

88th General Assembly in House Bill No. 104, for the purpose of constructing local storm water drains which are installed as a part of the street construction for the purpose of draining such street.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

495.

SINKING FUND TRUSTEES—MUNICIPAL—DEPOSITS SECURED BY REALTY MORTGAGES OR BONDS UNAUTHORIZED.

SYLLABUS:

The trustees of a municipal sinking fund are not authorized to accept real estate mortgages or bonds secured by real estate mortgages, as security for deposits made in the public depository which may be selected by them.

COLUMBUS, OHIO, June 8, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your communication in which you request my opinion in answer to the following question:

“May the trustees of the sinking fund in a municipality accept first mortgages or bonds secured by first mortgages upon unencumbered real estate located in Ohio as security for the deposit of the moneys in their hands held in reserve and deposited in a public depository by authority of Section 4515, General Code.”

Section 4515, General Code, reads as follows:

“At least once every three years the trustees of the sinking fund shall advertise for proposals for the deposit of all sums held in reserve and shall deposit such reserve in the bank or banks, incorporated under the laws of this state or of the United States, situated within the county, which offer, at competitive bidding, the highest rate of interest and best security and accommodation and give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety in a sum not less than twenty per cent in excess of the maximum amount at any time to be deposited. There shall not be deposited in any one bank an amount in excess of the paid-in capital stock and surplus of such bank, or to exceed in amount four hundred thousand dollars except when such moneys are deposited for the purpose of meeting the payment of some obligation.”

A depository of public funds has been defined as a person designated by law, to whom public officials may or should confide the custody of public funds. The safeguarding and preservation of the public funds of the several subdivisions of the State has been the subject of especial care in Ohio, and legislation has been enacted providing for public depositories for the public funds of the State, the several counties, townships, municipal corporations and school districts. The method of selecting these depositories of the several classes of funds above named, the limitation thereon, and

the details relating thereto, although similar in the main, differ in certain particulars, each being controlled by specific statutory provisions which were enacted at different times. In each instance, however, under the present existing statutory provisions with reference thereto, the depositories are required to secure in some manner the deposits with which they are entrusted.

The general rules of statutory construction apply to depository laws, the fundamental rule being to ascertain and make effective the intention of the Legislature, keeping in mind that intention as expressed in the statutes. It has been held that a depository law is remedial in character and should be construed to promote the remedy. *State vs. Siemens*, 68 Oreg. 1. It has also been held, however, as stated in *Corpus Juris*, Vol. 18, page 585, that:

“When a statute expressly specifies the character of the security the depositing officer has no authority to accept any other in lieu thereof.”

In Section 4515, *supra*, providing for a depository for funds held in reserve by the sinking fund trustees of a municipality, the kind of security which the depository must give is stated as follows:

“A good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety in a sum not less than twenty per cent in excess of the maximum amount at any time to be deposited.”

The question involved in your inquiry is whether or not the language:

“or furnish good and sufficient surety in a sum, etc.”

authorizes the sinking fund trustees to accept the deposit of first mortgages, or bonds secured by first mortgages upon unencumbered real estate located in Ohio as security for any deposits made.

It has been held in *State ex rel. vs. Reh fuss*, 7 O. C. C. (N. S.) 179, that:

“Inasmuch as the primary purpose of the law providing for the designation of an official depository for school funds is to obtain a revenue from the idle moneys of school funds the provisions of the act that a depository shall give a good and sufficient bond ‘of some approved surety company’ is incidental merely and indicates a purpose to require a good and sufficient lawful bond, and nothing more.”

Thus indicating that if the funds are actually secured, the requirements of the law are met, no matter what the security may be. I am of the opinion, however, that the Legislature may determine in the first instance what security must be given and it is not within the discretion of the depositing officer to accept any other security than that which the Legislature has prescribed.

The school depository law under consideration in the Reh fuss case, *supra*, Section 3968, Revised Statutes, had been enacted in 1904 (97 O. L. 351), and permitted school depositories to secure the deposit of school funds therein by the giving of a bond issue by a guaranty company authorized to do business in this State. It did not by its terms permit the giving of any other kind of a bond, or any other kind of security, than the surety bond above mentioned. The law was amended in 1910 (101 O. L. 290). As then amended it permitted the securing of such deposits by the giving of “a good and sufficient bond” or the hypothecation of certain classes of

securities, at the option of the board of education. It was again amended in 1925, enlarging the classes of securities that might be deposited by a depository to secure the deposits of school funds. Sections 7605 and 7607, General Code.

As early as 1894, public depositories for county funds were specifically authorized by statute to secure such deposits by the hypothecation of certain securities or by giving a bond (91 O. L. 403). In a number of revisions since that time, substantially the same provisions have been retained in the law although the classes of securities that might be accepted as security for such deposits have been, from time to time, enlarged. The present law with respect thereto is Section 2732, General Code.

Depositories for State funds, since the creation of the State Board of Deposit, have been required to deposit United States Government bonds, bonds of the State of Ohio, or of a county or municipality of the State of Ohio or surety company bonds to secure such State deposits. (97 O. L. 535). The present law with respect thereto is found in Section 330-3, of the General Code.

As bearing on a proper construction of Section 4515, *supra*, the history of the legislation providing for the deposit of municipal funds by municipal treasurers, and the construction placed on such legislation by former attorneys general is significant, and perhaps more helpful in showing the trend of the legislative mind with respect to public depositories than that of the legislation relating to the State, county or school district depositories.

The earlier statutes, until 1911, did not provide for the deposit of bonds or other securities to secure municipal deposits in public depositories. Prior to 1911, the statute, Section 4295, General Code, provided that municipal deposits must be secured by "a good and sufficient bond issued by a surety company * * * or furnish good and sufficient surety," identically the same provision as that now contained in Section 4515, of the General Code, providing for the securing of funds deposited in a public depository by the trustees of the sinking fund of a municipality. In 1911, the statute, Section 4295, General Code, was amended, providing a third alternative method of securing municipal deposits by the deposit of certain enumerated securities. (102 O. L. 122.) The securities there enumerated did not include mortgage deeds and note from private individuals. The Attorney General in 1912 was asked whether or not in his opinion mortgage deeds and notes from private individuals might lawfully be accepted as security for municipal deposits under Section 4295, General Code. In response thereto the Attorney General held as stated in the syllabus of his opinion reported in the Annual Report of the Attorney General for 1912, page 1757:

"The words 'or furnish good and sufficient surety' in Section 4295, General Code, providing for the deposit of municipal funds in banks which 'give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety,' refer to personal sureties only, and therefore, do not authorize council to accept note and mortgage securities."

In the course of the opinion the Attorney General said:

"In my opinion the only securities that can be deposited by a bank to secure a deposit made with it under this section are the securities named in the section as quoted above, and as the catalog of such securities as there given does not include mortgage deeds and notes from private individuals, my opinion is that the same cannot be accepted as securities. These securities are evidences of indebtedness and could not be accepted under the provisions authorizing such deposits to be secured by 'a good and sufficient bond issued by a surety company * * * or furnish good and sufficient surety * * *"

'because the word 'surety' as here used relates, I take it, to personal sureties as opposed to surety companies. This, I think, is evidenced by the statute itself in further specifying certain securities which may be accepted, thus making three classes of sureties which may be given by a bank: 1st, a bond issued by a surety company; 2nd, personal surety; 3rd, a deposit of securities.'

The conclusion of the Attorney General in the 1912 opinion, that the word "surety," as used in specifying the second alternative method of securing municipal deposits, should be construed as meaning "personal sureties as opposed to surety companies" is strengthened by a consideration of the meaning of the word "sureties," as the same is defined by lexicographers and courts. In the construction of statutes, words are to be given their ordinary meaning rather than a special, restricted or enlarged meaning and must be interpreted in the light of other parts of the Act in which they are used.

The word "surety," is defined by Webster as :

"A *person* who is given, or gives himself as a gage or pledge. *One* bound with and for another who is primarily liable and who is called the principal."

Bouvier's Law Dictionary defines "surety" to be :

"A *person* who binds himself for the payment of a sum of money or for the performance of something else for another."

That the word "surety" imports *personality* or a *person* is recognized by the courts in numerous states. Thus in *Wise vs. Miller*, 45 O. S. 399, the court quotes with approval from the case of *Smith vs. Sheldon*, 35 Michigan, 42 :

"A surety is a *person* who being liable to pay a debt or perform an obligation, etc."

Similar definitions of the word "surety" are given by the courts of other states.

"A surety is one who becomes bound simply for the accommodation of his principal, etc." *Trunkle vs. Ladoge Building and Loan Association*, 65 Ind. App. 415; 117 N. E. 452.

"A surety is simply one who is bound to pay the debt of another." *Dibert vs. D'Arcy*, 248 Mo. 617; 154 S. W. 1116.

"A surety is one who, etc." *Thayer vs. Braden*, 27 Calif. App. 435; 150 Pac. 653.

"A surety is a person who, etc." *Bright vs. Mack*, 197 Ala. 214; 72 So. 433.

In 1913 there was enacted Section 2288-1, General Code, which read, in part, as follows : (103 O. L. 719).

"In addition to the undertakings or security provided for in Sections 330-3, 2732, 4295 and 7607, it shall be lawful to accept first mortgages, or bonds secured by first mortgages bearing interest not to exceed six per cent per annum, upon unincumbered real estate located in Ohio, the value of which is at least double the amount loaned thereon. * * * "

Obviously, Section 2288-1, General Code, did not serve to change or modify the terms of Section 4515, General Code. No reference is made therein to Section 4515, General Code, and by no course of reasoning could it be said that the Legislature intended it to have any application whatever to the security to be furnished by a depository for the funds deposited by the trustees of a municipal sinking fund, unless some one of the statutes specifically referred to in Section 2288-1, General Code, by reference, included provisions for securing deposits made by the trustees of the municipal sinking fund. That is to say that if Sections 330-3, 2732, 4295 or 7607, General Code, or any one of them, then in force, fixed the security that might be accepted by municipal sinking fund trustees to secure deposits made by them, the language of Section 2288-1, General Code, would have the effect of enlarging the class of acceptable security by adding thereto first mortgages and bonds secured by first mortgages bearing interest not to exceed six per cent per annum, upon unencumbered real estate located in Ohio, the value of which is at least double the amount loaned thereon.

An examination of Sections 330-3, 2732, 4295, and 7607, General Code, and Section 7605, General Code, which was later included in the statute by amendment, discloses that none of them either in 1911, or since, made any provision whatever, either directly or by reference or adoption, applicable to depositories for municipal sinking funds. Section 4295, General Code, at the time of its amendment in 1911, when a third alternative method in addition to the giving of a surety bond or other good and sufficient surety, to-wit, the hypothecation of certain securities, for the securing of municipal funds was provided, provided further:

"And whenever any of the funds of any of the political subdivisions of the State shall be deposited under any of the depository laws of the State, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

From the fact that the provision above quoted was inserted in the statute at the time provision was first made for the securing of municipal deposits by the third alternative method, to-wit, the hypothecation of securities, and from the further fact that it provides that the securities therein mentioned may be accepted "in addition to such other securities as are prescribed by law," it is clearly indicated to my mind, that the said provision was not intended to have reference to, or be applicable to, any depository law that did not provide for this third alternative method of securing deposits and did not prescribe any securities which might be deposited to which the securities mentioned in Section 4295, General Code, might be "in addition to," and therefore cannot be made applicable to the depository law, as contained in Section 4515, General Code, for the deposit of the funds in the hands of the trustees of a municipal sinking fund.

I am therefore of the opinion that a depository for deposits made by the trustees for the sinking fund of a municipality is not authorized by statute to secure said deposits by the hypothecation of real estate mortgages, or bonds secured by mortgages on real estate, or in other manner than by the giving of a surety or personal bond.

Respectfully,

GILBERT BETTMAN,
Attorney General.