imposition of withdrawal restrictions does not constitute a "default" under section 2293-38, General Code.

In view of my conclusions, it is unnecessary to specifically answer your questions in regard to the expiration of the depository contract.

In the light of the foregoing, it is my opinion that:

1. By virtue of section 2293-38, General Code, bonds of the Home Owners' Loan Corporation may be accepted from a depository bank in exchange for first mortgages held by a municipality when such bank has defaulted in its depository contract and when the council or other legislative body of the municipality has determined such action to be advisable with a view to conserving the value of such mortgages for the benefit of such municipality and for the benefit of the depositors, creditors and stockholders or other owners of such bank. Opinions of the Attorney General for 1933, No. 1540, approved and followed.

2. When a restriction is imposed by virtue of sections 710-107a and 710-88a, General Code, rendering illegal the withdrawal of municipal funds from a depository bank, the municipality may, under section 2293-38, General Code, treat such restriction as producing a "default" and forthwith proceed under said Section 2293-38.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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2340.

## COUNTY DITCH—COUNTY NOT LIABLE FOR FURTHER REPAIR WHEN CONSTRUCTION THEREOF IS FAULTY.

*SYLLABUS:*

*Where a single county ditch, constructed under sections* 6442, *et seq., General Code, has been accepted as completed by a board of county commissioners and shortly thereafter much of the tile used in construction of such ditch became crushed, and the said ditch fails to work properly, the county is not liable for the further repair of the ditch, but such ditch should be repaired under the procedure set forth in sections* 6691 *et seq., General Code.*

COLUMBUS, OHIO, March 3, 1934.

HON. RAY W. DAVIS, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

> "I wish to submit the following inquiry for your opinion:
>
> In 1925 a petition was filed with the County Auditor of Pickaway County, Ohio, for the construction of a county ditch, which is now known as 'The Blaine Ditch', under the Single County Ditch law, being sections 6442 et seq., of the General Code, and such proceedings were had thereon that a survey and report and complete detailed specifications therefor were made by the County Surveyor, and the County Commissioners acting thereon, approved and confirmed the same and found in favor of the petitioners and granted the ditch and ordered the County Surveyor

to advertise for bids for construction, etc., and thereupon an appeal from the findings of the County Commissioners was taken to the Common Pleas Court and the Common Pleas Court heard the appeal de novo as provided by the Ditch law above referred to and also found in favor of the petitioners and granted the ditch, and thereupon a proceeding in error was filed in the Court of Appeals and the case was then reviewed and the Court of Appeals affirmed the Common Pleas Court and the case was then remanded back to the County Commissioners, and thereupon in accordance with this order, bids for the construction of this Ditch were advertised according to the specifications above referred to by the County Surveyor. Kagay & Mann, construction engineers, were awarded the contract for the construction, and the firm of The Rush Creek Clay Company were awarded the contract for the tile to be used. The work then went along until its completion in the latter part of December, 1932.

On December 31st, 1932, the final certificate of the County Surveyor as to the material furnished was filed, and the last payment to the contractor was made at that time.

The work on said Ditch was accepted by the County Commissioners December 30th, 1932, at which time the last payment was made to the Rush Creek Clay Company, Contractors.

The facts are, that soon after the payment and acceptance by the commissioners, owners of land through which the Ditch ran, notified the contractor that the ditch was not working. Upon investigation, the contractor found that some of the tile were crushed in, and the same was repaired by the contractor without further cost.

Approximately three weeks later, the Commissioners of Pickaway County, Ohio, were notified that the ditch was not working, and that a great many of the tile were crushed in. The County Surveyor of this county reports that upon an examination of the tile used, by the State Testing Laboratory, it was found that the tile were not strong enough to carry the weight imposed upon them, but the surveyor further states that they are the exact type called for in the specifications submitted by the County Surveyor, and that the laboratory test shows that the tile are not faulty in construction or materials used in their construction.

More specifically then, my question is, from the above statement of facts:

After the acceptance of the County Ditch by the County Commissioners, is the county liable further for the repair of such ditch, traced to and caused by inadequate tiles, when such tile furnished by the contractor is in compliance with the County Surveyor's specifications?"

At the outset, I may say that from the phraseology of your specific question, I presume that there is some question in your mind as to whether or not the contractor and his bondsmen could be held liable for the expense of the repair of the single county ditch under consideration in your communication.

After a study of the sections of the General Code relating to the construction of single county ditches, sections 6442, et seq., General Code, and the general law in connection with the facts of your communication, there is no doubt but that the contractor and his bondsmen were relieved of all liability at the time when the county commissioners accepted the ditch as completed.

Section 6454, General Code, makes it the duty of the county surveyor to prepare working specifications for the construction of the single county ditch,

including "size and kind of tile", and with the advice of the prosecuting attorney, said surveyor shall prepare forms of bonds to secure the performance of the contracts for construction of the ditch. Section 6479, General Code, provides for bids to be submitted on forms furnished by the surveyor.

Section 6483, General Code, provides in part:

> "The acceptance of said bids shall be approved by the commissioners; upon the acceptance of any bid for the whole or any part of an improvement, the bidder shall within ten days enter into a contract in writing *to perform the work or furnish the material bid for as prepared by the surveyor;* * * * " (Italics the writer's).

In other words, the contractor's obligation is to furnish the material bid for according to the specifications prepared by the surveyor. From the facts of your communication, the tile furnished was certified by the surveyor as being according to the specifications. Hence, the contractor's agreement was completed.

Section 6488, General Code, provides in part (relative to the bond of the contractor):

> "* * * The bond shall, in terms be conditioned:
>
> First: To save the county from any loss caused by delay in completing the work or furnishing the material within the time and in the manner expressed in the contract, bid, and specifications.
>
> Second: For the payment of claims of any person, arising out of the unlawful acts or negligence of the contractor in the performance of his contract.
>
> Third: That the contractor will perform the contract in the time stated in the contract, *that he will furnish and use in the improvement all* materials *of the grade, kind and quality as stated in the contract and specifications; that he will construct the improvement in the manner stated in the contract and specifications.* * * *" (Italics the writer's.)

Since the evidence seems to show that the tile was of the kind and quality as stated in the contract and specifications, it is apparent that no claim can arise against the bondsmen.

In Donnelly on Public Contracts, page 407, section 287, it is stated:

> "Defects like delays have numerous causes, and liability for defects depends upon responsibility for these varying causes, upon the acts of each party which proximately produced them. The defect may be caused by the public body *in furnishing improper, insufficient or defective plans.* It may furnish defective materials, * * * but if those provided are followed the contractor is relieved. In such cases the public body is chargeable with resulting defects and cannot shift the risk to the contractor. The contractor may not properly be held responsible when later a bridge collapses, because of defects in the plans furnished, or mortar or concrete disintegrates because directed to be laid in freezing weather or a building falls because materials were unsuitable or defective."

Having determined that the contractor and bondsmen are not liable for the

cost of repair of the ditch, the next question suggested by the phraseology of your specific question is as to whether the county commissioners, who under sections 6482 and 6483, General Code, are required to accept the bids submitted for construction of a single county ditch, and thus become parties to the contract, represent the county so that the expense of the repair of the ditch should be borne by the general fund of the county.

In the case of *Samuel Smith, et al., Com'rs* vs. *Daniel Griffen,* 9 C. C. 223, approved without opinion by the Supreme Court in 56 O. S. 75, it was stated at page 225:

> "The entire system of ditch legislation, as we now have it, proceeds on the theory that those who are to be benefited in some substantial way, and those alone, shall bear the burden of providing the drainage.
>
> It is true that under the provisions of the statute, the enforcement of proper and sufficient drainage of lands in localities requiring it, is worked out through application to the Board of Commissioners, who together with the engineer and other instrumentalities provided, have charge of the work; *yet, in the performance of such official duties they are not acting as the agents of the county at large; nor can they bind the county at large by any neglect* or wrongful act *while conducting* and managing *the execution of the ditch work.*
>
> If any relation of agency exists in such case, they would seem to be more the agents of the parties interested in the drainage, and who, by petition, have invoked the action of the commissioners, than of the tax-payers and people of the county.
>
> While the statute authorizes the board of county commissioners to appoint an engineer, and provides that the engineer shall let the work and take contracts and bonds for its performance subject to the approval of the commissioners, it is plain that, in discharge of these statutory duties, neither the engineer nor the commissioners are representing the entire county, so as to make all of its tax-payers liable for the manner in which they discharge these duties, or for the breach of such a contract as is contained in the petition."

While the statutory procedure for constructing single county ditches has undergone some changes since the rendition of the foregoing court decision, the fundamental procedure is practically the same now as then. The costs of the construction of a single county ditch are borne largely by special assessments against the benefited property owners. While the contractor's expenses are paid from the general ditch improvement fund of the county (see G. C. 6493), yet special assessments collected from benefited property owners are paid into the general ditch improvement fund (see G. C. 6492). To the same effect, that the public officials act as agents of the petitioners, see the case of *County Commissioners* vs. *Gates,* 83 O. S. 19, 30.

Thus, since the court in the above cases stated that the public officials contracting are not acting as agents of the county but as agents of the parties interested in the drainage, I do not see how it is possible to conclude that the county at large through its general fund can be held liable for the costs of the repair of the ditch.

It appears to me that the ditch, having been accepted by the county commissioners, must be regarded as constructed, even though it is an incomplete improvement, and any repairing of the tiles must be undertaken by the procedure for a

repair job under the general statutes providing for the repair of ditches in townships, namely, Sections 6691, et seq., General Code. The said statutes provide that repair work is to be supervised by the county surveyor or the ditch supervisor if one has been appointed (see G. C. 6691), and after the procedure of Sections 6695, et seq., General Code, is followed, the cost of the work is to be paid from the general ditch improvement fund of the county, and the county commissioners are to certify the costs to the county auditor who is required to collect taxes from the property owners benefited, and when collected, these taxes are credited to the general ditch improvement fund. (See G. C. 6702.)

It is believed that the foregoing discussion adequately answers your question.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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2341.

CONTRACT—NOT VIOLATION OF SECTION 12910 G. C. MEMBER OF STATE SENATE OR HOUSE OF REPRESENTATIVES TO BE INTERESTED IN CONTRACT FOR PURCHASE OF REAL ESTATE, SUPPLIES OR FIRE INSURANCE FOR USE OF COUNTY FROM WHICH ELECTED WHEN.

*SYLLABUS:*

1. *It is not a violation of section* 12910, *General Code, for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate, supplies or fire insurance for the use of the county or any one of the counties from which he is elected.*

2. *It is a violation of section* 12911, *General Code, for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate and fire insurance for the use of the county or any one of the counties from which he is elected, when the price of the real estate or premium on any one fire insurance policy exceeds* $50.00.

3. *Whether or not it is a violation of section* 12911, *General Code, for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of supplies for the county or any one of the counties from which he is elected, when the amount of the supplies exceeds* $50.00, *depends upon whether the statutes require the award of the contract for the particular kind of "supply" after advertisement and competitive bidding and such advertisement and competitive bidding is had pursuant thereto.*

COLUMBUS, OHIO, March 3, 1934.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Your recent communication reads as follows:

"You are respectfully requested to furnish us your written opinion upon the following:

Question 1: Is it illegal for a member of the State Senate or House of Representatives to be interested in a contract for the purchase of real estate, supplies or fire insurance for the use of the county from