2900.

COUNTY TREASURER—PREMIUM ON BOND—HOW PAYABLE.

SYLLABUS:

When the county treasurer gives an official bond signed by a duly licensed surety company, the county commissioners are authorized to pay the premium therefor out of the general funds of the county.

COLUMBUS, OHIO, November 20, 1928.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion as follows:

"For a number of years past Athens County has paid the premiums on its county treasurer's official bond. These bonds have been given by bonding or surety companies as surety. Premiums are now due covering the ensuing year.

QUERY: Are the county commissioners authorized to pay such premium out of the general fund of Athens County, Ohio, under the provisions of Sections 2633 or 9573-1, General Code of Ohio, and should you hold that such authority does not exist under the provisions of the last two named sections, is there any authority in law either statutory or otherwise, whereby the county may pay the premium on such bond or bonds.

I may suggest that which you already know, that Judge Darby of the Common Pleas Court of Hamilton County, Ohio, under date of March 8, 1928, in the case of *Dudley M. Outcalt* vs. *Henry Urner, Auditor,* reported among other places in the May 7, 1928 issue of The Ohio Law Bulletin and Reporter, held that Section 9573-1 was unconstitutional. On September 4, 1928, I wrote the Clerk of Courts of Hamilton County, Ohio, inquiring as to the further history of this case. Under date of September 5th, Joseph Borntraeger, Deputy Clerk, Cincinnati, Ohio, replied as follows:

'Replying to the above, we beg to advise that the case is still open as the defendant was given five days in which to answer.

The answer was filed on March 23rd, 1928, and no further entries appear of record.'

Assuming that the reasoning adopted by Judge Darby to be sound, I am wondering whether or not Section 2633 of the Code might likewise fall."

The only sections authorizing payment of bond premiums from the public treasury are the sections mentioned in your communication.

Section 2633 of the General Code relates solely to the bond of county treasurer and is as follows:

"Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more freehold sureties approved by the commissioners and conditioned for the payment, according to law, of all moneys which come into his hands, for state, county, township or other purposes. *If bond with bonding or surety companies as surety, be given, the expense or premium for such bond shall be paid by the commissioners and charged to the general fund of the county.*

Such bond, with the oath of office and the approval of the commissioners endorsed thereon, shall be deposited with the auditor of the county and by him carefully preserved in his office. Such bond shall be entered in full on the record of the proceedings of the commissioners, on the day when accepted and approved by them." (Italics the writer's.)

It will be noted that this section provides that if the treasurer gives a bond signed by a bonding or surety company, the expense or premium of such bond shall be paid by the county commissioners from the general fund.

Section 9573-1, of the General Code is as follows:

"The premium of any duly licensed surety company on the bond of any public officer, deputy or employe shall be allowed and paid by the state, county, township, municipality or other subdivision or board of education of which such person so giving such bond is such officer, deputy or employe."

This section relates to all officers and public employees, who are required to give a bond, and provides that the premium of such bond, if it is owing to a duly licensed surety company, shall be paid from the treasury of the subdivision for which such officer or employe is performing service.

The language of these sections is similar and if one section is invalid the other must also be invalid.

You have referred to the opinion in the case of *Outcalt* vs. *Urner, Auditor,* reported in The Ohio Law Bulletin and Reporter of May 7, 1928, Volume 27, N. P. (N. S.) 93. The headnotes of that case are as follows:

"1. General Code, Section 9753-1, providing for the payment of premiums on surety bonds of public officials out of the funds of the political subdivision served by such official, in cases where the surety is a duly licensed surety company, is unconstitutional as of unequal operation and discriminatory between private sureties and surety companies.

2. Where an office holder is under obligation to give bond, the payment by the state of the premiums on such bond would constitute a misapplication of public funds."

Relative to the second paragraph of the headnotes, the court on page 95 said:

"It seems that the section of the Code in question would necessarily fall within the reasoning of the Lucas county case, in that, if the office holder is under obligation to give bond to the state or other public subdivision, that to require the state to pay the expenses of the bond would be such unlawful application of public funds."

I cannot subscribe fully to the reasoning of the court in that connection. Many officers and employes of the state and public are required in connection with the performance of their duties to travel and incur expense in connection therewith. In many instances the law provides that such officer or employe shall be reimbursed from the public treasury for such expenses so incurred. Such provision includes the traveling expenses of the Common Pleas judges while holding court in another county than that from which said judge was elected. I do not believe that it is debatable that such provisions are constitutional and valid and the payment of said expenses is a proper expenditure from public funds.

The same reasoning is applicable to the expenses incurred in connection with giving of the bond. If a bond be required of an officer or employe, who is in the public service, such bond is for the protection of the public and not for the benefit of the individual officer or employe or for the benefit of bonding companies.

As to discriminating against individuals, who might sign surety bonds, the court cited the cases of *State* vs. *Robins,* 71 O. S. 273 and *Andrews* vs. *State ex rel.,* 104 O. S. 385, and stated as follows:

> "The unequal operation of this law, or its discriminatory character, is disclosed when it is considered that a particular individual might not be able to procure a surety bond, but be forced to make bond with individuals as surety; in such a situation he would be under obligation to pay out of his own pocket any premium that the surety might require, whereas in case of the surety company bonds, the individual would be under no obligation to pay the premium, but it would be paid by the state or some subdivision of the state."

Your communication states in substance that in the case of *Outcalt* vs. *Urner,* the opinion was rendered in connection with the court's decision on a demurrer to the petition; that an answer was later filed and that no final judgment has been rendered in the Common Pleas Court. I am informed, however, that final judgment was later rendered and that the cause is now pending on error in the Court of Appeals of Hamilton County. There has been, therefore, no final adjudication in this particular case upon the question, and the presumption as to the validity of the statute still prevails. And in this connection it may be observed that administrative officers should observe the provisions of the statute in question unless and until a final determination of the question is had and the statute here involved declared to be unconstitutional and invalid.

The Robins case, to which the court refers, was a case in which the court had before it for consideration an act providing that the execution of all bonds for the faithful performance of official or fiduciary duties, or the faithful keeping, applying or accounting for funds or property, or for one or more of such purposes, with certain exceptions, was required to be by a surety company or companies in case the amount of said bonds exceeded two thousand dollars. It also required that the premium of said bond when given by an administrator, guardian, trustee or other fiduciary should be paid by the estate or trust, and that such bond given by a public officer should be paid from public funds. The court in considering said section referred to Article I, Section 1 of the Constitution of Ohio, which reads as follows:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

In that connection the court held that:

> "Liberty to contract is one of the inalienable rights of man which is guaranteed to every citizen * * * subject only to such restrictions as clearly appear to be for the general welfare."

The court further stated that the mere fact that the General Assembly had enacted a law which narrows the liberty of contracts was not decisive but stated that:

"It is the province of the courts to determine whether a given statute infringes the constitution, which is the supreme law; and therefore it is within the province of the courts to decide whether the common welfare demands a restriction of the right of individuals to contract freely for their own benefit or convenience."

The court also pointed out that the provisions relating to the state and its subdivisions were interwoven with the provisions relating to individuals, so that if one part of it was unconstitutional the entire statute must fail. In applying the constitutional provisions quoted to the statute before it for consideration the court held that said section did unreasonably restrict the right of the individuals to contract in this, that in private matters it prevented the person, who was required to give bond, from freely contracting and prevented the person accepting the bond from exercising full discretion, and also required premiums for bonds to be charges on private funds unnecessarily in many instances, which was taking of property without due process of law. In other words, the section considered prevented the person, who was required to give bond, from contracting with a private individual even though he could procure a bond, satisfactory to the person who must approve it, without cost or upon any other terms, the section also preventing the person, who must approve a bond, from accepting a private bond no matter how satisfactory such bond would be.

In the case of *State* vs. *Robins,* supra, the Supreme Court held the act invalid on the sole ground that it compelled a surety company bond, Judge Davis saying at page 294:

" * * *

The issue raised here is whether the General Assembly may make security by security companies exclusive and compulsory. It is not whether corporations may be authorized to secure bonds, nor whether the person giving bond may at his option give a bond signed either by personal securities or by security companies.

* * * "

We have no such provision in connection with the sections of the Code considered in this opinion. Neither section prevents the employee or officer from giving a private bond or entering into a contract for that purpose. Nor do the sections prevent an appointing officer or person, who must approve a public bond, from accepting a bond signed by a private individual if the same be satisfactory. I am inclined to believe that the court in the Outcalt case misapplied the reasoning of the court in the Robins case. The court in the Robins case stated:

"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, as his own interest or convenience might suggest. The right of choice between the classes of sureties is now denied him. It is now made compulsory upon him to give bond signed by surety companies, and personal security is in effect abolished."

This reasoning of the court could not apply in any respect to the sections before us for consideration. As pointed out by the court in the Robins case, that section prohibited personal bonds, in cases in which the bond exceeded two thousand dollars, and the court said there was no good reason for so doing. It is true that the court in the Robins case stated in respect to the payment of the premium out of the public fund that:

"The effect of the latter provision is to require the state, county, township or municipality to pay to the enrichment of the security companies, each year, vastly more than it would lose by defaulting public officials; and it thus becomes evident that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result perhaps in no official bond in any case."

I do not believe that this objection could be fatal to the sections in question because that to which the court referred is a matter of legislative determination. Bonds are required of public officials and employees for the protection of the public and it is within the sound discretion of the Legislature to provide for such. The bond is for the protection of the public and not for the protection of the officer or employee and the premium incident to the giving of the bond is an incidental expense to the office or position.

The court in the Outcalt case also called attention to the fact that the Supreme Court in the Andrews case, supra, stated:

"Again, the Legislature in this enactment discriminates against individuals and in favor of surety companies."

It is true that this language is found in said opinion but the decision of the court was not based upon said statement. The court had before it for consideration in that case the bond commissioner act, passed in 109 O. L. 83, applying to counties of the state having twelve Common Pleas judges, which applied only to Cuyahoga County.

In passing upon said act, the court laid down the following rule in the syllabus:

"1. An act of the General Assembly providing for the appointment of a bonding commissioner by the chief justice or the presiding judge of the Court of Common Pleas, and the fixing of the salary by such judge, is a law of a general nature, dealing with bonds generally in criminal cases, their supervision, inspection, and recording; and, being such a law, the Constitution of Ohio, especially Section 26, Article II, requires that it shall have uniform operation throughout the state.

2. Such an act limited only to Cuyahoga County is unconstitutional."

The entire discussion is upon the principal of law stated in the syllabus, save and except the language relative to discrimination herein above quoted. I can not, however, find any unconstitutional discrimination in the sections before me for consideration. Said sections permit any employee or officer who is required to give a bond to furnish such bond given by a bonding company or a private individual or individuals. The person, who is required to approve said bond, may approve a bond given either by a bonding company or individual. The provisions of the statute are that if the bond is one given by a duly licensed surety company the premium thereof may be paid from the public treasury.

While such provisions might encourage persons required to give bond to furnish a bond given by a bonding company duly licensed in this state, because the premium therefor would be paid from the public treasury, the Legislature in so encouraging such dealing was acting within its constitutional rights, if it were of the opinion that the interests of the public were best protected by encouraging such bonds. It could not be said that this is arbitrary or beyond its constitutional grant of power. This is especially true because bonding companies licensed in the State of Ohio are regulated and supervised by the Superintendent of Insurance and the obvious purpose is to encourage the giving of bonds by sureties regulated and duly licensed by the State

of Ohio. The Legislature has in effect stated that the bond of a properly regulated licensee is to be preferred by placing such bonds in a separate classification and authorizing the payment of the premiums on such bonds from public funds.

It is to be observed that this does not necessarily mean that a private individual can not in any event have the premium of a bond on which he is surety paid from the public funds.

Section 670 of the General Code is as follows:

> "The provisions herein relating to the Superintendent of Insurance shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance."

This section and Section 665, General Code, which reads:

> "No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

were originally contained in Section 289, of the Revised Statutes, which was divided by the Codifying Commission, certain changes being made in the phraseology. Section 289, Revised Statutes, read in part as follows:

> "The provisions of this chapter shall apply to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance; and it is unlawful for any company, corporation, or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, or to engage in the business of guaranteeing against liability, loss or damage, unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating the same and applicable thereto have been complied with; * * * "

The purport of the language of Section 270, supra, is doubtful but there is at least an indication that an individual may engage in the insurance business in this state provided he qualifies in all respects and is properly licensed.

In the case of *Renschler* vs. *State,* 90 O. S. 363, the court, on page 366, said as follows:

> "Even if individuals, acting as purely natural persons, can carry on the business of insurance and exercise the functions of such, they must comply with all of the laws of Ohio on the subject of life insurance, Section 670, General Code, reading:
>
> 'The provisions herein relating to the Superintendent of Insurance, shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance.'

It may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual. See *Robbins* vs. *Hennessey et al.*, 86 Ohio St., 181; *State, ex rel.*, vs. *Ackerman et al.*, 51 Ohio St., 163. But if it be granted that Section 670, General Code, above quoted, would authorize the issuing of such a franchise to an individual, such individual would be bound by all the restrictions and requirements of an incorporated company."

Similarly, in the case of *Thornton* vs. *Duffy*, 20 N. P. (N. S.) it was stated on page 524:

"It is the contention of plaintiff that since the Legislature has repealed all regulations as to such indemnity insurance, that in the absence of laws requiring incorporation for the transaction of the business of insurance, that individuals are unrestrained in making insurance contracts with other individuals, and engaging in the business of insurance. This is because, as claimed, that the right to make insurance is an inalienable right protected by the Constitution; that the Legislature can not prohibit insurance, but may regulate it. It is the claim, in brief, that plaintiff, being an individual, can not be restrained by legislation from making indemnity insurance contracts.

I think it is not necessary to dwell at any length on this question. The Supreme Court has held in *Renschler* vs. *State*, 90 O. S. 366, that an insurance contract by an individual is subject to regulation by the insurance department; that even if individuals, acting as natural persons, can carry on the business of insurance, and exercise the functions of such, they must comply with all the laws of Ohio on the subject of life insurance; that it may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual."

I feel that the term "duly licensed surety company" as used in Section 9573-1, supra, is not restricted to corporations, but that it covers any lincensees, whether such license be a corporation, association or individual. Accordingly, the only distinction or discrimination made is between licensees and those not licensed, and this I believe the Legislature may constitutionally do.

For the above mentioned reasons, it is my opinion that when the county treasurer gives an official bond signed by a duly licensed surety company, the county commissioners are authorized to pay the premium therefor out of the general funds of the county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2901.

APPROVAL, BONDS OF MORROW COUNTY—$28,043.70

COLUMBUS, OHIO, November 21, 1928.

Industrial Commission of Ohio, Columbus, Ohio.