

See also *State vs. Cincinnati*, 52 O. S. 419, 445; *State ex rel. vs. Bause*, 84 O. S. 207, 217; *State ex rel. Durr, Aud., vs. Spiegel*, 91 O. S. 13; *State ex rel. vs. Fulton*, 99 O. S. 168, 177.

Another familiar rule of statutory construction that may be applied in the instant case, in my opinion, is stated in *Corpus Juris*, Vol. 59, page 959, as follows:

“Where a statute that has been construed by the courts has been re-enacted in the same or substantially the same terms, the legislature is presumed to have been familiar with its construction and to have adopted it as a part of the law, unless it expressly provides for a different construction.”

This rule has been repeatedly referred to and applied by the courts of Ohio. Among the cases in which the rule has been applied may be mentioned the case of *Spitzer vs. Stallings*, 109 O. S. 297; *Henry vs. Barberton*, 12 O. N. P. (N. S.) 364.

While it will not be contended that an opinion of the Attorney General has the force of a court decision, the fact can not be overlooked that the legislature, in the enactment of Sections 7605 and 7607, General Code, in 1933, had actual knowledge of the manner in which these sections had formerly been construed and applied by the Attorney General and by school administrative officers and banks. The necessity was not felt, and perhaps not thought of, for any change in the language of the statute other than to accomplish the purposes which the actual change indicated.

I am therefore of the opinion, in view of the familiar and universally accepted rules of statutory construction referred to above, that the proper construction of these statutes as they now exist, is that depository banks may secure the deposits of boards of education either by the giving of a bond or by the hypothecation of the securities enumerated by the statutes.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

2210.

BOND OF CHIEF ACCOUNTANT OF HIGHWAY DEPARTMENT MUST BE CONDITIONED UPON FAITHFUL DISCHARGE OF DUTIES OF POSITION—FORM OF BOND SUBMITTED DISCUSSED AND DISAPPROVED.

*SYLLABUS:*

1. *A statutory bond given to the State of Ohio on which the chief accountant of the department of highways is principal, must be conditioned upon the faithful discharge of the duties of his position.*
2. *Form of bond submitted by a surety upon which the chief accountant of the department of highways is principal, discussed and disapproved.*

COLUMBUS, OHIO, January 24, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a bond, upon which Edward

F. Baker is principal and the United States Casualty Company is surety, which bond purports to bind said surety to cover such pecuniary loss not exceeding ten thousand dollars as the State of Ohio may sustain of money or other personal property (including that for which the State of Ohio is responsible), by any act or acts of larceny or embezzlement on the part of the employe, Edward F. Baker, directly or through connivance with others, while in any position or at any location in the employ of the employer, the State of Ohio.

It is noted from your communication that the position of Edward F. Baker is "Chief Accountant, Department of Highways." This identification of the position, however, does not appear in the bond.

Undoubtedly, the authority for the Director of Highways to employ a "chief accountant" comes from the provisions of section 1182-2, General Code, which provides:

"The director (of highways) may appoint additional clerks and stenographers, and such other engineers, inspectors and *other employes* within the limits of the appropriation as he may deem necessary to fully carry out the provisions of this act; \* \* \*" (Italics the writer's.)

The foregoing section was passed in 112 O. L. 435, as section 10 of an act beginning at page 430, and ending at page 501. Section 1182-3, General Code, provides, so far as pertinent here:

"Each employe or appointee under the provisions of this act (112 O. L. 430-501) in cases other than where the amount of the bond is herein fixed, may be required to give bond in such sum as the director may determine. All bonds hereinbefore provided for *shall be conditioned upon the faithful discharge of the duties of their respective positions*, and such bonds, \* \* \* shall be approved as to the sufficiency of the sureties by the director (of highways), and as to legality and form by the attorney general \* \* \*."

(Italics and matter in parenthesis the writer's.)

This foregoing section was section 11 of the act of the General Assembly (112 O. L. 430-501) and immediately followed section 1182-2, General Code (section 10 of such act), so that its provisions are referable to said section 1182-2, General Code. In other words, the bond covering the position of chief accountant of the highway department must be conditioned upon "the faithful discharge of the duties of his position."

A reference to the bond form submitted shows that such bond covers losses arising only through acts of *larceny* and *embezzlement*. It is apparent that the condition—"faithful discharge of the duties" is very much broader than the condition of the bond form submitted.

In Opinions of the Attorney General for 1929, volume II, page 888, may be found an opinion in which the then Attorney General had under consideration a building and loan association bond covering losses on account of its officers and employes. Said bond covered losses through (1) any dishonest act, (2) robbery, (3) burglary, (4) larceny, (5) theft, (6) hold-up, or (7) destruction of property.

The then Attorney General, after quoting section 9670, General Code, which, among other things, provided that "the bond shall guarantee the faithful per-

formance of the duties" on the part of said officers and employes, stated at page 890:

"Among other things, the statute requires that the bond shall guarantee the faithful performance of duty on the part of officers and employes of a building and loan association. This, in my opinion, requires a guarantee of something more than is guaranteed under the terms of the contract of indemnity submitted herewith.

Losses sustained by reason of a bank employe's failure faithfully to perform his duties include losses occasioned by reason of negligence or carelessness of the employe or officer, such as the improper doing of any act within the scope of his duties, or a failure to use in the performance of any of those duties that degree of care, skill and diligence which the circumstances of the case reasonably demand, by reason whereof some one is injured."

The above reasoning of the foregoing opinion was followed and approved by the same Attorney General in a later opinion, reported in Opinions of the Attorney General for 1930, volume II, pages 1163, 1165 and 1166.

It would consequently seem that the condition of the bond form submitted does not meet the condition provided for by section 1182-3, General Code, and thus prevents me from approving the present bond.

There is another objection to the bond form submitted which I think advisable to point out at this time. Section 11226, General Code, provides as follows:

"An action on the official bond, or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued."

If the bond under consideration were executed in accordance with section 1182-3, General Code, it would undoubtedly be a "bond or undertaking given in pursuance of statute" within the meaning of section 11226, General Code, and actions might be brought thereon within ten years after the cause of action accrued.

The limitation of actions for the recovery of losses under the form of bond submitted is fixed by contract and such limitation is less liberal than section 11226, General Code. Section 2 of the bond form submitted reads:

"That claim, if any, be submitted by the Employer in writing, showing the items and the dates of the losses, and be delivered to the Surety at its home office within three months after such discovery, and that the Surety shall have two months after claim has been presented in which to verify and to make payment. In the meantime no suit, action or proceeding shall be brought against the Surety by the Employer, nor after the expiration of twelve months after the delivery of such statement of claim. If such limit of twelve months be prohibited under the law of the place governing the construction hereof, then the limit shall be the shortest period permitted by such law. In any suit, action or proceeding the Employe shall, if with reasonable diligence he can be found within

the jurisdiction, be made a party to the suit and served with process therein."

In an opinion of the Attorney General, reported in Opinions of the Attorney General for 1930, volume II, page 1163, the then Attorney General had under consideration a similar clause, to section 2 of the bond form under consideration, appearing in a building and loan association bond. After quoting the provisions of section 11226, General Code, and the clause in the building and loan association bond, the opinion states:

"The above provision of the contract does not, in my opinion, afford to persons who suffer loss on account of a failure of the officers or employes of a building and loan association to faithfully perform their duties, the protection which the law contemplates with respect to the time of bringing actions for the recovery of such loss if bonds had been given by the officers and employes strictly in accordance with the statute.

\* \* \*

The last sentence of the quotation from the contract above wherein it is provided that if any limitation embodied in the bond is prohibited by any law, such limitation should be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law, does not, in my opinion, suffice to cure the discrepancy between the terms of the contract and what the law required. This subject was discussed in my former opinion (Opinions of Attorney General for 1929, Vol. II, Page 888), to which your attention is directed."

In view of the above authorities, I am forced to return the bond form, together with all papers connected therewith, without my approval endorsed thereon.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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2211.

APPROVAL, BONDS OF CITY OF SHAKER HEIGHTS, CUYAHOGA COUNTY, OHIO—\$4,500.00.

COLUMBUS, OHIO, January 24, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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2212.

APPROVAL, BONDS OF CITY OF SHAKER HEIGHTS, CUYAHOGA COUNTY, OHIO—\$2,867.00.

COLUMBUS, OHIO, January 24, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*