175 Ind. 380, the Supreme Court held that one could not legally occupy the position of school trustee and deputy auditor at the same time. In an opinion from this office, it was ruled that the trusteeship of a school was a lucrative office within the meaning of the above provision of the Constitution.

As to the position of city civil engineer, I am not able to say that there are duties in the office that pertain to other than purely municipal affairs. In the case of Chambers v. State ex rel., 127 Ind. 365, 367, the court, after reviewing earlier decisions, says:

"It must, therefore, be regarded as the settled law of this State that if an office is purely municipal, the officer not being charged with any duties under the laws of the State, he is not an officer within the meaning of the Constitution, but if the officer be charged with any duties under the laws of the State, and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution."

Upon the basis, therefore, that a city civil engineer has no duties except such as are purely municipal, it is my opinion that your question should be answered in the affirmative.

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SINKING FUND FOR PUBLIC DEPOSITS: Whether proposed legislation violates the Federal Act prohibiting the payment of interest on deposits.

October 26, 1936.

Mr. Ross Teckemeyer, Secretary,
Sinking Fund Division,
Department of Treasury,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion as to the validity of certain proposed legislation creating a separate state fund to be known as the "public deposits insurance fund" made up of assessments levied by the Board of Depositories set up by the proposed legislation against banks acting as
depositories for public funds belonging to the State and its several political subdivisions and including cities and towns and other public municipal corporations. The fund is described as an "insurance fund," the purpose of it being "to insure the safekeeping and prompt payment of all public funds deposited in any depository in the manner required by this Act." The assessment procedure is set out in Sections 24 and 25 of the proposed legislation and is as follows:

"Section 24. Assessment Rate and Base. Subject to the limitations prescribed in this Act the board for depositories shall have the power and is hereby authorized to fix the assessment rate to be paid by depositories on account of the insurance of public funds on deposit therein. On or before the first day of July and the first day of January in each year, but at no other time, the board shall determine and fix the fair and reasonable assessment rate to be paid by depositories during the succeeding six months period. In fixing such rate the board shall have regard to the amount of public funds currently on deposit, the liabilities of the insurance fund, contingent and accrued, the cost of similar insurance by private insurers and the findings of any actuaries employed by the department of treasury with reference to the insurance fund. For any six months period the maximum assessment rate which may be fixed by the board shall be two per cent per annum and the minimum assessment rate which may be fixed by the board shall be one-half of one per cent per annum. If, at the beginning of any six months period, no assessment rate on public funds has been fixed by the board for depositories for the succeeding six months period, the assessment rate shall be one-half of one per cent per annum during that period.

The assessment base for each depository of public funds shall be determined monthly and shall be equal to the minimum balance of public funds on deposit for each month. On or before the second day of each month, every depository shall compute the amount of the assessment due from it to the insurance fund on account of public funds on deposit with it during the preceding month. The amount of the monthly assess-
ment shall be the product obtained by multiplying one-twelfth of the assessment rate for the particular six months period by the assessment base for the month for which the assessment is being computed.

"Section 25. Report of Assessment Base and Payment of Assessment. On or before the fifth day of August, 1937, and on or before the fifth day of each month thereafter, every depository which had public funds on deposit with it during the preceding month shall file with the insurance fund a certified report under oath showing for the preceding month the amount of the assessment base and the amount of the monthly assessment due the insurance fund determined in accordance with the provisions of Section 24 hereof, and shall pay the insurance fund the amount of the monthly assessment it is required to certify. If any depository shall fail to pay the insurance fund on or before the fifth day of each one month period the full assessment due from it for the preceding one month period on account of public funds deposited with it, the depository shall be liable for double the amount hereof and the same may be recovered in any court of competent jurisdiction in an action by the State of Indiana on the relation of the department of treasury."

The Section creating the fund is Section 20 of the proposed legislation and is as follows:

"Section 20. Public Deposits Insurance Fund. There is hereby created a separate state fund to be known as the ‘public deposits insurance fund,’ the purpose of which shall be to insure the safekeeping and prompt payment of all public funds deposited in any depository in the manner required by this Act. Every depository shall pay the insurance fund the assessments provided for herein and conform to all lawful requirements of the board for depositaries and department of treasury. The insurance fund shall be maintained by the assessments payable by the depositaries and by the collection and payment into it of all claims created under Section 28 hereof and of all interest and other earnings of the insurance fund from whatever source. All col-
lections and all payments for the benefit of the insurance fund shall be paid into the state treasury."

The particular question concerning which you request my opinion is the question as to whether the foregoing provisions, if enacted, will be in violation of Section 371a (1935 Cumulative Annual Pocket Part) of Title 12 U.S.C.A., prohibiting member banks of the Federal Reserve System from paying interest on any deposit which is payable on demand. The Section referred to reads as follows:

"Section 371a. Payment of interest on demand deposits. No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand: Provided, That nothing herein contained shall be construed as prohibiting the payment of interest in accordance with the terms of any certificate of deposit or other contract entered into in good faith which is in force on the date on which the bank becomes subject to the provisions of this paragraph; but no such certificate of deposit or other contract shall be renewed or extended unless it shall be modified to conform to this paragraph, and every member bank shall take such action as may be necessary to conform to this paragraph as soon as possible consistently with its contractual obligations: Provided further, That this paragraph shall not apply to any deposit of such bank which is payable only at an office thereof located outside of the States of the United States and the District of Columbia: Provided further, That until the expiration of two years after August 23, 1935, this paragraph shall not apply (1) to any deposit made by a savings bank as defined in Section 264 of this title, or by a mutual savings bank, or (2) to any deposit of public funds made by or on behalf of any State, county, school district, or other subdivision or municipality, or to any deposit of trust funds if the payment of interest with respect to such deposit or public funds or of trust funds is required by State law. So much of existing law as requires the payment of interest with respect to any funds deposited by the United States, by any Territory, District,
or possession thereof (including the Philippine Islands), or by any public instrumentality, agency, or officer of the foregoing, as is inconsistent with the provisions of this Section is hereby repealed."

Practically the same question arises as to insured nonmember banks on account of regulations promulgated pursuant to Title 12 U.S.C.A. (1935 Cumulative Annual Pocket Part), Section 264, subdivision (v) (8), which reads in part as follows:

"The board of directors shall by regulation prohibit the payment of interest on demand deposits in insured nonmember banks and for such purpose it may define the term ‘demand deposits’ but such exceptions from this prohibition shall be made as are now or may hereafter be prescribed with respect to deposits payable on demand in member banks by Section 371b of this title, as amended, or by regulation of the Board of Governors of the Federal Reserve System." * * *

The question, briefly stated, is:

Do the foregoing provisions of the proposed state legislation violate the above federal legislation? I think it may be that the consideration of this question is calculated to be too much influenced by the course of legislation in the State designed to protect public deposits. Beginning with the Indiana Public Depository Act of 1907, depositories of public funds were required to pay interest on all such deposits received by them varying from two per cent to three per cent, depending upon whether the deposits were subject to check or were time deposits and, if time deposits, whether semi-annual or annual. The interest thus collected, carrying out the true conception of the term, went to the purpose of increasing the fund. It had no relation to the security of the fund, which fund was required by the Act to be secured by a bond, or collateral, or both bond and collateral. The interest charged and collected was, in the true sense, compensation for the use of the money. This situation continued, with certain variances in interest rates and methods of computation and in the security required, until the enactment of the 1932 Act known as the State Sinking Fund for Public Deposits Act. This Act came
into being to overcome the weakness of the existing method of securing such deposits which had proven to be wholly inadequate to meet the condition of increasingly large numbers of bank failures. To meet the new need the method of assessment undoubtedly could have been resorted to, having in mind simply the legal questions involved.

Shallenberger vs. First State Bank, 219 U. S. 114.

That plan, however, was not adopted. The public and the banks were familiar with the payment of interest on public deposits. This obligation of public depositories was not new, and therefore, it was not unnatural, having regard for the then existing strain upon banks, to take what was already in existence and with which the public and the banks were familiar, and use it to create a fund for the protection of public deposits. The plan of the 1932 Act was thus developed providing for the diversion of depository interest, an item which otherwise would belong to the funds deposited, to a State Sinking Fund for Public Deposits, and limiting the same to $3,000,000.00, after which the interest would belong to the respective funds deposited. In doing so, no new obligation was placed upon the banks, the state and its political subdivisions becoming in a certain sense self-insurers, using their own money in a plan of mutual protection. This plan has been held to be valid by the Supreme Court of the State.

Sexton vs. Storen (1936), 200 N. E. 251.

The Act of 1935 is similar to the 1932 Act with respect to the matter under consideration and the case of Sexton vs. Storen supra would be applicable, but obviously both Acts would be contrary to the federal legislation copied earlier in this opinion, not, however, upon the basis of the creation of a State Sinking Fund, but upon the basis that its creation has underlying it the charging and collection of interest on deposits, which is prohibited.

I have said that I think it may be that the consideration of the question is calculated to be too much influenced by the course of legislation in the State designed to protect public deposits. The method of assessment in the proposed legisla-
tion is apt to look like just another way of collecting interest which the State and its various political subdivisions may divert to the creation of a State Sinking Fund for Public Deposits simply because that is the way the State Sinking Fund for Public Deposits is now created. But this is not true. The object of the prior legislation was two-fold, protection and interest, but the fact that, pursuant to such legislation, the State and its various political subdivisions took upon themselves the duty of using a part of this interest, their own funds, to protect their deposits, does not commit the State to a policy which would require it to continue indefinitely to use its own funds and the funds of its political subdivisions to protect their deposits. The object of the proposed legislation is protection only. No interest is charged or collected for the use of the money deposited, and if it may seem otherwise, it is only because of the apparent difficulty of forgetting the previous method of diversion of part of the interest, which was a fund belonging to the State and its political subdivisions, whereby they became self-insurers, so that a clear and unbiased appraisement of the proposed system, whereby the depository banks become the insurers, may be made without the existing system being in the background.

Fundamentally, assessments, such as are provided for in the proposed legislation, and interest are different. Interest is defined to be "the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention."

33 C. J. 178.

But the assessments provided for in the proposed legislation are not compensation for the use of the money deposited. They can never go to the accretion of the deposits. They can be used for protection only and find their analogy in insurance premiums payable to a State fund for such protection. The inhibition of the federal statutes above quoted is against the payment of interest on demand deposits either directly or indirectly, and I think would extend to the prevention of the payment of interest on demand deposits through any indirect subterfuge the character of which not being disclosed but being left undefined so as to cover the subject broadly. But the Government policy evidently is not opposed to the
giving of security for the safe-keeping and prompt repayment of the public money of a State or of any political subdivision thereof deposited in National Banks as is clear from the following provisions of the statute:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."


Under the above provision it has been held that a National Bank may give security for the public deposits of a State deposited with it pursuant to the State law requiring the giving of a bond which under the statute became a lien on all the assets of the bank.

Lewis vs. Fidelity Co., 292 U. S. 559.

While there is no express approval by the above statute of the particular form of security contemplated by the proposed legislation, I think the broad language used is sufficient to authorize the contribution to a mutual insurance fund as proposed where such fund is not greater than is reasonably required for adequate protection. At any rate, in my opinion, the proposed state legislation does not violate the provision of the federal legislation prohibiting the payment of interest on demand deposits.