

liens it will become necessary to determine from the records the amount due on each tract.

It is believed that the abstract discloses a good title in tract No. 2 to be in the name of Matilda Brink, free from incumbrances excepting whatever amount of the taxes and assessments for the year 1920, approximating \$28.17, as above described, may be against this particular premises.

An examination has been made of the deed submitted by you wherein Lucy L. Andress and husband convey the premises described in tract No. 1, above described, to the state of Ohio, and it is believed that said deed is properly executed. You also submit another deed wherein Matilda Brink conveys the premises described in tract No. 2 to the state, and it is believed that this deed is sufficient for the purpose.

Your attention is called to the fact that the abstracter did not date his certificate. However, inasmuch as said abstracter took the acknowledgment of the grantors to both of the deeds above referred to, which were both executed on September 18, 1920, it is believed that it may fairly be assumed that the certificate was made on said date.

It is further called to your attention that the abstract does not purport to disclose the record of mortgages which may have been against the premises under consideration. However, the abstracter certifies that "there are no unsatisfied or unreleased mortgages of record in said Wayne county, Ohio, against said property, as shown by the records of said county."

Therefore, it will be observed that if full credit is given to the statements of the abstracter, it will cover the objection above pointed out.

The abstract and deeds are being returned herewith.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1598.

APPROVAL, BONDS OF VILLAGE OF GIRARD, OHIO, FOR ROAD IMPROVEMENTS IN THE AMOUNT OF \$16,000.

COLUMBUS, OHIO, September 29, 1920.

The Industrial Commission of Ohio, Columbus, Ohio.

1599.

TREASURER OF STATE—LIABILITY OF SURETY COMPANY ON ACCOUNT OF DEPOSITS OF STATE FUNDS AND STATE INSURANCE FUNDS.

Liability of a surety company on account of deposits of state funds and state insurance funds under sections 321 et seq., G. C., and certain forms of bonds, considered.

COLUMBUS, OHIO, September 30, 1920.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date submitting the following statement of facts and questions involving the State Depository Act, was duly received:

"1. A bank has \$100,000 funds in inactive account and has put up surety bonds as security, and these funds are later withdrawn and the funds some time following are redeposited (the bonds have not been taken down). Would the bonds be liable for the re-deposit?"

2. A bank has \$100,000 funds in an inactive account and is solvent at time bond is given; later funds are withdrawn; bond still remains on file in treasurer's office; some time later funds are re-deposited and the bank later on is closed, and it develops that it became impaired during the time the funds were withdrawn and re-deposited; the bonding company denies liability on the ground that the funds they wrote the bond for were withdrawn. What would be the status of the bond, would it still be liable?"

3. A bank has \$100,000 fund in inactive account and puts up surety bond for security; these funds are withdrawn and surety bond is released to the bank; later on a re-deposit of the amount of funds withdrawn is offered the bank, and the bank offers the bond that was surrendered as security for the deposit. Would this bond be liable?"

The laws of this state governing the deposit of state funds, and commonly referred to as the state depository act, are found in sections 321 et seq. G. C. After establishing the state board of deposit, consisting of the treasurer of state, superintendent of banks, and the attorney general, the act provides that the board shall meet on the first Monday of April, 1911, and every two years thereafter, or as often as is necessary at the call of the chairman, and designate such banks as it deems eligible to be made state depositories.

After providing for the form and contents of applications by banks to be made state depositories, and that all awards for the deposit of such funds shall be made upon competitive bids to be received by the treasurer of state every two years beginning between one o'clock p. m. on the first Monday in March and closing at one o'clock p. m. on the third Monday of March, 1911, and every two years thereafter, it is also provided in section 330 G. C. that after bids have been opened the treasurer of state shall, on or before the first Monday in April of each bidding period, award the state funds to the highest bidders, and shall deposit the funds in such banks after their applications have been approved by the board of deposit. The section last mentioned further provides that:

"Should additional state funds become available at any time during the two years or until the next bidding period, it shall be awarded to the highest bidders, first to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award, and then the next highest bidders,"

thus disclosing that several deposits with a single depository during a particular bidding period are contemplated or authorized by the act, provided additional funds become available during any such period, subject, however, to the limitation in section 330-1 G. C. that no inactive depository shall have on deposit at any time state funds and state insurance funds in excess of the amount of its paid-in capital stock, and in no event more than \$300,000. See 108 O. L. Pt. II, p. 1137.

Before making such deposits, section 330-3 G. C. provides that the treasurer of state shall require that each and every depository bank or trust company deposit with him certain securities or surety company bonds, which when executed shall be for an amount equal to the amount deposited plus 5 per cent, conditioned for the receipt and safe keeping and payment over to the treasurer of state or his

written order of "all moneys which may come into the custody of such bank or trust company under and by virtue of this act," etc.

Section 330-9 G. C. as well as sections 330 and 330-3 G. C., also discloses that, subject to the limitation as to amount above noted, continuing deposits during the two years' bidding period are contemplated or authorized by the act; in this, that provision is made that the treasurer of state shall keep a record showing an account with each depository, showing, among other things, "the amounts of each deposit, the date of each," etc.

In 1919 Opinions of Attorney General, Vol. I, p. 434 (being opinion No. 248, addressed to you under date of May 2, 1919), attention was called to the fact that repeated reference was made in the depository act to the "bidding period" which must be understood in the light of sections 323 and 330 G. C. as being a biennial period beginning and ending with the first Monday in April of the odd number of years, and in answer to the query "What, then, is the purpose of the bidding period?" it was said:

"It is submitted that such purpose is to fix a period of time within which the treasurer of state is authorized to deposit and the successful bidder is authorized to receive on deposit moneys of the state in the amount indicated by the law with respect to the particular depository. In other words, after the expiration of the bidding period the depository has no right to receive under the expired award nor has the treasurer of state any right to deposit by virtue of such expired award any further sums whatever. So that if the treasurer of state, after the expiration of a bidding period, should deposit additional moneys with a depository which had failed to qualify at the new bidding, such a deposit would be unauthorized by law and would not be within the terms of the implied contract or indeed the express undertaking of the surety on the original deposit; so that the surety would not be liable for any default in respect of the amount so deposited after the expiration of the bidding period.

But for the due payment of all moneys deposited during the two-year period and remaining on deposit at the end thereof, with interest on daily balances accruing both before and after the end of the period on such deposits, the depository and its surety remain liable until the undertaking is discharged by performance."

For the purpose of this opinion, it is assumed that all "deposits" and "re-deposits" referred to in your letter were made during a particular two years' bidding period, for which surety company bonds were tendered, and that your questions do not involve deposits or re-deposits made after the expiration of that period.

Having seen that the act contemplates or authorizes one or more deposits with a single depository during a particular bidding period, and requires that a surety company bond tendered under section 330-3 G. C. shall be conditioned, among other things, for the payment over to the treasurer of state of all moneys which may come into the custody of the depository under and by virtue of the act, it becomes necessary to determine whether the particular bonds enclosed with your letter are in conformity with the statutory requirements. If they are, then the liability of the surety company extends to and covers all amounts deposited or re-deposited with the depository during the two years' bidding period, unless there be some provisions in the bonds restricting or limiting the surety company's liability.

Coming now to a consideration of the surety bonds enclosed in your letter, it is found that after certain recitals, such as corporate existence, the right to transact business in Ohio, the designation of a particular bank as a state depository, etc., the bonds are conditioned as follows:

"Now, therefore, if the said (name of bank) shall pay over to the treasurer of state for the use of said state of Ohio, upon demand made therefor, or upon his written order, any and all moneys which now are in the custody of said bank belonging to the state of Ohio, or which from time to time hereafter may come into the custody of such (name of bank) under and by virtue of said act, * * * then this obligation shall be void, otherwise it shall be and remain in full force and effect."

It will thus be seen that the obligation of the depository and its surety is to pay over to the treasurer of state not only all moneys presently in the custody of the bank belonging to the state, but also all moneys which "from time to time hereafter" may come into its custody under and by virtue of the act.

It is apparent, therefore, that the liability of the surety company extends to and covers not only the initial deposit, but subsequent deposits made with the bank during a particular bidding period, whether the deposit be called a "deposit" or a "re-deposit," subject, however, to the limitation which underlies the general rule of suretyship that the assured are required to act in good faith when dealing with sureties, and are bound to disclose to the surety known moral delinquencies of the principal which would increase the risk, such as culpable carelessness, dishonesty, etc. See *Smith vs. Josselyn*, 40 O. S. 409; *Dinsmore vs. Tidball*, 34 O. S. 411.

Since it is assumed for the purpose of this opinion, first, that the treasurer of state was without any knowledge, or even suspicion, of the fact that the depository involved in your second question was insolvent at the time re-deposits were made, and, second, that all deposits and re-deposits referred to in your letter were made during a particular bidding period, you are advised that your first and second questions should be answered in the affirmative.

With respect to the third question, I understand the fact to be that the surety bond was returned to the surety company with the intention and for the purpose of terminating the surety's contractual relation with or liability to the state on account of subsequent deposits. That being true, you are advised that the obligation and liability of the surety company under that particular bond could not be restored or revived so as to cover subsequent deposits without the company's consent, and that before any funds are deposited with the depository involved a new bond should be required.

The question of the liability of the surety company for funds deposited with a state depository after the expiration of the two year bidding period is not involved, and no opinion is now expressed concerning it; but the safe course for you to pursue will be not to make any deposits after the period has expired. See opinion, *supra*.

Inasmuch as section 1465-57 G. C. expressly authorizes the treasurer of state to deposit any portion of the state insurance fund not needed for immediate use, "in the same manner and subject to all the provisions of the law with respect to the deposit of state funds by such treasurer," you are further advised that the foregoing opinion also applies to the surety bond enclosed in your letter covering the state insurance funds.

Respectfully,
 JOHN G. PRICE,
Attorney-General.