

General, p. 273) I held that the monthly vouchers if accepted must be in full of the rent for the current monthly rent and not as a part thereof (p. 274). I am unable to find any provision of such statute which would appear to limit the issuance of such vouchers to the current month's rent. The limitation of the statute is that such vouchers in any one month shall not exceed one twelfth of the taxes on the premises occupied by the indigent, and shall not be issued for rent accruing prior to June 20, 1933, nor after March 1, 1935.

Specifically answering your inquiry, it is my opinion that:

1. Where a family has been found to be indigent, but is occupying real estate owned by such indigent as a home, no part of which is leased, such indigent owner may not receive vouchers, to be used in payment of taxes charged against such property, under authority of Amended Senate Bill No. 200 (115 O. L. 194) as amended by Amended Senate Bill No. 53 of the First Special Session of the 90th General Assembly.

2. When the board of county commissioners have otherwise complied with Amended Senate Bill No. 200 (115 O. L. 194) as amended by Amended Senate Bill No. 53 of the First Special Session, they may during any month, issue vouchers pursuant to such act in an amount of not to exceed one twelfth of the annual tax levied against such property for the payment of any rent of such indigent accruing after June 20, 1933, but prior to March 1, 1935.

Respectfully,

JOHN W. BRICKER,

Attorney General.

3058.

DEPOSITORY—BID VOID WHICH RESERVES TO BIDDER RIGHT TO ALTER DEPOSITORY CONTRACT UPON CHANGE IN DEPOSITORY STATUTES—COUNTY COMMISSIONERS MAY NOT ACCEPT SUCH BID FOR COUNTY DEPOSITORY.

SYLLABUS:

1. *When the board of county commissioners have advertised for bids for a county depository and in response thereto received a bid or bids at a lawful rate of interest, but subject to a reservation of the right to the bidder to alter the depository contract in the event of a change in the depository statutes; such reservation attached to the bid renders the bid void. It may not be accepted to create a depository on such terms (Section 2716, General Code).*

2. *When the board of county commissioners accepts a bid, void or illegal because of its terms, for a county depository, a contract executed embodying the terms of such bid is a nullity and does not create a depository even though other statutory provisions with reference to the establishment of county depositories are complied with.*

COLUMBUS, OHIO, August 18, 1934.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

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

"When the county received bids on April 24, 1933, for the establish-

ment of county depositories the banks bid 1% on the active and 2% on the inactive deposits. Each one of said banks added substantially the following clause:

'This bank reserves the right at any time to change and revise this bid and the contract that may be entered into thereby in view of state legislation that may be now pending affecting the deposit of public funds and federal legislation that may be now in process governing banking, to conform to such new legislation that may be enacted into law.'

When these bids were accepted the question was raised as to the legality of such a bid and in order to compromise with the banks in our contract with them we added this clause: 'subject to the conditions reserved in the bid of party of the second part hereto.'

This clause will be found in the fifth paragraph of the contract, a copy of which is herewith enclosed. All the contracts are similar in all respects.

The writer has before him your opinion, No. 2310, rendered on February 23, 1934, with reference to the right of township trustees entering into a contract of less than two years caused by a change in the law, whereby the Legislature eliminated the minimum amount that might be paid by a bank for township deposits, and in that opinion you held, and I think rightfully so, that the township trustees have no authority to enter into a contract for a period less than that prescribed by the statute and that the proviso contained in the contract making the contract void, if the Legislature shall amend the statute in such manner as to authorize the acceptance of a bid for a lesser rate of interest.

When you were dealing with that state of facts you had before you, of course, the question of the voidability of the contract, but the question in our case now is, having signed up a contract for the period of time authorized by the statute, whether or not the bank now, even with a reservation in their bids, and a statement as above referred to in the contract, can they now take advantage of that and ask for a reduction of the interest that they contracted to pay on the daily balances on both the active and inactive deposits?

Your opinion on this matter will be greatly appreciated."

Section 2716, General Code, authorizes the creation of county depositories for the safekeeping of its active and inactive funds.

Section 2716, General Code, as it existed on April 24, 1933, read:

"When the commissioners of a county provide such depository or depositories, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent per annum on the average daily balance, on inactive deposits, and not less than one per cent per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

This section was amended at the second special session of the 90th General Assembly to read:

“When the commissioners of a county provide such depository or depositories, they shall publish for two consecutive weeks in two newspapers of opposite politics and general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next preceding chapters which proposals shall stipulate the rate of interest on the average daily balance on active and/or inactive deposits that will be paid for the use of the money of the county as herein provided. Each proposal shall contain the names of the sureties or securities or both, that will be offered to the county in case the proposal is accepted.”

Section 2717, General Code, provides for the acceptance of the bid offering the highest rate of interest. I assume that this was done and proper security was taken by the county.

Section 2737, General Code, provides that the moneys deposited shall bear interest at the rate specified in the proposal.

The contract for the depository having been entered into at a time prior to the effective date of present Section 2716, General Code (April 5, 1934), it must be interpreted in view of the law as it then existed rather than in view of the law as it now exists. It is fundamental that a subsequent amendment of a statute cannot alter the provisions of a contract entered into prior to its enactment.

It has been held, however, that the insertion of a condition in a bid that was not contained in the advertisement for bids renders the bid invalid. *State, ex rel. Winters vs. Barnes*, 35 O. S. 136; *Kerlin Bros. vs. Toledo*, 20 O. C. C. 603.

In the *Winters* case, the advertisements that were made, required the proposal to state “the time when said work shall be completed.” The contract sought to be let was for the printing of session laws in permanent form. The two bidders who submitted the lowest bids, after stating a definite time when the work would be completed added the condition “or 30 days sooner if copy is furnished.” The court held each of such bids to be void.

In the *Kerlin Brothers* case the advertisement was for bids for the sale of certain property owned by the city upon which was located a gas plant “with the right to lay down, maintain and operate in the streets, alleys,” etc., the bid in question contained the further condition which was not contained in the advertisement “the right to continue to operate said city natural gas plant, and to take up the same.” The Court held that the insertion of such condition in the bid rendered it inoperative.

In my opinion No. 2310 (1934 O. A. G. 189) referred to in your inquiry, I did not pass upon the specific question presented in your inquiry. In such opinion I held that township trustees had no authority to enter into depository contracts on terms other than those required by the statutes with reference to township depositories. The reasoning of such opinion would lead to the conclusion that county commissioners could not enter into a depository contract on any other terms or conditions than authorized by statute at the time of the execution of the contract.

It is an established rule of law that a contract made in pursuance of a statute must be construed as though such statute had been incorporated into such contract.

Banks vs. DeWitt, 42 O. S. 263;
Compton vs. Railway, 45 O. S. 592;
Cincinnati vs. P. U. Com., 98 O. S. 320.

Under the provisions of statute which existed at the time of the contract in question, the county commissioners had authority to accept a bid and enter into a contract for a county depository, when the bid was for at least two per cent on inactive funds and one per cent on active funds (Section 2715, General Code, as it then existed).

For two reasons the contract in question is illegal:

First: Because of the proviso in the bid, there was no bid which the county commissioners could accept.

Second: By reason of the reservation which is contained in the contract, it is not one for the payment of at least one per cent on active and two per cent on inactive deposits during the life of the deposit.

What is the effect of the action of the parties to the contract? It is sometimes stated that ultra vires contracts of a municipal or quasi-municipal corporation are absolutely void and that courts will not lend their aid in the enforcement thereof, but will leave the parties in the exact position in which it finds them. An examination of the cases supporting such statement of the text writers shows that such rule applies only when the ultra vires contract is one which the corporation cannot enter into in any manner. However, the term "ultra vires contracts" is often applied to contracts which were illegally entered into or irregularly made; in such class of cases the courts have lent their aid. 3 McQuillin, *Municipal Corporations* (2d Ed.), Sec. 1274, page 816, and cases there cited. In the case in question, the county commissioners had the right to create a depository and to enter into a depository contract in question, but by reason of the defect in the bid and the exception in the form of contract it was beyond the powers of the county commissioners to enter into a depository contract in the form in question. It would, therefore, appear that the depository contract is void and, as a result, no depository is created. 3 McQuillin, *Municipal Corporations* (2d Ed.), Sec. 1274. The county commissioners are not estopped from denying such illegality even after purporting to have awarded the contract and to have received benefits thereunder

Hope vs. Alton, 214 Ill. 102;
Hill Dredging Co. vs. Vinton City, 77 N. J. Eq. 467;
McAleer vs. Angell, 19 R. I. 688;
Dawson vs. Dawson Waterworks Co., 106 Ga. 696;
Columbus vs. P. U. Com., 103 O. S. 79.

It would therefore appear that by reason of the illegality of the contracts, no depository has been created by the county commissioners and that the county commissioners may terminate the ultra vires contract at any time.

It might be argued that the banks in question were familiar with the statutes with reference to county depositories and that by reason of such fact only the exception or proviso was void and that the bid should be treated as a bid in accordance with the provisions of statute. I have been unable to discover authorities to support such contention.

It is, therefore, evident that your specific question should in my opinion be answered in the negative.

The question will undoubtedly arise in your mind as to the compensation by way of interest that should be paid by the bank for the use of the money that was deposited with it pursuant to the provisions of such illegal contract.

If the banks in question were depositories of the county prior to April 24th, 1933, it would appear that the bank is liable for interest at the rate provided in

such depository contract, by reason of the provisions of Section 2729, General Code, which reads:

“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.”

By reason of the provisions of such section, the term of the depository is “for three years or until the undertaking of its successors is accepted by the commissioners.” It is self-evident that if by reason of the illegality hereinbefore referred to, no new or successor depository was created, the county commissioners could not accept the undertaking thereof.

Assuming, however, that the bank in question was not a depository at the time of the execution of the agreement in question, what is the interest rate? If I am correct in the view herein expressed, that by reason of the illegal procedure in question no new depository was created, then there was no authority of law for the deposit by the treasurer of the funds in question with the bank. There is no statutory authority for the deposit of funds by a county treasurer in other than a county depository created pursuant to the statutes in question. The legislature alone has the authority to authorize such deposit and fix the terms and conditions thereof. *Fidelity and Casualty Co. vs. Union Savings Bank*, 119 O. S. 124. The deposit was therefore illegal. The relation between the bank and the county would be difficult to distinguish from those under consideration by the court in the case of *Franklin National Bank vs. Newark*, 96 O. S. 453. In that case the City of Newark failed to create a depository. The city treasurer nevertheless deposited the city moneys in a bank without any agreement for the payment of interest by the bank. The court held that the deposit was illegal, and therefore the bank held the funds so deposited in trust and when the funds were, by the bank, commingled with its general funds and invested by it, the bank must account for and pay to the city the amount earned by it on such deposit.

From the facts presented by your inquiry, if the agreement for a depository is void, there was no authority to deposit of the moneys in question in the bank. The deposit being illegal, no title to such moneys was acquired by the bank; they were held in trust by it. *Crawford County Comrs. vs. Strong*, 157 Fed. 49. I am unable to distinguish the case presented by you from the Newark case, which has never been overruled by the Supreme Court, and therefore feel that similar accounting could be required from the alleged depository.

It is therefore my opinion that:

1. When the board of county commissioners have advertised for bids for a county depository and in response thereto received a bid or bids at a lawful rate of interest, but subject to a reservation of the right to the bidder to alter the depository contract in the event of a change in the depository statutes; such reservation attached to the bid renders the bid void. It may not be accepted to create a depository on such terms (Section 2716, General Code).
2. When the board of county commissioners accepts a bid, void or illegal because of its terms, for a county depository, a contract executed embodying

the terms of such bid is a nullity and does not create a depository even though other statutory provisions with reference to the establishment of county depositories are complied with.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3059.

APPROVAL—BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS INVESTIGATOR DEPARTMENT OF HIGHWAYS, NEW YORK CASUALTY COMPANY, J. W. SNYDER.

COLUMBUS, OHIO, August 18, 1934.

HON. O. W. MERRELL, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the penal sum of \$2,000.00, with sureties as indicated, to cover the faithful performance of the duties of the official as hereinafter named:

J. W. Snyder, Investigator, Department of Highways—New York Casualty Company.

Such bond has undoubtedly been executed pursuant to the provisions of sections 1182-2 and 1182-3, General Code. Such sections provide, in so far as pertinent here:

Sec. 1182-2. "The director (of highways) may appoint * * * engineers, inspectors and other employes within the limits of the appropriation as he may deem necessary to fully carry out the provisions of this act. * * *"

Sec. 1182-3. "Each employe or appointee under the provisions of this act, in cases other than where the amount of the bond is herein fixed, may be required to give bond in such sum as the director may determine. All bonds hereinbefore provided for shall be conditioned upon the faithful discharge of the duties of their respective positions, and such bonds * * * shall be approved as to the sufficiency of the sureties by the director, and as to legality and form by the attorney general and be deposited with the secretary of state * * *"

Finding said bond to have been properly executed in accordance with the foregoing sections, I have accordingly approved the same as to form and return it herewith.

Respectfully,
JOHN W. BRICKER,
Attorney General.