

4788.

BANK—BOARD OF EDUCATION AND TOWNSHIP TRUSTEES—RIGHT OF SUCH SUBDIVISIONS TO ACCEPT ADDITIONAL SECURITIES ON A DEPOSITORY BANK—LIABILITY OF SURETY.

*SYLLABUS:*

1. *When the board of education of a school district has created a depository, pursuant to the provisions of Section 7604, General Code, and has taken a bond as security for such deposit, it may, when the sureties on such bond are no longer sufficient, accept the deposit of additional securities of the type mentioned in such section as security for the performance of the conditions contained in such bond, but may not release the original bond, provided that in so doing a condition of insolvency of the bank is not created.*

2. *When a board of township trustees has created a depository pursuant to the provisions of Section 3324, General Code, and has taken a bond as security for such depository, it may, when the sureties on such bond are no longer sufficient, accept the deposit of additional securities of the type mentioned in such section as security for the performance of the conditions contained in such bond, but may not release the original bond, provided that in so doing a condition of insolvency of the bank is not created.*

3. *When a board of education or a board of township trustees has accepted a bond as security for a deposit, pursuant to the provisions of Sections 7604 and 3324, General Code, and thereafter the bank has deposited, as additional security for the performance of the conditions contained in such bond, securities of the type authorized by statute, in the event of a default in the conditions of such bond, such board may proceed against the sureties and collateral so deposited concurrently or consecutively.*

COLUMBUS, OHIO, December 5, 1932.

HON. FREDERIC V. CUFF, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Your request for opinion reads as follows:

“(1) Under the provisions of Section 7604 of the General Code of Ohio, and related sections, the board of education of the \_\_\_\_\_ School District, Henry County, Ohio, on or about January 1, 1932, provided for the deposits of any and all moneys coming into the hands of its treasurer by making the \_\_\_\_\_ bank its depository. The bank gave a bond with certain individuals, who are directors of the bank, as sureties. The board of education now desires additional security, and the bank stands ready to place with the board of education, as additional security, certain securities enumerated in the statutes, if the same can be legally done.

May the board of education now legally accept additional security enumerated in the statutes? If so, and in case of default in the conditions of the depository bond, would the securities so deposited with the board of education be first exhausted before resort could be had to the securities on the original bond? Or, would the securities on the original bond be first exhausted before resort could be had to the securities so deposited? May the board of education accept in lieu of the original bond, the securities enumerated in the statutes, sufficient in amount to cover the amount

of the deposit, and release the sureties on the original bond from further liability?

(2) Under the provisions of Section 3324 of the General Code of Ohio, and related sections, the trustees of \_\_\_\_\_ Township, Henry County, Ohio, on or about January 1, 1932, provided for the deposit of all moneys coming into the hands of the treasurer of said Township by making the \_\_\_\_\_ bank its depository. The bank gave bond with certain individuals, who are directors of the bank, as sureties. The trustees now desire additional security, and the bank stands ready to place with the trustees, as additional security, certain securities enumerated in the statutes, if the same can be legally done.

May the trustees now legally accept additional securities enumerated in the statutes? If so, and in case of default in the conditions of the depository bond, would the securities so deposited with the trustees be first exhausted before resort could be had to the sureties on the original bond? Or would the sureties on the original bond be first exhausted before resort could be had to the securities so deposited? May the trustees accept, in lieu of the original bond, securities enumerated in the statutes, sufficient in amount to cover the amount of the deposits, and release the sureties on the original bond from further liability?"

You do not state in your inquiry the reason for the desire of the board of education and the board of township trustees for additional security from depositories of school funds and township funds, respectively.

If a condition of insolvency is threatened in the case of the depository, one legal question is raised by your inquiries. If the reason inducing such desire for additional security is the decrease in the net worth of the sureties, another legal question is raised by your inquiries.

When such motivating cause is the threatening insolvency of the depository, there is little doubt but that such conveyance of securities by the bank to the board of education or the township trustees would be void and of no effect, being a conveyance in contemplation of insolvency which condition and purpose was known to the parties. This statutory inhibition is contained in Sections 8618 and 11104, General Code. Section 8618, General Code, reads:

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be utterly void and of no effect."

Section 11104, General Code, in so far as material to your inquiry, reads:

"A sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise, by a debtor or debtors, \* \* \* in contemplation of insolvency and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and a sale, conveyance, transfer, mortgage or assignment made, \* \* \* with intent to hinder, delay or defraud creditors, shall be void as to creditors of such debtor, or debtors at the suit of any creditor or creditors. \* \*"

It is evident from the language of these sections, that if immediately after the conveyance of the securities of the board of education or township trustees such bank was insolvent, or, in other words, did not then have sufficient assets with which to pay its obligations, such conveyance is presumably fraudulent by reason of the provisions of statute above referred to; and, if the bank and the township trustees or the board of education consummated these transfers for the purpose of obtaining or creating, in favor of such boards, a preferred status as creditors over other creditors bearing a similar relationship to the deposit, each of such parties having full knowledge, such conveyance would be absolutely void and of no effect, and could be set aside at the instance of any other creditor of the depositor. Since this condition of the law is evident, I am assuming that your request implies that there is no threatened condition of insolvency on the part of the depository and that the transfer is not being considered in contemplation thereof, but rather that the purpose of such conveyance of additional security is by reason of the changed financial status of the sureties on such bond heretofore approved by such boards.

In discussing your first inquiry, I refer you to section 7605, which describes the security to be taken by a board of education from a depository for moneys deposited with such institution. Such section reads:

"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."

You will notice in this section that the requirement of the statute is that the bank "shall give a good and sufficient bond, or other interest bearing obligations," etc., that is, the legislature uses the disjunctive "or" rather than the conjunctive "and". However, even though the conjunctive "and" had been used in such section in place of the word "or", it would not answer your inquiry, for the reason that the deposit of securities or the giving of the bond referred to in such section is evidently a condition precedent to the establishment of a depository. The legislature has not specifically provided for a case where the deposits are in excess of the amount which was within the contemplation of the board of education and the depository at the time of the creation of the depository; nor does such statute specifically make provision for a case where, while the sureties on a

bond were sufficient at the time of the giving and the acceptance of the surety bond, but by reason of business conditions during the succeeding two years for which the bond was to run the financial status of such sureties became changed to such an extent that such sureties were no longer good and sufficient sureties.

It is to be presumed that when the board of education or the board of township trustees accepted bonds as security for a deposit of funds to be deposited by them, they found such bond to be "a good and sufficient bond" at that time. Otherwise, such board would have no authority under the statute either to approve or to accept such bond or to authorize the deposit of funds with such depository.

Since the sufficiency of the bonds in question has been found adequate and the depository for each of such funds created in the manner provided by law, the question becomes: Can the board of education or the board of township trustees now accept from the bank additional security? Has the bank the authority to furnish additional security and pledge its assets as security for the deposit of public funds after it has given a bond which has been approved by the public agency creating such depository which bond has not yet expired?

An examination of Sections 7605 and 7606, General Code, discloses that the purpose of such sections is to secure the return to boards of education of the funds deposited in the depository created by authority of such sections. Certain definite rules of statutory construction have been established by the courts and the rule governing the interpretation of such type of sections is stated in the fourth paragraph of *Cochrel vs. Robinson*, 113 O. S., 526:

"In the construction of a statute the primary duty of the court is to give effect to the intention of the Legislature enacting it. Such intention is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained."

This rule is more emphatically stated in the third paragraph of the syllabus of the case of *Cleveland Trust Company vs. Hickox*, 32 O. App. 68:

"In construing a legislative act to discover its application, the purpose of Legislature is an element which cannot be ignored."

The evident purpose of such statute being to insure the return of the funds and not to deprive such public officials of any powers which they have to protect public funds which have been entrusted to their possession, the question is: Does the language of such section limit their rights to secure the fund when the original bond has been received and approved at the time of the creation of the depository?

It appears to lead to a rather absurd conclusion if the language of such section were construed to mean that when the board of education had approved the sufficiency of the bond or security at the time of the creation of the depository its authority had ceased and that it did not have the authority to receive additional securities or an additional bond in the event that the sureties on the bond who were adequate at the time, became deceased or bankrupt. To place such a construction on Section 7605, General Code, it would be necessary to hold that, when the township trustees or board of education had created a depository and had received and approved a bond as security therefor, even though the sureties on such bond died at a time when no loss had accrued, the township trustees or

board of education would then have a depository which was not protected by a bond.

It is true that Section 2370, General Code, specifically gives to the county commissioners the right to require additional security from a bank while the statutes authorizing the creation of depositories for school funds and township funds do not contain a similar condition. A reading of section 2370, General Code, discloses the evident legislative purpose of such section of authorizing the county commissioners to terminate a depository agreement with a bank in the event it did not maintain the security for the deposit entrusted to it and did not rehabilitate such security upon demand by the county commissioners. Taking into consideration such evident purpose I do not believe that the fact that specific provision is made in Section 2370, General Code, for the increase of security, in the event of county funds on deposit with the depository, shows an intent on the part of the legislature to limit the rights of boards of education or township trustees in maintaining depositories for school and township funds. It appears to me that the effect of the provisions of Section 2370, General Code, is to make more emphatic and specific the duty of the county commissioners in this regard. I am, therefore, of the opinion that the statutes of Ohio, describing the manner in which depositories for school and township funds shall be created, do not limit the right of boards of education and township trustees to require such depositories to protect the deposit with a good and sufficient bond or other securities; and that, even though at some prior time the board may have approved a bond as legally sufficient, such boards have the right, upon change of conditions and surrounding circumstances, to accept additional securities for the purpose of maintaining the security for such deposit in the same adequately secured condition in which it was at the time it was created.

Even though the board of education and the board of township trustees may have the authority to receive additional security for funds deposited in a bank as depository, does the bank have the authority to convey or pledge its assets for such purpose?

A bank is a corporation, and as such, has certain powers; it has express powers which are expressly granted to it by its charter and also certain incidental powers which, while not created by the express words of its charter and not inferred from such language the law infers from the nature of their being thus created. It also has certain implied powers which are implied from the language used in the statute and charter creating it.

An examination of the banking statutes in Ohio (Sections 710-1 et seq. General Code) will not disclose any specific grant of power to a bank to pledge its assets or any portion thereof as security for public funds deposited in a bank as depository. Such statutes do not expressly deny such right. The banking institutions of Ohio are created under the provisions of these sections. It is therefore evident that if a bank has any such power it must be either an implied power or an incidental power.

In Section 710-141, General Code, the legislature specifically gives a "savings bank" the right to receive school district, township and certain other public funds on deposit. At the time this section was enacted (108 O. L. 116) the Ohio statutes only authorized such public funds to be deposited when such deposits were secured by the bank. Section 710-141, General Code, must be construed in the light of the evident legislative intent and to mean that a savings bank has the right to receive such deposits when deposited in the manner authorized by the law of Ohio and to give the savings bank the implied power to secure the public funds deposited with it in the manner provided by law.

There is no statutory limitation on the type of deposits which may be ac-

cepted by "a commercial bank." Such bank having, therefore, been given the right to accept deposits, has the implied power to accept deposits created in the manner recognized in business practice at the time when such statute was enacted. The commercial bank would therefore have the implied power to accept a deposit of public funds and secure the same when required by statute.

A banking institution, while it is a corporation by reason of the nature of its business, is a peculiar type of corporation. Banks are incorporated under the general corporation laws as limited by the special provisions contained in the Banking Act (Sections 710-1 et seq. General Code). The Banking Act clearly recognizes the fact that banking corporations are created under the general corporation code and if it were not for the express provisions contained in the Banking Act, such corporations could engage in as many types of business as were specified in their charters. In this respect the Banking Act limits them to a particular purpose or purposes, and subjects such types of corporations to rigid inspection by governmental officers; it dictates the method of doing business and throws around such type of institutions safeguards and limitations for the benefit of persons who may have business relations with them which the legislature does not require of other types of corporations.

The entire banking system is built upon a condition of confidence between the customers of the bank and the bank. It is for this purpose that the safeguards contained in the Banking Act have been imposed by the legislature. The legislature requires that a bank shall keep its books in a certain manner and shall issue and publish statements as to its condition and provides that such corporations shall be inspected by government officials in order to determine whether or not such bank is functioning in the manner required by the legislature, and in the event that the government official finds the banking corporation to be functioning otherwise, it is his duty to close the institution, liquidate its assets and distribute them among its depositors and other creditors.

Taking into consideration the nature of a bank and the restrictions imposed by the legislature on its method of operation; and, further, taking into consideration the fact that the purpose of these inhibitions is to prevent fraud, it is evident that the legislature considers that the assets of a bank are in the nature of a trust fund for the benefit of all depositors and other persons who may deal with the bank. If this were not true, there would be no reason for the statute authorizing the Superintendent of Banks to take possession of the assets of the bank when it:

1. Has violated its charter or any law applicable thereto;
2. Is conducting its business in an unauthorized or unsafe manner;
3. Is in an unsound or unsafe condition to transact its business;
4. Has an impairment of its capital for a period of ninety days;
5. Has refused to pay its depositors in accordance with the terms on which such deposits were received;
6. Has become otherwise insolvent;
7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent of banks;
8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department; or
9. Its officers have refused to be examined upon oath regarding its affairs."

See Section 710-89, General Code.

While, from the foregoing, it appears to be quite doubtful as to whether a bank has the authority to pledge its assets to an ordinary depositor as security for the return of such deposit, the requirements of the Banking Act, which define and limit the powers and rights of a bank, must be construed in conjunction with the statutes authorizing the deposit of public funds when we are endeavoring to determine whether an implied power exists to secure the deposit of such public funds. Any authority which the bank has to receive these funds must be found in the act of the legislature authorizing such funds to be deposited, for, as has been held in the case of *Fidelity and Casualty Company vs. Union Savings Bank*, 119 O. S. 124, the legislature is the only body under our system of government that has the authority to authorize public funds to be deposited in a bank. Likewise, under the Ohio Constitution, a bank can not be created by any other governmental agency than the legislature.

I am, therefore, of the opinion that the Banking Act, when construed in conjunction with the Public Depository Act, gives to the bank the implied power to secure the deposit of funds deposited with it by either a board of education or a board of township trustees as depository, subject to the limitations herein set forth.

In answering your second inquiry, the Ohio statute authorizing the deposit of township funds and the securing of same is, for the purposes herein discussed, similar. Such section of the statutes is Section 3324, General Code, and reads as follows:

"Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, and the trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

The reasoning above set forth, when applied to such section, would lead to a similar conclusion.

You further inquire as to whether the securities so deposited by the board of education or the board of township trustees, in the event that there was a default in the conditions of the depository bond, should first be exhausted before resort could be had to the original bond.

From your statement of facts, the original bond secures the entire amount deposited in the depository. Such being the case, it is self-evident that the sureties on such bond are liable for the whole loss occasioned by reason of the default of the bank to return such funds on demand. When securities are deposited as additional security for the performance of the conditions stated in the bond, such securities also become liable for the whole amount of the default; and, therefore, the board of education or the board of township trustees would have the right to institute an action against the original bondsmen without subjecting the securities to the payment of the loss and then institute action against the sureties on the bond for any deficiency.

I am not discussing herein the rights of contribution between the sureties on the bond or the rights of subrogation of such sureties, in the event that they pay the entire loss, such rights being personal to the sureties and not of specific interest to either the board of education or the board or township trustees.

You further inquire whether the board of education and the board of township trustees may accept the securities enumerated in the statute in lieu of the

original bond. As I have above set forth, there is no specific authority for such action on the part of either the board of education or the board of township trustees. Such authority has been specifically granted by the legislature to boards of county commissioners in Section 2370, General Code. The language of Sections 7605 and 3324, General Code, does not expressly grant this right to such boards, nor does the language therein contained show any legislative intent to bestow on such boards the right of substitution. I am therefore of the opinion that none exists, especially in view of the fact that these boards are purely creatures of the legislature, and have no authority except such as is given to them by the legislature.

Specifically answering your inquiries, I am of the opinion that:

1. When the board of education of a school district has created a depository, pursuant to the provisions of Section 7604, General Code, and has taken a bond as security for such deposit, it may, when the sureties on such bond are no longer sufficient, accept the deposit of additional securities of the type mentioned in such section as security for the performance of the conditions contained in such bond, but may not release the original bond, provided that in so doing a condition of insolvency of the bank is not created.

2. When a board of township trustees has created a depository pursuant to the provisions of Section 3324, General Code, and has taken a bond as security for such depository, it may, when the sureties on such bond are no longer sufficient, accept the deposit of additional securities of the type mentioned in such section as security for the performance of the conditions contained in such bond, but may not release the original bond, provided that in so doing a condition of insolvency of the bank is not created.

3. When a board of education or a board of township trustees has accepted a bond as security for a deposit, pursuant to the provisions of sections 7604 and 3324, General Code, and thereafter the bank has deposited, as additional security for the performance of the conditions contained in such bond, securities of the type authorized by statute in the event of a default in the conditions of such bond, such boards may proceed against the sureties and collateral so deposited concurrently or consecutively.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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4789.

APPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF THEIR DUTIES—H. P. CHAPMAN, AS FIRST ASSISTANT DIRECTOR OF HIGHWAYS—J. R. BURKEY, DEPUTY DIRECTOR OF HIGHWAYS IN CHARGE OF BRIDGES—MORGAN J. FITZPATRICK, PAYROLL CLERK, DIVISION NO. 3, DEPARTMENT OF HIGHWAYS.

COLUMBUS, OHIO, December 5, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Enclosed herewith find bonds for the following officials in the Department of Highways upon which I have endorsed my approval:

H. F. Chapman—First Assistant Director of Highways.