3648.

COUNTY COMMISSIONERS—AUTHORIZED TO COMPOUND OR RELEASE AN OBLIGATION TO ACCOUNT FOR COUNTY FUNDS—WHEN UNDIVIDED TAX MONEYS, MAY RELEASE ONLY COUNTY FUNDS.

SYLLABUS:

1. *In the event the deposits made by a county treasurer in a county depository bank, duly designated as such according to law, consist entirely of funds which belong to the county, the board of county commissioners of the county may lawfully compound or release in whole or in part, the obligation of the bank and its bondsmen to account for those funds, by force of Section 2416, General Code.*

2. *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.*

COLUMBUS, OHIO, October 9, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The Board of County Commissioners of Hancock County passed a resolution, copy of which is herewith enclosed, compromising the claim against the signers of the bond of The Buckeye Commercial Savings Bank of Findlay, Ohio, as a depository for the county funds, doing so by virtue of the provisions of section 2416, of the General Code.
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> Question 1: Did the Board of County Commissioners have legal authority under the provisions of this section to compromise this claim in the event that all of the funds deposited in such bank were distinctly county funds?
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> Question 2: In the event that the funds deposited in this bank were the result of taxes collected, which at the proper settlement would become due to the state, county, and other taxing districts, would the county commissioners have authority to make such compromise?"

Under date of April 23, 1931, there was rendered by this office Attorney General's opinion No. 3176, addressed to the Prosecuting Attorney of Tuscarawas County, the syllabus of which opinion reads as follows:

> "Under proper circumstances, county commissioners have authority under section 2416 of the General Code to enter into a compromise of claims due the county for money deposited in a county depository, which depository is in course of liquidation."

An examination of said opinion 3176 will disclose that it involved consideration of a situation somewhat different from that presented by your inquiry. It did not involve the acceptance by way of settlement or compromise of an amount less than was actually due to the county.

The question there presented was whether or not, upon the closing of a bank, which had been a county depository, the board of county commissioners could lawfully accept the obligation of a new bank, to be organized, in place of the obligation of the bank which had been closed. On the face of the matter at least, the county did not stand to lose any of its funds. The obligation of the new bank, which was accepted in lieu of the obligation of the closed bank, was for the full amount of the original obligation.

It will be observed, however, that the statute, Section 2416, General Code, by authority of which it was held in the former opinion the board of county commissioners was authorized to make the proposed substitution of obligations, goes further than to merely authorize a compromise or settlement such as was there considered. The said statute reads as follows:

> "The board may compound or release, in whole or in part, a debt, judgment, fine or amercement due the county, and for the use thereof, except where it, or either of its members, is personally interested. In such case the board shall enter upon its journal a statement of the facts in the case, and the reasons for such release or composition."

It will be observed that the statute authorizes a board of county commissioners to "compound or release, in whole or in part" certain classes of obligations due to the county. So long as the obligation is of one of the classes mentioned in the statute, the power extended to the commissioners is, in my opinion, clearly broad enough to authorize the acceptance of an amount less than the full face of the obligation. To compound or release in whole or in part, clearly authorizes the acceptance, by way of compromise, of an amount less than the full amount, and even extends to releasing or wiping out the obligation in its entirety.

It is only, however, when a liability is a "debt, judgment, fine or amercement due the county" that a board of county commissioners is empowered by the statute to act.

That the obligation of a depository bank, lawfully designated as such in the manner provided by law, is a "debt" is well settled. *State* v. *Executor of Buttles,* 3 O. S. 309; *Fidelity and Casualty Company* v. *Savings Bank Company,* 119 O. S. 124; In re. Liquidation of Osborn Bank, 1 O. A. 140; Opinions of the Attorney General for 1931, 3124; Opinion 3176, supra.

The gist of the foregoing authorities is to the effect that the relationship between a legally designated depository bank and the political subdivision whose funds are on deposit, is that of borrower and lender, or as it is sometimes expressed, debtor and creditor. The legal effect of this relationship is to constitute the obligation of the bank to the depositing agency to be that of a "debt". The same relationship would exist, in my opinion, between the political subdivision whose funds were on deposit and the bondsmen or sureties on the undertaking of the depository bank, and upon default of the bank the obligation of these sureties is a "debt" in the same sense and to the same extent as was the original obligation of the bank.

That being true, the obligation is such as a board of commissioners is author-

ized to compound and release by authority of the statute to the extent that the debt is owing to the county.

It is possible, however, that a county depository bank may have on deposit funds that are not strictly county funds, and therefore the "debt" which arises upon their deposit is not a debt "owing to the county."

By force of Section 2736, General Code, each county treasurer is directed to deposit in the designated county depository "all moneys in his possession." Quite frequently, a county treasurer has in his possession funds that are not strictly county funds, and therefore, upon the deposit of such funds, a debt due to the county would not arise. As the statute does not authorize commissioners to compound or release an obligation unless it is one owing to the county, I am of the opinion that the obligation of a depository bank or that of a bondsman arising by virtue of the deposit of those funds which are not county funds, may not be compounded or released by authority of the statute.

The powers of county commissioners are limited strictly to those extended to them by statute, and statutes extending power to cancel a debt owing to the public, should, in my opinion, be strictly construed and not extended beyond their clear and plain import as expressed by the language used in granting the power. *State ex rel. Locher* v. *Menning et al.,* 95 O. S. 97; *State ex rel.* v. *Pierce,* 96 O. S., 44; Lewis Sutherland on Statutory Construction, 2nd Ed. Sections 542 and 632. It has been held that a fine imposed by a court on a defendant in a state case, although payable into the county treasury to the credit of the general county fund, is not a debt due to the county and is not a proper subject for compounding or releasing by the county commissioners by authority of Section 2416, General Code. In re. Moore, 14 O. C. C., 237.

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.

That the portion of undivided tax funds in the custody of a county treasurer which are the proceeds of taxes levied for the state and the several taxing subdivisions of the state, and which have been collected as such *belong* to the state or taxing subdivisions, as the case may be, for which the tax had been levied, and therefore do not *belong* to the county and can not for that reason be said to be a debt due the county when deposited in a depository bank, was recognized by the legislature in the enactment of sections 2688 and 2689, General Code, by the 89th General Assembly. 114 O. L. (Amended Senate Bill No. 323). This is evidenced by the language used in the statutes, which reads as follows:

> "Sec. 2688. After he has made each settlement with the county auditor, the county treasurer shall pay into the state treasury, on the warrant of the state auditor, the full amount of all sums found by the auditor of state, on an examination of the duplicate settlement sheets sent to him by the county auditor, to belong to the state."
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> "Sec. 2689. Immediately after each settlement with the county auditor, on demand, and presentation of the warrant of the county auditor therefor, the county treasurer shall pay to the township treasurer, city or village treasurer, the treasurer of the school district, or the treasurer of any legally constituted board authorized by law to receive the funds or proceeds of any special tax levy, or other properly designated officers delegated with authority to receive such funds or proceeds by such boards and subdivisions, all moneys in the county treasury belonging to such boards and subdivisions."

Clearly, if a portion of these undivided tax funds *belong* to the state and taxing subdivisions other than the county, as stated in the above statutes, they do not belong to the county and do not, when deposited in a county depository, constitute a debt due the county.

As I read the statutory law of Ohio, pertaining to the collection and distribution of taxes, in the light of such pronouncements of the Supreme Court as that of Judge Davis in the case of *State ex rel Guilbert* v. *Yates,* supra, I am impelled to the conclusion that no other interpretation of these statutes is tenable than that county auditors, county treasurers, county commissioners and county depository banks are not strictly county agencies with respect to matters of taxation, but are, on the other hand, a part of the governmental machinery of the state established for the purpose of collecting, holding and distributing to the state and the several taxing subdivisions thereof the revenues derived from tax levies made for and on behalf of the state and the several taxing subdivisions.

A county treasurer, although for some purposes a county officer whose bond is fixed and approved by the county commissioners, is not the agent of the county in the collection and distribution of taxes, nor is a county depository bank the agent of the county in receiving on deposit the proceeds of tax levies pending distribution, in the sense that the county is responsible for their acts in accordance with the principles of agency. They act for the state and each of

the taxing subdivisions in a governmental capacity as a part of the governmental machinery of the state for the purposes of taxation.

The Supreme Court of Indiana, under statutes very similar to those of Ohio, held, in the case of *Vigo Township* v. *Board of Commissioners of Knox County,* 111 Ind., 170, 12 N. E., 305, 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.
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> 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.
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> 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.
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> 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.
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> 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."

In the course of the opinion the court said:

> "The treasurer is required to make annual settlements with the county auditor for the amount of taxes for which he is to stand charged. * * Immediately after the annual settlement with the auditor, he is required to pay over to the proper township trustee, upon the warrant of the auditor, all the moneys in his hands belonging to each township. The duty of apportioning the several funds to the townships is imposed by law upon the county auditor, while the duty of collecting and paying the funds over to the several townships is laid directly upon the county treasurer. With the powers and duties of these officers in respect to those funds, the boards of commissioners have no authority whatever to interfere. In each case the duty of the officer relates directly to the township, and may be enforced by mandate in case of the officer's neglect or refusal to act. * * In respect to all matters pertaining to the collection, keeping and paying over to the townships the funds belonging to them, the county treasurer acts on his own responsibility, and independently of the board of commissioners of the county. *Halbert* v. *State, ex rel.,* 22 Ind. 125. * *
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> In contemplation of law, moneys collected for the townships do not go into the corporate or county treasury. Such moneys, according to the policy of the statute, remain in the hands of the county treasurer

as an independent public officer, for the benefit of the townships, until they are paid over by him upon the warrant of the auditor. *Lorillard* v. *Town of Monroe,* 11 N. Y. 392."

In a later case the Supreme Court of Indiana held:

"A warrant issued by a county auditor on the county treasurer, as authorized by Burns' Ann. St. 1901, §8075, for the payment of town taxes collected by the county treasurer does not represent a debt or liability of the county to the town, payable out of county funds, the warrant merely constituting authority to the county treasurer to pay over to the township money belonging to it.

A county treasurer, in the collection of taxes for townships and incorporated towns, does not act as the agent of the county, and the county is therefore not answerable for his delinquencies." *State ex rel. Wiles, Town Treasurer,* v. *Spinney, County Treasurer,* 76 N. E. 971.

A similar holding was made by the Supreme Court of Nebraska, in the case of *Lancaster County* v. *State,* 149 N. W., 331. It was there held:

"Where the county treasurer is relieved from liability upon his bond for the loss of funds deposited in such banks, (depository banks) the county itself (in the absence of extraordinary circumstances, such as fraud, bad faith, or gross negligence in the selection of a depository or the approval of its bond) is free from liability to the state for money collected as taxes in the capacity as trustee for the state and deposited by the county treasurer in such depository bank."

"A county is not an insurer of the safekeeping of funds derived from the collection of state taxes in its capacity as trustee for the state." See also Cent. Dig. subject Taxation, §§1742-1745; Dec. Dig. subject Taxation, Key 912.

Reverting now to your specific inquiry and the resolution of the Board of Commissioners of Hancock County compromising the liability of the bondsmen of its county depository bank, a copy of which resolution is enclosed with your inquiry, I am of the opinion that the resolution is in proper form and sufficient for the purpose intended, if the commissioners have legal authority to compromise the claim as they have attempted to do.

I am of the opinion that the liability of the signers of the undertaking of a depository bank to secure the funds deposited therein, is a "debt" and in so far as that debt is owing to the county a board of county commissioners has authority, by force of section 2416, General Code, to compromise or release the same either in whole or in part. Your first question should therefore be answered in the affirmative.

With reference to your second question, I am of the opinion that the power extended to a board of county commissioners to compromise or release debts due the county, by force of section 2416, General Code, extends only to the releasing or compounding of the obligation of a county depository bank and its bondsmen, to the extent that that obligation consists of a debt due the county, and that when the deposits involved consist of undivided tax moneys, a portion of which belong to the state and taxing subdivisions thereof, the commissioners

may release only the obligation to repay that portion of those moneys which represents the receipts of tax levies made for strictly county purposes.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3649.

BOARD OF EDUCATION—MAY ESTABLISH SCHOOL AT A PRIVATE INSTITUTION FOR TUBERCULAR CHILDREN IN OR OUTSIDE THE SCHOOL DISTRICT—WHERE BOARD NEGLECTS TO ACT, BECOMES DUTY OF SPONSORS OF HOME TO PROVIDE SUCH EDUCATION.

SYLLABUS:

1. *By authority of section 7644-1, General Code, the board of education for a city school district may establish a special elementary school for the resident youth of school age who are afflicted with tuberculosis, either within or without the school district.*

2. *In the event a private home for tubercular contact children, residents of a city school district, is established outside the boundaries of the district, and the board of education of the city school district fails or refuses to establish a school at said home, or provide educational advantages for the children of said home, it is the duty of the sponsors of the home to provide for the education of the children in the said home.*

COLUMBUS, OHIO, October 9, 1931.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "A private individual purchased a building outside the school district of Columbus, said building to be used for the purpose of restoring children with tubercular tendencies to health. All of these children are residents of the city of Columbus but are temporarily placed in this home until such time as their health is restored by treatment there. This institution is being financed by private individuals.
>
> Can the city of Columbus legally expend funds to hire a teacher to teach these children, now located outside the Columbus City School District?"

I am advised that the home to which you refer in your inquiry, is located outside the limits of an incorporated city or village. It is in one of the school districts of the Franklin County School District.

While it is not called a children's home or orphan asylum but is, on the other hand, maintained more in the nature of a private sanitarium, I am of the opinion that it has all the characteristics of a private children's home and may be classed as such, as the term "private children's home" is used in Section 7681. General Code. Said Section 7681, General Code, reads in part, as follows: