

3841.

COUNTY TUBERCULOSIS HOSPITAL FUNDS—CLASSED AS COUNTY FUNDS AND TRUSTEES OF HOSPITAL UNAUTHORIZED TO DEPOSIT SUCH FUNDS—SURETY COMPANY LIABLE ON THEIR BOND EVEN THOUGH FUNDS IRREGULARLY DEPOSITED.

*SYLLABUS:*

1. *The trustees of a county tuberculosis hospital do not have the custody of the funds appropriated for the maintenance of the hospital and are not authorized to deposit those funds in a bank. Such funds are county funds, and their custody is in the county treasurer, who should deposit them in the regular county depository in accordance with the county depository law.*

2. *When the trustees of a county tuberculosis hospital unlawfully have the custody of funds appropriated for the maintenance of the hospital and deposit those funds in a bank, whether the county depository bank or not, and the bank secures the deposits by the giving of an undertaking, such undertaking may be enforced according to its terms, in the event of default on the part of the bank, and such undertaking remains in force according to its terms so long as the deposit remains, or until it expires by limitation of time in accordance with its terms or is cancelled by consent of the parties.*

COLUMBUS, OHIO, December 11, 1931.

HON. R. H. BOSTWICK, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion on the following questions:

“FIRST: May a surety company be released of its obligation on a depository bond covering county tuberculosis hospital funds.

SECOND: In the event a release is obtainable, is it incumbent upon the trustees of the hospital to demand withdrawal of the money or substitution of surety.

The facts are as follows:

A county tuberculosis hospital organized under Sections 3139 et seq. General Code, made a deposit of hospital funds by its board of trustees in a bank. The bank secured a surety bond to cover the deposits, and paid the premium therefor. Thereafter, and before the expiration of the period of coverage provided for in the surety bond, the surety company took the following steps in an effort to cancel said surety bond and be released from the obligations of same, in accordance with Section 2725, General Code.

First: Informed the depository bank it desired to be released from its obligations on the bond, and returned the unearned premium to the bank.

Second: Gave written notice separately to the County Commissioners, the County Auditor, County Treasurer, and Board of Trustees of the hospital to remove the funds of the hospital from the bank within ten days.

Third: Gave written notice to the Board of Trustees to withdraw the funds from the bank, or get new security for same.

The bank refused to accept the unearned premium and the trustees of the hospital refused to withdraw the funds.

Two responsible surety companies stood ready to give bond to secure the hospital deposits at all times herein mentioned."

By a later communication I am informed that while the bank to which you refer in your letter was the duly designated county depository the deposits in question were not made by the county treasurer but were made by the trustees of the county tuberculosis hospital.

Authority is extended by Sections 3139 et seq. of the General Code, for the establishment and maintenance of county tuberculosis hospitals and it is provided in Section 3141-2, General Code, that "the management and control of such tuberculosis hospital shall be vested in a board of trustees, appointed by the county commissioners for a term of three years."

There is no authority, however, extended to these trustees to handle any funds which are used for the maintenance of such a hospital. A hospital of this kind is a county institution and should be maintained from appropriations made from county funds by the county commissioners. In my opinion the custody of the funds which are used for the maintenance of a county tuberculosis hospital is in the county treasurer, the same as other county funds and should be deposited by him in the county depository in accordance with the laws relating to that subject.

That being the case, there is no authority for the hospital trustees to make deposits or to take a bond to secure deposits which have been thus made irregularly. I am of the opinion, however, that if an irregular deposit is made, as seems to have been done in this case, and a bond taken to secure it, the surety on the said bond would be liable if a loss should occur. *Maryland Casualty Company v. McDiarmid*, 116 O. S., 576.

I am further of the opinion that inasmuch as the deposit in question was not made by the county treasurer in accordance with the county depository law, and the bond to which you refer was not given to secure a county deposit made in accordance with the county depository law, the said undertaking, having been given to secure these deposits and being based upon a valuable consideration and not prohibited by law or against public policy, is in full force as to any and all deposits secured by it, until the same are withdrawn or until the bond by its terms expires.

The provisions of Sections 2724 and 2725, General Code, whereby a means is afforded for the cancellation of a bond given to secure regular county depository accounts, have no application to a bond of this kind, and there is no means provided by law for the cancellation of a bond such as this. It remains in full force until it expires by limitation of time in accordance with its terms or is cancelled by mutual consent.

Section 2725, General Code, referred to by you in your letter provides in substance that an undertaking given to secure regular county depository accounts may be cancelled by ten days written notice to the county commissioners, the county auditor and the county treasurer, each separately, given by a surety thereon to withdraw the money of the county in such depository. The provisions of this statute, however, apply only to undertakings given to secure regular depository accounts and can therefore have no application to a bond given otherwise.

In my opinion these funds should be transferred to the custody of the county treasurer and deposited by him in his regular county depository account. When

these funds are all withdrawn from the present account and no more funds are deposited in that account, the bond in question automatically ceases to be of any force.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

3842.

TRANSFER OF REAL PROPERTY—MAY BE TRANSFERRED BY  
 AFFIDAVIT—SECTION 2768, GENERAL CODE, NOT REPEALED  
 BY ENACTMENT OF SECTION 10509-102.

*SYLLABUS:*

1. *Section 2768 of the General Code is not repealed by implication through the enactment of Section 10509-102 of the General Code.*
2. *The enactment of Section 10509-102 renders inoperative that part of Section 2768 which is inconsistent with the latter section.*
3. *The county recorder should accept for record affidavits for the transfer of real property prepared in conformity with the requirements of Section 2768.*

COLUMBUS, OHIO, December 11, 1931.

HON. J. S. HARE, *Prosecuting Attorney, New Philadelphia, Ohio.*

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

“For the guidance of the auditor, recorder and probate judge of this county, I desire your opinion on the following:

Under the provisions of the new Probate Code, which becomes effective January 1, 1932, it is provided in Section 10509-102 that real estate shall be transferred on the order of the probate judge after an application has been filed by the Administrator or Executor for such transfer. The Legislature in enacting this section overlooked Section 2768 of the General Code, which provides for transfer of real estate by affidavit.

Does Section 10509-102 repeal Section 2768 by implication, or can real estate still be transferred by affidavit under Section 2768 of the General Code?

It is my request that you give this immediate attention for the reason that preparations are being made in this county to put the new code into effect, and it is necessary that this matter be cleared up.” Section 10509-102, of the General Code, reads as follows:

“Whenever real estate passes by the laws of intestate succession or under a will, the administrator or executor shall, immediately upon the determination of heirship as to such decedent according to law, or in the event the estate is one in which determination of heirship is not required by law, within three months after the date of appointment of such executor or administrator, file in the probate court an application describing each parcel of real estate so passing, and requesting of the probate court a certificate of transfer as to such real