COUNTY DEPOSITORY:

Procedure in selection of County Depository: Liability of County Treasurer on official bond in event no depository is selected by County Court.

September 26, 1933.

10-2

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Hon. John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Eversole:

We have your letter of September 9th, 1933, with request for an opinion, which letter we are incorporating in our opinion.

> "I am writing you this letter at the request of my Friend Wilson Bell who is county treasurer of Washington County.
>
> Each and every bank in this county have refused to give Mr. Bell the necessary bond required of a county depository. Mr. Bell has made every possible effort to secure this bond, in fact has even gone out side of the county in his attempt to secure a bond after the banks in this county had all refused.
>
> We wish your advice as to what should next be done and in the meantime do you consider Mr. Bell and his bondsmen liable in case of a bank failure. Would certainly appreciate a reply at your very earliest convenience. Mr. Bell and I intend to be in Jefferson City in the near future to discuss this and other matters with you but would like your advice in the meantime."

While you definitely do not state in your letter, we assume that your county court has complied with all of the provisions of the statute relative to the selection of the county depository, that is, that the county court has proceeded under the provisions of Section 12184 R. S. 1929, by advertising for bids for the county funds and no bids were received by the county court from the banking corporations, associations, or individual bankers in the county and all of the banking institutions in your county have failed to proceed under Sections 12184, 12185, 12186 and 12187 R. S. 1929, in submitting bids for the county funds and in the giving of a bond or bonds for the county depository.

In case the county court has complied with the statutes and no bids have been submitted, all as provided in Sections 12184, 12185, 12186 and 12187, supra, then, in that event, the county court may go to Section 12189, R. S. 1929, for the selection of the county depository, which section is as follows:

> "DUTY OF COUNTY COURT IN CASE NO BIDS ARE RECEIVED.--If for any reason the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositaries as provided in section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, in such sums or amounts, and for such period of time, as the court may deem adviseable, at such rate of interest, not less than one and one-half per centum, as may be agreed upon by the court and the banker or banking concern receiving the deposit; said interest to be computed upon the daily balances due the county, as provided in section 12186, and any bank or banking concern agreeing to accept deposits under the provisions of this section shall execute a bond in manner and form as prescribed in section 12187, with all the conditions therein mentioned, the penalty of such bond or bonds to be not less than the total amount of the county funds to be deposited with such bank or banking concern."

The duty under the statutes of selecting the county depository devolves on the county court and it should first proceed under the first four sections of Article IX, Chapter 89, R. S. 1929, viz, 12184, 12185, 12186 and 12187, supra, and then if there are no bids submitted by the banks the county court should then go to Section 12189, supra, for guidance and under said section the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties etc., who are willing to comply with this section by paying the required interest, not less than one and one-half per cent, to be computed upon daily balances, and executing a bond in manner and form as prescribed in Section 12187.

Coming now to the question as to the liability of the county treasurer of your county on his official bond, in event of a bank failure and consequent loss of the county funds in the county depository:

Section 12198 R. S. 1929, provides as follows:

> "COUNTY TREASURER EXEMPT FROM LIABILITY, WHEN.--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."

In the case of Glaze v. Shumard, 54 S. W. (2d) 726 l. c. 728, it is said:

> "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."

As was said by the Supreme Court in the case of City of Fayette v. Silvey, 290 S. W. 1019, l. c. 1021:

> "* * * The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public

money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.

In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22 l. c. 24, 66 A. L. R. 1053, the Missouri Supreme Court in this leading case said:

"The ruling in the University City Case was made in recognition of the rule followed in this State, and generally followed that the liability of the treasurer of a public corporation for its funds coming into his hands is absolute. State ex rel. v. Powell, 67 Mo. 395; 29 Am. Rep. 512; State ex rel. v. Moore 74 Mo. 413; 41 Am. Rep. 322; County of Mecklenburg v. Beales, 111 Va. 691, 69 S. E. 1032, L. R. A., (N. S.) 285. The rule is one founded upon considerations of public policy."

In the case of Everton Special Road District v. Bank of Everton, 55 S. W. 335, l. c. 336, the Supreme Court stated:

"In selecting a county depository the steps may be all regular up to the execution of a

> bond by the depository and then if the bond given does not substantially comply with the requirements of the statute, the depository selected is not the legal depository."

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751, l. c. 754, the Supreme Court said:

> "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. Now 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."

The Springfield Court of Appeals followed the Huntsville Trust Company case in the case of Consolidated School District v. Citizens Savings Bank, 21 S. W. (2d), l. c. 788, and the Huntsville case is cited with approval in the case of White, County Treasurer, v. Greenlee, 49 S. W. (2d) 132.

Also, in the case of Boone County v. Gantley, Commissioner, 51 S. W. (2d) 56, l. c. 58, the Supreme Court further said:

> "A bank which has given a bond that does not comply with the provisions of Section 12187 R. S. 1929, regardless of the action taken by the county court with respect to it, is

> not a county depository either in law or in fact. And upon the receipt of county funds by such a bank, under color of being a county depositary, a trust as to funds so deposited arises in favor of the county. Huntsville Trust Co., v. Noel, 321 Mo. 749, l. c. 757; 12 S. W. (2d) 751."

In the case of State ex rel. Cravens, to Use of Consolidated School District No. 2, v. Thompson, 22 S. W. (2d) l. c. 198, the court made the following statement which is appropriate to the question here involved:

> "It is plaintiff's position, as reflected in the first assignment of error, that the recital in the said minute, 'Bond of D. W. Thompson as treasurer approved. Money to be kept in Farmers Trust Co.,' was not sufficient in law to designate a depository for the moneys of the district and to authorize Thompson to place the money there, because not in conformity with the provisions of sections 9582-9586, Rev. St. 1919, governing procedure in respect to county funds; and that, when the power of an inferior body to do a thing depends upon a condition precedent prescribed by statute, all the world must take notice of that limitation of its power and authority, and determine at their own peril whether or not the condition has been complied with and the authority granted; and that the act of the board of education in directing by minute entry only that the funds of said district be kept in the Farmers' Trust Company of Grant City, without first advertising for bids, and without requiring a bond of the depository selected, was void and of no effect, and not binding on the district; and that it was the duty of the treasurer before depositing the funds with the Farmers' Trust Company to see and know that said depository had been properly and legally selected and designated, and that a bond of said trust company had been properly approved and filed, and his failure to do so renders him and his sureties liable."

It will be seen from the above cases that where the county depository has not been selected in the manner designated by the statute and no depository bond has been given as required by the statutes that the bank or trust company does not become a lawful county depository and, in that event, under the decisions the county treasurer is liable under his official bond in case of a bank failure and consequent loss to the county of its funds.

We hope that this fully answers your questions, but should there be any further question on this matter we shall gladly give you our opinion.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:________________________
ROY McKITTRICK
Attorney-General.

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