

June 20, 1935.

Hon. Frank H. Johnson
State Examiner
The Capitol

You have submitted the following:

"1. Will you please render your opinion as to whether or not the following moneys deposited in the depository banks by county or city treasurers must be deposited ratably and if a uniform rate of interest must be paid on such deposits as provided by Chapter 23 of the Extraordinary Session Laws of 1933-34:

"Funds received from the Federal Government from the sale of county, city, school district or irrigation district bonds or government grants for the purpose of constructing a court house, city hall, school buildings, irrigation or water systems.

"These funds are placed in a special account in a bank, approved by the Federal Public Works Board, by the county or city treasurers and are paid out only by warrants issued by the Board of County Commissioners, City Council, School Trustees or Irrigation District Commissioners.

"2. Also would the county, city, school district or irrigation district be permitted to pay the bank a service charge for handling such account; if so, how would they pay same."

Opinion No. 128.

**Banks and Banking—Public Moneys
—Deposits—Ratable Deposits—Service Charges—Federal Loans.**

HELD: 1. Funds received from the Federal Government for the sale of county, city, school district or irrigation district bonds or government grants for the purpose of constructing a court house, city hall, school buildings, irrigation or water systems, are public moneys and must be deposited ratably among all qualified banks under Chapter 23, Laws of the Extraordinary Session, 1933-34.

2. Counties, cities, school districts and irrigation districts are not permitted to pay depository banks a service charge for handling such accounts.

Section 4767, as amended by Chapter 23, Laws of 1933-34, Extraordinary Session, makes it the duty of all county, city and town treasurers to deposit all public moneys in their possession and under their control, in solvent banks in the county, city or town of which such treasurer is an officer, such deposits to be distributed ratably among all of such banks qualifying therefor and said deposits shall bear uniform interest at the rate of not more than 2% per annum, payable quarter annually. It also provides for the giving of security for such portion of the deposits as is not guaranteed or insured according to law. The question is whether the funds you mention are "public moneys" within the meaning of this section.

Section 11320 defines public moneys as follows: "The phrase 'public moneys,' as used in this code, includes all

bonds and evidences of indebtedness, and all moneys belonging to the state, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, city, or town officers in their official capacity."

Our Supreme Court in *State v. McGraw*, 74 Mont. 152, after quoting this definition, said, page 158: "Aside from the Code definition and provision quoted, it is generally held that it is the official character in which moneys are received, and not the ultimate ownership, which makes them 'public moneys.' (*People v. Hamilton*, 3 Cal. Unrep. 825, 32 Pac. 526; *Agoure v. Peck*, 17 Cal. App. 759, 121 Pac. 706; *Myers v. Board of Commrs.*, 60 Kan. 189, 56 Pac. 11.) In the first case cited, the court said: 'The allegation that these moneys were received by the defendant 'in his official capacity' is the allegation of a fact which conclusively fixes their character as 'public moneys.' In the second it was held that: 'The court then having accepted in its treasury the \$1,000 involved and adjudged it to be a money deposit in court, the law requires the clerk to pay the same into the hands of the county treasurer, and the same when received by the treasurer in his official capacity became public money'."

Tested by the statute and the language used by our court, the funds in question must be considered as public moneys as they not only belong to the county, city, school district or irrigation district but they are received by the respective treasurers in their official capacities. These funds, therefore, must be distributed ratably among all of the banks according to statute qualifying therefor and must be secured as required by statute and shall bear interest at the rate not to exceed 2% per annum, payable quarterly.

Answering your second question regarding service charges, when a deposit of public moneys is made in a depository bank a contractual relationship in the nature of creditor and debtor arises as between the public body and the depository bank. The terms of this contract are fixed by statute and each party is bound by the law. It is the statutory duty of

the depository bank to pay the interest and it is the statutory duty of the county, city or town treasurers to collect the same. The depositing public body and the depository bank cannot enter into any private contract in derogation of the laws of the state which apply to the depositing of public funds.

The legislature has placed the burden of paying this interest upon the depository bank. If the bank, in turn, were permitted to charge the public bodies a service charge then the bank would in fact be requiring the taxpayers to assist them in paying the interest. It was not the intent of the legislature to place the burden of paying such interest upon the taxpayers of this state as no provision was made therefor. The legislative intent was to require the bank that had the use of these public deposits for commercial gain, to pay this interest. If the banks could legally make a reasonable charge to the public bodies they could also fix this service charge at a rate equal to the interest they are required to pay. Such a policy would circumvent the statutes of this state and place the entire burden upon the depositors. Moreover, there is no levy authorized by law whereby public bodies could raise such a fund by taxation.

It is, therefore, my opinion that counties, cities, school districts and irrigation districts are not permitted to pay depository banks a service charge for handling such accounts.