DEPOSITORIES;)
) Bond must be given to secure the full amount of the "total annual revenue" of the
COUNTY DEPOSITORIES:) county.
County treasurer liable for funds deposited in an unlawful county depository.

March 5, 1937.

3-17

FILED
82

Honorable H. J. Simmons
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of February 20th, in which you request the opinion of this Department on the questions therein submitted. We set forth your letter in full:

> "The Treasurer Elect who takes office April 1st is required to give bonds in the total penalty of about $125,000.00. The bonding Company with whom he has made application refuses to write the bond until the County Court has selected the County Depository and the County Depository has executed a bond prescribed by Section 12187, the penalty of such bond to be not less than the total amount of County funds to be deposited with such depository.
>
> "The County Court will advertise for proposals from banking institutions in this County in compliance with section 12184, but the banks have indicated that they will not submit proposals; in which case no proposals being made it then becomes the duty of the County Court, Section 12189, to select one or more banking corporations to act as County Depositories and to fix the rate of interest at not less than 1½%, to be

computed on the daily balances due the County as provided in Section 12186. The banks state that they will not pay interest on County deposits. The peak deposits at the present time are about $127,000.00; the penalty on the bonds which have been deposited by the present depository is but $50,000.00. The present depositories are not willing to increase deposit bonds in excess of $50,000.00.

"If I understand the law the present banking institutions are County Depositories of funds up to the amount of the bonds deposited with the county. In case of a failure, assuming the County had more than $50,000.00 on deposit in said depository the depository would become the Trustee of the County Treasurer who in turn would have a preferred claim for the amount of deposits in excess of the $50,000.00. If the preferred creditors were not paid 100 cents on the dollar and a loss was sustained, then the County Treasurer and the Bonding Co. would become liable to the County for the deficiency.

"As stated in the beginning the bonding Co. at the present time is refusing to write a treasurers bond until the County Depository has complied with Section 12189.

"Assuming that the Banking Corporations of this County refuse to deposit bonds in excess of $50,000.00 and the total funds in the hands of the County Treasurer amount to $127,000.00 then what should the County Treasurer do with the excess of $77,000.00.

"As a matter of second importance, Section 12187, Session Laws 1935, provides that in case a depository bids on County funds and the bid is approved by the County Court, then such depository shall file in the office of the clerk thereof a bond, the

penalty of which shall not be less than the total annual revenue of said county for the years for which the bond is given. The anticipated revenue of Vernon County is approximately $300,000.00.

"Will you kindly advise whether the depository, proceeding under Section 12187, is required to deposit a bond of not less than $300,000, when the average daily balances of the county are between twenty and forty thousand dollars?

"It may be that your office has already written an opinion on this matter for some other County. I would appreciate receiving an opinion from your office at your earliest convenience, as very little time remains until the County Treasurer must have a bond."

I.

Your first question is:

Assuming that the Banking Corporations of this County refuse to deposit bonds in excess of $50,000.00 and the total funds in the hands of the County Treasurer amount to $127,000.00 then what should the County Treasurer do with the excess of $77,000.00?

Section 12187, R. S. Mo. 1929, as amended by Laws of Missouri, 1935, page 315, provides that the successful bidder for the county money shall within ten days execute a bond with not less than five solvent sureties, to be approved by the county court and filed in the office of the clerk thereof. And said section further provides that in lieu of a personal or surety bonds that the selected depository may pledge "bonds of such county, or of the State of Missouri, or of the United States, or bonds fully guaranteed by the United States, which such bonds shall be deposited as the court may direct, with a Trustee, Trust Company or fiduciary designated or approved

by it; the penalty of each depository'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," etc.

Section 12198, R. S. Mo. 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 alderman 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. 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."

It is therefore the law that if there is not a full compliance with the statutes pertaining to the selection of a depository for the county funds, and a bond is not given which complies with the statutes, it is considered an unlawful deposit and in the event of the failure of the bank and loss in consequence thereof the county is entitled to a preferred claim, and if the preferred claim is not sufficient to pay the full amount of the deposit the county treasurer and his sureties would be liable for the deficiency.

The case of Marion County v. First Savings Bank of Palmyra, 80 S. W. (2d) 861, is more applicable to the facts stated in your letter, and the court said (l. c. 864-865):

> "In the instant case, the original penalty of the depositary's bond was reduced from $40,000 to $20,000 as of October 5, 1932. Thereafter, the deposits in said depositary increased from $16,462.66 between November 26, 1932, and January 31, 1933, to $38,721.67. The county officials were without lawful authority to deposit and said depositary, as such, was without lawful authority to receive the $18,721.67 excess of deposits over the penal amount of the bond. Under such circumstances the title to said $18,721.67 did not pass, but remained impressed with the trust imposed upon it while in the lawful possession of the official rightfully entitled to it, and said depositary held the same as trustee ex maleficio. School Dist. v. Cameron Trust Co., 330 Mo. 1070, loc. cit. 1077, 51 S. W. (2d) 1025; State ex rel. v. Page Bank, 322 Mo. 29, loc.

cit. 35, 14 S. W. (2d) 597, 599; Harrison Township v. People's State Bank, 329 Mo. 968, loc. cit. 971, 46 S. W. (2d) 165; Clearmont School Dist v. Jackson Bank (Mo. App.) 37 S. W. (2d) 1006; City of Macon v. Farmers' Trust Co. (Mo. App.) 21 S. W. (2d) 643, loc. cit. 644 (3); Special Road Dist. v. Cantley, 223 Mo. App. 89, loc. cit. 93, 8 S. W. (2d) 944. (and other cases cited)."

From the above and foregoing we find that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise; and that the bank or trust company does not become a county depository merely by being selected, but bonds or securities must be pledged which satisfy the mandates of the statute. And if, as in your case, $50,000.00 worth of bonds were pledged and there was $127,000.00 to the credit of the county treasurer, there would be a deficiency of $77,000.00, and, therefore, in event of the bank's failure, whatever is lost thereby the treasurer and his bondsmen would be liable therefor.

II.

Your second question is:

Will you kindly advise whether the depository, proceeding under Section 12187, is required to deposit a bond of not less than $300,000, when the average daily balances of the county are between twenty and forty thousand dollars?

In answer to this question we can only quote you the statute (Sec. 12187, supra), which says:

"* *; the penalty of each depository'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, * * *."

The penalty of the county depository bond was discussed in the case of Marion County v. First Savings Bank of Palmyra, supra, wherein it was held (l. c. 864):

> "The penalty of the bond should be not less than such 'total annual revenue' to comply with the letter, as well as the spirit, of the statute; and if for but one of the four parts, then the penalty of the bond should be not less than one-fourth of such 'total annual revenue.' The county court is without authority to fix any less amount as the penalty of the bond; but may determine upon a greater sum therefor."

It is therefore our opinion that the depository should deposit a bond and the penalty of same should be not less than such "total annual revenue" of the county, and that a bond, the penalty of which is only for the average daily balances of the county, would not be in compliance with Section 12187, as amended by Laws of Missouri, 1935, at page 316.

We hope that this answers the questions submitted in your letter.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney-General.

CRH:EG