

certified becomes at once encumbered for the purpose of meeting the contract and cannot be spent or certified against for any other purpose, and there would be no object in postponing payments over a period beyond the fiscal year in which the contract is made.

Moreover, there is no exception made by statute, authorizing boards of education in the purchasing of school busses, to make such purchases on the installment plan and exempting deferred payments from the requirements of existing appropriations and fiscal officers' certificates, as there is with respect to county commissioners and township trustees when purchasing road machinery, in Section 7201, General Code.

It may be suggested that bonds may be issued by a school district within the limitations of net indebtedness fixed by law, to purchase motor vehicles. Section 2293-2 and Section 2293-9 (Class F) General Code.

Your second question may be answered by reference to Section 7731-5, General Code, as enacted in House Bill 314, of the 90th General Assembly. As so enacted, said Section 7731-5, General Code, reads as follows:

"The board of education of each school district may procure liability and property damage insurance covering each school wagon or motor van and all pupils transported under the authority of such board of education. This insurance shall be procured from a recognized insurance company authorized to do business of this character in the state of Ohio, and shall include compensation for injury or death to any pupil caused by any accident arising out of or in connection with the operation of such school wagon, motor van or other vehicle used in the transportation of school children. The amount of liability insurance carried on account of any school wagon or motor van shall not exceed one hundred thousand dollars."

Said House Bill 314, of the 90th General Assembly, was filed in the office of the Secretary of State on June 27, 1933, and therefore becomes effective on September 25, 1933.

Prior to the effective date of said House Bill 314, a board of education was without power to procure liability and property damage insurance covering school busses and pupils transported therein. After September 25, 1933, such insurance may be effected as provided by said act.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1042.

PUBLIC FUNDS—SECURITIES MAY NOT BE DEPOSITED WITH TRUSTEES UNDER TRUST AGREEMENT TO SECURE DEPOSITS OF POLITICAL SUBDIVISIONS.

SYLLABUS:

A county, city, city school district, other school districts within the geographical limits of the county, townships within the geographical limits of the county,

and villages located therein, may not accept as security for the deposit of their respective public funds, the deposits of securities and mortgages with trustees who may, or may not be fiscal officers of such subdivision under a trust agreement which vests the control and custody of such securities in such trustees, to be deposited in a safe deposit box which may not be opened except by one of such trustees and an officer of the depository bank in trust for the purpose of securing each of such political subdivisions from loss which may be occasioned by any default of the depository.

COLUMBUS, OHIO, July 18, 1933.

HON. EMORY F. SMITH, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Your recent request for opinion reads:

“The depository has executed separate personal surety bonds to each of the several municipal subdivisions, to secure their deposit of public funds.

Personal surety bonds have been found to be grossly inadequate to secure the payment of public funds so deposited and the signers of the respective personal surety bonds desire to be relieved of their obligation under the respective bonds.

The funds deposited bear interest and the depository has large funds in cash, on hand, bearing no interest, and desire that the municipal subdivisions withdraw their deposits and release the bond, or accept a single deposit of securities and real estate mortgages to secure the payment of all of the municipal subdivision deposits.

The deposits to be secured are those of the Treasurer of Scioto County, Ohio, the City of Portsmouth, the School Board of the City of Portsmouth and other school boards and different townships in the county.

It appears that the aggregate of the funds deposited by the several municipal subdivisions do not vary to any great extent, that before distribution the funds of the County Treasurer are high and the funds of the municipal subdivisions to which distribution is made, are very low, and after the distribution, the funds of the County Treasury are very low, and the funds of the other municipal subdivisions to which distribution is made are greatly increased, that is, the funds of the county are decreased by the amount of their distribution to the other municipal subdivisions and the funds of the other municipal subdivisions are increased by the like amount, so that a single deposit of securities and mortgages sufficiently large to cover the maximum of the aggregate deposits at any time, is proposed by the depository.

These deposits to be delivered in trust to the fiscal officers of Scioto County, Ohio, the City of Portsmouth, Ohio, and the School District of Portsmouth, Ohio, and such other fiscal officers or persons that may be designated as trustees in trust, to secure the payment of all deposits of public funds by the certain municipal subdivisions of the county who are parties to such trust deposit agreement.

Trustees shall deposit the securities and mortgages hypothecated with them, in a safe deposit box in The Security Central National Bank of Portsmouth, under the joint control of the trustees and the depository,

so that such safe deposit box may not be opened except upon the consent and in the presence of one of said trustees and of an officer of said depository.

Any security or mortgage that may be called or paid, may be withdrawn by the depository upon substituting therefor, other securities or mortgages in a like amount of those withdrawn, to the satisfaction of said trustees.

Question: May Scioto County, the City of Portsmouth, the School District of Portsmouth, Ohio, and other school districts in the county and townships of the county, and villages of the county accept as security for the deposit of their respective public funds, a single deposit of securities and mortgages made to certain of their fiscal officers in trust, to secure the faithful performance of the depository and the payment by the depository of the funds deposited with it?"

In your request you use the term "municipal subdivision" in its technical sense, that is, as referring to all those taxing authorities such as counties, townships, cities, villages, boards of education, etc. Inasmuch as the statute refers to such bodies as "political subdivisions" for the purposes of taxation and finance, I am using the term "political subdivision" in this opinion when referring to such bodies.

Bearing in mind the holding of the court in the case of *Fidelity & Casualty Company vs. Union Savings Bank*, 119 O. S. 124, Syllabus 1:

"The legislature alone has authority to empower a public officer to make a deposit of state funds in a banking institution and to provide the terms and conditions of such deposit."

And also of the court, in the case of *Frisbee Co. vs. City of East Cleveland*, 98 O. S. 266, syllabus:

"Where a statute prescribes the mode of exercise of the powers therein conferred upon a municipal body, the mode specified is likewise the measure of the power granted, and a contract made in disregard of the express requirements of such statute is not binding or obligatory upon the municipality."

It is clearly apparent that the authority to enter into the depository agreement in question must be found in some statute enacted by the legislature, for counties, townships, municipalities and boards of education are governmental agencies to which the state has delegated certain sovereign functions.

Separate provisions of statute have been made for the creation or establishment of depositories by the different political subdivisions: Thus Sections 2715 to 2738, Section 2288-1 and Section 4295, General Code, set forth the authority for the creation of county depositories; Section 3320 to 3326 and Section 4295, General Code, provide the method of creation of township depositories; Sections 4294, 4295, 2288-1 and 4515, General Code, provide the method of creation of municipal depositories; Sections 7605 to 7612, 4295 and 2288-1, General Code, provide the method of the establishment of a board of education depository.

For the purposes of this opinion, I assume that the depositories in question were legally created and limit myself solely to a consideration of the question

of the legality of the proposed method of securing the deposits in the depositories.

Your inquiry raises three questions of law:

(1) May a political subdivision permit the custody of securities delivered to it as security for the return of funds to be placed in any other manner than the exclusive control of the political subdivision?

(2) May such public subdivisions, even if authorized to accept securities as security for the return of public funds deposited in a public depository, accept jointly, the deposit of securities for such purpose?

(3) May the political subdivision in question, release a bond given to secure a public depository and accept securities in lieu thereof?

With respect to the first of these inquiries, I call your attention to Section 4296-4, General Code, which section is specific as to the manner in which the custody of municipal securities may be held. Such section reads:

"All securities belonging to the treasury of any city or to any fund thereof, other than the sinking fund, shall be in the custody of the city treasurer, and shall be kept by him in a safe deposit box or vault belonging to a regular city depository. Such safe deposit box or vault shall be opened only in the presence of one or more of the three officers named in section 4296-2 hereof, and only upon a warrant or order of the chief accounting officer directing the deposit or removal of securities purchased or sold, or the clipping of interest coupons for collection. A report of whatever is placed in or removed from such safe deposit box or vault upon any such occasion shall be signed by the treasurer and by the witness or witnesses required by this section, and shall be returned to the chief accounting officer upon the same day. Whenever any securities are so held for the city the officers having power to make such investments shall be bonded in amounts to be stipulated by ordinance. Such bonds may cover other contingencies in which such officers might become liable to the city."

It is true that the absolute title to the securities assigned to a municipality as security for a public depository, is not vested in the municipality, but whatever relation the municipality may have to such securities, it must necessarily have that of a bailee. The title of a bailee to the bailment is good as against all the world except the bailor, and even against him he has the exclusive right to possession until the purpose of bailment has been accomplished.

In the opinion of one of my predecessors (1 O. A. G. 1921, p. 745) it was held that the duty of the legal custody and safekeeping of securities hypothecated by depository banks of a political subdivision was upon such subdivision.

In an opinion of another of my predecessors in office (2 O. A. G. 1927, 990) it was stated in the syllabus that:

"Securities deposited with a board of education by a depository of public funds should be kept at all times under the control and dominion of such board."

The question before such Attorney General was whether a school board might deposit for safe-keeping the securities hypothecated by a depository bank with a bank other than the depository bank and take its receipt therefor. In such opinion the former Attorney General says, (page 992):

"The hypothecated securities should be in the exclusive control and dominion of the board of education and available without the concurrence of anyone else for the purpose for which the deposit was made."

As pointed out in another opinion of one of my predecessors (O. A. G. 1928, 1933) the treasurer of the county is personally liable in the event that any of such securities so hypothecated with him are lost.

The evident purpose of the legislature in authorizing the deposit of securities as security for public deposits was to enable the public depositor to realize the amount of his damage from the sale of such collateral, in the event of a default by the depository. Bearing in mind such purpose, the terms of the depository acts, and taking into consideration the reasoning underlying the opinions of former Attorneys General, I am not persuaded to depart from the holdings in such opinions.

It is likewise my opinion that when securities are hypothecated by a public depositor for the purpose of securing a public deposit, such securities must be deposited in such manner that the public depositor has the exclusive custody and dominion over the same.

Since, in your request and in the proposed indemnity trust agreement the securities deposited will not be in the exclusive control or dominion of a particular subdivision, but rather in the hands of trustees "in trust for the benefit of all said depositors * * without priority one over another" and are "under the joint control of the trustees of said depository" it would appear to me that the subdivisions in question have no authority to enter into the agreement attached to your request. I must therefore answer the first question in the negative.

With reference to the second question, that is, whether a public subdivision may jointly accept a deposit of securities from a bank which is the legal depository of such subdivision, analogous reasoning to that above set forth in answer to the first question would lead to the conclusion that "deposit" as used in the depository laws with reference to the hypothecation of securities as security for a public deposit would mean the deposit with the depositor subdivision and in its exclusive custody and control. A like answer must therefore be given to the second question of law presented by your inquiry.

Being of the opinion hereinabove expressed, it is unnecessary to consider the third question of law raised by your request.

Specifically answering your inquiry it is my opinion that a county, city, city school district, other school districts within the geographical limits of the county, townships within the geographical limits of the county and villages located therein, may not accept as security for the deposit of their respective public funds the deposit of securities and mortgages with trustees who may or may not be fiscal officers of such subdivision under a trust agreement which vests the control and custody of such securities in such trustee to be deposited in a safe deposit box which may not be opened except by one of such trustees and an officer of the depository bank in trust for the purpose of securing each of such political subdivisions from loss which may be occasioned by any default of the depository.

Respectfully,

JOHN W. BRICKER,

Attorney General.