

2315.

WAIVER OF CLAIM—EFFECT OF LETTER ACCOMPANYING CHECK.

SYLLABUS:

Discussion of effect of letter, accompanying check paid by bonding company to Industrial Commission to cover defalcation of a former employe and expressly stating that check might be cashed without prejudice to any right of state to collect balance of the penal sum of the bond.

COLUMBUS, OHIO, July 3, 1928.

HON. HERMAN R. WITTER, *Director, Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of June 29, 1928, as follows:

“A former branch office deputy of this department, Mr. H. T. M., who is no longer in the service of the State and whom we have been unable to locate for some time, in the course of his duties as branch deputy was required to deliver certain payments from the state insurance fund, which are known as lump sum payments. In checking over the accounts of this branch office deputy at the time he left the service of the state, it was discovered that he could not account for the sum of \$1235.45, which represented payments from the state insurance fund on account of lump sum payments.

Mr. M. had given bond to the State of Ohio in the penal sum of \$2,000.00, conditioned upon the faithful discharge of the duties imposed upon him by law and the Department of Industrial Relations. The surety on the bond of Mr. M. has admitted its liability to the extent of \$1235.45 and tendered warrant for that amount, drawn to the order of the Department of Industrial Relations. This warrant, however, bears on its face a statement that it is in payment of shortage in the accounts of H. T. M., formerly deputy commissioner of the Cleveland office of the Industrial Commission of Ohio, Department of Industrial Relations.

This warrant, however, was transmitted to our Cleveland office with a letter which indicates that the acceptance of this check for the sum of \$1235.45 will be without prejudice to the rights of either party with reference to other alleged losses. In addition to the \$1235.45, which represents the amount of lump sum payments made from the state insurance fund for which Mr. M. failed to account, it is alleged that he retains in his possession the sum of \$1,000.00, which represents a portion of a lump sum payment of compensation made by an employer who had been authorized to pay compensation, etc., direct, the warrant for which the lump sum payment was sent by the self-insuring employer to Mr. M. for distribution.

According to the information which this Department has been able to obtain, the warrant or check for the amount of this lump sum payment which Mr. M. received from the employer was delivered by him to the claimant, a Mrs. F. N., of Cleveland, Ohio; the total amount of this check was \$1650.40. Mrs. N. deposited the check to her credit and signed a check drawn to the order of Mr. M. for the sum of \$1,000.00, in return for which check Mr. M.

handed to Mrs. N. an instrument which purports to indicate that he owes her a thousand dollars.

In view of the facts which this department now has before it with respect to this latter transaction, this department does not desire to release the surety on the bond of Mr. M. We, therefore, ask your advice as to whether the acceptance of this check for \$1235.45, which was forwarded to our Cleveland branch office by the field supervisor of claims of the Columbia Casualty Company, the surety on the bond of Mr. M., would release the surety from further obligation to the State of Ohio because of the bond which is in the penal sum of \$2,000.00. For your convenience in this connection, we are enclosing the warrant referred to and the letter from the Columbia Casualty Company, dated June 9, 1928, which is also referred to above."

The warrant, which you also enclose, states that it is "In payment of shortage in the accounts of H. T. M., formerly deputy commissioner in the Cleveland Office of the Industrial Commission of Ohio, Department of Industrial Relations." Upon the back of the warrant is the following printed matter: "Endorsement of this draft constitutes a release in full for account as stated herein."

Standing alone, this warrant would apparently constitute a settlement of all the claims arising out of the shortage of the former employe of the state. The letter accompanying the warrant, however, is as follows:

"We tender you our check in the amount of \$1235.45. We are making this payment with the understanding that payment by the company and its acceptance by the State of Ohio will be without prejudice to the rights of either party with reference to the state's claim for \$764.55, balance of the bond which is being claimed by the state as a result of an alleged loss by the state in the amount of \$1,000.00 on account of a transaction by Mr. M. with one, F. N., wherein the state alleges that the said H. T. M., contrary to his instructions as deputy in charge of the Cleveland office of the Industrial Commission of Ohio, Department of Industrial Relations, State of Ohio, and unlawfully as trustee, misappropriated said sum of a thousand dollars in connection with the disbursement of a lump sum award made to F. N. by the said Industrial Commission of Ohio, Department of Industrial Relations, State of Ohio.

It is understood that we do not by this letter intend to admit the validity of the claim that the said H. T. M. committed any act in connection with the transaction of Mrs. F. N. which may properly be made the basis for a recovery under the bond in this case."

The letter and the warrant are signed by the same officer of the surety company and consequently I am of the opinion that no question could be raised as to his authority to make statements in his letter at variance with those contained in the warrant itself.

We have accordingly two inconsistent statements and your question is whether or not the State's claim as to the remainder of the penal sum of the bond would be waived and released by the cashing of the warrant in question. I have no hesitancy in saying that the terms of the warrant have been expressly waived in the letter which it accompanied. The language is plain and unequivocal and clearly permits the cash-

ing of the warrant without prejudice to any right of the State to the balance of the penal sum of the bond.

You are accordingly advised that the warrant may be placed in course of collection without prejudice to your right to prosecute any further claim against the surety company with respect to the transaction described in the letter heretofore quoted.

I am, of course, not passing upon the possibility of further shortages not yet discovered. The language of the warrant is such that it constitutes a full release of the claims of the state, the only exception being that incorporated in the letter with reference to the specific claim described therein. It follows that if you have any question about claims other than the one described, you would not be safe in cashing the warrant.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2316.

APPROVAL, ABSTRACT OF TITLE TO LAND OF ALBERT STICKSEL, IN
THE VILLAGE OF NEWTOWN, HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, July 3, 1928.

HON. CHARLES V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—You recently submitted for my examination and opinion a corrected abstract of title with respect to certain tracts of land owned by one Albert Sticksel, located in the Village of Newtown, Hamilton County, Ohio, and more particularly described in Opinion No. 2031 of this department, under date of April 28, 1928. On my examination of said corrected abstract of title I find that the vital defects in the abstract noted in the former opinion of this department above referred to have been corrected by further information which has been made a part of said abstract. I am, therefore, of the opinion, on my examination of said corrected abstract of title, that Albert Sticksel, the owner of record of said lands and premises, has a good and indefeasible fee simple title to the same, subject only to the taxes for the last half of the year 1927, amounting in the aggregate to \$12.22, and to the taxes for the year 1928, the amount of which is as yet undetermined. I understand that your department has some understanding with the owner of the property with respect to the payment of said taxes and this matter should be taken care of at the time your purchase of this property is concluded.

Respectfully,
EDWARD C. TURNER,
Attorney General.