496.

BIDS—COUNTY DEPOSITARIES—COMMISSIONERS MAY REJECT PROPOSALS AND READVERTISE WHEN COLLUSION APPARENT.

SYLLABUS:

County commissioners, upon receiving bids for county depositaries, are authorized to reject all bids and readvertise, if, in the exercise of a fair and reasonable judgment, it appears that a combination to stifle bidding had existed among the bidders.

COLUMBUS, OHIO, June 8, 1929.

HON. MICHAEL B. UNDERWOOD, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion with reference to the following:

"The county commissioners of Hardin County have advertised for bids for depositories of the county funds under Section 2715, et seq., of the General Code of Ohio, and are undecided as to what they should do with the results.

They advertised for bids from various banks and 2½ per cent on inactive, and 1½ per cent on active was submitted by each of the eleven banks in the county, each bank bidding the same amount.

As compared with last year's schedule in which the bids ranged from three to about five per cent, the county would lose approximately $9,000.00 in interest.

As these bids are within the minimum, it would seem that it would be perfectly legal for them to accept this bid, but they are reluctant to do so on account of the loss it would entail to the county as a result."

The county depositary law is contained in Sections 2715, et seq., of the General Code of Ohio. These statutes provide, in substance, that the county commissioners of each county shall designate, in the manner provided therein, a bank or banks, or trust companies, situated in the county, as inactive depositaries, and one or more banks or trust companies, located in the county, as active depositaries of the public money of the county. In case no proper bank exists in the county or fails to bid or to comply with the law relating to county depositaries, any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, may be designated as such inactive depositary.

Public bids are to be received for such funds by the said commissioners, after due notice thereof, and awards are to be made to such banks or trust companies as submit the highest bids over a prescribed minimum, and tender the proper security. Certain limitations are placed on the amount of deposits that may be awarded to any one bank or trust company, and provision is made that if, on account of the large amount of money to be deposited, the highest bidder is not entitled to all the funds of the county, the commissioners, after according to the highest bidder all to which it is entitled, shall award the balance to the next highest bidder or bidders, respectively. Section 2718, General Code.

If two or more banks offer the same highest rate of interest with proper sureties, securities, or both, the use of the money shall be awarded to either of them, or the commissioners may award a portion of such money to each of such banks or trust companies. Section 2719, General Code.

It is provided by Section 2721, General Code, that if no proposals are received

offering the rate of interest prescribed in the depositary act, the commissioners shall at once again advertise for bids in the same manner as before, until acceptable proposals are received.

The first general law providing for county depositaries was enacted in 1894, 91 O. L. 403. Prior to that time, special laws were in force providing for county depositaries in certain counties. In subsequent amendments to the general law enacted in 1894, certain minor changes have been made in the law, but no change material to the present inquiry has been made therein.

Under this depositary law only banks located in the county are eligible to bid on the county funds, and awards must necessarily be made to such banks, except under certain conditions when the commissioners are authorized to select other banks as depositaries for inactive funds. The only statutory authority to readvertise for bids is that contained in Section 2721, supra. This depositary law was held to be constitutional in *State of Ohio ex rel. Alexander* vs. *Oviatt,* 8 C. C. (n. s.) 567, affirming *State ex rel.* vs. *Oviatt,* 4 O. N. P. (n. s.) 481, wherein it was held as stated in the headnotes:

> "The county depositary law is constitutional and under its provisions only banks which have their situs in the county are eligible as bidders for the public funds of the county."

In *State of Ohio ex rel. The Defiance City Bank Co.* vs. *The Board of County Commissioners of Defiance County, Ohio,* 5 O. N. P. (n. s.) 225, it was held as stated in the fourth paragraph of the headnotes:

> "The designation of a depositary by the county commissioners is not a judicial but is a ministerial function, to be exercised without discretion, except in the matter of bond, at the time the proposals are opened by an immediate award to the highest bidder; * * * "

In *Board of County Commissioners of Henry County* vs. *State ex rel.,* 91 O. S. 145, it was held as stated in the syllabus:

> "The provision in Section 2717, General Code, that the county commissioners shall award the use of the county money to the bank that offers the highest rate of interest therefor, provided proper sureties, securities or both, are tendered in the proposal, is mandatory, and those officials cannot refuse to award the use of the inactive deposits of the county to a bank offering the highest rate of interest therefor, for the sole reason that in its proposal for the inactive deposits it names as sureties the same individuals named in its proposal for the use of the active deposits of the county."

It will be observed upon examination of this law that at no place is any mention made of collusion among bidders or is any authority given to the commissioners to find that there has been collusion among the bidders or to reject all bids and readvertise for bids if the commissioners do think that the bidders have entered into a conspiracy with reference to their bidding.

The school depositary law, Section 7604, et seq., General Code, provides for the selection of banks within a school district, if there are such banks, to be school depositaries, and provides in Section 7606, General Code:

> "If in the opinion of a board of education there has been any collusion between the bidders, it may reject any or all bids and arrange for the de-

posit of funds in a bank or banks without the district as hereinafter provided for in districts not having two or more banks located therein."

The above provision was contained in the law as it was first enacted in 1904. The same legislature that enacted the school depositary law, revised practically the entire county depositary law, and several sections of the county depositary law have been amended by subsequent legislatures. At no time, however, has there been inserted in the county depositary law a provision with reference to collusion among bidders similar to that contained in the school depositary law. It would seem, therefore, that the failure of the Legislature to make such provision has been done advisedly.

There are, however, several old and familiar maxims of the common law which bear upon the application of that law to illegal contracts. These maxims are frequently cited. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dalo mato non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* In substance, no legal cause of action can be predicated on, or grow out of, an illegal agreement.

That a contract to stifle bidding for public work or to control a public award is, as between the parties thereto, illegal as being against public policy, is too well settled to admit of controversy.

In R. C. L., Vol. 6, p. 813, it is said:

"The rule is well settled in the United States that agreements which, in their necessary operation upon the action of contractors bidding for public work, tend to restrain the natural rivalry and competition of the parties, and thus produce a result disadvantageous to the public, are against public policy, and void."

In McQuillan on Municipal Corporations, Second Edition, Section 1326, it is said:

"Any understanding between persons whereby one or more agree not to bid, and any agreement fixing the prices to be bid so that the awarding of the contract is thereby controlled or affected, is in violation of a requirement for competitive bidding and renders a contract let under such circumstances invalid."

Again, in Section 1345 of McQuillan on Municipal Corporations, it is said:

"So an agreement between prospective bidders to prevent competition between them renders invalid the contract secured by one of them pursuant thereto."

In Page on Contracts, Second Edition, Section 875, it is said:

"Contracts to stifle bidding partake of the nature of contracts in restraint of trade, of contracts to defraud a third person, and, in some cases, of contracts to defraud the public or the government. Contracts between two or more prospective competitors to prevent competition in bids for letting public contracts are invalid, not only because they tend to stifle bidding, but also because they tend to monopoly, and operate as a fraud upon the government, * * * If prospective depositaries for public funds are required to submit competitive bids, a contract between two or more prospective depositaries, by which it is agreed that only one of such competitors shall bid, is illegal."

In the case of *Kuhn* vs. *Buhl,* 251 Pa. 348, Annotated Cases, 1917 D, page 415, it is held:

> "Where a public right is to be disposed of by government officers or agents, public policy forbids that one competing applicant shall contract for the extinguishment of another competitor and invalidates all contracts made for that purpose."

In the case of *Hall* vs. *San Jacinto State Bank,* 255 S. W. 506, it is held:

> "An agreement between a county depositary and another bank, subsequently appointed depositary, to stifle competition in bidding, bid certain amounts, and to keep half the funds deposited with the successful bidder on deposit with the other, being void as in fraud of the law and against public policy, county funds on deposit with the former depositary, when its successor, to which they were credited pursuant to such an agreement, went into liquidation as insolvent, belonged to the county as against the insolvent bank and the banking commissioners."

In the case of *Jennings County* vs. *Verborg,* 71 Ind. 107, it is held:

> "A complaint against a board of commissioners alleged that pursuant to a proposition by the board for bids on certain work to be done for the county, the plaintiff had made a bid, which was accepted by the board, conditioned upon his giving bond, which he had done, and averred performance by him and a breach by the board.
>
> It is sufficient answer to such complaint to allege that the plaintiff by promises of reward made by him to one who intended making a bid to do the work for a less sum than that bid by the plaintiff, had induced him not to make a bid."

Although boards of county commissioners are said to be boards of limited powers, and no express authority exists for them to advertise for depositary bids, after having once done so, except when no proposals are received the first time offering the rate of interest prescribed by law, yet they are not authorized to make an award on other than legal bids and if the bids submitted are not legal bids, there is no other course for them to follow than to reject all bids and readvertise.

They are enjoined by statute to award the public funds after receiving public bids therefor, thus implying that the bids should be competitive. Bids submitted in pursuance of an agreement among bidders to stifle competition by submitting like bids are not competitive, and, in that case, if such a situation actually exists, I am clearly of the opinion that the the commissioners are empowered to reject the bids and readvertise.

It is stated in an opinion of the Attorney General, rendered in 1919 and reported in his opinions for that year, Vol. II, page 1508, as follows:

> "In case it can be established by competent evidence that all the banks and trust companies submitting bids under the act were in combination or collusion to suppress competition among themselves in bidding for county funds, the commissioners would not only be justified, but it would be their duty to reject all the bids."

It will be observed that the Attorney General in the 1919 Opinion, supra, predicates

his opinion on the premise that the combination among bidders be established by competent evidence. I am clearly of the same opinion, but feel that from a practical standpoint it would be almost impossible in any case to establish the combination by competent evidence at the time the bids were received. We are therefore confronted with the further question of whether or not the commissioners are justified in determining whether or not an agreement among the banks to stifle competition had existed without positive proof thereof.

From the very nature of things, bidders who do enter into a combination to stifle bidding are not going to make it public or permit the commissioners to obtain positive proof of it at the time the bids are made. There is no way to compel them at that time, at least, to disclose an agreement of that kind among themselves, and for that reason the commissioners in practically all cases can only judge from the circumstances. The mere fact, perhaps, that all the bidders bid exactly the same is not conclusive. It is a strong circumstance, however, and especially where the bids are much lower than bids previously submitted by the same bidders for the same purpose, and no real economic reason exists for the banks paying a lower rate of interest than had previously been paid.

If, after bids had been received and contracts let, it should later develop that a combination had existed among the bidders to the disadvantage of the county, the commissioners would, no doubt, be criticized for permitting such a thing to happen, and there is no doubt the courts in a proper action would declare depositary contracts, let under those circumstances, illegal. In that event, there is little doubt but that the court would hold that a bank receiving deposits in pursuance of such illegal contract would be liable to the county for whatever profits had accrued to the bank, by reason of receiving the deposits, in accordance with the doctrine of *Bank* vs. *Newark*, 96 O. S. 453, instead of depositary interest at the rate specified in the illegal contract.

The commissioners, therefore, should exercise considerable care in determining whether or not a combination exists among the bidders, and they must necessarily make that determination at the time of, or soon after, bids are received, and without the advantage of securing testimony on the subject as a court would have in a proper action instituted therein. The commissioners are limited in their investigation to the circumstances and what reasonably may be inferred therefrom.

It is my opinion that the commissioners may exercise their honest judgment with respect to the matter and, if it reasonably may be concluded from the circumstances that a combination to stifle bidding had existed among the bidders, the commissioners lawfully may reject all the bids and readvertise.

Respectfully,
GILBERT BETTMAN,
Attorney General.

497.

FINGER PRINTS—SUSPECTED PERSONS—MAY BE MADE AFTER ARREST ONLY UNDER SECTIONS 1841-13 TO 1841-21, GENERAL CODE—RIGHTS OF OFFICERS GENERALLY.

SYLLABUS:

Sections 1841-13 *to* 1841-21, *inclusive, of the General Code, do not confer any right upon sheriffs of the several counties of the state, chiefs of police of cities and marshals of villages to take finger prints before arrest of a person suspected of committing a crime. However, officers have the right, generally, to subject persons whom they have*