

1461.

TRUST COMPANY—WHERE PRIOR TO ENACTMENT OF SECTION 710-161 G. C. BOND WAS GIVEN UPON A TRUST—MUST MAINTAIN SUCH BOND DURING ENTIRE PERIOD OF EXECUTION OF TRUST.

*A trust company which, prior to the enactment of section 710-161 of the General Code, gave bond upon a trust accepted by it must maintain such bond during the entire period of the execution of the trust, subject to the control of the court to the extent to which it might have been exercised in the first instance: and this conclusion is not altered by the fact that the bond in the first instance is applicable only during the period for which premiums are paid in advance.*

COLUMBUS, OHIO, July 24, 1920.

HON. WILLIAM H. LUEDERS, *Probate Judge, Cincinnati, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of July 16th requesting the opinion of this department on the following question:

“A certain trust company was appointed trustee of an estate on June 12, 1917, and shortly thereafter gave bond in the sum of \$23,000 for the faithful performance of the trust assumed by it.

This company now claims the benefit of sections 710-160 and 710-161 of the General Code as enacted 108 Ohio Laws, part I, pp. 120-121, and submits that it is entitled to be relieved of the burden of maintaining the bond, which is a surety company bond with annual premiums.

Is the contention of the trust company well founded?

Accompanying your inquiry is copy of a letter to you from the assistant trust officer of the company advancing the argument that inasmuch as the bond originally given is a surety company bond, with annual premiums, in effect the payment of each premium is the giving of a new bond and that the court having accepted such bond in the first instance the question arises upon each accruing renewal period as if it were a case of giving a bond in the first instance and inasmuch as the statute now dispenses with the necessity of such bond it ought to govern.

At the time the trust was accepted the statutes of this state, it is admitted, required such trustees to give bond and permitted the acceptance of surety company bonds with annual premiums.

Sections 710-160, 710-161 and 710-162 of the General Code, as enacted 108 Ohio Laws, part I, p. 121, constitute the new provisions of law which must be considered. They provide as follows:

“Sec. 710-160. A trust company may take, accept and execute all such trusts which may be committed to it by order of any court of record or probate court of this or any other state or of the United States, to act as executor, administrator, assignee, guardian, receiver, or trustee, or in any other trust capacity, and receive and take title to any real estate which may be the subject of any such trust and such courts of record and probate courts may appoint such trust company to act as executor, administrator, assignee, guardian, receiver trustee or in any other trust capacity provided that any such appointment as guardian shall apply to the estate only and not to the person. But no such trust company shall be required to assume or execute a trust without its consent thereto.”

“Sec. 710-161. 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 depository, 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."

"Sec. 710-162. Any judge of a court in which such trust company is acting in such trust capacity, if he deems it necessary, or upon the written application of any party interested in the estate which it holds in a trust capacity, at any time, may appoint a suitable person or persons, who shall investigate the affairs and management of such trust company concerning such trust and make sworn report to the court of such investigation. The expense thereof shall be taxed as costs against the party asking for such examination, or the trust fund of such trust company as the court decrees. Such court at any time may examine any officers of such trust company, under oath or affirmation, as to its trust matters in the court, or as to its affairs and management while considering its appointment in such capacity, and for any cause, applicable to natural persons in the same capacity, order that such trust company forthwith settle its trust."

It is assumed that no such "application" as is referred to in section 710-161 of the General Code has been made. The simple question thus arises as to whether or not the sections which have been quoted are applicable in cases in which trusts have been accepted prior to their enactment. The answer to this question, in the opinion of this department, is in the negative. To hold otherwise would give to section 710-161 of the General Code a retroactive operation. It is true that the saving clause of the act in which these enactments are found (being section 189 thereof) does not contain any provision with respect to past transactions of this kind, and that by reason thereof some doubt is engendered as to the application of section 26 of the General Code. However, the sections themselves speak prospectively, and must so speak on familiar principles of statutory construction, unless the opposite intent is clear. The language is "the duties undertaken by such trust company in respect to any trust," "for or in respect to any trust, nor when appointed executor, administrator, etc.," "the court or officer making such appointment;" finally, the verbs employed in the section, in which the idea of time is always most exactly connoted, are "shall be required" and "may require." These expressions all look to the future and have to do with the action or course to be taken after the law became effective. The sections constitute exceptions to the general rule embodied in other sections of the Code relating to the obligations of trustees and other officers. They operate, as has been stated, upon the powers of the courts.

It is clear, therefore, that except by the ingenious method of reasoning employed in support of the contention of the trust company at this time, it could not be contended that the sections under examination have the effect of dispensing with bonds given prior to the date when they took effect. That is to say, if such bond were a personal bond, it could not be argued that the sureties thereon would not be liable for defaults occurring after the sections became effective, nor as to a surety company which became surety prior to the date when these sections took effect could it be argued that the liability thereon would either be entirely discharged by the passage of the sections or limited to defaults occurring prior to the date when they became effective.

Only by considering the payment of a premium as the giving of a new bond could the argument be sustained.

In *Bryant vs. American Bonding Co.*, 77 O. S. 90 it was held upon the construction of the official bond and application then before the court that the contract evidenced thereby "should be regarded as continuing only upon the condition of mutual assent, and if such assent is not had the officer will not be liable for the premium. And further, that in case the officer refuses to assent to a continuance of the contract, liability for future conduct of the officer does not attach." (Syllabus and opinion p. 103, per Spear, J.)

In the same case the court said that the bond standing alone would have been held "to remain in force during the incumbency of the officer on his present term, and the officer will remain liable for the payment of annual premiums so long as liability to the state on the bond continues." (Syllabus and opinion p. 103) the contrary result being arrived at by the consideration of the application, which the court held to be a part of the contract.

It thus appears that the exact question as to whether a fidelity or surety bond is a contract, the duration of which with respect to the risk assumed depends upon the duration of the risk or the payment of the premium, may depend upon the instrument itself, together with such other instruments as show the exact contract entered into. If such contract is of the effect described by the court in the case cited, as that of the bond in that case standing alone, then no basis for the contention now made would exist; if, however, the other construction should be given to the entire contract the basis for the theory of the trust company presented to you would exist. It will therefore be assumed for the purpose of discussion that the whole contract by which the surety company became surety for the trustee was such that the annual payment of premium was necessary to cause the liability of the surety company to attach to subsequent transactions of the trust company. The situation would then be, upon failure to pay the premium, that the trust company would be in default under the original order of the court requiring bond. It is, of course, clear that a new bond would have to be furnished in order to keep the trust company qualified as trustee, unless section 710-161 of the General Code (which it is assumed would then be in effect) so operates as to dispense with such necessity. But this section, as heretofore pointed out, looks to the action of the court at the initiation of the duties of the trustee. It clearly does not authorize the court to release a bond already given with respect to a trust accepted prior to the enactment of the section. It seems equally correct to say that the section can not be looked to for authority to dispense with a renewal of the bond originally intended by means of annual premiums to cover a trust accepted prior to the passage of the section.

For these reasons, it is the opinion of this department that a trust company which, prior to the enactment of section 710-161 of the General Code, gave bond upon a trust accepted by it must maintain such bond during the entire period of the execution of the trust, subject to the control of the court to the extent to which it might have been exercised in the first instance, and that the conclusion is not altered by the fact that the bond given in the first instance is applicable only during the period for which premiums are paid in advance.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*