COUNTY DEPOSITORY: Liability of Bank where no bond furnished as provided by law.

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July 21,1933

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Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

This office acknowledges receipt of your letter of July 24th, 1933, in which you make the following request for an opinion:

> "I am writing you in regard to the construction to be given sections 12,184, 12,185, 12,186, 12,187, 12,192, 12,193, 12,195. Please give me your opinion in regard to the following state of facts of the interpretation of the above mentioned sections R. S. of Missouri 1929.* * *
>
> The county court of this county has continued the selection of the depository of the county funds in May of every odd year since 1925, according to the directions of the law hereinbefore mentioned. However, at no time since 1925 has a new bond been given to secure the deposits of this county, although the said Security Bank mentioned above has been at all times the county depository as required by law. The records of the county court however show that the said Security Bank has been selected every odd year as required by law. The county court on May 6, 1931, made the following order, 'The court makes an order that the Security Bank is to take the deposits of the county funds and pay 1½% interest on daily deposits.' No mention is made in the record of requiring a bond of the said depository as required under section 12,187 R. S. of Missouri, 1929.

The facts of this case will show that since 1925 the Security Bank of Fredericktown, Missouri, has been taking a part of the county funds of this county and placing them on deposit in the Bank of Fredericktown, Fredericktown, Missouri. However there is nothing to show in the records of the Bank of Fredericktown, Fredericktown, Missouri, that there was a deposit by the county through the county treasurer. The records do show that when deposits of this nature were made they were recorded to the Security Bank. There was an understanding between the officials of the said banks that the deposits of the county would be taken care of in that manner, so as to avoid competition and also to avoid paying a higher rate of interest than 1½%. The county court of this county had knowledge of the transactions between the two banks.

Following their usual custom the Security Bank of this county received all deposits for the year 1932, but as was stated before, no bond was given to secure said deposits. After receiving said deposits from the county, the Security Bank placed $13,300 on deposit with the Bank of Fredericktown, Fredericktown, Missouri.* * *The Bank of Fredericktown, Fredericktown, Missouri, is now operating under restrictions of the State Finance Department, alloting only 5% of all deposits to be withdrawn every six months. Under the circumstances and the facts that I have tried to relate to you, would the Security Bank of Fredericktown, Missouri, be responsible for all deposits of this county made to the said Security Bank, including $13,300 now on deposit in the Bank of Fredericktown, Fredericktown, Missouri?

If the above stated cases are correct, would the deposits of Madison County, Missouri, in the Security Bank of Fredericktown, Missouri

become a trust fund by operation of law? What action would you advise as a means of recovering for Madison County in this case?

Section 12187 R. S. Mo. 1929, provides as follows:

"Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety: Provided, that the court may accept in lieu of real estate as security bonds of the United States or of the state of Missouri, which said bonds shall be deposited as the court may direct; the penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court, and said bond shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon said depositary and for the payment upon presentation of all checks drawn upon said depositary by the proper officers of said county or any township whenever any funds shall be in said depositary, and that all interest will be paid promptly, and that all said funds shall be faithfully kept and accounted for according to law; and for a breach of said bond the county or any school district or township of said county or any person injured may maintain an action in the name of the county, to the use of the complainant."

Under the facts as set out in your letter, at no time since 1925 has a new bond been given to secure the deposits of Madison County held in the Security Bank. There is no doubt but that a deposit of public funds without requiring the bond prescribed by statute is in violation of law; and deposits made by officials with a depositary that has failed to execute a bond as the law requires, creates and constitutes the monies so deposited, a trust fund for which a preference will be allowed.

The Missouri Supreme Court has held that a bank does not become a depository merely by deisgnation as such but must qualify by giving security. Consolidated School District v. Citizen's Savings Bank, 21 S. W. (2nd) 781.

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2nd) 751, the Court held:

> ** * *As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. How a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27,1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them. See Harrison v. Smith, 83 Mo. 210, 215, 53 Am. Rep. 571; Midland Nat. Bank v. Brightwell, 148 Mo.

358, 365, 49 S. W. 994, 71 Am. St. Rep. 608; Page County v. Rose, 130 Iowa, 396, 106 N. W. 744, 5 L.R.A. (N.S.) 886, 8 Ann. Cas. 114; Board of Fire & Water Com'rs v. Wilkinson, 119 Mich. 655. 78 N.W. 893, 44 L.R.A. 493; Cherry v. Territory, 17 Okl. 221, 89 P. 192, 8 L.R. A. (N.S.) 1254. See also, Leach v. Exchange Bank, 200 Iowa, 185, 203 N. W. 31,36; and State v. Foster, 5 Wyo. 199, 38 P. 926, 29 L.R.A. 226, 250, 63 Am. St. Rep. 47." " "

In the case of Fidelity & Deposit Company of Maryland v. Peoples Bank, 44 Fed. (2nd) 19, the Court held:

" " "In the instance where the banks received from the county treasurer county funds and placed them on deposit when they were not legal county depositories, they became trustees ex maleficio. Merchants' Nat. Bank v. School Dist. (C.C.A.) 94 F. 705; Bd. of Comm'rs v. Strawn (C.C.A) 157 F. 49, 15 L.R.A.(N.S.) 1110; U.S.F. & G. Co. v. Union Bk. & Tr. Co. (C.C.A) 238 F. 448; American Sur. Co. v. Jackson (C.C.A.) 24 F. (2d) 768; Fiman v. State of South Dakota, 29 F. (2d) 776 (C.C.A.8); Compton v. Farmers' Tr. Co., 220 Mo.App.1081, 279 S. W. 746. As such their absolute liability could be relieved only be restoring the funds to the county. The banks in becoming trustees ex maleficio lost their right to presume that the county treasurer in withdrawing the funds would make proper disposition thereof. Perry on Trusts (7th Ed.) vol. 1, 245; Central Stock & Grain Exchange v. Bendinger (C.C.A.) 109 F. 926, 56 L.R.A. 875; U.S. F. & G. Co. v. People's Bank, 127 Tenn. 720, 157 S. W. 414; Glasgow v. Nicholls, 124 Wash. 281, 214 p. 165, 168, 35 A. L. R. 419.

In the case of Glasgow v. Nicholls, supra, the court said:

> A trustee de son tort does not escape liability to his cestui que trust by showing that he has disposed of the property, the subject of the trust. It may be that such disposition has placed the property in the hands of a bona fide purchaser for value, without notice, and the cestui cannot impress the trust upon the property in the hands of the ultimate holder of it; but, at the same time, the trustee de son tort is personally liable for the value of the property of the cestui which he has had in his possession, for he has converted the trust property, and although the cestui may not be able to follow the specific property and impress a trust upon it, he is nevertheless entitled to a judgment against the wrongdoing trustee."

Therefore, in view of the cases cited above there is no doubt but that the Security Bank of Fredericktown, holds the funds deposited in it by Madison County, as trustee for Madison County. As to the $13,300, deposited in the Bank of Fredericktown, there is no liability on the part of the bank of Fredericktown to Madison County. The Security Bank of Fredericktown is absolutely responsible for this deposit. From the facts as stated in your letter it is apparent that there was an agreement between the bank of Fredericktown and the Security Bank to supress the bidding for county funds and this was known to the county court. This would seem to make the bank of Fredericktown an undisclosed principal and subject that bank to liability to Madison County. However, the county court has no authority to apportion the county funds among two or more banks and therefore two or more banks cannot jointly submit a bid nor can one bank be the undisclosed principal of another presenting a bid. The bank selected as the depositary, in this instance the Security Bank, and its sureties are alone responsible for a failure to accountyfor the funds deposited by the county.

In the case of Henry County v. Citizens Bank of Windsor, 208 Mo. 209, the Court held:

> "There can be no undisclosed principal among the bidders for the county funds. The law requires the names of all bidding banks, together with the bid of each, to be entered upon the records of the court, and that one to be selected which is the highest bidder. And if, by reason of an agreement among all the banks of the county one of them was to be and was the highest bidder, and that agreement further provided that it would turn over to the defendant a designated portion of the county's moneys deposited with it, and that agreement was carried out, defendant was not an undisclosed principal in the agreement entered into between the county and the bank accepted as depositary. There can be no such thing as a joint bid of two or more banks for the county funds; consequently, defendant was neither a disclosed nor an undisclosed principal to the county's agreement." * * *

The Court in the case of Henry County v. Citizen's Bank supra, at page 232 said:

> "* * *Upon the execution, acceptance and approval of the bond of Salmon & Salmon as the depositary of the funds of Henry county, they were entitled to the possession of such funds, and they and their sureties became responsible to the county court for any failure to properly account for such funds; and, there is absolutely no authority by which Salmon & Salmon and the respondent by any arrangement or agreement, could in any way vary the terms of the contract with the county court or render any person other than those embraced and disclosed in the contract liable for any breach of it." * * *

The holdings of the court in the case of Henry County v. Citizens Bank supra, simply mean, insofar as the facts in this case are concerned, that there is no <u>contractual</u> relation

between Madison County and the Bank of Fredericktown regardless of the agreement between the two banks and the knowledge of the county court with respect to these transactions. As the court in the case of Henry County v. Citizens Bank supra expressly states at page 229:

> "* * *We do not mean to be understood as holding that if funds of a county, either legitimately or by some unlawful agreement, find their way into some other banking institution, the county court could not be authorized to pursue such fund and recover it, but we do mean to say that such recovery cannot be sought on the ground that such banking institution having such deposit is an undisclosed principal, or that an action can be maintained at all upon the contract provided for by the statute unless the principal is therein disclosed." * * *"

Section 12198 R. S. Mo. 1929 provides:

> "The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, 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 depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

If the bond accepted by the county court does not fully comply with the statutory regulations, the treasurer is liable on his own bond for the county money.

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (Sup. Ct. Mo) (2nd) 22, the Court said:

> "It could not be made the duty of the treasurer to deposit the funds of the district in the depositary selected by

> the board unless the board had the legal authority to select such depository and had done so in substantial compliance with the authority granted." " "

A depositor makes out a prima facie case when he shows that a deposit has been made and a demand and refusal of the money deposited. The onus is then upon the depositary to exonerate himself from the liability which attached when he assumed the custody of the money. Wiser v. Chesley, 53 Mo. 547. Thompson v. St.Louis & San Francisco Railway Company, 59 Mo. A. 37.

Therefore, in view of the foregoing, it is the opinion of this department that (1) the Security Bank of Fredericktown, Fredericktown, Missouri, is responsible for all deposits of Madison County made to said Security Bank, including $13,300 now on deposit in the Bank of Fredericktown. (2) That the deposit of Madison County, Missouri, in the Security Bank of Fredericktown, Fredericktown, Missouri, constitutes a trust fund by operation of law. (3) That if the bond accepted by the county court does not fully comply with the statutory regulations, the county treasurer is liable on his own bond for the county money. (4) That while the ordinary relationship between the bank and county with respect to funds deposited under the statute is that of debtor and creditor, the facts as presented here constitute the Security Bank of Fredericktown, Fredericktown, Missouri, as trustee for Madison County, and Madison County may sue the Security Bank of Fredericktown for the recovery of this money and may subject all the assets of said bank to the repayment of this trust fund.

Yours very truly,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:MM