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TRUST COMPANY, INCORPORATED—DEPOSITED FUNDS WITH TREASURER OF STATE—REQUIRED TO GIVE BOND BEFORE QUALIFIED TO ACT AS A FIDUCIARY WHERE APPOINTMENT MADE AND LETTERS ISSUED BY PROBATE COURT—SECTIONS 710-161, 10506-4, G. C.

SYLLABUS:

An incorporated trust company which has deposited funds with the Treasurer of State as provided by law is required, notwithstanding the provisions of Section 710-161, General Code, to give a bond by reason of the provisions of Section 10506-4, General Code, before being qualified to act as a fiduciary where its appointment is made and letters are issued by the probate court.

Columbus, Ohio, December 19, 1945

Hon. D. Deane McLaughlin, Prosecuting Attorney
Canton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The opinion of your office is requested as to whether an incorporated trust company, which has deposited funds with the Treasurer of State as provided by law, is nevertheless required under the Probate Code to file a bond for the faithful discharge of its duties.

This question arises because of an apparent conflict between

Section 710-161, General Code, of Ohio and Section 10506-4 of the General Code.

It will be seen that under Section 710-161 it is specifically provided that no bond shall be required unless the court upon proper application shall so require. On the other hand, Section 10506-4 would seem to be a mandatory requirement applicable to all fiduciaries.

It is further to be noted that prior to September 2, 1935, Section 10506-4 commenced with the phrase—'unless otherwise provided by law.' Furthermore, it was stated by the probate code committee of the Ohio State Bar Association that the phrase referred to above, to-wit: 'Unless otherwise provided by law' was stricken out by the amendatory legislation, making it thereafter necessary for qualified trust companies to file a separate fiduciary bond."

Section 710-161, General Code, as it now exists, was enacted by the Legislature in 1919 (See Volume 108 Ohio Laws, Part I, page 121) and provides as follows:

"The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, and the fund deposited with the treasurer of state as provided by law shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust, and no bond or other security, except as hereinafter provided, shall be required from any such trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, assignee, or depositary; except that the court or officer making such appointment may, upon proper application, require any trust company which shall have been so appointed to give such security for the faithful performance of its duties as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such trust company and revoke such appointment."

In construing the exception mentioned in the preceding section, it was held by a former Attorney General (See 1920 Opinions of the Attorney General, Volume I, Page 210) that:

"A court or other authority appointing a domestic trust company to any of the fiduciary positions mentioned in section 710-161, G. C., may not, in the first instance, require the giving of a specific bond or other security for the performance of the duties of the position; but after appointment, upon application in writing

made by any person interested in the trust estate at any time, such additional security may be required by the court or officer.”

Section 10506-4, General Code, as effective January 1, 1932, provided as follows :

“Unless otherwise provided by law, or by the instrument creating the trust, every fiduciary shall, prior to the issuance of his letters file in the probate court in which the letters are to be issued, a bond with penal sum in such amount as may be fixed by the court, but in no event less than double the probable value of the personal estate, and of the annual real estate rentals which will come into his hands as such fiduciary, except that the penal sum of the bond of a guardian of the person only shall be double the probable expenditures to be made by such guardian for the ward during one year. Said bond shall be in such form as the court shall approve, shall be signed by such sureties as are required by law and approved by the court, shall be conditioned that the fiduciary will faithfully and honestly discharge the duties devolving upon him as such fiduciary, and shall be conditioned further as may be provided by law.”

Until September 2, 1935, the two above quoted sections were not in conflict and the provision “unless otherwise provided by law” found in Section 10506-4, indicated that that section was not to apply to those trust companies mentioned in Section 710-161. On September 2, 1935, Section 10506-4, being a part of the Probate Code, was amended and the provision “except as otherwise provided by law” was deleted therefrom. The section now reads, in so far as pertinent to your question, as follows :

“Every fiduciary shall, prior to the issuance of his letters, file in the probate court in which the letters are to be issued, a bond with penal sum in such amount as may be fixed by the court, * * *.”

The comment by the Probate Code Committee of the Ohio State Bar Association with reference to the amendment to Section 10506-4 is reported as follows :

“Developments in the liquidation of some trust companies indicate that they should have been required to give separate bonds in every case ; hence the striking out of the words ‘unless otherwise provided by law, * * * ’”

It would seem quite evident from the above comment that the intent

of the committee was to require bonds from all fiduciaries, including trust companies appointed in the probate court and that intent was adopted by the Legislature in enacting the above amendment.

In Diebel's Probate Law, 3rd Edition, there is to be found a comment by the writer under this section as follows:

"It is submitted that the present form of this section requires trust companies to give bonds notwithstanding General Code Section 710-161."

It is evident from a reading of the above two quoted sections that they are now in conflict as to the requirement of a bond by a trust company before being qualified to act as a fiduciary appointed by the probate court; Section 710-161 requiring no bond from such trust company in any instance irrespective as to whether the appointment is made through the probate court or otherwise, while Section 10506-4 requires bonds from all fiduciaries including trust companies appointed by the probate court. It being apparent that in this respect these two sections can not now be reconciled, the question remaining is which of the two sections controls.

Section 710-161, General Code, was enacted prior to Section 10506-4, General Code, and is general in its terms in that it requires no bond from a trust company in respect to any trust and also when appointed executor, administrator, guardian, trustee, receiver, assignee or depositary, which includes appointments other than those made by the probate court, while Section 10506-4 is special in nature in that it requires bonds of all fiduciaries appointed through the probate court only. It seems to be well settled that a special law, particularly where the special law is a later enactment, repeals by implication an earlier general law to the extent of an irreconcilable conflict between their provisions (See 37 O. Jur., Statutes, Sections 135, 148 and 151). It therefore follows that inasmuch as Section 10506-4 of the General Code requires bonds from all fiduciaries appointed by the probate court that this section in that respect repeals the inconsistent provision of Section 710-161 which requires no bond from a trust company to act as a fiduciary even though appointed by the probate court.

In specific answer to your question, I am of the opinion that an incorporated trust company which has deposited funds with the Treasurer of State as provided by law is required, notwithstanding the provisions

of Section 710-161, General Code, to give a bond by reason of the provisions of Section 10506-4, General Code, before being qualified to act as a fiduciary where its appointment is made and letters are issued by the probate court.

Respectfully,

HUGH S. JENKINS

Attorney General