

would prevent him from qualifying as long as he retained a pecuniary interest in the contract of the company with the board of education. It is obvious that Mr. Johnson could qualify if he renounced his rights under the contract, i. e., if he sold or otherwise disposed of his stock in the company and terminated his services with the said company as manager. If Mr. Johnson should qualify by acting as above suggested, the contract of the company with the board would in no way be affected.

Respectfully,

JOHN W. BRICKER,

Attorney General.

1982.

APPROVAL, NOTES OF PLAIN TOWNSHIP RURAL SCHOOL DISTRICT,
FRANKLIN COUNTY, OHIO, \$1,020.00.

COLUMBUS, OHIO, December 9, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1983.

SURETY — NOT LIABLE FOR FAILURE OF DEPOSITORY TO PAY FUNDS OF TAXING SUBDIVISION WHEN—LIABILITY OF TOWNSHIP TRUSTEES WHERE FUNDS TRANSFERRED WITHOUT KNOWLEDGE OR CONSENT OF SURETY — LIABILITY OF CLERK OF BOARD OF EDUCATION IN SUCH CASE—RESTRICTED BANK DEPOSITS.

SYLLABUS:

1. *When a taxing subdivision, by virtue of an agreement between the county treasurer and its depository, causes a portion of the undivided tax funds to be transferred from the desopitory account of such subdivision in the same bank without the knowledge or consent of the sureties on the depository bond of such subdivision, the sureties on such bond are not liable for the loss in the event that the depository bank fails to pay such funds on demand.*

2. *When a board of township trustees has caused to be transferred to it that portion of the undivided tax funds of a county due and owing to it, at the time of the settlement between the county treasurer and the county auditor, from the depository account of the county which has been restricted as to payment by authority of Section 710-107-a General Code, but without the knowledge or consent of the surety on the township depository bond, such township trustees, by reason of the provisions of Section 3326, General Code, are liable for any loss which may result to the township by reason of such depository's failure to pay such moneys on demand.*

3. *When a clerk of a board of education, without the knowledge or consent of the sureties on the bond of its depository, has caused that portion of the undivided tax funds due and owing to the board of education, at the time of a settlement between the county treasurer and county auditor, from the depository account of the*

county, whose payment of deposits has been restricted pursuant to the authority of Section 710-107a General Code, such clerk of the board of education, by reason of the provisions of Section 7604, et seq. General Code, is liable for any loss that may result to the board of education by reason of the depository's failure to pay such moneys on demand.

COLUMBUS, OHIO, December 11, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion concerning the following matters:

“In Opinion No. 1045, given by you to the prosecuting attorney of Lorain County, under date of July 18, 1933, it is held that the frozen assets of the county, representing taxes collected for the subdivisions, **in** its restricted depository bank may be transferred to the frozen assets of a subdivision of the county having the same bank for its depository.

We respectfully request your opinion upon the following questions:

1. If the subdivision of the county has as security for its funds a bond signed by individuals or by a surety company, will such individuals or surety company be liable for the amount so transferred to the subdivision in the event of the ultimate liquidation of the bank? .

2. In the event that the amount so transferred is in excess of the bond held by the subdivision, will the trustees of a township and the clerk of a board of education of a school district be liable for the excess over and above the amount of the security?”

In your inquiry you refer to my opinion No. 1045 rendered to the Prosecuting Attorney of Lorain County, the syllabus of which opinion reads:

“When a bank, which is a county depository and is also the depository of the subdivision, is, by order of the superintendent of banks pursuant to the provisions of Section 710-107a, General Code, restricted as to payments to depositors, and prior to the time of such order, there have been deposited by the county treasurer, funds collected by him, being the proceeds of taxes levied by and for the benefit of taxing subdivisions upon the request of and upon receipt of a proper voucher of the county auditor the county treasurer may, pursuant to the authority of Section 2675, General Code, issue such check or other order to such taxing subdivision as will cause the portion of the funds so deposited in such depository, but belonging to the subdivision, to be transferred to it, even though by virtue of the order of the superintendent of banks, such funds are not immediately withdrawable.”

You will observe that the question considered and answered in such opinion is whether restricted deposits in a county depository representing undivided tax funds collected by the county treasurer by reason of taxes levied by various taxing subdivisions may be assigned and transferred by the county treasurer to the taxing subdivision by a bank restricted as to payment of deposits pursuant to the provisions of Section 710-107a, General Code. The legal questions presented in your inquiry are neither considered nor answered in such opinion.

In such opinion, the only question considered was that of whether it was legally possible to make such transfer. Such opinion holds merely that such transfer, by agreement between the county treasurer and the subdivision may be legally made; it does not consider or discuss the liability of any party having an interest in the depository funds, when he or it has not entered into such agreement of transfer nor assented thereto. At the time such inquiry was presented for my consideration, it was represented that the same bonding company was the surety on both depositories and that it was the mutual desire of the surety and the subdivision that the transfer be made if it could legally be effected. I considered only the question as to whether the title to the funds might be transferred in the manner stated in the request for such opinion.

Your inquiries might be restated as: Can the surety of the depository of a taxing subdivision to which a portion of the funds formerly in the county depository have been transferred, be held liable for such funds so transferred if they are not ultimately paid to such subdivision to which they have been transferred by the depository bank?

The liability of the obligors on a bond, whether as principal or as surety, must be determined solely from the terms and conditions of the bond creating their obligations. *Roofing & Ceiling Company vs. Gaspard*, 89 O. S., 185; *Surety Company vs. Chambers*, 115 O. S., 443; *Weir Plow Company vs. Walensley*, 110 Indiana, 242; *Ligget vs. Humphreys*, 21 How., 66.

Statutory bonds, such as that of a depository of public funds, must be interpreted according to the intent and meaning of the statute authorizing and requiring such bonds. *Brockway vs. Petted*, 79 Mich. 620. In such cases the statute is read into, or as a part of the bond. *Duke vs. Security Company*, 130 Wash. 276; *Surety Company vs. Chambers*, 115 O. S., 434.

In your inquiry you do not state which of the different taxing subdivision depositories was the motivating cause of your inquiry. However, an examination of the various statutes with reference to the bond of such depositories shows that they differ but little as to the condition of the bond. See Sections 3322 et seq. 4295 et seq. and 7605 et seq. General Code. Such bonds are conditioned for the safe custody of funds deposited by the subdivision in the depository. An examination of such statutes fails to disclose any language which in the absence of a special agreement between the bank and the depositor, would authorize the deposit of any other obligations in the depository than money. These statutes in referring to the conditions of the bond, was the expression "safekeeping of funds" or "return of funds". The term "funds" has an established connotation in the English language. That is, by the use of the term "fund" is meant an accumulation of money available for the purpose of being devoted to a specified end. See *Vayto vs. Terminal Railway Company*, 18 O. N. P. (N. S.) 305; *Zilch vs. Baumgardner*, 91 O. S. 205; *Remholz vs. Industrial Commission*, 96 O. S. 457.

As stated above, the liability of the surety on the bond of the depositories must be gathered from the terms of the bond.

As stated by the court in *Crouch vs. Parker*, 188 Indiana, 660; 7 A. L. R., 1603:

"It is a sound and well settled principle of law that sureties are not to be made liable beyond their contract, and any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety will discharge him from responsibility."

See *Sprigg vs. Bank of Mt. Pleasant*, 14 Pet., 201; *Bailey vs. Boyd*, 75 Ind., 125; *Pidcock vs. Bishop*, 3 Barn & Co. 605; *Magee vs. Manhattan Life Ins. Com-*

pany, 92 U. S., 93; *Weed Sewing Machine Company vs. Winchel*, 107 Ind. 260; *Glenn Co. vs. Jones*, 146 Cal. 518.

It has been held that where a party gives a bond with sureties conditioned for his faithful performance of a written contract the sureties will not be liable for the principal's default to perform any duty or obligation arising out of a contract not clearly within the provisions of the written contract which the bond is given to secure. *Burlington Ins. Co. vs. Johnson*, 120 Ill. 622. It has been held also, that if the duties which the principal is to perform are varied by agreement between the principal and the obligee after the surety for the conduct of the principal has become bound, such surety will generally be discharged thereby. An agreement amounting to a departure from the contract by which the surety is bound and materially varying or enlarging his liabilities without his consent will generally operate to discharge him. See 2 Brandt Suretyship, Sections 393, 397; 24 American and English Encyc. of Law, 759; *McCartney vs. Ridgeway*, 160 Ill. 129.

In view of the foregoing authorities, it would appear that if, by virtue of an agreement between the taxing subdivision entitled to share in the undivided tax fund and its depository bank which is operating on a restricted basis by reason of an order issued by the Superintendent of Banks pursuant to the authority of Section 710-107a, General Code, to accept a non-withdrawable deposit of money in lieu of an actual deposit of cash that such deposit in the depository is not such as would have been within the contemplation of the taxing subdivision and the sureties on the bond at the time of its execution. The obligation of the sureties on a depository bond is to pay to the obligee the sum of money which was placed in the depository which the depository neglected or refused to pay on demand, or more strictly speaking, to make good to the subdivision any loss which it suffered by reason of the default of the depository. It would appear that when the subdivision and the bank both of whom had knowledge of the imposition of the restrictions by the Superintendent of Banks pursuant to the authority contained in Section 710-107a, General Code, permitted such account which both the primary obligor and the obligee knew would not be paid on demand, to become increased without the consent of the sureties that such sureties could not be held liable by reason of such act. Such conduct of accepting a transfer of funds from another account which were not presently withdrawable, could hardly be considered as a deposit of funds and if not, such conduct, if without the knowledge of the surety, would, in my opinion, be sufficient to discharge the sureties from any loss which might be occasioned by the subsequent failure of the bank to pay out such increase of deposits upon demand.

It might be contended that such agreement between the depository bank and the taxing subdivision would amount to a fraud on the surety since by virtue of such conduct, if the sureties on the bond of the county depository were of questionable responsibility by such transfer the liability could be shifted from such sureties to the surety of other taxing subdivision's depositories.

Such contention has the support of text writers on the law of suretyship. In *Stearns on Suretyship*, 3rd Ed., Sec. 106, is the following language:

"Sec. 106. A concealment or suppression of material facts which affect the risk of the promisor will amount to fraud and constitute a defense to the suretyship contract. The law requires good faith on the part of the beneficiary of the contract, and it is the duty of the creditor to disclose information which he has concerning the principal which, if known to the promisor, would prevent him from entering into the contract. * * "

And in Section 107, is the following language:

"Sec. 107. The requirement of good faith continues after the execution of the contract, and the creditor owes the duty to the promisor, in a continuing or executory contract of suretyship, to disclose to him such acts of the principal, as materially affect the promisor's risk, and for which, the creditor himself might put an end to the main contract."

However, herein I express no opinion on such question since I am unable to find anything either in Sections 3322 et seq. 4295 et seq. or 7605 et seq., General Code, nor in the ordinary form of bond which is given as security for depositaries which would indicate that either the surety, the depository or the subdivision had in contemplation at the time of the execution of the bond the deposit therein of any substances other than those substances ordinarily, at that time, passing as money or customarily accepted for deposit in banking institutions.

There are other established theories of law under which the sureties might attempt to establish a defense, to an endeavor to enforce liability against them on their own bond. Thus, when the bank, by reason of an order issued pursuant to the provisions of Section 710-107a, General Code, was no longer able to perform its contract to pay the deposits on demand did it not cease to be a depository? If the courts should hold that such depository had ceased to exist, could any attempted deposits in such bank be considered as covered by the surety bond, which covers moneys and funds deposited in the depository? Concerning this argument, however, I express no opinion, since you do not state whether a demand has been made by the taxing subdivision and further for the reason that my opinion as herein expressed, renders it unnecessary to decide such question.

Your second inquiry is as to the liability of the board of trustees and clerk of a board of education in the event that such funds, so transferred, are not paid on demand. Section 3326, General Code, makes the township trustees personally liable in the event that they deposit township moneys in a bank in any manner other than that provided by statute. I am unable to find any provision of law authorizing the township trustees to permit township funds to remain in a bank without security. It would therefore appear to me that such trustees would be liable for any loss resulting to the township by reason of the failure of the depository to pay such funds on demand.

Section 7609, General Code, provides that the clerk-treasurer of a board of education and his bondsmen shall not be held personally liable in the event that funds in the depository were deposited in the manner contemplated by such section. By inference, the legislative intent is that they are to be held liable when deposited in any other manner. It would therefore appear to me that the courts would hold the clerk-treasurer liable for any loss that might be suffered by reason of a deposit in any other manner.

Specifically answering your inquiries, it is my opinion that:

(1) When a taxing subdivision, by virtue of an agreement between the county treasurer and its depository, causes a portion of the undivided tax funds to be transferred from the depository account of the county to the depository account of such subdivision in the same bank without the knowledge or consent of the sureties on the depository bond of such subdivision, the sureties on such bond are not liable for the loss in the event that the depository bank fails to pay such funds on demand.

(2) When a board of township trustees has caused to be transferred to it that portion of the undivided tax funds of a county due and owing to it at the

time of the settlement between the county treasurer and the county auditor, from the depository account of the county which has been restricted as to payment by authority of Section 710-107a, General Code, but without the knowledge or consent of the surety on the township depository bond, such township trustees, by reason of the provisions of Section 3326, General Code, are liable for any loss which may result to the township by reason of such depository's failure to pay such moneys on demand.

(3) When a clerk of a board of education, without the knowledge or consent of the sureties on the bond of its depository, has caused that portion of the undivided tax funds due and owing to the board of education, at the time of a settlement between the county treasurer and county auditor, from the depository account of the county, whose payment of deposits has been restricted pursuant to the authority of Section 710-107a, General Code, such clerk of the board of education, by reason of the provisions of Sections 7604, et seq. General Code, is liable for any loss that may result to the board of education by reason of the depository's failure to pay such moneys on demand.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1984.

APPROVAL, NOTES OF SHARPLES RURAL SCHOOL DISTRICT, LUCAS COUNTY, OHIO, \$1,193.00.

COLUMBUS, OHIO, December 11, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1985.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO—\$20,000.00.

COLUMBUS, OHIO, December 11, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1986.

APPROVAL, BONDS OF CUYAHOGA COUNTY, OHIO—\$5,000.00.

COLUMBUS, OHIO, December 11, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.