

579.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
CUYAHOGA COUNTY.

COLUMBUS, OHIO, June 29, 1929..

HON. ROBERT N. WAID, Director of Highways, Columbus, Ohio.

580.

APPROVAL, BONDS OF VILLAGE OF OAKWOOD, MONTGOMERY
COUNTY, OHIO—\$17,145.49.

COLUMBUS, OHIO, June 29, 1929..

Industrial Commission of Ohio, Columbus, Ohio.

581.

APPROVAL, BONDS OF MONFORT HEIGHTS RURAL SCHOOL DIS-
TRICT, HAMILTON COUNTY, OHIO—\$50,000.00.

COLUMBUS, OHIO, June 29, 1929..

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

582.

SURETY BOND—PROPOSED BUILDING AND LOAN BLANKET BOND
DISAPPROVED—POWER OF SUPERINTENDENT TO PRESCRIBE
OMNIBUS FORM OF INDEMNITY CONTRACT.*SYLLABUS:*

1. *Proposed building and loan blanket bond, standard form No. 16, of the American Surety Company of New York, does not comply with the requirements of Section 9670, General Code, and the prescribing of that form of bond by the Superintendent of Building and Loan Associations, for the purposes contemplated by Section 9670, General Code, is therefore disapproved.*

2. *By virtue of the authority vested in the Superintendent of Building and Loan Associations to prescribe the form of bond to be given in compliance with Section 9670, General Code, that official may lawfully prescribe an omnibus form of a contract of indemnity, covering the officers and employes of a building and loan association and fully securing the directors, depositors and patrons of the building and loan association against all the contingencies which the statute prescribes shall be guaranteed against by the officers and employes of the association by the giving of a bond, even though it is not contemplated that the officers and employes covered by the indemnity contract join in its execution.*

COLUMBUS, OHIO, July 1, 1929.

HON. JOHN W. PRUGH, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion as to the availability of certain forms of surety bonds for use in bonding officers and employes of building and loan associations, under the provisions of Section 9670, General Code.

With your communication is enclosed a form of contract between the American Surety Company of New York and a building and loan association, purporting to be a contract of indemnity securing the building and loan association against losses that may accrue on account of certain acts of its officers or employers.

My reply will necessarily be confined to a consideration of the form of contract submitted.

This contract is an "omnibus" bond covering some, and perhaps all of the employes and officers of a building and loan association. It is designated as "Building and Loan Blanket Bond, Standard Form No. 16," and purports to be a contract between the American Surety Company and a building and loan association. Section 1 thereof reads in part as follows:

"Section 1. The American Surety Company of New York, a corporation of the State of New York, with its home office in the city of New York, New York, hereinafter called the Underwriter, in consideration of an annual premium agrees to indemnify * * * hereinafter called the Insured, against the direct loss, sustained while this bond is in force and discovered, as hereinafter provided, of any money or securities, or both, as defined in Section 5 hereof, in which the Insured has a pecuniary interest, or held by the Insured as collateral, or as bailee, trustee or agent, and whether or not the Insured is liable therefor 'such money and securities being hereinafter called Property,' in an amount not exceeding _____ Dollars (\$ _____), as follows:"

Here follows an enumeration of the specific acts and situations against which the surety company, by the terms of the bond, protects the building and loan associations. These, in substance, are indemnification against direct loss sustained during the time the bond is in force, in a sum not exceeding the amount specified, arising through any dishonest act, wherever committed, of any of the employes of the insured, whether acting alone or in collusion with others, or through robbery, burglary, larceny, theft, hold-up, or destruction of the property of the building and loan association, while such property is actually within any of the offices of the building and loan association covered under the terms of the contract, or is actually within any recognized place of safe deposit within the United States, or within the premises of any of the building and loan association's depository banks within the United States, or within the premises of any transfer or registration agent within the United States

for the purpose of exchange, conversion, registration or transfer in the usual course of business, or through robbery, burglary, larceny, theft, or hold-up by whomsoever committed while the property is in transit within the United States but within fifty miles of any of the insured's offices covered hereunder, and in the custody of any of the employees.

The contract further states, in Section 7 thereof :

"This bond does not cover :

- (a) Any loss resulting directly or indirectly from forgery, unless the forgery be committed by or in collusion with one or more of the employees ;
- (b) Any loss through larceny or theft, committed by any person to whom any employe shall have, otherwise than through dishonesty, delivered property or extended credit.

* * * * "

In Section 15 it is provided that the bond is subject to certain express conditions, therein named, which provide for certain limitations of time within which actions for liability accruing under the bond shall be brought, and provides :

"If any limitation embodied in this paragraph is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law."

The law relating to building and loan associations provides in Section 9670, General Code, as follows :

"* * * * All officers and employees of building and loan associations having control or access to moneys or securities of such association in the regular discharge of their duties before entering upon their duties, shall give bond with two or more responsible freeholders or a surety company qualified to transact business in the State of Ohio, as surety thereon ; such bond shall guarantee the faithful performance of duty on the part of said officers and employees, and the safe keeping and proper application of all moneys or property coming into their hands. All officers of such corporation on being re-elected to office shall renew their bonds. The amount and form of said bond and the sufficiency of the surety thereon shall be approved by the board of directors, which form shall be substantially that prescribed by the superintendent of building and loan association. * * * "

It will be observed from the terms of the foregoing statute, that the superintendent of building and loan associations is vested with some discretion at least, in prescribing the form of bond to be used by building and loan associations in bonding officers and employees as prescribed by the statute. This discretion, however, extends only to the form of the bond and does not empower him to vary the substance of the bond so as to lessen the security contemplated by the statute.

Among other things, the statute requires that the bond shall guarantee the faithful performance of duty on the part of officers and employees 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. While an officer or employe of a building and loan association is not a public officer, I have no doubt that the same principle would be applied in the construction of Section 9670, supra, and of a bond given thereunder, as was applied in the cases of *American Guaranty Company vs. McNiece*, 111 O. S. 532, and *United States Fidelity and Guaranty Company vs. Samuels*, 116 O. S. 586.

The authorities covering the subject of liability of sureties upon bonds of officials for acts done by virtue of or under color of office, were collected and reviewed in the McNiece case, supra, and it was there held:

"The sureties on a bond of an official, conditioned upon the faithful performance of his duties, are liable to all persons unlawfully injured by the non-feasance, misfeasance or malfeasance perpetrated by such officer, either by virtue of his office or under color of his office."

In the Samuels case, supra, it was held as stated in the syllabus:

"Where in the discharge of official duty a police officer fails to take that precaution or exercise that care which due regard for others requires, resulting in injury, his conduct constitutes misfeasance.

A surety on the bond of a motorcycle police officer, with a condition that he 'shall faithfully perform the duties of the office of policeman of said city,' is liable for the negligent operation of a motor vehicle by such officer in the performance of his official duties."

The contract here under consideration does not, in my opinion, cover such losses, and therefore the acceptance by the directors of a building and loan association of an indemnity contract of this kind in lieu of the bond prescribed in Section 9670, supra, would not be a substantial compliance with the statute.

Furthermore, the indemnity contract submitted purports to fix the time for limitations of actions accruing thereunder, whereas, limitation of actions which might accrue on the bond described in the statute are covered by law, and cannot be changed by any contract the building and loan association might make.

True, there is a provision in the contract that if any limitation embodied in the paragraph relating to limitations of actions is "prohibited" by any law controlling the construction thereof, the limitation in the contract is to be construed as being amended to conform with the law. It cannot be said that the limitation in the proposed contract is "prohibited" by law. This contract is not in my opinion an official bond or a bond or undertaking given in pursuance of statute, within the terms of Section 11226, General Code. This section of the Code provides that an action on the official bond or undertaking of an officer, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued.

It cannot be said that the provisions of Section 11226, General Code, or any other statute of limitations "prohibits" the fixing of limitations for instituting actions thereunder, in a contract of the kind submitted because it is not such a contract as is required to be executed by any law of the State, or one given in pursuance of statute.

It is a private contract of insurance purporting to insure the building and loan association against loss resulting from many contingencies, including some of the losses which the law contemplates should be covered by the bond spoken of in Section 9670, supra. It is entirely probable, however, that many losses which would be covered by the kind of bond contemplated by the statute may occur which are not covered by this contract.

It being a private contract, the execution of which is not required by any law of the State, the provisions therein with respect to limitations of actions are not prohibited by law. These provisions, however, as written in the contract, do not conform to what depositors and patrons of the building and loan association have a right to expect under the law, and for that reason, if for no other, the contract in question does not afford the protection to the directors, patrons and depositors of a building and loan association that the law contemplates would be afforded if a proper bond were given by the officers and employes of the association.

In this connection, I am not unmindful of the case of *Maryland Casualty Company vs. McDiarmid*, 116 O. S. 576, where it was held that when the State or a political subdivision of the State takes an indemnity bond for the faithful performance by an officer of his official duties, even though the execution of such a bond is not required by statute, and the officer himself does not join in its execution or its obligation, the bond was held to be an official bond within the meaning and contemplation of Section 11242 of the General Code, and an action thereon may be instituted at any time within a period of ten years after the cause of action accrues, in accordance with the terms of Section 11226, of the General Code.

The bond under consideration in the McDiarmid case, supra, was an omnibus bond, very similar in form to the bond here under consideration. However, it was given to the city of Dayton, a public corporation, and while its execution was not required by any statute of the State or by the charter or an ordinance of the city of Dayton, it was said to be not prohibited by law or against public policy, and was held to be an official bond within the meaning of the statutes above referred to. The question of the right of private contract was not involved nor indeed did the bond attempt by its terms to limit the time for bringing actions thereunder. The contract here under consideration cannot be construed as an official bond, as a building and loan association is not a public corporation, nor can it be considered as having been given in pursuance of statute for the reasons already given and therefore the bringing of actions thereunder is not controlled by Section 11226, of the General Code, nor does any statute "prohibit" the limitation of the time for bringing actions under private contracts of this nature.

The manifest purpose of requiring officers and employes of building and loan associations to give a bond, as does Section 9670, General Code, is to afford protection to the building and loan association and its directors, depositors, and patrons against possible losses that might accrue on account of failure on the part of those officers and employes faithfully to perform their duties or failure safely to keep and properly apply the moneys and property coming into their hands, and if an "omnibus" indemnity bond covering these officers and employes contained the proper provisions that purpose would be effected. It would necessarily have to contain provisions guaranteeing "the faithful performance of duty on the part of said officers and employes and the safekeeping and proper application of all moneys and property coming into their hands," as is provided by the statute, either in the words of the statute or by such language as to mean the same thing, else it would not afford the protection contemplated by the statute.

By the terms of Section 9670, General Code, the Superintendent of Building and Loan Associations is authorized to prescribe the form of bond which shall be given by the officers and employes of a building and loan association. If such superintendent, in his discretion, prescribes a form of omnibus indemnity bond covering all or a number of the officers and employes of a building and loan association and such indemnity bond fully protects the building and loan association, its directors, depositors and patrons to the same extent as would individual bonds executed by each officer and employe of the building and loan association in strict compliance with Section 9670, of the General Code, I am of the opinion that such an omnibus indemnity bond would meet the requirements of the law.

For the reasons hereinbefore given, I am of the opinion that the form of indemnity contract submitted with your inquiry would not afford the security to a building and loan association, its directors, depositors and patrons that would be afforded by the bond specified in the statute and is not in my opinion such a bond as is contemplated by law.

Respectfully,
GILBERT BETTMAN,
Attorney General.

583.

FIREMEN—VOLUNTEER—RIGHT TO RECEIVE DOLLAR PER CALL
FROM TOWNSHIP TRUSTEES.

SYLLABUS:

Under the provisions of Section 3298-54, General Code, the trustees of a township may legally pay to each volunteer fireman the sum of one dollar for attending a fire call.

COLUMBUS, OHIO, July 1, 1929.

HON. E. B. UNVERFERTH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication which reads:

“Section 3298-54 of the General Code of Ohio reads as follows:

‘Township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom, and, when a volunteer fire company has been organized for service in the township, of such character, as to give assurance of permanency and efficiency, may purchase and provide, for the use of such company, such fire apparatus and appliances as may seem to the trustees advisable, in which event they shall provide for the care and maintenance thereof, and, for such purpose, may purchase, lease or construct and maintain necessary buildings; and they may establish and maintain lines of fire alarm telegraph within the limits of the township.’

The township trustees of Pleasant Township, Putnam County, Ohio, have asked me to write to you and inquire whether under this section they are privileged to pay to each volunteer fireman, the sum of one dollar for attending a fire call.”

Section 3298-54, which you quote in your communication, clearly authorizes the establishment of a volunteer fire company for service in a township and further authorizes the township trustees, when such a company is established, to furnish fire apparatus and appliances as may to the trustees seem advisable. The section does not expressly authorize the payment of compensation to members of the fire department for services in such connection. However, the section does authorize the trustees to “establish all necessary regulations to guard against the occurrence of fires.” While, of course, it is somewhat inconsistent to make payment to one who is a volunteer, yet it would seem that the power is vested in the trustees to perform the major duties to provide against fire and a mere nominal fee to be paid to a volunteer would not necessarily destroy the character of the service.