

ARK.] STATE USE CRAWFORDSVILLE SPECIAL SCHOOL 361
DISTRICT *v.* HUXTABLE.
STATE USE CRAWFORDSVILLE SPECIAL SCHOOL DISTRICT *v.*
HUXTABLE.

Opinion delivered November 19, 1928.

1. BANKS AND BANKING—AUTHORITY TO SIGN BOND OF PUBLIC OFFICER.—Notwithstanding Crawford & Moses' Dig., § 747, subdiv. 7, authorizing trust companies organized under §§ 746-9 to guarantee the fidelity of public officers, a corporation organized to do a general banking business never had the power to sign the bond of a public officer as surety.
2. BANKS AND BANKING—BANK ASSUMING LIABILITIES OF INSOLVENT TRUST COMPANY.—A contract whereby a new bank took over the assets and assumed the liabilities of an insolvent bank and trust company did not make the new bank liable on the bond of a county treasurer on which the trust company was a surety where, at the time of taking over such assets, neither a trust company nor a company organized to do a general banking business was authorized to sign the bond of a public officer as surety.
3. BANKS AND BANKING—BANK'S ASSUMPTION OF PREDECESSOR'S LIABILITIES.—A contract whereby a new bank took over all the assets and assumed the liabilities of an insolvent trust company, *held* to include only the existing liabilities of the latter, and not such as might accrue in the future.
4. BANKS AND BANKING—TERMINATION OF LIABILITY OF INSOLVENT TRUST COMPANY.—Where the affairs of an insolvent trust company were wound up by the State Bank Commissioner, and its assets distributed under the statute, its existence terminated, and it was not thereafter liable as surety on an officer's bond, and a new bank which purchased its assets and assumed its liabilities was not liable thereon.
5. BANKS AND BANKING—SUPERVISION.—The police power of the State extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the State may prescribe.
6. BANKS AND BANKING—REGULATION OF BUSINESS.—The State's power to regulate the banking business includes the power to provide adequate machinery to wind up the affairs of an insolvent bank, including future liabilities, and to terminate its existence for all purposes except those held open by the regulating statute itself.
7. OFFICERS—LIABILITY FOR LOSS OF MONEYS.—The general rule with respect to the liability of public officers and their sureties for the loss of public funds is that, where the statute expressly and unconditionally imposes the duty to pay over the public funds

DISTRICT *v.* HUXTABLE.

received and held as such, the officer's obligation is absolute, and a plea that the money has been lost without his fault is no defense to an action for its recovery.

8. SCHOOLS AND SCHOOL DISTRICTS—LIABILITY OF COUNTY TREASURER.—Where the report of the county treasurer, stating that he had, through the failure of a certain bank, lost a specified fund belonging to a certain school district, was approved by the county court, such action by the court was unauthorized, and constituted a "legal fraud," which chancery was authorized to set aside.
9. COUNTIES—AUTHORITY TO SUE ON TREASURER'S BOND.—Where the report of the county treasurer, stating that he had lost a fund belonging to a school district, was approved by the county court, such approval constituted a finding that the district was entitled to that amount of money, and no special order to pay over same was necessary as condition precedent to a suit against the surety on the treasurer's bond.
10. EQUITY—JURISDICTION TO REFORM INSTRUMENT.—Equity has jurisdiction to reform a contract whereby a bank assumed the liabilities of an insolvent trust company.
11. EQUITY—RETAINING JURISDICTION FOR COMPLETE RELIEF.—Where a court of equity assumes jurisdiction of a case for one purpose, it will retain jurisdiction until the whole case is settled, even though this involves the administration of legal relief after equitable relief has been granted.

Appeal from Crittenden Chancery Court; *J. M. Futrell*, Chancellor; reversed.

STATEMENT OF FACTS.

Appellants brought this suit against appellees to recover the sum of \$5,306.97, alleged to be moneys belonging to the Crawfordsville Special School District, and lost by Frank B. Huxtable, county treasurer of Crittenden County, by the failure of the Bank of Commerce of Earle, in which said sum of money was deposited. Crittenden County Bank filed an answer, in which it asked for a reformation of the contract under which it was sought to be held liable for said sum of money, and, on its motion, the case was transferred to equity and tried there.

The facts necessary to a decision of the issues raised by the appeal may be briefly stated as follows:

DISTRICT *v.* HUXTABLE.

Crittenden County Bank & Trust Company was organized as a trust company on the 5th of January, 1909, under the provisions of §§ 746-749 of Crawford & Moses' Digest. By virtue of subdivision 7 of § 747, it had the power "to guarantee the fidelity and diligent performance of their duty of persons holding places of public or private trust."

Frank Huxtable was elected treasurer of Crittenden County on October 3, 1922, and duly qualified and entered into the discharge of his duties as such county treasurer. He executed a bond for the faithful discharge of the duties of his office, as required by statute, and the Crittenden County Bank & Trust Company and the individual defendants in this action signed his bond as sureties.

On December 17, 1923, the Crittenden County Bank & Trust Company became insolvent, and its affairs were taken charge of by the State Bank Commissioner. On the 31st day of December, 1923, the Crittenden County Bank was organized to do a general banking business. The affairs of the Crittenden County Bank & Trust Company were wound up by the State Bank Commissioner as an insolvent bank, in the manner provided by statute. The Crittenden County Chancery Court made an order authorizing the State Bank Commissioner to sell the assets of the Crittenden County Bank & Trust Company to the Crittenden County Bank. By the terms of the sale the Crittenden County Bank took over all the assets of the Crittenden County Bank & Trust Company and assumed all its liabilities, except certain liabilities which were specified, and which have no reference to the present litigation. At the time this contract was entered into there had been no default on the bond of Frank T. Huxtable as county treasurer. Subsequently the Crittenden County Bank became insolvent, and its affairs were wound up by the State Bank Commissioner, and the Bank of Crittenden County was organized to take over its affairs. On February 5, 1927, the Bank of Crittenden County purchased the assets of the Crittenden County Bank, and assumed its liabilities.

In the meantime, on November 30, 1924, it had been ascertained that there was defalcation by Frank B. Huxtable as county treasurer. The sum of \$5,306.97, belonging to Crawfordsville Special School District, was deposited by him in the Bank of Commerce, doing business at Earle, in Crittenden County. This sum was lost to the school district by the failure of said bank. Frank Huxtable, as county treasurer of Crittenden County, filed his settlement in the county court of Crittenden County for the quarter ending December 31, 1924. In his report he stated that the sum of \$5,306.97 had been lost by the failure of the Bank of Commerce of Earle, and it appears that this sum of money belongs to Crawfordsville Special School District. The court examined the quarterly settlement of said treasurer, and approved the same.

Other facts will be stated or referred to in the opinion. The court found all the issues in favor of the defendants, and it was decreed that the complaint should be dismissed for want of equity. The case is here on appeal.

Charles D. Frierson, for appellant.

S. V. Neely and Rose, Hemingway, Cantrell & Loughborough, W. B. Scott and A. B. Shafer, for appellee.

HART, C. J., (after stating the facts). In the first place, it is contended by counsel for the Crittenden County Bank and the Bank of Crittenden County that there was no liability on their part. The Bank of Crittenden County was organized for the purpose of purchasing the assets and assuming the liabilities of the Crittenden County Bank, which had become insolvent. The contract for the purchase of the assets and the assumption of the liabilities of the Crittenden County Bank was made on February 5, 1927. It is sought to hold both of these banks liable upon the theory that the Crittenden County Bank had purchased the assets and assumed the liabilities of the Crittenden County Bank & Trust Company. Of course, if there was no liability

on the part of the Crittenden County Bank, there could be none on the part of the Bank of Crittenden County.

Now, it is sought to hold the Crittenden County Bank liable under its contract to purchase the assets and assume the liabilities of the Crittenden County Bank & Trust Company, which was approved by the chancery court on the 3d day of February, 1926. The Crittenden County Bank & Trust Company was organized as a trust company, and, under subdivision 7 of § 747 of Crawford & Moses' Digest, it had the power to sign the bond of Frank Huxtable as county treasurer of Crittenden County. It did sign his bond as one of his sureties, and, on that account, became liable for the faithful discharge of the duties of his office. On December 17, 1923, the Crittenden County Bank & Trust Company became insolvent, and its affairs were wound up by the State Bank Commissioner under the statute. At this time no liability had accrued against any one on Huxtable's bond. The liability of Frank B. Huxtable and his bondsmen for the \$5,306.97, belonging to the Crawfordsville Special School District, did not accrue until nearly a year afterwards. This money was lost because of the failure of the Bank of Commerce of Earle, in which the money was deposited. Prior to the failure of the Bank of Commerce, the Crittenden County Bank was organized for the purpose of purchasing the assets of the Crittenden County Bank & Trust Company and assuming its liabilities. The contract of purchase and sale was approved by the chancery court on February 3, 1926; and it is contended by counsel for the appellants that the liability of Frank B. Huxtable and the sureties on his bond as county treasurer included the amount belonging to the Crawfordsville Special School District, which was lost by the failure of the Bank of Commerce.

We cannot agree with counsel in this contention. It is true that the Crittenden County Bank & Trust Company had the power to sign as surety the bond of Frank B. Huxtable as county treasurer of Crittenden County. Subdivision 7 of § 747, Crawford & Moses'

Digest. This power, however, was taken away by the Legislature of 1923. Acts of 1923, p. 515. Section 10 of that act expressly repeals par. 7 of § 747 of the Digest. Besides, corporations organized to do a general banking business never had the power to sign the bond of a public officer as surety. At the time the affairs of the Crittenden County Bank & Trust Company were placed in the hands of the Bank Commissioner, and sold by him under the order of the chancery court, neither a corporation organized to do business as a trust company nor that organized to do a general banking business had the power to sign the bond of a public officer as surety. Therefore it could not be said that, under the contract in question, the Crittenden County Bank should be held to have taken the place of the Crittenden County Bank & Trust Company as one of the sureties on the bond of Frank B. Huxtable. No liability had accrued on his bond at that time.

The Bank of Commerce did not fail until nearly a year afterwards. The money involved in this suit was lost by its failure. Hence there was no existing liability on the bond of Frank B. Huxtable at the time the Crittenden County Bank purchased the assets and assumed the liabilities of the Crittenden County Bank & Trust Company.

We are of the opinion that the terms of contract of purchase and sale of the assets of the Crittenden County Bank & Trust Company only included existing liabilities of the latter, and that no attempt was made to include a default on the bond of the treasurer which might accrue in the future.

But it is contended that the liability of the Crittenden County Bank & Trust Company, as surety on the bond of Frank B. Huxtable, was a continuing one, and that it continued throughout his term of office, although the Crittenden County Bank & Trust Company became insolvent and its affairs were placed in the hands of the State Bank Commissioner, to be wound up by him pursuant to statute. We do not think so. When

DISTRICT *v.* HUXTABLE.

the affairs of the Crittenden County Bank & Trust Company were wound up and its assets disposed of and distributed pursuant to statute, its existence came to an end, and it could not in any sense be said to continue liable on the bond of the county treasurer. When its affairs had been wound up and its assets had been distributed among its creditors as provided by statute, it no longer had any powers whatever, and could in no sense be said to continue liable as one of the sureties on the bond of the county treasurer.

The police power of the State extends to the regulation of banking business, and even to its prohibition, except on such conditions as the State may prescribe. *Noble State Bank v. Haskell*, 219 U. S. 104, 31 S. Ct. 86, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. The business of banking is of a public nature, and therefore is subject to statutory regulation for the protection of the public. The power to regulate the business necessarily carries with it the power to provide adequate machinery for winding up its affairs when insolvent. If it should be said that the liability of a trust company as a surety on the bond of a public officer must necessarily continue during the life of the bond, regardless of the insolvency of the bank and trust company, then a statute providing for the winding up of the affairs of insolvent banks and trust companies by a State Bank Commissioner or other public agency would be seriously impaired, and of but little advantage to the public or to those dealing with such bank or trust company. The power to wind up and settle its affairs must necessarily conclude its future liabilities and have the effect of putting an end to its existence for all purposes except those held open by the regulating statute itself.

We have already seen that, by the terms of the contract, the Crittenden County Bank only assumed the existing liabilities of the Crittenden County Bank & Trust Company. When the affairs of the Crittenden County Bank & Trust Company were wound up pursuant to statute, its liability as one of the sureties on the

bond of the county treasurer ended. Therefore we are of the opinion that there is no liability on the part of the Crittenden County Bank or on the part of the Bank of Crittenden County, which purchased the assets and assumed the liabilities of the former.

The chancellor held that the individual sureties on the bond of the treasurer were not liable because the county court had given the treasurer credit for the amount lost by him on account of the failure of the Bank of Commerce at Earle, in Crittenden County, and no appeal has been taken. It appears from the record that on June 30, 1925, a day of the April term, 1925, of the county court of Crittenden County, F. B. Huxtable, as treasurer of Crittenden County, filed his report as such county treasurer for the quarter ending December 31, 1924. Among other items for which he asked credit is the following: "Lost in Bank of Commerce, \$5,306.97." The county court approved and confirmed his settlement, thereby giving him credit for the sum of \$5,306.97, belonging to Crawfordsville Special School District, which had been lost by the failure of the said Bank of Commerce. No appeal was taken from the judgment of the county court in the premises. Hence it is claimed that the matter is *res judicata*, and that, inasmuch as the county court has never adjudged that any liability existed, the present suit cannot be maintained under the authority of *Graham v. State*, 100 Ark. 571, 140 S. W. 735. In that case the court held that, before a suit can be brought upon the bond of a county treasurer, there must be a settlement made with him by the county court, and the amount due by him determined, and an order made to pay over the amount found to be due. The court said that the judgment fixing the liability and containing an order to pay over was a condition precedent to the bringing of a suit against the treasurer and the sureties on his bond.

Now, under § 10165 of Crawford & Moses' Digest, the county court was given the power on its own motion to reconsider and adjust the settlement of any county

officer at any time within two years from the date of settlement. In *Sims v. Craig*, 171 Ark. 492, in construing this section of the statute, the court said that unintentional errors and mistakes in accounting, resulting in a loss to the county, would be a legal fraud upon the county, and might be corrected by the county court itself within the two years. The court also held that the chancery court has the power to surcharge and correct such settlement for fraud at any time within five years.

Was the action of the county court allowing the treasurer credit for the \$5,306.97 belonging to Crawfordsville Special School District, lost by him on account of the failure of the Bank of Commerce of Earle in which it was deposited, a fraud? We think so. The general rule with respect to the liability of public officers and their sureties for the loss of public moneys is that, where the statute, in express terms, imposes the duty to pay over public funds received and held as such, and no condition limiting that obligation is in the statute, the obligation thus imposed upon and assumed by the officer is absolute, and the plea that the money has been lost without his fault does not constitute a defense to an action for its recovery. *United States v. Prescott*, 3 How. (U. S.) 578; *Smythe v. United States*, 188 U. S. 156, 23 S. W. 279; *Board of Education v. Jewell*, 41 Minn. 427, 46 N. W. 914, 20 A. S. R. 586; and 33 R. C. L., par. 136, p. 463.

In *Mecklenburg County v. Beales*, 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285, the Virginia Supreme Court of Appeals held that a county treasurer is liable for public funds lost through bank failure, although he believes the bank to be sound, and it is generally so regarded, and in depositing the funds he merely follows a long-prevailing custom, and acts with knowledge of the supervisors, where the statutes of the State manifest an intention to guard with the utmost care the public funds from loss, and to hold the county treasurer handling them to a very strict accountability for their safekeeping. Many decisions are cited in the opinion in support of the

rule, and many more are cited in a case-note to 36 L. R. A. (N. S.) 285.

In *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926, the West Virginia Court of Appeals said:

“By the great weight of authority the custodian of public money is not a bailee bound only to the exercise of a high degree of care, prudence and diligence for its safety, and excusable for the loss thereof by fire, robbery, theft or bank failure, when such loss is not in any sense due to negligence or misconduct on his part, but a debtor and insurer to the extent of the amount received, excusable for no losses except those resulting from acts of God or the public enemy.”

Numerous decisions from the Supreme Court of the United States and from the courts of last resort of the various states are cited in a case-note to 17 Ann. Cas. at p. 929, to the effect that the reasons on which the proposition rests are to be found in the unqualified terms of the bond and in considerations of public policy. Among the cases cited are the following: *State v. Croft*, 24 Ark. 550; *State v. Newton*, 33 Ark. 276; and *State v. Wood*, 51 Ark. 205, 10 S. W. 624.

In this State the condition of the treasurer's bond is that he will faithfully discharge the duties of his office, and under § 2832 of Crawford & Moses Digest he and the sureties on his official bond are liable for all funds deposited by him in a bank when such bank, on demand, shall fail to pay to the person entitled to receive the same. Demand was made for the funds in the case at bar, and there was a failure to pay the same to the persons entitled to receive the same. Under the authorities above cited, the county court was wholly without power to allow the county treasurer credit for the funds in question, and the action of the county court in allowing the same constituted a legal fraud which a court of chancery had the authority to set aside in the present suit. *Fuller v. State, use of Craighead County*, 112 Ark. 91, 164 S. W. 770; and *Sims v. Craig, supra*, and cases cited.

This principle was sustained in *State v. Croft*, 24 Ark. 550. In that case the court held that the declaration, in a suit upon a county treasurer's bond, averring that a specified sum, as appeared by the books, remained in the treasurer's hands; that he had been summoned by the county court to settle his accounts, but had failed to do so; that the court struck the balance due by him, and that he is justly indebted to the county as treasurer in such sum; which he had neglected and refused to pay, were sufficient to charge the sureties in the bond, without the averment of a formal judgment rendered by the county court.

In the case at bar, the county treasurer admitted that he was indebted to Crawfordsville Special School District in the sum of \$5,306.97, which was due, and which he had lost by the failure of a bank in which he had deposited it. This substantially amounts to an averment that the county court had settled and determined the amount due from the treasurer to said school district as a part of its school fund, and that such adjustment and settlement are shown by the records of that court. In short, the settled rule is that public policy requires that every depository of public money should be held to strict accountability. The obligation to keep safely the public money is absolute, without any condition, express or implied. Nothing but the payment of it, when required, can discharge the bond, unless by statutory authority. *Newton County v. Green*, 104 Ark. 270, 1409 S. W. 73, Ann. Cas. 1914C, 491; *State v. Davis*, ante, p. 153, 10 S. W. (2d) 513; *Pearson v. State*, 56 Ark. 138, 19 S. W. 499, 35 A. S. R. 91.

Therefore, in view of the situation of the parties as shown by the record, the order of the county court procured by the treasurer giving him credit in his quarterly settlement is a legal fraud against which equity will relieve; and we hold that Crawfordsville Special School District was entitled to recover the sum sued for from the county treasurer and his individual bondsmen.