You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a contract bond upon which the American Surety Company of New York appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation Act have been complied with.

In this connection, it will be noted that the award was made prior to January 1, 1929, and that the original appropriation lapsed before such contract was approved by the Attorney General. However, it will be further noted that the 88th General Assembly, in Amended House Bill No. 203, reappropriated such funds and authorized the expenditure of money for such purposes with the consent and approval of the Controlling Board.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

395.

SURETY—FOR SCHOOL FUNDS DEPOSITED IN BANK BY BOARD OF EDUCATION—WHEN LIABLE FOR PRINCIPAL'S DEFAULT.

SYLLABUS:

Where a board of education has duly designated a bank as a school depository under Section 7605 of the General Code, and a surety bond has been executed conditioned to secure that said depository shall faithfully and truly, according to law, perform its duties as the custodian of such school funds, such surety is liable to the board of education for the full amount of the fund deposited therein to the extent of the maximum amount named in said bond, as soon as such depository fails to deliver said fund on demand being made therefor, notwithstanding said bank may be in the process of liquidation.

COLUMBUS, OHIO, May 10, 1929.

HON. G. G. JEWELL, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—In your recent communication you request my opinion as follows:

"The board of education of Lanier Township Rural School District in the latter part of February or the forepart of March, 1927, designated the First National Bank of West Alexandria, Ohio, as the depository of the school funds of said board of education and received according to law a bond for the faithful performance of its duties as such depository. A copy of which bond is enclosed in this letter.

On the 12th day of March, 1929, The First National Bank of West Alexandria, Ohio, was closed by order of the Comptroller, and is still closed

for the transaction of all business except the liquidation of said bank. The bank has not paid out any money to its depositors and we do not know when it will pay its depositors. In fact there is some doubt whether it will pay out in full.

The board of education in order to meet its running expenses has been compelled to borrow money from The Twin Valley Bank in West Alexandria, Ohio, and have borrowed about $6,500.00 from said bank in anticipation of their August draw.

A demand has been made upon the bondsmen to produce the money but they refuse to do so, taking the position that they are in no position to know how much they will have to pay, if anything.

We would like your opinion as to whether the board of education should wait until the bank is finally liquidated before bringing suit against the bondsmen. If the board of education must wait such time it may be two or three years before the bank is finally liquidated. We would like your construction of the bond and your advice as to when suit should be brought.

The board of education has a little over $13,000 in the bank. This includes principal and interest.

Please let us hear from you at your very earliest convenience, as the board of education is in need of funds each month to meet the salaries falling due for the payment of the teachers, as well as the payment of the drivers of the conveyances which haul the pupils to school."

The copy of the bond which you enclose reads, in part:

"KNOW ALL MEN BY THESE PRESENTS:

That we, The First National Bank, of West Alexandria, Ohio, as principal and H. H. Unger, M. D. Johnson, A. B. Ulrich and Jos. C. Eby, as sureties, are held and firmly bound unto The Board of Education of Lanier Township School District, of Lanier Township, Preble County, Ohio, in the sum of twenty thousand—dollars. To be paid to the said board of education of Lanier Township School District, of Lanier Township, Preble County, Ohio, or their successors, executors, administrators or assigns, for the payment whereof well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

* * *

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT,

Whereas, the First National Bank of West Alexandria, Ohio, was on the 14th day of March, 1927, duly chosen as depository of the funds of the Lanier Township School District, of Lanier Township, Preble County, Ohio, for a term of two years from the first day of March, 1927, and until their successors are chosen and qualified. Now, if the said bank shall faithfully and truly according to law, perform their duties as the custodians of such funds, * * * then this obligation shall be void; otherwise it shall be and remain in full force and effect.

* * * ."

It is an elementary proposition of law that a surety is primarily liable upon the failure of the principal to meet a valid and subsisting obligation. *Morrison* vs. *Bank*, 6 O. N. P. 7.

Section 7604 of the General Code requires the board of education of any school district by resolution to provide for the deposit of any and all moneys coming into the hands of its treasurer, etc.

Section 7605, General Code, provides:

"In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent, for the full time the funds or any part thereof are on deposit. Such bank or banks shall give a good and sufficient bond, or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the State of Ohio, or county, municipal, township or school bonds issued by the authority of the State of Ohio, or notes issued under authority of law by any county, township, school district, road district, or municipal corporation of this state, or farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act, approved July 17, 1916, and amendments thereto, at the option of the board of education, in a sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond. But no contract for the deposit of school funds shall be made for a longer period than two years."

Section 7606, General Code, relates to the method of receiving and accepting bids. Section 7607, General Code, relates to the method of designating a bank as a depository for school funds when there is less than two banks in a district, which would seem to have no application in view of your statement of facts.

It, undoubtedly, is the duty of any school depository to pay over on demand of the board of education any funds it has on hand belonging to such board. The very purpose of the law in authorizing the establishment of such depositories is to preserve the funds for the use of such district when needed. When a demand is made by the board of education for the funds upon deposit and the depository fails to make payment, the conditions of the bond obviously have been broken and the liabilities under the bond arise.

The following is quoted from 18 C. J., page 588:

"There is a breach of the bond where the depositary fails to delivery on demand the funds deposited; and although it has been held that the depositary is never in default until payment is demanded and refused, and that mere insolvency does not constitute a breach, yet it is the general rule that incapacity to make delivery is equivalent to the refusal of a demand."

While in many cases under such circumstances, no demand is made from the surety until the liquidation is complete and then, of course, the surety is liable only to the amount of the loss, it does not follow that such a practice is an exclusive procedure. Section 11242, General Code, provides that when a person forfeits his bond and renders his surety liable, the person injured is entitled to the benefit of the security and may bring an action thereon. Section 11258 of the General Code, provides:

"One or more of the persons severally liable on an instrument may be included in the same action thereon."

In view of the foregoing, under the circumstances you present, it seems clear that both the principal and sureties upon said bond are jointly liable upon the conditions thereof being broken. It follows, therefore, that on the failure to pay the fund in such depository on demand made by the board of education, the liability arises and a suit could properly be maintained to enforce payment against the sureties.

In this connection, it will be noted that Section 12194, General Code, provides in part:

> "When the surety in a judgment, who is certified therein to be such, or his personal representatives, pays the judgment, or part thereof, to the extent of such payment he shall have all the rights and remedies against the principal debtor that the plaintiff had at the time of such payment."

It will further be observed that Section 11713 of the General Code provides that when judgment is rendered upon an instrument of writing in which two or more persons are jointly or severally bound and it is made to appear to the court, by parole or other evidence, that one or more of the persons against whom the judgment is rendered is a surety or bail for the co-defendant, the clerk must certify which of the defendants is the principal debtor and which is surety.

It, therefore, is clear that in the event the sureties are required to pay the funds which they have secured, such sureties will be entitled to the right of subrogation.

Based upon the foregoing, you are specifically advised that it is my opinion that:

Where a board of education has duly designated a bank as a school depository under Section 7605 of the General Code, and a surety bond has been executed conditioned to secure that said depository shall faithfully and truly, according to law, perform its duties as the custodian of such school funds, such surety is liable to the board of education for the full amount of the fund deposited therein to the extent of the maximum amount named in said bond, as soon as such depository fails to deliver said fund on demand being made therefor, notwithstanding said bank may be in the process of liquidation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

396.

PUBLIC WORK—EMPLOYES OF SANITARY DISTRICT—HOURS OF LABOR—WHAT CONSTITUTES EXTRAORDINARY EMERGENCY.

SYLLABUS:

Where the only emergency in any sense presented with respect to the construction of the works of a sanitary district, created and organized to furnish a supply of pure water to cities in a sanitary district, is the great and pressing need for such water supply, which need has existed since the inception of said project and which will continue until all of the works of the sanitary district are completed, such emergency, if such it be, is not an extraordinary emergency within the meaning of the term as used in Section 17-1, General Code, and neither said sanitary district nor contractors constructing the works of said district have any right to require or permit workmen employed in the construction of said works to labor more than eight hours a day or forty-eight hours a week.

COLUMBUS, OHIO, May 11, 1929.

HON. WILLIAM T. BLAKE, *Director Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication, which is as follows: