

Opinion No. 23-3740

November 13, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Hon. Warren R. Graham, State Treasurer, Santa Fe, New Mexico.

The State Treasurer is not Liable on His Official Bond for the Loss of any State Money Deposited Within the Lawful Limit in any Designated Depository.

OPINION

{*103} Inquiry is made as to whether the State Treasurer is liable on his official bond for the loss of any state money deposited, within the legal limit, in any designated depository. I have no hesitation in saying that in the absence of any positive negligence, the Treasurer is not liable on his official bond for losses under such circumstances. I looked into this matter some months ago and came to this conclusion at that time. I have since discussed the matter with a number of leading lawyers in the state and have found that their opinions coincide with mine.

I had intended to write an exhaustive opinion on this matter, but this morning I am in receipt of a copy of a letter written by J. O. Seth of Santa Fe to the State Treasurer on this subject. I thoroughly agree with the contentions and conclusions of Mr. Seth's letter and I am pleased to adopt his letter as my official opinion in answer to this inquiry.

COPY

November 12, 1923

Hon. Warren R. Graham,

State Treasurer,

Santa Fe, New Mexico.

Dear Mr. Graham:

Referring to the question raised by Mr. Cross, representing the U. S. F. & G. Company, as to your liability in the event the bond of a depository for state moneys should prove to be insufficient and the state lose a part of the money deposited by you with such a depository.

The point raised by Mr. Cross, as I understand it, is that the provision of your bond that the treasurer will "pay over all moneys that may come into his hands by virtue of his said office, to the officers and persons authorized by law to receive the same" in some

manner controls or modifies the provisions of Section 30 of Chapter 76 of the Laws of 1923, the Public Moneys Act, relieving the Treasurer from liability for loss of public moneys deposited by him in any bank qualified to receive the same except in the case of negligence on the part of the Treasurer.

By Section 3 of the Public Moneys Act, (Chapter 76, Laws of 1923), a State Board of Finance is created comprised of the Governor, the Attorney General and the Auditor. This Board is given "general supervision of the fiscal affairs of this state and of the safe keeping and depositing of all moneys belonging to or in the custody of the state."

Any bank desiring to be designated as a depository of state funds must make application to the State Board of Finance, which {**104*} passes on the application and designates the bank. (See Section 10 of the above Act.) Any bank so designated must qualify by giving bond with either personal or surety company surety or by the deposit of certain forms of securities mentioned in the Act. By Section 8 of the Act, bonds furnished by depositories must be approved by the State Board of Finance and by Section 9 of the Act, any securities deposited by any such bank must likewise be approved by the Board of Finance.

By Section 7 of the above mentioned Public Moneys Act, it is made the duty of the State Treasurer to deposit money received by him in banks certified to him by the State Board of Finance as qualified under the provisions of the Public Moneys Act; and by Section 12 of the Act, the State Treasurer is required to "deposit all moneys in his custody, equitably among depositories applying therefor when qualified under the terms of this Act, subject to the control and regulation of the State Board of Finance as otherwise in this Act provided." It will be observed that the State Treasurer is not a member of the State Board of Finance and has no connection whatever with the designation of the depositories of the state funds or the approval of bonds or other securities furnished by such depositories. This duty is devolved entirely on the State Board of Finance. The treasurer is required to deposit all moneys in his custody equitably among the depositories which have been approved and whose bonds have been approved by the State Board of Finance.

The Public Moneys Act in carrying out this general idea further provides in Section 30:

"No treasurer shall be liable for the loss of public monies by him deposited in any bank qualified to receive the same under the provisions of this Act, due to the failure of such depository to repay the said monies, except in cases where such loss could have been avoided by the exercise of reasonable care on the part of such treasurer."

The legislative intent seems perfectly clear to take away from the state treasurer all control of the designation and qualification of depositories of state moneys and likewise to relieve him from all liability for loss due to the failure of such depository except in cases where the state treasurer by reasonable diligence might have avoided the loss.

In states having similar provisions for the designation and qualification of depositories, it is generally held that a treasurer who deposits money in a properly designated depository is relieved from further liability and this is true even though there is no express provision such as is found in the above quoted Section 30 of our Public Moneys Act. (See State vs. Bobletter, (Minn) 86 N. W. 461; Perley vs. Muskegon County, 32 Mich, 132; Hinton vs. State (Okla.), 156 Pac 161.) Certainly with an express provision such as is found in Section 30 of our Public Moneys Act, there can be no question as to the treasurer's being free from liability where he deposits in a bank properly designated by the State Board of Finance and keeps his deposit within the limits prescribed by law, except possibly in cases where the treasurer by the exercise of due care might have prevented the loss.

Your bond is conditioned that you will well and faithfully perform your duties as treasurer during your term of office and until your successor is elected or appointed and qualified, and will {*105} exercise all possible diligence and care in the collection of all money which it is your duty by law to collect and will render true accounts of your office and your doings therein as required by law and pay over all moneys that may come into your hands by virtue of your office, to the officers and persons authorized by law to receive the same. This bond is in the form set out in Section 17 of the Public Moneys Act and in my opinion there is no conflict whatever between the provisions of this bond and Section 30 of the same act, which expressly relieves you from liability for loss due to the failure of a properly designated depository.

The form of bond prescribed, and also Section 30 of the Act have been in our Public Moneys Act without substantial change since said Act was first passed in 1915 and there has been, so far as I can learn, no claim of any conflict between the provisions of the bond and what is now Section 30 of the Act. If you have deposited money coming into your hands in a properly designated depository, it is my opinion that you have paid over the money to the officers and persons authorized by law to receive the same within the meaning of the bond and that you have well and faithfully performed your duties as treasurer in making such a deposit, except, perhaps, in cases where you might be held guilty of negligence in so doing.

But assuming that the prescribed form of bond is in conflict with the provisions of said Section 30, the provisions of the latter would necessarily control. In this Section 30, the legislature has definitely and positively expressed its intention as to the liability of a treasurer in the event of the failure of a depository bank and the intention so expressed is completely in harmony with the other provisions of the Act under which the treasurer has no control of the designation or qualification of the depository. This clear and positive declaration of legislative intent would necessarily control any conflicting provision in the form of bond prescribed. This is particularly true when we consider the well established rule of law that an official bond is merely security for the performance of his official duties by the officer by whom it is given and it is not the purpose of such a bond to enlarge the duties or liability of the officer. (See 22 R. C. L. 496). The Public Moneys Act, including Section 30, prescribed your duty with reference to the State moneys and relieves a designated depository except in case of negligence on your part

and it could not be reasonably contended that the form of bond was intended to extinguish this exception to your liability and extend your duties and liability beyond those prescribed by the Act.

It is my opinion, therefore, that there is nothing in the suggestion of Mr. Cross and that you are not liable for the loss of state money deposited in a bank designated as a depository by the State Board of Finance and whose bonds, or other securities, have been approved by such Board, so long as you keep the deposit within the limits prescribed by law and are not otherwise guilty of negligence in connection with such deposit.

Very truly yours,

(Signed): J. O. SETH.