

the matter of whether or not gates are placed at either end or at each end of this private road has no bearing upon the requirement as to the construction of partition fences. I base this view on the language of the court in the Zarbaugh case, *supra*, at page 140, wherein it is said:

“The validity of such a requirement is to be determined wholly without reference to whether gates are fixed at the end of the right of way, making a complete enclosure. The making of the complete enclosure of the right of way is not the necessary thing.”

See also *Smith vs. Pierce, Aud.*, 17 O. N. P., (N. S.) 264.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2784.

DEPOSITORY—UNDER SECTION 2729, GENERAL CODE, COUNTY DEPOSITORY BANK LIABLE FOR INTEREST BETWEEN EXPIRATION DATE OF CONTRACT UNTIL NEW DEPOSITORY CREATED.

SYLLABUS:

When the time covered by a depository agreement between a bank and the county commissioners for the deposit of county funds has lapsed, the depository bank by reason of the provisions of Section 2729, General Code, is liable for interest at the contract rate specified in such depository agreement until a new depository is created and its undertaking has been accepted by the county commissioners or until the money has been paid by such former depository into the county treasury.

COLUMBUS, OHIO, June 6, 1934.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“On March 31, 1934, the depository contracts of the Seneca County Commissioners with two of the banks in this city expired. At that time the banks were awaiting legislation which would allow them to pay a lesser rate of interest upon such public funds, and no bids were received until after the law was changed removing the minimum of 2%. The new contract of one bank was not executed and delivered, together with the bond securing the deposit, until about the 15th of April. The other bank which received the contract for one-half of the county funds has not yet submitted sufficient security to satisfy the Board of County Commissioners, but contemplates doing so within a short time.

The banks maintain that on the 31st of March they told the commissioners that they would not pay any interest after that date, and that they could have the funds immediately that were then on deposit in the

banks. However, no other tender of the funds was made, by way of the actual cash or draft, or bank check. The one bank now maintains that it is not liable for the 2% interest, which was the amount paid prior to April 1, 1934, between the time of the expiration of the old contract, namely March 31, 1934, and April 15, 1934, but that it is not liable at all between such dates, or only until the new law went into effect reducing the minimum amount of interest to be paid. The other bank maintains that even though it has not yet submitted sufficient security, it is liable only for one-tenth of 1%, the amount upon which the bids were awarded under the new contract from and after April 1, 1934.

The State Examiner who has been investigating this matter received an opinion from A. B. Peckinpugh, the Deputy Supervisor of the Bureau of Investigation, that the banks would be liable for the earnings upon these public funds after the expiration of the old contract, under the authority of 96 Ohio State 453.

I would like to know whether or not the old contracts could be considered in force until the new ones were executed and delivered and proper security given, and that therefore the banks would owe 2% upon the average daily balances after March 31, 1934, or whether they are liable for the earnings upon said money after that date, or whether they are liable at all under their statement to the commissioners that they would not pay interest after the expiration of the old contract and that the commissioners could have the funds immediately."

In your request you state that the depository contracts terminated on the 31st day of March, 1934. In view of the provisions of Section 2729, General Code, I am unable to arrive at such conclusion concerning the facts stated in your request. However, if such were the fact, the bank would be liable to the county for all profits received by them from such trust funds so used by it rather than for contract interest, for, in the case of *Franklin Bank vs. Newark*, 96 O. S., 453, the court held as stated on page 457:

" * * any bank receiving funds of a municipality under the circumstances disclosed by this record, knowing the same to be the funds of the municipality, becomes a trustee and must account to the municipality for the fund so deposited and all profits arising from such deposit."

Another question is raised by the facts stated in your inquiry. Section 2729, General Code, reads as follows:

"Upon the acceptance by the commissioners of such undertaking, and upon the hypothecation of the bonds as hereinafter provided, such bank or banks or trust companies shall become the depository or depositories of the money of the county and remain such for three years or until the undertaking of its successor or successors is accepted by the commissioners."

There is little question in my mind but that one depository bank may legally be a successor depository to itself.

Such section differs from the township depository statute in that the town-

ship depository can not be created for a longer period than two years, while a county depository is created for a definite period, or:

“* * until the undertaking of its successor or successors is accepted by the commissioners.”

From the facts stated in your inquiry, I believe it is to be assumed that the new undertaking by the new depository was accepted by the county commissioners sometime after April 1, 1934. If such be the fact, it would appear that the bank is liable for interest at the depository contract rate until a new depository has been created as provided by statute.

You further state that on the 31st day of March the depository banks stated that after such date they would not pay any interest, and informed the county commissioners that they could withdraw their money immediately, if they so desired. Section 2725, General Code, provides the manner in which an undertaking may be cancelled, and reads as follows:

“Such undertaking may be cancelled by ten days’ written notice to the county commissioners, the county auditor and the county treasurer, each separately, given by a surety thereunder to withdraw the money of the county in such depository. If the money of the county so deposited is paid by such depository to the county treasurer on his demand within ten days, or if it furnishes and substitutes new and satisfactory undertakings or securities, as provided herein, such security shall be released from his obligation, but not before. No cancellation shall operate to relieve any surety of liability for deposits made before such notice was given, until such deposits are secured to the satisfaction of the county commissioners as evidenced by resolution spread on their journal or until such deposits are returned to the county treasurer. No such cancellation shall be accepted until satisfactory undertakings or securities as herein provided shall be substituted therefor.”

The facts stated in your inquiry do not show a compliance with the conditions precedent as stated in this section. If the bank had made a tender to the county of the money or had turned the county money back to the county treasurer a different question might arise. If no more facts exist concerning a tender than are stated in your inquiry, I do not believe that a tender has taken place since the tender of payment must be in lawful money of the United States in order to discharge the debtor from the running of interest.

The facts in your letter indicate nothing more than a willingness to repay the money to the county if the county should demand it.

In specific answer to your inquiry it is my opinion that when the time covered by a depository agreement between a bank and the county commissioners for the deposit of county funds has lapsed, the depository bank by reason of the provisions of Section 2729, General Code, is liable for interest at the contract rate specified in such depository agreement until a new depository is created and its undertaking has been accepted by the county commissioners or until the money has been paid by such former depository into the county treasury.

Respectfully,
JOHN W. BRICKER,
Attorney General.