

your agent who is to procure the execution of the deed by the owners of the property above named.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4320.

SURETY COMPANY—BANK IN LIQUIDATION—DEPOSITORY BOND FOR TOWNSHIP FUNDS—MAY SET-OFF OUTSTANDING WARRANTS ON SUCH LIABILITY.

SYLLABUS:

Where a surety company is the obligor on a bond delivered by a bank as security for the receipt of the deposit of township funds, as authorized by Section 3322, General Code, which bank subsequently became insolvent, the surety company is without legal authority to deduct from its loss the amount of outstanding warrants.

COLUMBUS, OHIO, May 14, 1932.

HON. MARCUS C. DOWNING, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, as follows:

“On the 25th day of August, 1931, a warrant for the sum of Twelve Hundred Five Dollars and Forty Cents (\$1205.40), drawn on the Vanlue Banking Company, of Vanlue, Ohio, was issued to Harry S. Day, Treasurer of the State of Ohio, for a road bond and interest, by the Township Trustees of Amanda Township, Hancock County, Ohio. This warrant was mailed on the following day to Harry S. Day, Treasurer. The warrant was not presented for payment until the 11th day of September, 1931, and on the 12th day of September, 1931, the Vanlue Bank closed its doors by order of the Superintendent of Banks and Banking of the State of Ohio.

The A. Surety Company was surety on the depository bond for the safe-keeping of the township funds. The surety company will pay the amount of money on deposit at the time the bank closed, except the Twelve Hundred Five Dollars and Forty Cents (\$1205.40). The surety company contends that this warrant was not presented for payment as required by statute.

Please advise who shall bear the loss.

I am enclosing a photostat copy of the warrant.”

The copy of the warrant is as follows:

“CLERK’S OFFICE

Amanda Township, Hancock County, Ohio: No. 1090
The Vanlue Banking Co., Vanlue, Ohio, Vanlue, Ohio, Aug. 25, 1931
Depositary of said Township
will pay to the order of Harry S. Day
Twelve Hundred & five.....40/100 DOLLARS, \$1205.40
for Bond & Int.
A. J. Cole out of Debt Fund in the Depository.
O. H. Thomas
J. H. Alspach Township Trustees

M. C. Bayless
Township Clerk”

From the Treasurer of State's office I have acquired the following additional information: That Warrant No. 1090, although dated August 25, 1931, was received by the Treasurer's office on September 3, 1931; that such warrant was not accompanied by statements or other evidence indicating the purpose for which it was delivered to the Treasurer's office; that after some difficulty, it was ascertained that said warrant was in payment of certain bonds and coupons owned by the State Teachers' Retirement System and the Industrial Commission of Ohio, and for this reason the warrant was not deposited until after the difficulty had been straightened out, on September 11, 1931.

The surety bond referred to in your request, was evidently issued under the provisions of Section 3322, of the General Code, which, in so far as material, reads as follows:

"Such bank or banks shall give a good and sufficient bond to be approved by the township trustees for the safe custody of such funds in a sum at least equal to the amount received."

The purpose of the bond referred to in your request, was for the safekeeping of the funds by the bank and does not purport to create and could not be construed as creating an obligation on the part of the surety company to see that any particular warrant or check issued by the township was paid.

The surety company evidently bases its contention on an allegation that the issuance of the warrant operated as an assignment of the funds in the bank to the Treasurer of State in the amount of such warrant. However, the courts have consistently held that a check or draft does not constitute an assignment of any portion of the funds of the drawer which may be in the bank upon which it is drawn (until after certification or acceptance of the check or draft.) *Cincinnati, Hamilton & Dayton Railroad Company vs. Bank*, 54 O. S., 60, *Covert vs. Rhodes*, 48 O. S. 66.

There is no evidence on the warrant enclosed and none in the facts submitted in your request that there has ever been a certification by the Vanlue Banking Company of the warrant, and until such act has been done, the balance standing to the credit of Amanda Township would apply to such township and the Treasurer of State would have no interest whatsoever therein. Such funds being the property of the township, would be secured by the terms of the bond issued by the surety company.

However, even though the bond had been conditioned to secure the township trustees against liability on its obligations, the facts presented do not show that the warrant was not presented for payment within a reasonable time. An examination of the warrant shows that it is payable from a particular fund and it is therefore not a negotiable instrument, within the meaning of the Negotiable Instrument Law of Ohio. (Sections 8106 et seq. General Code.) One of the requirements of a negotiable instrument, within such act, is that such instrument "must contain an unconditional promise or order to pay a certain sum of money." (Section 8106, General Code.) In Section 8108, General Code, the following language is used:

"* * but an order or promise to pay out of a particular fund is not unconditional."

The surety company evidently bases its contention upon the provisions of Section 8291, General Code, which is a part of the Negotiable Instrument Law, which section reads as follows:

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

If the instrument had been a negotiable instrument, within the Negotiable Instrument Law, the question might have arisen as between the township trustees and the Treasurer of State as to whether or not the township was not discharged from the obligation to pay the Treasurer of State the debts for which the warrant was accepted by such Treasurer of State. This position could hardly be maintained by the township trustees against the Treasurer of State since the instrument does not come within the provisions of the Negotiable Instrument Law for the sole duty of the Treasurer of State as to the presentment of the warrant was to present it within a reasonable time, and when received on September 3rd, such Treasurer was unable to determine whether or not he was entitled to receive the funds until he had procured evidence as to his authority to receive it.

The Treasurer of State being a state official, has only authority to receive such funds as the statutes give him authority to receive, and until such fact was determined he would have committed an illegal act had he deposited the warrant. This dispute, if any, between the township trustees and the Treasurer of State is no concern of the surety company which executed the bond which enabled the bank to receive the deposits of township funds, and it is highly improbable that a jury would hold in an action between the Treasurer of State and the township trustees, that such warrant was not presented within a reasonable time, which would be necessary in order to make the Treasurer of State liable for loss which may have been suffered by an unreasonable delay in presentment.

Specifically answering your question I am of the opinion that where a surety company is the obligor on a bond delivered by a bank as security for the deposit of township funds, as authorized by Section 3322, General Code, which bank subsequently became insolvent, the surety company is without legal authority to deduct from its loss the amount of outstanding warrants.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4321.

DISAPPROVAL: ABSTRACT OF TITLE TO LAND IN MILAN AND OXFORD TOWNSHIPS, ERIE COUNTY, OHIO.

COLUMBUS, OHIO, May 14, 1932.

HON. I. S. GUTHERY, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to me under date of May 2, 1932, for my opinion, the authorization of the controlling board under date of March 16, 1932, the incumbrance estimate dated April 25, 1932, the deed of Wade H. Roberts and wife, and R. E. Sickinger, single, to the State of Ohio, executed March 31, 1932, and the abstract of title for property situate in Milan and Oxford Townships, Erie County, Ohio.

The abstract was made up and certified as of April 11, 1932—10:20 A. M., by The Erie County Title Company, and contains an exhibit of all deeds, mortgages,