

COUNTY TREASURERS: County treasurers are the insurers of all moneys coming into their hands and are not relieved of such responsibility by Section 12198, R. S. Mo. 1929, unless there is a substantial compliance with Article IX, Chapter 85, R. S. Mo. 1929, notwithstanding said funds are held by the bank as trustee ex maleficio.

December 19, 1940

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Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of December 3, 1940, wherein you ask for an opinion upon the following statement of facts:

"Our Company executed the two above described bonds for Fred B. Black at the beginning of his term as Treasurer January 1, 1937, at which time legal depositories were provided in Jasper County for the County funds, said depositories furnishing security as provided by law at that time.

"Effective August 1, 1939, letters were addressed to the County Court of Jasper County, Missouri, by the Bank of Carthage and by the Central National Bank at Carthage, Missouri, in which each of them offered to accept one-half of the County money, but this agreement provided for the pledging of no securities to guarantee the deposits. On the same date, the County Court of Jasper County, Missouri, made the following order:

"Be it ordered by the County Court that the County Treasurer be, and he is hereby ordered to deposit all county funds that may come into his hands during the period beginning August 1, 1939 and continuing until

the adjournment sine die of the May Term, 1941, of the County Court, in the following banks: Bank of Carthage, Carthage, Missouri; Central National Bank of Carthage, Missouri.

"Be it further ordered by the County Court that the Treasurer be directed to make daily deposits in said banks of such county funds as may come into his hands, and that such funds shall remain therein until properly disbursed as provided by law, and not transferred elsewhere, except upon order of record made by the County Court, and that as nearly as practicable the balances maintained in each such bank shall be equal.

"Be it further ordered by the County Court that this order be made a matter of record by the County Clerk and that he shall deliver a certified copy of this order to the County Treasurer.'

"Since the date of this order, neither of these Banks has furnished any security other than their membership in the Federal Deposit Insurance Corporation, guaranteeing the re-payment of the County deposit. It would seem from several Court decisions here in Missouri that these Banks are accepting County deposits illegally and that such money that is deposited by the County Treasurer would constitute trust funds and be a preferred claim upon the assets of these Banks. This being so, the County probably is amply protected, but the statutes requiring the depositories to pledge securities equal to their maximum deposit is not complied with and the County Court has not required the Banks to comply with the statutes.

"Under the circumstances, should the Treasurer follow the order of the County Court or is it his duty to bring action forcing the County Court to provide legal depositories in keeping with statutory requirements? Who is responsible to see to it that the statutes are complied with? Is it satisfactory with your Department that the law is not complied with?

"Mr. Black has been elected for a term to succeed himself and our ability to make the bond covering his new term will depend greatly upon his responsibility, if any, for the failure of the County Court to take security from the county depositories."

In the case of *State ex rel. The Township v. Powell*, 67 Mo. 395, the court quoted with approval the following statement of law as declared in the case of *United States v. Prescott*, 3 How. 578:

"Public policy requires that every depository of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity."

In tracing the authorities, we find that in the case of *University City v. Schall*, 205 S. W. 631, l. c. 633, the aforesaid cited case was approved by the court and also in the case of *City of Fayette v. Silvey, et al.*, 290 S. W. 1019.

In the case of *Glaze et al. ex rel. Board of Supervisors of Harrison County Drainage District v.*

Shumard et al., 54 S. W. (2d) 726, l. c. 728, 227 Mo. App. 434, the court had this to say:

"Since it is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise, \* \* \* the depositing of such funds by the county treasurer and ex officio collector, to his account as county treasurer in the Bethany Savings Bank, was at his peril."

Bragg City Special Road District v. Johnson, 223 Mo. 990, 20 S. W. (2d) 22; Butler County v. Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047.

Therefore, from the reading of the aforesaid cases it has been the uniform rule that public officers charged with public funds are charged with the safekeeping and are the insurers of said funds against all hazards unless they are relieved of this responsibility by some statute.

Now turning to Section 12198, Article IX, of Chapter 85, R. S. Missouri 1929, which has to do with county depositories, we find that said section reads as follows:

"The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depository, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depository shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

The aforesaid section, without question, would

relieve the county treasurer from liability provided he placed the funds in a legally selected depository. However, from reading your letter, the question arises whether or not the county court of Jasper County has legally selected a depository in accordance with Article IX, Chapter 85, supra.

We find from reading your letter that neither the Bank of Carthage nor the Central National Bank has furnished any securities and we have further learned that the banks in each monthly statement made to the county court report that the moneys are held "Special deposit of public and funds belonging to Jasper County, Missouri, to be held by this bank and to be disbursed only on checks issued and signed by the County Treasurer or his authorized agents." This communication was made known to this office through a letter dated December 11, 1940, by Fred B. Black, County Treasurer.

In the case of Liquidation of Peoples Bank of Butler v. Moberly, 127 S. W. (2d), page 669, l. c. 671, the court had this to say:

"Mount Pleasant Township did not designate a depository for its funds, but deposited them in the three banks named which were acting as county depositories. Appellant contends that none of these banks was lawfully designated as a county depository and the township is therefore entitled to a preference, on the theory that the deposits were illegal and that the banks are trustees ex maleficio.

"The selection of county depositories is governed by Article 9, Chapter 85, R. S. Mo. 1929, sections 12184-12198, inclusive; Mo. St. Ann. sections 12184-12198, pp. 6455-6465. In brief, they provide: the county court shall select a depository at the May term every two years; it shall divide the county funds

into not less than two nor more than ten equal parts; cause notice to be published; receive sealed proposals as to rate of interest the banks offer to pay on the funds for the ensuing two years, the bids to be accompanied by certified checks, etc.; the bids shall be publicly opened and recorded on the first day of the May term and a depository or depositaries be selected on condition that the specified bond be executed and approved; section 12188 Mo. St. Ann. Section 12188, p. 6461, provides that if a township board fails to select a depository its funds shall be deposited in the county depository. Other provisions of the statute are not material to the present discussion.

"We have held the requirements of these statutes mandatory and that a failure of compliance prevents title to the public funds passing to the bank and the relation of creditor and debtor arising. *Harrison Township v. People's State Bank*, 329 Mo. 968, 46 S. W. 2d 165; *In re Cameron Trust Co.*, 330 Mo. 1070, 51 S. W. 2d 1025; *Marion County v. First Sav. Bank*, 336 Mo. 675, 80 S. W. 2d 861; *White v. Greenlee*, 330 Mo. 135, 49 S. W. 2d 132; *Denny v. Jefferson County*, 272 Mo. 436, 199 S. W. 250; *Huntsville Trust Co. v. Noel*, 321 Mo. 749, 12 S. W. 2d 751. We have also held that a literal compliance with all the statutory provisions is not required, if no public or private right is prejudicially affected. *Boone County v. Cantley*, 330 Mo. 911, 51 S. W. 2d 56; *Wright County v. Farmers' & Merchants' Bank*, Mo. Sup., 30 S. W. 2d 32; *Henry County v. Salmon*, 201 Mo. 136, 100 S. W.

20; Town of Canton v. Lewis County Bank, 338 Mo. 817, 92 S. W. 2d 595; Mitchell v. Bank of Ava, 333 Mo. 960, 65 S. W. 2d 99; School Dist. of St. Joseph v. Security Bank, 325 Mo. 1, 26 S. W. (2d) 785."

In the case of Harrison Township, Vernon County, et al. v. People's State Bank of Bronaugh et al., 46 S. W. (2d), page 165, l. c. 166, the court had this to say:

"Under article 9, c. 85, R. S. 1929, it was the duty of the township board of Harrison township to select a depository for the funds belonging to said township and secure from the depository a bond faithfully to account for and pay the sums deposited. Heitz, in charge of the fund, had no right to make the deposit in his name as trustee, the bank not having been selected as depository, and when he did take charge of said fund he was charged with a trust to account for it.

"When the People's State Bank received that fund from Heitz and placed it to his credit, it was impressed with the same trust in the hands of the bank. The relation of debtor and creditor did not obtain between the bank and the depositor. The bank took the money, according to the stipulation, knowing the funds to be public moneys belonging to the plaintiffs. The funds, being commingled with other assets of the bank, had augmented those assets in that amount. Huntsville Trust Co. v. Noel, 321 Mo. 749, 12 S. W. (2d) 751, loc. cit. 754; State ex rel. Gentry v. Page Bank, 322 Mo. 29, loc. cit. 36, 14 S. W. (2d) 597; Clearmont School

District v. Jackson Bank (Mo. App.)  
37 S. W. (2d) 1006.

"Since this trust fund added that amount to the assets of the bank, the general creditors are in the same position with the preference allowed as if the deposit had not been made. There is nothing to show that any one deposited or otherwise gave credit to the bank on the strength of that particular asset."

Therefore, from reading the cases, supra, in reference to the selection of county depositaries, we question whether there has been a substantial compliance with Article IX, Chapter 85, R. S. Missouri 1929, and believe the county funds are held by aforesaid banks as trustees ex maleficio, and if the banks were to go into liquidation the county, no doubt, would have to resort to appropriate legal measures to obtain whatever money was in the banks at the particular time, and under the decisions, supra, would be entitled to a preferred claim against the bank assets, and it is our opinion that the county treasurer, however, would not be absolved from liability.

The situation presented in your letter is indeed a regrettable one and is confronting the county officials of many of the counties throughout the State of Missouri. Such situation having been brought about by the depression and different demands and conditions under which all banks are now operating, and the sections of the statute which have been passed by the past Legislature cannot now be carried out and this situation should be alleviated immediately by the Legislature and suitable laws should be immediately enacted which would set forth a plan for the handling of county moneys to meet the time in which we are now living.

#### CONCLUSION

In conclusion we are of the opinion that the county treasurer is the insurer of the county funds for

Hon. Forrest Smith

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the reason that there is not a substantial compliance by the Bank of Carthage and the Central National Bank of Carthage.

Respectfully submitted

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APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney General

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