Since state owned institutions are not expressly included nor by necessary implication included in the general health statutes relating to city district boards of health, it is my opinion that such boards have no jurisdiction over the state owned buildings or grounds. It was evidently the intent of the legislature to leave the health regulation of state owned buildings and grounds to the state officers having supervision of such property, except those quarantine and sanitary rules and regulations adopted by the state board of health. This is my interpretation of section 1238, General Code, which provides:

> "Local boards of health, health authorities and officials, *officers of state institutions,* police officers, * * * shall enforce the quarantine and sanitary rules and regulations adopted by the state board of health. (Italics the writer's.)

Specifically answering your inquiry, it is my opinion that neither local district boards of health nor local health commissioners have any general jurisdiction over state owned property in their political subdivisions.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1356.

COUNTY FUNDS—PERSONAL SURETIES UNDER DEPOSITORY CONTRACT LIABLE WHEN—DEPOSITORY NOT RELIEVED FROM PAYING INTEREST THEREON WHEN.

SYLLABUS:

1. *If a county executes two continuing depository contracts for the same period with the same bank, each covering one-half the total active and inactive deposits, upon the withdrawal of one-half the total deposit and the surrender of the collateral pledged as security under one contract, the personal sureties under the second contract are liable for only one-half the balance remaining after such withdrawal, where the funds deposited under both contracts are commingled, all active funds being deposited in one account and all inactive funds in another.*

2. *If the conservator of such depository bank should designate the one-half of the funds released to be the one-half secured by collateral, such designation would not bind the sureties under the other contract.*

3. *Where county funds are deposited under the county depository statute, Sections 2715 et seq. of the General Code, the bank will not be relieved from paying the rate of interest stipulated until the contract is terminated regardless of restrictions imposed upon the bank by executive order or legislative enactment after the making of the contract. It follows that the county commissioners would be justified in refusing to return collateral pledged to secure the deposit until the payment of interest accruing during the period of such restriction as well as the payment of principal.*

COLUMBUS, OHIO, August 8, 1933.

HON. CHARLES W. LYNCH, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

"I have been requested by the Board of Commissioners of Monroe County, Ohio, to get your opinion on the following questions:

1. 'Should the County Commissioners authorize the County Treasurer to accept one-half of the deposits held by The First National Bank of Woodsfield, Ohio, and release government bonds which have been given to secure the one-half of the account, when the County Commissioners have entered into two contracts with the bank, one contract being for one-half of the active and one-half of the inactive funds and secured by a personal bond, and the second contract being executed approximately 4 months later with regard to the other one-half active and one-half inactive funds, secured by government bonds which have not been properly hypothecated?'

2. 'If the government bonds are released and a suit is commenced against the bank and its sureties, would the sureties be entitled to set up a defense that one-half of the active and one-half of the inactive funds have been released and that they would be responsible only for one-half of the balance remaining in said bank, for the reason that there is no separation and that all of the active funds are together and all of the inactive funds are in another account?'

3. 'Under a recent opinion, you stated that we were entitled to interest not less than 2% on the monies held in a restricted bank. Would we be justified in refusing to turn over the securities to the bank until the 2% interest, as well as the principal, is paid?'

4. 'If the conservator of the bank would designate the one-half of the funds released to be the one-half secured by Government Bonds, would such statement be binding on the sureties, third parties to the transaction?'

The statement of facts is as follows: On August 17, 1931 the Commissioners advertised for a county depository. Said advertisement was given by publication in two newspapers of opposite politics and of general circulation in the County, for two consecutive weeks. The commissioners met in special session on August 31, 1931. The award of the County funds was made—one-half of the active and one-half of the inactive funds to The Monroe Bank, Woodsfield, Ohio and one-half of the active and one-half of the inactive funds to The First National Bank of Woodsfield, Ohio. The award also approved the security offered, which was a personal bond with good and sufficient sureties. The First National Bank of Woodsfield, Ohio gave the personal bond and received one-half of the active and one-half of the inactive funds. On October 3, 1931 The Monroe Bank of Woodsfield, Ohio was taken over by I. J. Fulton, Superintendent of Banks, and said The Monroe Bank was never able to act as depository for said County funds. On December 26, 1931 the County Treasurer advised the County Commissioners that they had provided no legal depository for the one-half of the active and one-half of the inactive funds of the County and asked that they provide a legal depository for the same. On December 29, 1931 a resolution was passed

ordering the Auditor to advertise for sealed bids from all banks desiring to submit a proposal to become a depository for one-half of the active funds and one-half of the inactive funds, said advertisement to be published in two newspapers of opposite politics and of general circulation in the County and to be published once a week for two consecutive weeks. On January 18, 1932 an award was made to The First National Bank of Woodsfield, Ohio for a period of three years on one-half of the active and one-half of the inactive monies of said County. United States Government Bonds, Monroe County Municipal Bonds, Bonds of the State of Ohio and Federal Land Bank Bonds were offered as security. The First National Bank of Woodsfield, Ohio is now depository for all of the funds of the County, under two separate accounts, one taken in the year 1931 and the other on January 18, 1932. This money in the bank is shown on our books as two accounts, one being "Active Funds" and the other "Inactive Funds". The First National Bank is now in the hands of a conservator. The County funds have been restricted since February 28, 1932. The conservator now offers to give a draft for one-half of the County funds upon the release of the government bonds which were given to secure one-half of the funds. No interest has been allowed on this account since the bank has been restricted.

The Auditor has not been able to make his February settlement so we would appreciate an early answer to our questions in order that we can give the bank our decision with reference to the securities which they desire to be released."

It appears that two continuing depository contracts were entered into by the County Commissioners with the same bank, each to secure one-half the active and one-half the inactive funds of the county. A personal bond was given under the first contract and collateral was pledged as security for funds deposited under the second contract, entered into four months later.

It is well settled that acts of the creditor which prejudice the surety result in the release of the latter. 50 C. J. 112. An alteration in the contract of the surety without his consent will release him even though he is not thereby injured. *Clinton Bank* vs. *Ayres,* 16 O. 283. A surety has the right to stand upon his contract as made. *Brewing Company* vs. *Schultz,* 68 O. S. 407.

While I do not have before me the contract of the sureties, I understand their undertaking to be the securing of one-half of the county funds deposited in the bank. In spite of fluctuations in the amount on deposit in either the active or inactive account, the liability at any particular time of the personal sureties under the first depository contract, could be readily ascertained by a simple mathematical process. There is no way of finding out whether a particular withdrawal is intended to be of funds deposited under the first depository contract or under the second since the funds are commingled.

It is now proposed to withdraw one-half of the funds in each account and to release the collateral securities hypothecated under the second depository contract. Had one-half the total funds been deposited under each of the two contracts in separate accounts, i.e., an active and an inactive account under the first contract and an active and an inactive account under the second, it seems clear that the deposits in the accounts opened pursuant to the contract providing for collateral security could have been withdrawn without in the least affecting the liability of the personal sureties under the other contract. But that course was not pursued. Each contract purports to cover one-half the county funds in the

depository without further designation. So far as I know, there is no convenient rule applicable to this situation such as that the one-half deposited last in point of time falls under the contract last executed which, in this case, would be the contract under which the collateral was pledged. If there were such a convenient rule, after a withdrawal of one-half the total deposit in the bank the personal sureties under the contract first executed would remain liable for the balance.

Since the making of your request, you have informed me that it is impossible to obtain from the sureties waivers of any defenses that may arise from the proposed action. It thus appears that the contemplated designation of the funds to be withdrawn as those deposited under the second contract, will be solely by agreement between the creditor and the conservator who stands in the position of the debtor. It is clear that by agreement these parties can not alter the sureties' contract to their prejudice. *Thompson* vs. *Massie,* 41 O. S. 307; 50 C. J. 116. This being true, the personal sureties under the first contract might successfully contend, that since the funds are commingled only one-half of any payment made by the bank consists of funds deposited under the second contract. It follows from this position that the personal sureties would be liable for only one-half of the funds remaining after the payment by the conservator.

A search of the authorities reveals that the facts presented by you are unique. However, in my opinion, based upon the principles above discussed, if one-half the total deposit should be withdrawn and the bonds released, the sureties would be liable for only one-half the balance on deposit after such withdrawal.

Whether or not the Commissioners should authorize the Treasurer to release the bonds securing one-half of the funds on deposit is a matter for their decision as administrative officers after considering all the facts. I can merely point out that in my opinion as a matter of law, the personal sureties would not be liable for more than one-half the balance remaining on deposit after withdrawal of one-half the total deposit.

Your third question is whether the Commissioners would be justified in refusing to turn over the securities hypothecated under the second contract until the payment of interest, at the rate stipulated in the contract, accruing while the bank has been operating under restrictions. In an opinion of this office rendered April 21, 1933, bearing number 705, it was held as disclosed by the third branch of the syllabus:

> "3. Public funds in banks are deposited under a depository contract and draw the rate of interest stipulated for therein. This rate of interest will continue until the contract is terminated and no bank will be relieved from paying same because of any regulations imposed on them by executive order or legislative enactment."

In my opinion the county is entitled to receive interest under the depository contract up to the time of the termination of that contract. It follows that my answer to your third question is in the affirmative.

Your fourth question is whether a designation by the conservator of the bank that the funds proposed to be released are those deposited under the second contract is binding upon the sureties. In the light of the above discussion, it appears that I must answer this inquiry in the negative.

Respectfully,
JOHN W. BRICKER,
Attorney General.