ON DEPOSIT, SUCH SUBDIVISIONS OWNERS OF ACCOUNT, ENTITLED TO ANY DIVIDENDS — IN SETTLEMENT OF CLAIM, COUNTY TREASURER HOLDS ANY MONIES FOR VARIOUS SUBDIVISIONS, OWNERS OF ACCOUNT, NOT FOR BENEFIT GENERAL FUND OF COUNTY.

## SYLLABUS:

1. *When the county treasurer receives a sum of money in payment of a note and the interest thereon, taken by the county as payment of*

*or to secure the payment of moneys belonging to the undivided tax fund on deposit with a bank depository at the time it was taken over for liquidation, issued, in the reorganization of such bank, by a corporation which purchased a portion of the assets of such reorganized bank, such moneys are received by him for the use and benefit of the subdivisions which were the owners of the undivided tax funds so on deposit at the time of the closing of such bank.*

2. *Upon receipt of such moneys in payment of the principal and interest of such note, they should be placed in the undivided tax fund of the county and, upon settlement with the county auditor, distributed to the subdivisions which were the owners of the funds deposited in the closed bank at the time it was taken over for liquidation.*

3. *When a bank depository in which the undivided tax funds of the county were on deposit, in the year 1933 was taken over for liquidation having on deposit a sum of money, the various subdivisions for which such funds were levied and collected, and not the county, are the owners of such account or claim and are entitled to any dividends paid thereon. (Opinions of the Attorney General for 1931, Vol. II, page 1245, and Opinions of the Attorney General for 1934, Vol. II, page 937, approved and followed.)*

4. *When in settlement of such claim the county receives a note bearing interest and as a result thereof the county treasurer receives payments of interest, he holds such moneys for the benefit of the various subdivisions which were the owners of the account in the closed bank and not for the benefit of the general fund of the county.*

Columbus, Ohio, May 29, 1941.

Hon William G. Wickens, Prosecuting Attorney,  
Elyria, Ohio.

Dear Sir:

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

“At the time of the bank holiday in 1933, the Elyria Savings & Trust Co. was a banking institution and a depository for the public funds of Lorain County. The Elyria Savings & Trust Co. failed to reopen and at that time had a deposit from Lorain

County in the amount of \$278,977.59. Later a reorganization plan was worked out whereby the sum of \$181,977.00 was to be paid in cash to the Lorain County Treasurer. Lorain County was to receive a debenture note in the amount of \$97,000.00 from a newly created Andwur Mortgage Loan Company, which note was to bear interest, and under said plan the Elyria Savings & Trust Co. was to be discharged from any further liability. On September 11, 1934 the Board of County Commissioners of Lorain County passed a resolution accepting the plan and waiving the deposit liability of the Elyria Savings & Trust Co. in the amount of \$97,000.00 and agreed to accept delivery of a note from the said newly created Andwur Mortgage Loan Co. in lieu of the deposit. Thereafter the Court of Common Pleas of Lorain County approved the reorganization plan and impressed the said plan on all depositors of the bank and ratified and approved the action of the Board of County Commissioners. The order of the Court further enjoined Lorain County or any other depositor from ever asserting any right, claim or demand contrary to the terms of said plan.

At the time of said bank reorganization the said deposit included a deposit of undivided tax funds by the Lorain County Treasurer so that the various taxing districts of Lorain County, other than the county itself had approximately a 24% interest in the said deposit.

Following the approval of said plan by the Court, the Elyria Savings & Trust Co. paid to Lorain County the said sum of \$181,977.59 and the Andwur Mortgage Loan Co. delivered to Lorain County its note for \$97,000.00 with interest thereon.

The said note and interest have been paid and the various taxing districts have received their pro-rata share of the principal.

About \$12,000.00 in interest has been received on the said debenture note from the Andwur Mortgage Loan Co. and it is relative to the distribution of said interest that I request your opinion.

The County Commissioners by their resolution have ordered this sum of \$12,000.00 deposited in the county general fund under the general principle that all revenues accruing to the county should be deposited in that fund, where not otherwise provided for. Several of the subdivisions feel that the said interest should be deposited in the depository interest fund and that it should be distributed pro-rata as would be undivided tax funds."

In arriving at the answer to your inquiry, it is necessary to bear in mind the nature of the fund out of which the debenture or note mentioned in your request arose. From the statements contained in your request,

I must assume that the moneys on deposit in the depository were moneys received by the county treasurer in payment of property taxes and constituted a portion of the so-called "undivided tax funds" of the county treasurer, as distinguished from moneys of the county.

If such be true, I must refer to the opinions of two of my predecessors in office, wherein the nature of the ownership of such deposit was considered. In Opinions of the Attorney General for 1931, Vol. II, page 1245, one of my predecessors in office at page 1247 analyzed the nature of the treasurer's interest in such funds as follows:

"The classes of funds which oftentimes are in possession of the county treasurer and which he is directed to deposit in a county depository, consist of undivided tax funds, that is the proceeds of taxes which are collected and not yet distributed to the state and taxing subdivisions for whose benefit they had been levied.

For the purpose of collecting these taxes the county treasurer is a mere ministerial officer. *Champaign County Bank v. Smith*, 7 O.S., 42; *Cincinnati v. Jones*, 24 O.C.C. N.S., 374.

In the field of tax collecting and distribution to the state and taxing subdivisions, a county treasurer is something more than a local county officer. He is an agency of the state and a constituent part of the scheme of permanent organization in the government of the state, to use the words of Judge Davis in the case of *State ex rel. Guilbert, Auditor v. Yates*, 66 O.S. 546. See also *State v. Lewis*, 69 O.S., 202. A county treasurer is charged by statute with the duty of receiving certain property taxes levied on behalf of the state, county, the several municipalities, townships, school districts and other taxing subdivisions within the county. At stated intervals he is required to make settlements or accountings with the county auditor for all such collections made. After these settlement periods he is required to pay to the state, upon the warrant of the Auditor of State, and to other taxing subdivisions upon the warrant of the county auditor, the share of taxes collected which belong to the state and the several taxing subdivisions. Advances are sometimes made to the several taxing subdivisions upon the warrant of the county auditor at other times than immediately after the settlement periods fixed by law.

After taxes are collected by a county treasurer and until they are distributed as provided by law, they constitute undivided tax funds in the custody of the county treasurer and are deposited by him as directed by law in the regular county depository together with those funds that are strictly county funds. The legislature has recognized the status of these funds

and provided that the depository interest earned on the portion of the funds collected for the state and each political subdivision shall be apportioned to the state and the several political subdivisions in the proportion that the amounts accruing to the state and the several political subdivisions bear to the total amount of undivided tax funds upon which interest is earned. Section 2737, General Code."

The precise question presented to such Attorney General was whether the county commissioners could compromise a claim against the closed bank with respect to such funds so on deposit. He held in the second syllabus of such opinion that:

"When the deposits in a county depository bank, made by a county treasurer of funds in his possession, consist of undivided tax moneys, which upon proper settlement by the county treasurer would become due to the state, county and other taxing subdivisions, the county commissioners of the county are without authority to compromise or release in whole or in part, the obligation of the bank and its bondsmen to repay, or account for, any portion of the said funds, except that portion which upon settlement of the county treasurer would be due to the county."

The same question was considered by the succeeding Attorney General in Opinions of the Attorney General for 1934, Vol. II, page 937, and was answered in a similar manner, as stated in the first syllabus of such opinion:

"When the deposits in a county depository bank, made by a county treasurer of funds in his possession, consist of undivided tax moneys, which upon proper settlement by the county treasurer would become due to the state, county and other taxing subdivisions, the county commissioners of the county are without authority to compromise or release, in whole or in part, the obligation of the bank and its bondsmen to repay, or account for, any portion of the said funds, except that portion which upon settlement of the county treasurer would be due to the county. Opinions of the Attorney General, 1931, Vol. II, p. 1245, approved and followed."

In *Vigo Township v. Board of Commissioners of Knox County*, 111 Ind., 170, the court analyzes the relation of the county and county treasurer with reference to tax funds collected by the county treasurer for the benefit of the various subdivisions as follows:

"A county treasurer is not an agent of the county in such

a sense that the maxim respondeat superior can be invoked. His duties are prescribed by law, and in the exercise of his office he is in no way subject to the control of the board of county commissioners.

A county treasurer is not the agent of the county in respect to funds collected by him for townships, and, in the absence of a statute so providing, the county is not liable to the townships for his defalcations.

The board of county commissioners has no control of the funds which the law requires to be collected for and apportioned to the townships, and occupies no relation of trust concerning such funds in the treasurer's hands, unless they have actually been paid into the corporate treasury, i.e., credited to the general fund of the county.

In drawing warrants upon the county treasurer for the funds in his hands belonging to the townships, the county auditor does not act as the agent of the county, nor do such warrants create any obligation against it.

Where a suit has been instituted by the county auditor upon the official bond of a defaulting county treasurer, and a compromise is effected, whereby a certain part of the amount converted is accepted in full satisfaction, a township which suffered a loss to its funds by the defalcation is entitled to its proportion of the sum recovered, but it can not maintain an action therefor against the county, unless it is shown that the share belonging to it has been covered into the county treasury to the credit of the general fund."

It would seem that, with respect to the moneys so received in the county treasury, the county treasurer occupies a fiduciary relationship. It is as though he were a trustee of such moneys of which the various taxing units are the beneficiaries. If then the county treasury occupies a fiduciary relationship with respect to such funds, it follows as a necessary incident that the treasury may not receive a profit or benefit from the earnings of such trust res, except to the extent that the county is also a beneficiary. The legislature had clearly recognized such principle and in former Section 2737, General Code, which was in existence at the time of the failure of the Elyria Savings and Trust Company, provided that:

"All such interest realized on the money belonging to the undivided tax funds shall be apportioned by the county auditor to the state, cities, city school district and county taxing or assessing districts in the proportion that the amounts collected for the respective political subdivisions or districts bear to the entire amount collected by the county treasurer for such un-

divided tax funds and deposited as herein provided, due allowance being made for sums transferred in advance of settlements.”

In the enactment of the “Uniform Depository Act” (Sections 2296-1 to 2296-25, General Code), the legislature has made similar provision in Section 2296-21, General Code, as follows:

“All interest realized on money included within a public deposit and belonging to undivided tax funds shall excepting as otherwise expressly provided by law, be apportioned by the auditor pro rata among the separate funds or taxing districts in the proportions in which they are entitled to receive distribution of such undivided tax funds, due allowance being made for sums transferred in advance of settlements. All interest arising from other moneys deposited by a treasurer, which, by reason of being custodial funds, or funds belonging in the treasury of a taxing or assessment or other district of which he is acting as ex-officio treasurer, or for any other reason, do not belong in the treasury of the state or subdivision, shall be apportioned among and credited to the funds to which the principal sums of such deposits, or portions thereof belong.”

In an opinion of one of my predecessors in office to be found in Opinions of the Attorney General for 1933, Vol. II, page 1005, the then Attorney General ruled:

“1. When a county treasurer, upon receipt of tax funds levied by the county, municipalities, board of education and other taxing authorities which have levied taxes on the property in such county or a part thereof, has deposited them along with other county funds, under authority of law, in the legally constituted county depositories which thereafter are closed by the superintendent of banks, any loss suffered by reason thereof, is the loss of subdivisions which would be entitled to share in such funds upon distribution in the proportion that the collections by the county treasurer of such taxes levied for such subdivision bear to the total sum in the county depositories.

2. When a county depository bank has been taken over by the superintendent of banks and closed to business, such bank ceases to be a depository of the county. The equitable rights of the various taxing subdivisions are fixed as of that date.”

Since the equitable ownership of the funds in the bank was not in the county at the time it was taken over for liquidation but rather in the various subdivisions, it necessarily follows that the county could not and

did not acquire such equitable interest unless by purchase. In your inquiry you state that the principal amounts of the moneys received by way of cash distribution on the reorganization, as well as those received in payment of the note, were distributed among such subdivisions and districts, and I therefore assume that such purchase was not made.

As above pointed out and as ruled by my two predecessors in office in Opinions of the Attorney General for 1931, Vol. II, page 1245, and Opinions of the Attorney General for 1934, Vol. II, page 937, the county commissioners did not have the authority by law to consent to the reorganization of the bank and the acceptance of the note of the mortgage company in payment of the obligation owed by the closed bank to the various subdivisions. We must therefore assume that such commissioners either entered into such agreement as the agents of the various subdivisions by virtue of grants of authority of such subdivisions and therefore received the payments on the note as such agents on behalf of their various principals, or, if such be not the fact, it would lead to the result that the county was a trustee of a resulting trust and would hold the earnings of such note for the beneficiaries in proportion to their respective interests in the moneys on deposit in such closed bank at the date of its closing. As stated in Loring's Trustees Handbook, Section 95:

"It is fundamental that all profits gained by use of the trust fund belong to the trust estate and not to the trustee. This is true whether the profits have been gained rightfully or wrongfully."

Whether we regard the county in holding the note of the Andwur Mortgage Loan Company until maturity and collection as an agent or as a trustee, it would seem that the earnings thereof belong to the principals or beneficiaries and not to the agent or trustees.

In the memoranda accompanying your request, you intimate that some question has been raised as to whether the interest received should not be placed in the general provisions of Section 5625-10, General Code, which provides that:

"All revenue derived \* \* \* from sources other than the general property tax, unless the law prescribes its use for a particular purpose, shall be paid into the general fund."

Upon reading the law of which such section is a part — "The Uniform



Tax Levy Law," you will note that such provision in providing the disposition that is to be made of revenue received by each subdivision is not applicable to the county alone. It would therefore seem that unless the moneys received in payment of interest on the note under consideration constitute revenue of the county, there is no direction in such section that they be placed in the general fund of the county. The moneys received by the treasurer by reason of the settlement of the claim for deposits of undivided tax proceeds are necessarily a part of the undivided tax funds, which belong to the respective subdivisions qualified to share in such fund and which were the equitable owners of the frozen deposit. Section 2689, General Code, requires that immediately after each semi-annual settlement the county treasurer shall pay to the various subdivisions the moneys received by him as a result of levies for such subdivisions upon presentation of proper warrant issued by the county auditor. Complementary provisions are to be found prescribing the duties of the county auditor with respect to the drawing of such warrants.

Specifically answering your inquiries, it is my opinion that:

1. When the county treasurer receives a sum of money in payment of a note and the interest thereon, taken by the county as payment of or to secure the payment of moneys belonging to the undivided tax fund on deposit with a bank depository at the time it was taken over for liquidation, issued in the reorganization of such bank, by a corporation which purchased a portion of the assets of such reorganized bank, such moneys are received by him for the use and benefit of the subdivisions which were the owners of the undivided tax funds so on deposit at the time of the closing of such bank.

2. Upon receipt of such moneys in payment of the principal and interest of such note, they should be placed in the undivided tax fund of the county and, upon settlement with the county auditor, distributed to the subdivisions which were the owners of the funds deposited in the closed bank at the time it was taken over for liquidation.

3. When a bank depository in which the undivided tax funds of the county were on deposit, in the year 1933 was taken over for liquidation having on deposit a sum of money, the various subdivisions for which such funds were levied and collected, and not the county, are the owners of such account or claim and are entitled to any dividends paid thereon.

(Opinions of the Attorney General for 1931, Vol. II, page 1245, and Opinions of the Attorney General for 1934, Vol. II, page 937, approved and followed.)

4. When in settlement of such claim the county receives a note bearing interest and as a result thereof the county treasurer receives payments of interest, he holds such moneys for the benefit of the various subdivisions which were the owners of the account in the closed bank and not for the benefit of the general fund of the county.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.