Banks—Bonds—Bonding Companies — Counties — Contracts—Pledge—Receivers—Sureties.

A county having public funds on deposit in a bank which becomes insolvent and has a receiver appointed therefor and having as security for such deposit a surety bond for a portion of such deposits and a pledge of certain warrants and other obligations for the balance, cannot lawfully enter into an agreement with the bonding company to the effect that if the latter pays to the county the amount of the bond that the county will pay to the surety company any surplus over and above the balance of the county claim which may arise out of the pledged property.

Chas. E. Collett, Esq.,
County Attorney,
Sidney, Montana.

My dear Mr. Collett:

You have submitted to me the following statement of facts:

> Richland county had on deposit in a bank which subsequently failed (and for which a rceeiver has been appointed), $10,000 of county funds, and as security therefor the bank furnished the County Treasurer with a surety company bond for $5,000, and for the balance of said deposit the bank placed in the hands of the County Treasurer certain warrants and other obligations in the sum of $7,298.26, and this bond and these securities the County Treasurer now holds. The bonding company is ready to pay the amount of its bond, but demands, as a condition precedent thereto, that the county agree that, in case it collects out of said warrants and obligations an excess over and above the amount necessary to cover the entire deposit of the county in the bank when added to the $5,000 paid by the surety company, it will pay the said excess to the surety company.

Upon this statement of facts you request an opinion as to the right of the county to enter into such an agreement.

The terms of the bond of the surety company do not make the entering into such an agreement a condition precedent to the discharge of the liability of the company. The liability of the company and the rights of the county are measured by the terms of the bond and, as nothing is said therein relative to entering into such agreement before the company is required to pay the amount of the bond, the company cannot insist upon the agreement being entered into before its liability is enforceable.

Furthermore, these warrants and other obligations were delivered to the bank as a pledge to secure the payment of county deposits and interest not covered by any other sort of security, that is, by

bond or otherwise. The surety company was not a party to the pledge contract. Under Section 8314, R. C. M. 1921, the pledgee must pay the surplus moneys collected by him out of the pledged property to the pledgor on demand. The bank now being in the hands of a receiver, that officer would be entitled to receive the surplus which the surety company wants paid over to it.

When personal property is pledged, the legal title to the property remains in the pledgor. (Averill Machinery Co. v. Bain, 50 Mont. 512.) The possession of the pledgee is for security only. (Section 8293, R. C. M. 1921.) Therefore, the receiver of the defunct bank has the legal title to the pledged property, and it is considered in custodia legis:

> "As a general rule it may be stated that property in the possession of a receiver is in custodia legis; that receiver's possession is the possession of the court for the benefit of the party or parties ultimately entitled thereto."
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> 34 Cyc. 187.

The county has possession for security only. Therefore, after the county has collected from the pledged property sufficient moneys to discharge the obligation secured, its possession terminates as to the residue and the county must deliver it back to the pledgor, or its successor, which in this case is the receiver. The county is not required to collect more than is necessary to discharge the obligation secured. If it did, it would hold the surplus in trust for the benefit of the receiver in this case and, upon demand, such surplus would have to be paid into his hands as assets to be administered by him under the direction of the court. If the court is of the opinion that it is for the best interests of the estate that the obligation be paid and the security returned to the receiver, it could direct the receiver to pay the amount and it would then be the duty of the county to deliver the securities to the receiver.

Under these circumstances, the inability of the county to enter into the proposed agreement is apparent. If it did enter into it, before collections were made, the receiver under the orders of the court might tender the county the amount of the obligation secured, and it would then be the duty of the county to deliver to him the securities, which it could not do and at the same time fulfill its part of the agreement. If the county did collect out of the securities more than was necessary to discharge the obligation, the county could not turn over the surplus to the bonding company under the agreement without violating Section 8314, R. C. M. 1921, requiring the surplus to be returned to the pledgor, or in this case its receiver, and at the same time diverting from the proper custodian funds which for all purposes are in custodia legis, the said surplus being impressed with the same legal title that the receiver formerly held as to the securities.

Upon payment of the bond, the surety company will be subrogated to the rights of the county as a general creditor of the bank. It will have the right to participate in whatever dividends are declared by the receiver in common with all other unsecured creditors. If the proposed agreement were entered into and carried into execution, and a surplus was realized, by turning that surplus over to the bonding company the company would secure a preference to the extent of the surplus, which cannot be permitted.

It is, therefore, my opinion that the county cannot lawfully enter into the proposed agreement.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.