COUNTY DEPOSITORY: Liability of County Treasurer on official bond where no depositary bond given.

August 14, 1933.

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Hon. L. D. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Rice:

This Department is in receipt of your letter of August 4th, 1933, with request for opinion, which letter is as follows:

> "Mr. John W. Franks, County Treasurer of Newton County, Missouri, has asked me to obtain from you an opinion on certain matters relative to his office.
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> Attached hereto you will find Exhibit "A" which is an order of the County Court of Newton County, Missouri accepting bids for depositories for county funds, made on the 3rd day of May, 1933. After this order was made and entered of record depository bonds were made by the Granby Miners Bank of Granby, Missouri covering one-tenth of the funds, and by the State Bank of Granby of Granby, Missouri, covering one-tenth.
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> The First National Bank of Neosho, Missouri, which received four-tenths of the deposits, and the Bank of Neosho of Neosho, Missouri which received four-tenths of the deposits have failed to make depository bonds as provided in this court order, and also as provided by the statutes. The two banks in Neosho give as their reason for not making this bond that the members of their Board of Directors will not sign the bond and they cannot afford to get a surety company's bond covering these deposits.

The New York Casualty Company with offices in Kansas City, Missouri, made the bond for Mr. John W. Franks, County Treasurer. This bonding company is now insisting that Mr. Franks compel the County Court of Newton County to require the two banks in Neosho to furnish bond. The County Court refuses to take any action in the matter for the reason that they say they could not get a depository in any part of southwest Missouri that would agree to furnish bond, and for that reason and for the reason that they regard the two banks here as being absolutely solvent they refuse to do anything in the matter.

The County Treasurer wants an opinion as to whether he or his surety would be liable if he follows instructions of the County Court and deposits the money in the two banks in Neosho as ordered, and the banks should fail and the deposits be lost.

Also, what steps can be taken to require the County Court to secure bonds from these two depositories.

He has been advised that the surety company is only liable for his personal integrity, and if he deposits the money in the banks designated by the County Court, it relieves him and his surety from any liability for loss by reason of the banks' failure. The surety company seems to take a different view of the matter."

You do not state in your letter but we assume that the county court proceeded regularly under Sections 12184, 12185 and 12186, R. S. 1929, in regard to the advertising for bids for the county funds and the opening of the bids, and the court followed the statutes in every particular up to the giving of the depository bond by the bank as provided by Section 12187.

We set out Sections 12187 and 12198, R. S. 1929, for the reason that said sections are directly involved in your particular question, that is, the liability of the county treasurer, or his sureties, in the event no depository bond is given by the bank

and the treasurer follows the instructions of the county court and deposits the money in the two banks in Neosho, and the banks should fail and the deposits be lost.

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

"BOND OF DEPOSITARY.--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."

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 instrusted 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.
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> 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 augumented, 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. Cantley, 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 depositary 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."

From the above cases we find that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise; that the 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 12187 R. S. 1929, and where the statutory procedure in the selection of the county depository has not been followed, as in your case, by the giving of the bond and the approval by the county court, the banks in question are not the legal depositories of your county.

It is, therefore, the opinion of this Office that since the banks in your county, mentioned in your letter, have not given the depository bonds as required by statute, the county treasurer depositing moneys in said banks, belonging to said county, does so at his own peril, and in the event of the failure of said banks and the loss of county funds thereby he and his sureties become liable on his official bond.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:_____
ROY McKITTRICK
Attorney-General.

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