

General Code, the taxing authority is limited by the estimated income of such taxing authority as determined by the budget commission by Section 5625-26 of the General Code, and such limitation is the amount of money which the taxing authority is estimated to receive from general property taxes during the ensuing half-yearly period after deducting therefrom taxes to be received for the payment of debt charges and all advances, whether received from real estate, public utility, unclassified personal property or classified personal property taxes.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4094.

TOWNSHIP FUNDS—MAY NOT BE DEPOSITED FOR LESS THAN TWO PERCENT INTEREST—TOWNSHIP CLERK ACTS AS COUNTY TREASURER—TOWNSHIP TRUSTEES MAY PERMIT TAX FUNDS TO REMAIN IN COUNTY TREASURY.

SYLLABUS:

1. *The board of township trustees, when unable to procure a greater rate of interest from a depository, may not legally contract with a depository for the deposit of township funds at a less rate than two percent.*

2. *If unable, after the use of due diligence, to obtain a depository which will pay interest at the rate of two percent or more, such board of trustees does not become personally liable for the two percent penalty described in Section 3326, of the General Code.*

3. *The office of township treasurer has been abolished by the legislature in the enactment of 110 O. L., 30, and the duties thereof placed on the township clerk, and it does not become revived by the inability of the board of township trustees to provide a depository.*

4. *The board of township trustees or the board of education may permit the tax funds to remain with the county treasurer and withdraw same by means of warrants executed by the township trustees and township clerk in amounts of not less than one hundred dollars.*

COLUMBUS, OHIO, February 26, 1932.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—This will acknowledge your recent request for opinion. Requests for opinions on substantially the same questions have been received from the Prosecuting Attorney of Stark County and the Prosecuting Attorney of Defiance County. I am therefore taking the liberty of combining the inquiries contained in these three requests into a single opinion and deducing the following inquiries:

"1. Under the statutory law regarding township depositories, may township trustees contract for a bid of less than two percent, when a bid at a greater rate is not obtainable?

2. In the event that the board of township trustees is unable to contract for a bid at a rate of two percent or greater, what must they do

with moneys turned over to them in order to escape the liability provided by Section 3326 of the General Code?

3. Does Section 3316-1, General Code, revive the office of township treasurer when the board of township trustees is unable to procure a depository satisfying the requirements of Sections 3320 et seq. of the General Code? If so, can the clerk act as such treasurer? With whom should his bond as such treasurer, be filed?

4. Who is to act as finance officer in the event a depository can not be procured for township funds? Could the clerk act as treasurer in such event, and should he give a separate bond as clerk and as treasurer?

5. May a township or board of education contract with a bank for a depository for an amount of funds less than the amount possessed by such township or board of education and allow the funds in excess of this depository requirement to remain in the county treasury and from time to time draw on the county treasurer for amounts equal to the excess over the depository, so remaining in the county treasury?"

Your inquiries in effect call for an interpretation of Sections 3316-1, 3320, 3322, 3323, 3324 and 3326 of the General Code which were enacted by the 85th General Assembly (House Bill 43; 110 O. L., 30). Such sections are as follows:

"Sec. 3316-1. When a depository has been provided for the township moneys, as authorized by this act (G. C. §§ 3320 et seq.), the township trustees shall dispense with a treasurer. The township clerk shall perform all the services, discharge all the duties and be subject to all the obligations formerly required by law of the township treasurer."

"Sec. 3320. That within thirty days after the first Monday of January, 1916, and every two years thereafter, the trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the treasury of the township, and shall deposit such money in such bank, banks or depository within the county in which the township is located as they may direct subject to the following provisions."

"Sec. 3322. In townships containing two or more banks, such deposits shall be made in the bank or banks situated in the township that offers at a competitive bidding the highest rate of interest on the average daily balance on such funds, which in no case shall be less than two per cent, for the full time the funds are on deposit. Such bank or banks shall give a good and sufficient bond to be approved by the township trustees, for the safe custody of such funds in a sum at least equal to the amount deposited. No bank or depository shall receive a larger deposit of such funds than the amount of such bond and in no event to exceed three hundred thousand dollars. The trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

"Sec. 3323. In a township in which but one bank is located, and the location thereof is convenient, the funds of the township shall be deposited in such bank at a rate of interest not less than two per cent on the average daily balance, but when the trustees have reason to believe that such bank is not a safe depository or when the location thereof is inconvenient or when such bank refuses to pay at least two per cent interest, or where there are two banks in a township and either one or

both refuse to pay at least two per cent interest on such deposits, or in a township in which no bank is located, after the adoption of a resolution providing for the deposit of its funds, the trustees may enter into contract with one or more banks within the county, or in a county adjacent to the county of which the township is a part, that are conveniently located and which offer the highest rate of interest on the average daily balance, and which in no case be less than two per cent for the full time the funds are on deposit."

"Sec. 3324. Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, and the trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

"Sec. 3326. When such depository is provided and the funds are deposited therein as herein directed, the trustees of the township and their bondsmen shall be relieved of any liability occasioned by the failure of the bank or banks of deposit or by the failure of the guaranty company acting as surety for such bank or banks, or by the failure of either of them except as herein provided in cases of excessive deposits. On failure of the trustees of any township to provide a depository according to law the trustees and their bondsmen shall be liable for any loss occasioned by their failure to provide such depository, and in addition shall pay into the township treasury two per cent on the average daily balance on the township funds during the time said township shall be without a depository. Said moneys may be recovered from the township trustees and their bondsmen for the use and benefit of the township treasury upon the suit of any taxpayer of the township."

It is evident from the language of the foregoing statutes that the intent of the legislature was not to authorize the township trustees to accept a depository which would not agree to pay interest at the rate of at least two per cent per annum and thus avoid the personal liability for the return of such funds. See Opinions of the Attorney General for 1912, page 705, Opinions of the Attorney General for 1921, page 263 and Opinions of the Attorney General for 1921, page 745.

The history of the act clearly shows the intent of the legislature in this regard. In Section 1513 of the Revised Statutes of Ohio, the township was only authorized to deposit its funds in a bank when "a good fire and burglar-proof safe" was not provided. And even though the funds were deposited in a bank the township treasurer was made individually liable for the return of the funds by Section 1514 of the Revised Statutes of Ohio. Such sections read as follows:

"Sec. 1513. In any township in which there is not provided a good fire and burglar proof safe, in which to keep the funds belonging to said township, the treasurer or person intrusted with funds of the same, may, by and with the consent of the trustees deposit the funds belonging to said township in some bank or other safe place, subject to the order of the treasurer making the deposit."

"Sec. 1514. The failure or inability on the part of an individual or corporation, with whom the funds of a township are deposited, to refund

the money deposited, shall not, in any way or manner release the treasurer from responsibility, but he shall be held and firmly bound for the money belonging to said township."

Such sections were amended and supplemented by subsequent legislatures (106 v. 242; 110 v. 30) permitting the deposit of such funds in a bank, when the depository bank is designated in the manner prescribed in such Sections 3320 et seq. of the General Code, supra.

Township trustees have no authority other than that given them by the legislature. No authority having been given them to deposit township funds at a lesser rate than two percent, they can have no such authority.

From your inquiries I deduce that the township trustees have made diligent effort to provide a depository for township funds as required by the statute, but without avail. My opinion, as expressed herein, is based upon this presumption.

The provisions of Section 3326, General Code, are evidently penal in their nature, and for that reason, one of the earliest rules of statutory construction requires that such statute be given a strict meaning. As stated in 2 Lewis' Sutherland Statutory Construction, Section 564:

"A penal statute should be construed to carry out the obvious intention of the legislature and be confined to that. Every case must come not only within its letter but within its spirit and purpose; but it should be given a rational construction. There must generally be such an act or omission as implies an actual and conscious infraction of duty."

Section 3326 of the General Code, by its language, relieves the township trustees from personal liability for the funds deposited upon the failure of the depository bank in the event that a rate of interest not less than two percent is procured upon funds deposited in a depository created in the manner set forth in the sections quoted above.

Since such section is a penal statute, and requires a strict construction, and further, since it is one of the presumptions of our legal system that the law does not require the performance of the impossible, is it not also a reasonable inference that the legislature did not intend to inflict a penalty of two percent upon the township trustees who had exerted every effort to provide a depository for township funds which would meet the requirements laid down by the legislature? I do not believe that the purpose of the legislature was otherwise than to provide for the safekeeping of township funds, nor do I believe that it had any purpose to require the payment by the township trustees of a penalty on funds that could not possibly be deposited in accordance with the legislative requirements.

In reply to the third inquiry, a reading of Sections 3316-1 and 3320, supra, discloses that the language of such sections is apparently mandatory that, "within thirty days after the first Monday in January, 1916, the trustees shall provide by resolution for the depositing of any and all moneys" and, "when a depository has been provided for the township moneys, as authorized by this act, the township trustees shall dispense with a treasurer. The township clerk shall perform all the services, discharge all the duties and be subject to all the obligations formerly required by law of the township treasurer."

Section 3316, of the General Code, provides:

"No money belonging to the township shall be paid out except upon

an order signed personally by at least two of the township trustees and countersigned by the township clerk."

It therefore seems that the treasurer is relieved of all duties to sign vouchers, and his duties given to the trustees and clerk. I do not believe this language will reasonably stand the construction that when the township trustees provided a depository in January, 1916, and thus abolished the office of township treasurer, such office was to be revived by any action of the township trustees.

When an office is created by the legislature, it can be abolished by it, and when such office has been abolished by legislative act, regardless of the fact that the specific time of abolishment fixed by the legislature, is to be determined by some act to be done by an administrative body, as in this instance, the designation of a depository during January, 1916, the conduct of the township trustees at a future time, without legislative action could not recreate the office.

The title to the Act enacting such sections is further evidence of such purpose: "To amend Section 2938 * * * relative to abolishing the office of township treasurer." (110 O. L., 30).

It is further evident that the purpose of the legislature was to definitely abolish the office of township treasurer, that in 110 O. L., 30, Sections 3309 to 3311, both inclusive, of the General Code, were expressly repealed. Such sections provided for the election, qualification and bond of a township treasurer. There is now no legal method of selecting a township treasurer and no duties provided for such office.

I am therefore of the opinion that the office of township treasurer is definitely abolished and can not be revived by any action of the board of township trustees.

Such office having been abolished by the Act in 110 O. L., 30, the legislature in such Act, transferred the duties to the township clerk by virtue of the provisions of Section 3316-1, supra, by the use of the following language:

" * * The township clerk shall perform all the services, discharge all the duties and be subject to all the obligations formerly required by law of the township treasurer."

In the same Act, in the paragraph which bears sectional number 3300, of the General Code, the legislature provided the manner of determining the bond of the township clerk. Such section is as follows:

"Before entering upon the discharge of his duties, the township clerk shall give bond payable to the trustees with sureties approved by them, in such sum as they determine, conditioned for the faithful performance of his duties as clerk. Such bond shall be recorded by the clerk, filed with the county treasurer and carefully preserved."

It is therefore evident that the duties of the township treasurer are abolished and the duties thereof placed upon the township clerk, whose bond shall be fixed by the board of township trustees. This conclusion also answers the fourth inquiry.

In answer to the fifth inquiry, I must call your attention to Sections 2690 and 2692 of the General Code, which are as follows:

"Sec. 2690. If a township treasurer or other proper officer so requires, or the trustees of a township, the council of a city, village, or

the board of education of a school district, respectively, so direct, such moneys shall remain in the county treasury, to be drawn by the proper treasurer on the warrant of the county auditor, in sums of not less than one hundred dollars."

"Section 2692. When the local authorities by resolution so request the county auditor shall draw, and the county treasurer shall pay on such draft to township, city and village treasurers, and the treasurer of any board of education and the treasurer of any other political subdivision or taxing district whose funds derived from taxes or other sources are payable by law to the county treasurer any money that may be in the county treasury to the accounts of such local authorities respectively and lawfully applicable to the purposes of the current fiscal year in which such request is made; provided that the county auditor and treasurer shall retain any amounts that may be needed to make such payments of the obligations of the local political subdivisions or taxing districts as are required by law to be paid directly by the county authorities."

From the express provisions of these statutes it is apparent that either the township trustees or the boards of education may leave these funds in the county treasury and draw thereon by means of warrants executed by the township trustees in any amount not less than one hundred dollars.

The remainder of the fifth request has hereinbefore been answered.

Specifically answering these inquiries, it is my opinion that:

1. The board of township trustees, when unable to procure a greater rate of interest from a depository, may not legally contract with a depository for the deposit of township funds at a lesser rate than two per cent.

2. If unable, after the use of due diligence, to obtain a depository which will pay interest at the rate of two per cent or more, such board of trustees does not become personally liable for the two per cent penalty described in Section 3326, of the General Code.

3. The office of township treasurer has been abolished by the legislature in the enactment of 110 O.L., 30, and the duties thereof placed on the township clerk, and it does not become revived by the inability of the board of township trustees to provide a depository.

4. The board of township trustees or the board of education may permit the tax funds to remain with the county treasurer and withdraw the same by means of warrants executed by the township trustees and township clerk in amounts of not less than one hundred dollars.

Respectfully,

GILBERT BETTMAN,
Attorney General.