Official Bonds—Premium on—Refund of Portion of Premium.

The State of Montana is entitled to a refund of the portion of premiums paid on official bonds of State officers by reason of the reduction in the amount of the bonds made by Chapter 229 of the Laws of 1921.

E. G. Toomey, Esq.,
Secretary, Public Service Commission,
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My dear Mr. Toomey:

You have requested my opinion as to whether the State of Montana is entitled to a refund of a portion of the premiums paid on official bonds of State officers by reason of the reduction in the amount of the bonds as provided in Chapter 229 of the Laws of 1921.

By Chapter 229 of the 1921 Laws the amounts of the official bonds of various State officers were reduced substantially from what was required by the then existing laws. Bonds of a public officer are usually given to cover the term for which the officer was elected or appointed. (9 C. J. Secs. 73 and 74, pp. 44-45, and cases there cited.) To the same effect is Section 480 of the Revised Codes of 1921. Chapter 229 of the 1921 Laws took effect on July 1, 1921, so that in answering your question it becomes necessary to determine the extent of the liability of the sureties on such bonds after July 1, 1921, the bonds having been executed for a larger amount than prescribed by Chapter 229 of the 1921 Laws.

It has generally been held that it is within the power of the Legislature to impose new or additional duties upon an officer, and that a breach of those duties or obligations on the part of the officer

renders the sureties liable on the bond theretofore executed. (9 C. J. Sec. 72, p. 43, and cases there cited.) For the same reason that the Legislature has power and authority to add new duties, it may reduce the amount of the penalty on a bond to take effect during the term of officers elected prior thereto.

The conclusion follows that the amounts of the bonds required by all State officers after July 1, 1921, was the amounts named in Chapter 229. Bonds executed prior to that time and in a larger amount are to that extent a departure from the conditions required by the statute.

Sections 484 and 485 of the Revised Codes of 1921 provide that:

> "484. Whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and sureties; but they are equitably bound to the state or party interested; and the state or such party may, by action in any court of competent jurisdiction, suggest the defect in the bond, approval, or filing, and recover the proper and equitable demand or damages from such officer and the persons who intended to become and were included as sureties in such bond.
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> "485. No official bond entered into by any officer, nor any bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged, but the principal and surety shall be bound by such bond, recognizance, or written undertaking to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance or written undertaking. In all actions on a defective bond, recognizance, or written undertaking, the plaintiff or relator may suggest the defect in his complaint and recover to the same extent as if such bond, recognizance, or written undertaking were perfect in all respects."

The Supreme Court of Indiana in the case of Graham v. The State, 66 Ind. 386, had under consideration the question as to the extent of the liability of sureties who had executed a bond in the penal sum of an amount in excess of that prescribed by the statute. In this case the court, in discussing the liability of the sureties, said:

> "The following questions arise: Is an official bond, in a larger penalty than that prescribed by law, void? Or is such bond valid as a voluntary bond for the amount of the penalty named therein? Or is such bond valid to the amount of the penalty prescribed by the statute for such bond?

"Without considering how these questions would have to be decided, were they controlled exclusively by the common law, we may observe that they seem to us to be controlled and settled by the statutes of this State.

"By section 12 of an act touching official bonds and oaths, 1 R. S. 1876, p. 189, it is provided that 'No official bond shall be void because of defects in form or substance, or in the approval and filing thereof; but upon the suggestion of such defects such bond shall be obligatory as if properly executed, filed and approved.'

"Again, in 2 R. S. 1876, p. 311, sec. 790, is found the following provision:

" 'No official bond entered into by any officer, nor any bond recognizance or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want or form of substance, or recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance or written undertaking were perfect in all respects.'

"Construing these statutory provisions, all together, we think it is clear that the Legislature intended that, whatever departure there may have been from the provisions of the statute requiring the bond, in taking it, as to its form or substance, which includes the amount of the penalty named in it, the principal and surety should be bound upon it to the same extent, and no farther, as if the bond had been in all respects such as the law requires; in other words, that the principal and surety should be deemed liable as upon such a bond as the statute requires.

"There are many cases in our Reports that tend to sustain the above propositions. It will be sufficient to cite the following: The State, ex rel., v. Berg, 50 Ind. 496; Miller v. McAllister, 59 Ind. 491.

"The defect in the bond sued upon was apparent on its face, and needed no further suggestion. See the case last above cited.

"It follows that the bond sued on is not void; nor is it good for the whole amount of the penalty named in it; but it is good for the amount required by law for the penalty of such official bond."

It should be observed that the statutes of Indiana referred to in this decision are substantially the same as our statutes, and, in so far as the question here involved is concerned, they may be treated as identical.

The Supreme Court of South Dakota in the case of State v. Taylor, 72 N. W. 407, has had this same question under consideration in a case in which an officer executed a bond for the sum of $350,000 when the statute required a bond in the sum of $250,000 only. The Supreme Court of South Dakota referred to the case of Graham v. The State, 66 Ind. 386, above referred to. The Supreme Court of South Dakota, in discussing the Graham Case, referred to the fact that it was based upon the Indiana statutes and they declined to follow the rule laid down by the Supreme Court of Indiana, and held that the sureties were liable in the full amount specified in the bond. The court, in discussing the matter, said:

> "There is no provision in the statute prohibiting parties from entering into a contract assuming a greater liability than that prescribed in the statute, or that makes a bond void for the excess. It is true, Taylor could not have been required to furnish a bond with a penalty in excess of $250,000; but he and his sureties were at liberty to assume a greater liability, if they chose to do so. The principal and sureties have voluntarily assumed this greater liability upon a sufficient consideration. Upon what theory consistent with any recognized principle of law can this court relieve the appellants, and reduce their liability to $250,000?"

Inasmuch, however, as our statute is practically identical with the Indiana statute, I am of the opinion that the sureties on the bonds are liable for the amounts named in the statute only. In view of the reduction in the amounts of the bonds made by the statute commencing on July 1, 1921, the sureties were liable in the amount fixed by Chapter 229 and could not be held for the full amount named in the bond.

While it might be maintained that the contract, having been entered into and the premium paid for one year in advance, it is inequitable to demand a return of a portion thereof by virtue of a change in the law, at least without notice and demand being made upon the companies by the proper authorities, nevertheless the bonds are payable to the State of Montana and the State or its subdivisions pay the premiums, and the enactment of the statute gave notice to the sureties that after the effective date of the statute the sureties would no longer be held for amounts greater than those named in the new Act, and that therefore the State or its subdivisions would not expect to pay a premium upon an amount for which the bondsmen would not be held liable. While the county officers and authorities could well have made demand upon the companies for a readjustment of the amounts of bonds for a credit or refund of the excess

premium, their failure so to do does not prejudice the right of the counties or State to claim that which is legally theirs. (Yellowstone County v. First Trust and Savings Bank, 46 Mont. 439.)

The liability of the sureties being limited to the amount fixed in the statute, it follows that the State is entitled to a refund of the premiums paid to the surety companies in excess of the premiums required for bonds for the sums named in Chapter 229.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.