

Opinion No. 24-3774

July 21, 1924

BY: JOHN W. ARMSTRONG, Assistant Attorney General

TO: Requested by: Hon. R. H. Carter, State Comptroller, Santa Fe, New Mexico.

Securities to be Used in Lieu of Depository Bonds Must be in the Custody of the Proper Finance Board.

Discussion of Disposition Which May Be Made of County Moneys When a Depository Within the State Fails to Qualify.

OPINION

{*154} Your inquiry presents some interesting and serious matters. It appears that a certain county treasurer is bonded by a surety company; that such treasurer can find no bank within the state to handle the county deposits by offering a depository bond in usual form and amount; that a bank, however, does offer to secure the amount of such deposits with Liberty Loan Bonds to remain in a New York bank and such treasurer to be furnished with a trust receipt showing the bonds are on deposit in the New York bank to secure such county deposit; that the surety company bonding such county treasurer deems such an arrangement not a compliance with the law sufficient to authorize it to remain on the treasurer's bond; and that the case presents a situation where the treasurer may soon be without bond and the county without a qualified depository.

Are bonds offered by depositories in lieu of the usual depository bond, to be and remain in the absolute control of the county board of finance? The law seems so to contemplate. Different sections of the statutes, to which we shall presently refer, seem to require that the bonds shall be **delivered** to the board of finance; that, after delivery, they shall be approved by the board of finance; that, after approval, they shall be delivered to and held by the secretary of such board; that, at the time of such delivery by endorsement or the equivalent thereof, the **title** thereto shall vest in the board of finance; that they may be withdrawn under certain conditions; that the board having **custody** of such bonds, under certain circumstances, may sell them; that such sale shall be at public auction at the **office** of the board; that, when so sold, the bonds shall be endorsed or assigned so as to vest title in and be delivered to the purchaser; and that not only the bonds but the interest thereon may be held by the finance board when the depository bank may default in payment of public moneys so secured. See Secs. 9 and 13, Chap. 76, S. L. 1923.

We, therefore, conclude that the law does not authorize the acceptance of security for deposits in the manner outlined by your inquiry. By the foregoing, however, we do not mean to infer that any board shall maintain, at all times, manual possession of such securities, but that they should be at once available and the title thereto incontestable.

The further question presented by the situation involves difficulties and possibly untried procedure. The county is likely to be without a qualified bank depository and the treasurer without any bond. In this situation, two courses apparently are open for the protection of the county's money and interests.

First, it is the duty of the county board of finance to provide the treasurer with a depository but, of course, the board cannot provide a bank depository unless it can find a bank, within the {**155*} state, willing to make the proposal, agreement and bond mentioned at Sec. 10, Chap. 76, S. L. 1923. Failing in every attempt to obtain a qualified bank depository, then, the board of county commissioners have the power and it is their duty to properly safeguard the county's money. We quote the following sections of law to indicate the broad powers and duties of the commissioners:

Each organized county in this State shall be a body corporate and politic, and as such shall be empowered for the following purposes: * * * To make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers. * * *. -- Sec. 1150, Code 1915.

The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners. -- Sec. 1188, Code 1915.

The board of county commissioners shall have power at any session to make such orders concerning the property belonging to the county as they may deem expedient. -- Sec. 1199, Code 1915.

To represent the county and have the care of the county property and the management of the interest of the county in all cases where no other provision is made by law. -- Sec. 1201, Code 1915.

These clauses seem to mean something more than the ordinary powers appertaining to counties. They confer express authority to do the acts in the interest of the county, and to make contracts in reference to the concerns necessary to the exercise of this authority, when not otherwise provided by law. * -- *Agua Pura Co. v. Mayor, etc.*, 10 N.M. 6; 60 Pac. 208; 50 L. R. A. 225.

In our opinion, the county commissioners may do most anything necessary to protect the county's money -- make or rent a safety vault, and provide guards for same if necessary, rent a "strong box" in any bank within the state and purchase burglar insurance to cover contents, etc. Such procedure is allowable only in the absence of any other provision of law governing such cases. When the depository provisions of the law fail, there is no other law specifically restricting the acts of the commissioners in this connection.

Second, the state has the power and a duty to perform in an emergency of this character. The county is but an agency of the state and it, of course, is incumbent on the latter to safeguard its own interests by safe-guarding those of the county. We think,

then, the state may co-operate with the counties in any reasonable way in the situation at issue. We quote the following to indicate the extent of these powers:

"The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed. -- Sec. 4, Art. 5, State Constitution.

"The Governor, the Attorney General and the Auditor shall, without additional compensation, constitute a State Board of Finance. * * * The State Board of Finance shall have general supervision of the fiscal affairs of this State and of the safekeeping and depositing of all monies belonging to or in the custody of the State and shall have {*156} power to make rules and regulations to carry out the purposes of this Act. -- Sec. 3, Chap. 76, S. L. 1923.

The Comptroller shall have the general superintendence of the fiscal affairs of the State, under the supervision and direction of the State Board of Finance. The Comptroller, the State Auditor, the State Treasurer, the State Tax Commission, and other officials, directly or indirectly, concerned in the financial operations of the State government, shall so co-ordinate and correlate the work of their respective offices under the direction of the Governor, as to subserve the best interest of the public. -- Sec. 17, Chap. 48, S. L. 1923.

One of the principal objects of said Chapter 76 is to safe-guard the public moneys and Sec. 3 of said Chap. 76 empowers the state finance board to make rules and regulations to carry out that purpose. In an emergency, the state, proper, may open its own vaults or depositories for the safe-keeping of county moneys. Said Section 3 includes not only the depositing and safe-keeping of strictly state moneys but such as may be in the "custody" of the state. The state has somewhat broader specific powers over moneys and securities in its custody than counties, as will be observed by a consideration of the following statute:

The State Board of Finance shall have power to contract for the safe-keeping of all moneys or securities in the State Treasury, the cost of such safe-keeping and insurance to be paid out of the interest on deposit fund upon warrants drawn by the State Auditor. -- Sec. 28, Chap. 76, S. L. 1923.

When any county treasurer has public money on hand in excess of that which depositories are qualified to receive, he should advise the chairman of the county board of finance in conformity with Sec. 4, Chap. 76, S. L. 1923. Then, it would appear that it is incumbent on the board to provide proper facilities for the safekeeping of such money. From the foregoing, it will be seen that the state too has a duty to perform in such an eventuality.

In the emergency you mention, the county commissioners should be in a position to provide the necessary relief. If not, they, in conjunction with the State Board of Finance, can doubtless find adequate means of relief.