Specifically answering your inquiry, it is my opinion that services performed in connection with the liquidation of state banks by employees of the Superintendent of Banks, are not within the term "employment" as defined by Sections 210(b), 811(b) and 907(c) of the Federal "Social Security Act" (42 U. S. C. A., Sections 301 to 1305), and therefore the Superintendent of Banks is not required to comply with said act.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5131.

LIQUOR CONTROL DEPARTMENT—CERTAIN BONDS GIVEN BY APPLICANTS FOR LIQUOR PERMITS NOT ENFORCIBLE OBLIGATIONS IN FAVOR OF STATE.

SYLLABUS:

Where bonds were given to the State of Ohio with surety to the satisfaction of the Tax Commission of Ohio, by applicants for class C-1, class C-2 and class D-1 permits from the Department of Liquor Control of the State of Ohio, on and after June 5, 1935, such bonds do not constitute either legal statutory or voluntary common law bonds, and are therefore not enforcible obligations in favor of the State of Ohio.

COLUMBUS, OHIO, February 1, 1936.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: Acknowledgment is hereby made of your request for my opinion, which reads as follows:

> "Amended Substitute Senate Bill No. 2 of the 91st General Assembly was approved by the Governor June 5, 1935. The requirement of bonds from certain kinds of permit holders under the Department of Liquor Control was omitted from this act. There was some discussion as to the date on which different parts of the act should become effective. The Department of Liquor Control had first adopted July 1 as the date for terminating these requirements. It was later decided that the date should have been June 5.
>
> Many bonds were demanded and received by the Tax Commission to accompany permits issued between June 5 and July 1, which according to the later determination were not necessary. The question arises whether each of these bonds duly executed

by principal and surety and filed with the Tax Commission is as a matter of law a liability of the bonding company for delinquencies of the permit holder from the date of issue to the date of cancellation or expiration. Bonding companies appear to have diverse views as to whether such bonds are legally in effect."

Section 6064-15, General Code, as enacted in 1933 by the Legislature, Section 15 of House Bill No. 1 of the second special session of the 90th General Assembly, effective December 23, 1933, provided for certain enumerated classes of permits that might be issued by the Department of Liquor Control. Among these permits were Permits C-1, C-2 and D-1. See 115 O. L., Pt. 2, page 131. Section 6064-18, General Code, Section 18 of said House Bill No. 1, provided in part:

"No permit, other than a class F permit, shall be issued unless and until the applicant therefor shall have furnished a bond to the state of Ohio, with surety to the satisfaction of the commission, conditioned on the faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto. The penal sums of such bonds for the classes of permits designated shall be fixed by the department of liquor control within the following limitations, to-wit:

1. For all class A permits, not less than two thousand dollars nor more than ten thousand dollars.
2. For all class B permits, not less than five thousand dollars nor more than twenty-five thousand dollars.
3. For all class C, class D, class E, class G and class H permits, not less than one hundred dollars nor more than one thousand dollars.

Such bonds shall be filed with the commission and kept in its office.

* * * * * * * * *"

Obviously, under the original Liquor Control Act, House Bill No. 1, just referred to, it was required that applicants for permits known as C-1, C-2 and D-1 had to furnish a bond as required in Section 6064-18 (115 O. L., part 2, page 137).

In an act known as Amended Substitute Senate Bill No. 2, referred to in your communication, the 91st General Assembly, at its regular session, amended several sections of the General Code that had been enacted in 1933, in Amended House Bill No. 1. This act was passed by the General Assembly on May 23, 1935, and approved by the Governor

on June 5, 1935. See 116 O. L., 511-547. Among the sections amended were Sections 6064-15 and 6064-18, General Code.

Section 6064-15, General Code, was amended to add some new permits and, among other things, to amend the language relative to Permits C-2 and D-1, while the language relative to Permit C-1 was left unchanged. Section 6064-18, General Code, was amended and the portion of the statute quoted, supra, was changed to read as follows:

> "No permit other than a class C-1, class C-2, class D-1, and class F permit shall be issued unless and until the applicant therefor shall have furnished a bond to the state of Ohio, with surety to the satisfaction of the commission, conditioned on the faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto. The penal sums of such bonds for the classes of permits designated shall be fixed by the department of liquor control within the following limitations, to-wit:
>
> 1. For all class A and class B permits, not less than two thousand dollars nor more than ten thousand dollars.
>
> 2. For all class D-2, class D-3, class D-3-A, class D-4, class D-5, class E, class G, class H, class I, class J, and class K permits, one thousand dollars.
>
> No bond shall be required of a class B permit holder when such class B permit is issued to and held by a class A permit holder.
>
> Such bonds shall be filed with the commission and kept in its office.
>
> * * * * * * * * *"

Obviously, the language of Section 6064-18 of Substitute Senate Bill No. 2, above quoted, when considered with the language in Amended House Bill No. 1, shows conclusively that the Legislature intended to eliminate the former requirement of furnishing of bonds by class C-1, C-2 and D-1 permit applicants.

I presume that your question involves bonds that were furnished by these C-1, C-2 and D-1 permit applicants after June 5, 1935.

As you indicate in your communication, at the time that the Governor approved Amended Senate Bill No. 2, on June 5, 1935, the question arose as to whether the whole act or certain portions only were effective immediately when signed by the Governor, on the ground of being laws providing for a tax levy.

Pending the ruling of the Attorney General, your commission evi-

dently went ahead after June 5, 1935, and exacted bonds from class C-1, C-2 and D-2 permit applicants on the theory that Section 6064-18, General Code, as amended by such Amended Substitute Senate Bill No. 2 might be held not to go into legal effect until ninety days after the act was filed in the office of the Secretary of State, to-wit, ninety days after June 6, 1935, or September 5, 1935.

In Opinion No. 4348, rendered June 21, 1935, this office ruled that Section 6064-15, General Code, as amended in Amended Senate Bill No. 2, went into effect on June 5, 1935, when such act was approved by the Governor, and in Opinion No. 4396, rendered July 6, 1935, this office likewise held that Section 6064-18, General Code, as amended in the same act, went into effect on the same date.

Assuming that these sections, 6064-15 and 6064-18, as amended in Substitute Senate Bill No. 2, will be held by a court to have gone into effect on June 5, 1935, as concluded by the aforementioned opinions of this office, the question is now presented whether or not the bonds exacted from the C-1, C-2 and D-1 permit applicants after June 5, 1935, were legal and enforcible obligations until the expiration of the time for which the permits were issued or until such permits were sooner validly revoked.

It is obvious from what has already been stated that the Legislature intended to remove all statutory authority for the requiring of bonds of applicants for C-1, C-2 and D-1 permits on the effective date of Amended Senate Bill No. 2, so that any bonds entered into after June 5, 1935, to accompany C-1, C-2 and D-1 applications can not be considered statutory bonds. The question then arises as to whether or not such bonds may be considered as good common law bonds, and thus be enforcible as such obligations.

In the case of *Maryland Casualty Co.* v. *McDiarmid,* 116 O. S., 576, the Supreme Court of Ohio had occasion to consider the matter of the validity of an indemnity bond given by a police officer of the city of Dayton to such city to cover the faithful peformance of the duties of such officer. As pointed out by the court, there was no state statute, charter or ordinance provision authorizing the furnishing of such a bond. The court, however, held such bond to be an enforcible obligation. It was stated in the first paragraph of the syllabus:

> "1. Where the state, or a political subdivision of the state, takes from any one an indemnity bond for the faithful performance by an officer of official duty, and such bond is voluntarily given, *is based upon a valuable consideration* and is not prohibited by law or against public policy, liability of the obligor of such bond upon a breach of its condition is enforceable, notwithstanding the execution of such bond is not required by any

statute of the state or by the charter or an ordinance of a municipality." (Italics mine.)

It is to be noted from the italicized wording in the foregoing syllabus, that the Supreme Court has clearly stated that a bond entered into without statutory authority must not only be voluntarily given, but must also be based on a valuable consideration, and not be prohibited by law or against public policy.

Passing for the time being the consideration of whether the bonds involved in your communication were voluntarily given, and are not prohibited by law or against public policy, the question arises whether or not such bonds were based on a valuable consideration.

In the McDiarmid case there was no issue of want of consideration made by the pleadings, and the record disclosed that the city of Dayton, the obligee, paid to the surety, The Maryland Casualty Company, the sum of $3.00, and this was assumed by the court to constitute a valid consideration.

In the instance herein, there was not, and could not be, any payment made by the State or any board representing it to the sureties, as premium or consideration. Hence, it is difficult to see where these bonds could be upheld on the theory of being voluntary or common law bonds. The Supreme Court approved the law as stated in the syllabus of the case of *Ashmuhs* v. *Bowyer,* 39 Okla., 376, 135 P., 413, 50 L. R. A. (N. S.), 1060, decided by the Supreme Court of Oklahoma. The syllabus of such case reads:

> "A bond, voluntarily given by a district court clerk prior to the passage of the Act of March 19, 1910 (Laws 1919, c. 69), naming the state of Oklahoma as obligee, conditioned for the faithful performance of his official acts, and for the accounting and paying over of all moneys by him received as such officer, is a valid and binding obligation, though not required to be given by statute, *where supported by a valid consideration.*" (Italics the writer's.)

This is the weight of authority in this country. The principle is stated in 9 C. J. 29, Section 45, "Bonds", as follows:

> "3. Voluntary Bonds. A bond, whether required by statute or order of court or not, is good at common law if it is entered into voluntarily by competent parties *for a valid consideration,* and is not repugnant to the letter or policy of the law; and such a bond, other than an official bond, is enforceable according to its conditions, although they are more onerous than would have

been required if a statutory bond had been given for the same purpose. This rule has been applied to bonds given to the United States." (Italics mine.)

In the recent case of *Town of Merton* v. *Hansen, et al.,* 200 Wisc., 576, 229 N. W., 53, decided by the Supreme Court of Wisconsin on February 4, 1930, the facts showed that a town board required a bond of one Hansen as a condition of obtaining a permit to traffic in non-intoxicating liquors and beverages. The facts showed that there was no statutory requirement for the giving of such a bond. The defendant Hansen breached the conditions of such bond and action was brought by the town of Merton to recover the penalty of the bond. The Supreme Court of Wisconsin held that the demurrer of the defendant surety to the complaint should have been sustained, thus concluding that there being no statutory authority for such bond, and no consideration therefor, such was void. The first paragraph of the syllabus reads:

"1. In an action to recover the penalty of a bond exacted by a town as a condition of granting a license under the provisions of Sec. 165.31, Stats. 1927, to sell non-intoxicating beverages, brought by the town against the licensee and his surety on the ground that the licensee had breached the conditions of the bond that he would conform to the laws of the state and to the rules and ordinances of the town, the surety's demurrer to the complaint should have been sustained, as the bond was without consideration and void, since the statute did not authorize the town board to require such a bond, and neither the licensee nor the surety is estopped from denying liability thereon."

At page 579 of the opinion the court stated:

"We conclude from an examination of the whole prohibition act, and considering its general purpose, that the legislature did not intend that the town should require a bond of an applicant for license to traffic in non-intoxicating beverages.

The bond, therefore, was wrongfully exacted from the licensee, without consideration, and was void. Comm. v. Ledforth, 129 Ky. 190, 110 S. W. 889; State v. Heisey, 56 Iowa 404, 9 N. W. 327; Hoeg v. Pine, 143 Iowa 243, 121 N. W. 1019; Dudley v. Rice, 119 Wis. 97, 95 N. W. 936. Nor is the bond valid at common law. Aucoin v. Guillot, 10 La. Ann. 124, and cases cited supra. The licensee obtained no benefits by giving the bond. He was entitled to the license without such bond. Neither he nor his surety is estopped from denying liability thereon. People v. Federal Surety Co., 336 Ill. 472, 168 N. E. 401."

Some of the cases cited by the court in its opinion involved facts similar to those of the McDiarmid case, that is, bonds were given by officers to guarantee their official acts where no statute authorized such an official bond. The courts held there was no consideration to support such bonds. The citing of this type of cases involving official bonds, showed that the court considered the same principles of law applied to a bond of the nature herein, i. e., a bond to accompany a permit or license.

The case of Commonwealth v. Ledforth, 129 Ky., 190, 110 S. W., 889, cited by the Wisconsin Supreme Court, involved a bond given to guarantee a license for a merchant liquor dealer to conduct a retail business. In such case, it appeared that there was no statutory authority for such bond. The court held as disclosed by the first and third paragraphs of the syllabus:

> "1. Under Ky. St. 1903, Section 4224, authorizing county courts alone to grant merchants licenses to retail liquors, and prescribing the procedure for procuring such licenses, the county court has little discretion whether a license shall be granted to an applicant of good character, who keeps an orderly house, has complied with the statutory requirements as to posting notices of his application, and against the granting of a license to whom the majority of the voters of the neighborhood have not protested, and the county court is not authorized to exact a bond for the faithful observance by the applicant of the law with respect to the conduct of his business, in the absence of a statutory provision authorizing the taking of such bond.
>
> 3. A bond required by the county court of a merchant liquor dealer, which bond the county court had no authority to take, was not a voluntary bond so as to make it good as a common-law bond upon which an action could be maintained for its breach."

At page 192 of the opinion, the court stated:

> "And as bond is expressly required of tavern keepers, but not of merchants, the county court was without authority to exact or to receive such bonds of the latter. They are without consideration besides. It amounts to this: A is concededly entitled to have a certain license granted to him upon his paying the fees; but in addition he is required to execute a covenant not to violate the law. The requiring the covenant was as much unauthorized as if, in addition to the toll legally exactable by a ferryman, he should also require a bond of the traveler to keep the peace. In neither event is it a voluntary bond. And not being such, it is not good as a common-law bond. Perry v. Hensley, 14 B. Mon. 474, 61 Am. Dec. 164."

It should be stated that Section 6064-18, has again been amended since its amendment in Substitute Senate Bill No. 2, namely, in House Bill No. 583, passed by the 91st General Assembly at its first special session on December 19, 1935, and approved by the Governor on December 23, 1935. In this amendment the only change made was the broadening of the conditions for which permit bonds shall be given. The portion of the statute, namely, the first sentence thereof not requiring a bond of class C-1, class C-2 and class D-1 permit applicants, however, was not changed, and therefore the amendment has no application in so far as your question is concerned.

In view of the foregoing, I am of the opinion that the bonds involved in your communication, not being based on a valuable consideration, were not good voluntary and common law bonds, and hence are not enforcible legal obligations. Such being the case, it follows that your commission, having such bonds on file in your office, should return them to the obligors giving such bonds.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5132.

PUBLIC FUNDS—TOWNSHIPS AND VILLAGES UNAUTHORIZED TO PURCHASE BURGLARY OR ROBBERY INSURANCE TO PROTECT SECURITIES, ETC.—O. A. G. 1938, VOL. 3, P. 1933, DISCUSSED AND FOLLOWED.

SYLLABUS:

Townships and villages are unauthorized to expend public funds for burglary or robbery insurance to protect securities hypothecated to a township or village by a bank to guarantee deposits of public funds. Opinions of the Attorney General for 1928, Volume 3, p. 1933, discussed and followed.

COLUMBUS, OHIO, February 1, 1936.

HON. RUSSELL V. MAXWELL, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion which reads as follows:

> "Several inquiries have come to this office from the township trustees and village officials relative to the insuring of securities hypothecated to a village or township by a bank to guarantee deposit of public funds.