1148.

APPROVAL—BONDS OF GOOD HOPE RURAL SCHOOL DISTRICT, HOCKING COUNTY, OHIO, $3,000.00.

COLUMBUS, OHIO, September 13, 1937.

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

RE: Bonds of Good Hope Rural School Dist., Hocking County, Ohio, $3,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue of deficiency bonds dated September 1, 1937, bearing interest at the rate of 4% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1149.

BANK—LOANS TO CORPORATIONS—MAY ACCEPT RIGHTS IN INSURANCE POLICIES AS SECURITY, WHEN—PAYMENT OF PREMIUMS.

SYLLABUS:

A bank, having made a loan to a corporation which became bankrupt and which at the time of bankruptcy carried three insurance policies on the life of its treasurer, is within its legal powers in accepting as security for the loan any rights under the policies which the corporation agrees to transfer to it. The trustee in bankruptcy has no interest in a contingent or future value, but only in the cash surrender value at the time of bankruptcy; hence, the insured or the beneficiary may pay to the trustees or secure to be paid the cash value and retain the benefits under such policies. The insurable interest of the corporation in the

life of its treasurer does not cease at bankruptcy, and since the policies were valid at their inception, they may be transferred, after the trustee has foregone any interest in their cash value to the bank, even when the bank had no direct insurable interest in the life of the corporation's treasurer. Having succeeded to the rights of the corporation, the bank is empowered to pay premiums to keep up the policies and at maturity would be entitled to the amount of its loan, with interest, and any premiums paid by it.

COLUMBUS, OHIO, September 13, 1937.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR: This is in answer to your recent letter, which reads as follows:

> "A state bank made a loan to a corporation and as evidence of said loan the corporation executed and delivered to the bank its promissory note. Later the debtor corporation was adjudged a bankrupt. Among the assets scheduled in the bankruptcy proceeding were three insurance policies (whole life) on the life of the treasurer of the bankrupt corporation and that corporation was designated as beneficiary in each of said policies. The bank in order to protect its loan entered into negotiations with the insurance company which wrote the policies and was advised that in order to obtain the benefits thereunder it would be necessary for the trustee appointed in the bankruptcy proceeding to obtain an order disclaiming title to and abandoning said policies. Such an order was entered by the Referee in Bankruptcy ordering and directing the trustee to disclaim title to and abandon and transfer all of the right, title and interest of the bankrupt and of himself as trustee in bankruptcy in said insurance policies to the bank.
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> In order to benefit under these policies, it will be necessary for the bank to pay the premium thereon as the same from time to time become due and payable.
>
> I would like to have your opinion as to whether or not by reason of the proceedings had the bank has such interest in the policies of insurance described as will entitle it to the benefits thereunder upon the death of the insured provided premium payments are kept current."

In keeping with the statutory provisions for corporate powers, and also with the judicial decisions, it is hardly necessary now to argue that corporations may carry insurance on their officers.

Is the bank itself violating the doctrine of ultra vires in accepting the policies? The Corporation Act substantially changes that doctrine for corporations in general. Under the Banking Act there are still some special restrictions as to such business, but Section 710-47, General Code, in part, says that a bank is empowered

> "(e) to do all needful acts, to carry into effect the objects for which it is created."

The bank about which you have inquired is clearly endeavoring to protect a loan to a corporation which is bankrupt. Such a course, in face of the bankruptcy, certainly seems to be in keeping with the statutory provisions that a bank is empowered "to do all needful acts, to carry into effect the objects for which it is created."

Apart from the exigency of a bankruptcy, it is of course not unusual for banks to protect their loans by insurance policies which are assigned to them. It might be that the debtor would agree to continue payments of premiums on the policy assigned, but surely in the event of his failure to do so a bank itself would protect its loan by directly keeping the policy in force.

It might be well to examine the position of the trustee of a bankrupt and his authority over insurance policies viewed as assets. He is not concerned with a contingent or future expectancy, but only with the cash value.

Under the Federal Bankruptcy Act, the trustee, as a general rule, is entitled only to that sum which was available to the bankrupt at the time of the bankruptcy as a cash asset, with the privilege existing in the insured or his beneficiaries to retain the benefit by paying or securing such value. Couch, Vol. 6, p. 5282; also *Cohen* vs. *Samuels,* 245 U. S. 50, 61 L. Ed., 143, 38 Sup. Ct. Rep., 36.

If there is no cash surrender value that the trustee in bankruptcy desires to claim, it is pertinent to consider how the bank as a creditor of the corporation may act to its own advantage.

Subject to whatever statutory or contractual provisions to the contract may exist, a creditor undoubtedly has an insurable interest in the life of his debtor, and may be made the beneficiary in a regular life insurance policy upon the debtor's life, so as to entitle him to the proceeds of the policy, at least to the amount of his debt, including interest, and the cost of the insurance with interest thereon during the period of expectancy of the life of the insured. *Connecticut M. L. Ins. Co.* vs. *Schaefer,* 94 U. S., 457, 24 L. Ed., 251.

Discharge of the debtor in bankruptcy does not destroy his moral obligation to pay the debt, or cut off the creditor's insurable interest,

and a policy on the life of a debtor, issued to a creditor who pays the premium, is not a wager, or against public policy, if there is nothing in the circumstances surrounding the transaction to indicate that it is speculative. Couch, Vol. 2, p. 1106.

There is no doubt from the foregoing citations, that the bank, as creditor, would have an insurable interest in the life of an individual debtor who became bankrupt. In the present instance, however, it is the corporation which directly incurred the debt, so that as an individual the treasurer is not personally responsible. Yet the policies were on his life, with the corporation as beneficiary. Thus there is the difficulty of deciding the question as to whether or not the bank can step over the corporation, which was the direct debtor, and have an insurable interest in the individual who was treasurer.

In the leading and much cited case in which there was a policy on the joint lives of husband and wife and after divorce followed by death of the husband, the wife sought to collect the insurance, the Supreme Court held inter alia that:

> "* * * A policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the effect of the provisions of the policy itself. * * * But supposing a fair and proper insurable interest of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is no good reason why the contract should not be carried out according to its terms."

Connecticut Mutual L. Ins. Co. vs. *Schaeffer,* 94 U. S., 457.

From the foregoing exposition, it would seem that at the bankruptcy of the corporation herein considered, the policy on the life of the treasurer did not end, but that the insurable interest would continue and at the subsequent death of the treasurer the benefit would accrue to the corporation or its successors in interest, or its assignee, if the policy had been assigned.

An Ohio case of similar purport concerned a policy, with a corporation as beneficiary, on the life of an officer of the corporation who had then left the company sometime before his death. After the death of the insured officer, who died intestate, his executors sought collection of the amount due under the policy, while the corporation also demanded payment.

In answering several questions raised, the court ruled that "where one causes his own life to be insured for the benefit of a stranger, the

want of insurable interest will not invalidate the policy." The court therefore held that corporation did have an insurable interest. As against the contention of the executors that any interest on the part of the corporation ceased when the officer severed his connection, the court held that if a policy is valid at its inception because based on an insurable interest or because it was taken out by the officer on his own life, the existence of such an interest at the maturity of the policy is immaterial. *Northwestern Mutual L. Ins. Co.* vs. *Coshocton Glass Co.*, 13 O. C. C. (N. S.) 229.

In view of such legal decisions, it appears that the bankruptcy alone would not end the insurable interest of the corporation here considered in the life of its treasurer. Hence arises the question as to whether or not the corporation, continuing to have an insurable interest, could transfer that interest to the bank as its creditor.

In a number of earlier decisions, it was held that a person without insurable interest could not take any rights under assignment. The Supreme Court, in one case widely cited, held that:

> "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. * * * To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced to him, he stands in the position of one holding a wager policy. The law might readily be evaded, if the policy or an interest in it could, in consideration of paying the premiums and assessments upon it, and the promise to pay, upon the death of the assured, a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money."
>
> *Warnock* vs. *Davis*, 104 U. S. 775 (1881).

A reading of the foregoing case appears to indicate that in no circumstances may a policy be assigned to anyone who does not have an insurable interest. Since the case of *Warnock* vs. *Davis* is so widely cited, it is illuminating to read a later case in which the Supreme Court sanctions a greater latitude in assignments. In the headnotes of this later case, it is set forth that:

> "The rule of public policy that forbids the taking out of insurance by one on the life of another in which he has no insurable interest does not apply to the assignment by the insured of a perfectly valid policy to one not having an insurable interest.

In this case, *HELD* that the assignment by the insured of a perfectly valid policy to one not having any insurable interest but who paid a consideration therefor and afterwards paid the premiums thereon was valid and the assignee was entitled to the proceeds from the insurance company as against the heirs of the deceased."

The Supreme Court, speaking through Mr. Justice Holmes, in part said:

"Of course the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. * * *"

But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. * * * The danger that might arise from a general license to all to insure whom they like does not exist. Obviously, is is a different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynical fear of the temptation opened by a pecuniary benefit accruing upon a death. * * * So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the Bankruptcy Law, Section 70, which provides that unless the cash surrender value of a policy like the one before us is secured to the. trustee within thirty days after it has been stated the policy shall pass to the trustee as assets. Of course, the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. * * * And cases in which a person having an interest lends himself to one without any, as a cloak to what is in its inception a wager, have no similarity to those where an honest contract is sold in good faith." *Grigsby* vs. *Russell,* 222 U. S., 149 (1911).

Clearly the corporation itself has an insurable interest in the life of its treasurer, and thus became beneficiary under the three policies on his life. The law is to the effect that, under the Federal Bankruptcy Act, the trustee is entitled only to that sum which was available to the bankrupt as a cash asset; hence the insured or the beneficiary may make a settlement by paying the cash surrender value or securing it to be paid, and thus retaining the benefit. You state in your letter that the trustees, under direction of the referee in bankruptcy, has agreed to forego any claim to a present cash surrender value. In consequence, whatever contingent or future value was in the three policies would rest with the corporation as beneficiary.

An examination of your photostatic copies of the proceedings by the trustee and the referee has been made. In the Petition for Instructions as to Worthless Property by the trustee, among other things it is stated that:

> "Your petitioner further represents that he has investigated the value of such property and finds the same to be worthless and actually burdensome to the bankrupt's estate for the following reasons:
>
> 1. Policy No. 1853426 lapsed on June 21, 1932, for failure to pay the premiu mdue, and Policy Nos. 1816058 and 1821435 lapsed on June 16, 1932, for failure to make the premium payments.
>
> 2. The records show assignments of all the rights, title and interest of the * * * Company in the three policies made by the * * * Company on June 16, 1931, to the Banking Company * * * which is a creditor of the * * * Company in the sum of $11,500.
>
> Your petitioner represents that it would be impossible for the trustee to continue the payments of the annual premium due on said policies, and that it will be for the benefit of the bankrupt's estate that your petitioner be instructed to disclaim title and to completely abandon said property, and to assign all the right, title, and interest of said bankrupt Company and the trustee herein to the Banking Company."

From the facts stated in the foregoing Petition for Instructions and the law as applied above, it appears that such an assignment may be made to the bank; provided that, as declared by the referee, there is, in fact, no cash value and he elects not to take the policies because they are burdensome rather than valuable. He of course would not be concerned with the bank alone, as one creditor, but with all creditors. The

object of a bankruptcy act, as far as concerns creditors, is to secure equal distribution from the proceeds of the assets stated. The trustee, therefore, stands in the shoes of the bankrupt but also represents all the creditors.

At the same time, it is optional with a trustee to accept or refuse to accept such assets as are of an onerous or unprofitable character, and he has a reasonable time to make his election. Although all property and rights of property are by operation of law transferred to and vested in the trustee, yet he is not bound in all cases to take possession of every part. If any of the property would be rather a burden than a benefit to the estate, the assignee may elect not to take such property, and in the case of his making such an election, the right remains in the bankrupt. 5 O. J. 153; see also *Buckingham* vs. *Buckingham*, 36 O. S. 68.

The views herein are to the effect that the assignment by the corporation is valid. The trustee declared that, as far as he is concerned, the policies are without value. Why does he then go through the motions of transferring his rights in property which he avers is valueless? This may be an added precaution on the part of the bank, but the reasoning here means that if the assignment be valid it is valid as between the corporation and the bank; hence the purported assignment by the trustee is superfluous and nugatory.

It is my opinion, therefore, that with the trustee in bankruptcy rejecting the policies as burdensome rather than asserting any claim to the cash value, the corporation, whose insurable interest does not cease with the bankruptcy, may transfer its rights to the bank, and that thereupon the bank would be entitled to collect at maturity the amount of its loan, with interest, plus any premium it had paid.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

1150.

APPROVAL—BONDS OF STOW TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY, OHIO, $25,000.00.

COLUMBUS, OHIO, September 13, 1937.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of Stow Township Rural School Dist., Summit County, Ohio, $25,000.00.