

OPINION NO. 69-020**Syllabus:**

The bond required to be given pursuant to Section 2923.04, Revised Code, may be either a corporate surety bond or a personal surety bond, and the adjutant general may accept either type, provided that the particular bond tendered in each case is satisfactory to him.

To: Major General S. T. Del Corso, Adjutant General, Columbus, Ohio
By: Paul W. Brown, Attorney General, February 13, 1969

I have before me your request for my opinion on the question of whether the bond required to be given pursuant to Section 2923.04, Revised Code, need be a corporate surety bond, or whether a personal surety bond may be accepted.

Section 2923.04, supra, reads in pertinent part as follows:

"No person shall own, possess, transport, have custody of, or use a shotgun with barrel less than eighteen inches in length, or rifle with a barrel of less than sixteen inches in length, or shotgun or rifle with an overall length of less than twenty-six inches, or machine gun, light machine gun or submachine gun, unless he first procures a permit therefor from and at the discretion of the adjutant general,* * *. Before obtaining such permit each applicant shall give bond to this state, to be approved by the adjutant general, in the sum of five thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapon while under the control of such applicant or under the control of another with his consent; and any person injured by such improper use may have recourse on said bond.* * *"

The question of the legality of attempting to limit official bonds to bonds executed by corporate sureties was considered in Opinion No. 113, Opinions of the Attorney General for 1937. That opinion was occasioned by the passage of a resolution, by the Board of Real Estate Examiners, to the effect that the Board would accept only such brokers' bonds as were given by a recognized surety company.

The then Attorney General concluded that the Board of Real Estate Examiners could not prescribe corporate sureties to the exclusion of personal sureties on the bonds which were the subject of Opinion No. 113, supra. This conclusion was based upon State, ex rel. McKell v. Robins, 71 Ohio St. 273, and State ex rel. Barr v. Deckenbach, 105 Ohio St. 643.

In the Robins case, supra, the Supreme Court considered the constitutionality of Section 3641c, Revised Statutes, which required that any administrator's bond in excess of \$2000 be executed and guaranteed by a surety company authorized to do business in the State of Ohio. The court recognized the right of the legislature to require bonds to be given "for the faithful performance of official or fiduciary duties, or the faithful keeping, applying, or accounting for funds or property* * *," and to make reasonable requirements as to execution, approval, and security in order to effectuate fully the purposes of such bonds. However, it rejected the contention that official bonds may be limited to bonds issued by qualified corporate sureties. The pertinent part of the opinion of the court is quoted in Opinion No. 113, supra, beginning at page 143:

"* * *Before the enactment of this statute an officer was at liberty to present a bond signed by personal sureties or by a surety company or companies. The right of choice between the classes of sureties is now denied him. It is now made compul-

sory upon him to give bond signed by surety companies, and personal security is in effect abolished. It is very plain that the security companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights is not apparent. The amount of loss to the state, county, township or municipality on official bonds, or to the beneficiaries under bonds of executors, administrators, guardians, trustees or other fiduciaries, comparatively speaking, is trifling. Indeed it is possible that the loss is no greater than would result when the bonds shall be signed exclusively by incorporated companies, which sometimes become insolvent as individuals do. It is true that the loss, if any default occurs, falls on the sureties, and that there have been special acts of the general assembly for the relief of sureties in cases in which it was claimed that the principal was not in fault. Some of these acts are meritorious, many of them improvident, and most of them unconstitutional. It argues nothing in favor of the legislation which is assailed here that sureties sometimes seek to escape from the consequences of their contract of suretyship. The fact remains that those whose interests are protected by personal bond rarely lose. We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution therefor of corporate security, and the reasons which we have given persuade us that the public welfare does not require it.

"* * * * *

"It does not seem to us, therefore, that any part of this statute was promoted by considerations of public necessity or public welfare, and thence it follows that it is an unconstitutional restriction upon the liberty to contract which is guaranteed by Article 7, Section 1 of the constitution of this state."

In the Deckenbach case, supra, following its decision in the Robins case, supra, the court declared unconstitutional a city ordinance which required operators of motor vehicles and taxicabs to post a bond signed by a surety company as a prerequisite to the issuance of a license.

Of course, Section 2923.04, supra, does not attempt to limit the bonds given pursuant to it to corporate surety bonds. However, a determination to so limit the bonds given pursuant to this section would meet the same constitutional objections as were considered in the Robins and Deckenbach cases, supra, and in Opinion No. 113, supra.

Therefore, it is my opinion and you are hereby advised that the bond required to be given pursuant to Section 2923.04, Revised Code, may be either a corporate surety bond or a personal surety bond, and the adjutant general may accept either type, provided that the particular bond tendered in each case is satisfactory to him.