Agricultural Department—Liability in Damages for Acceptance of Personal Bond—Insufficiency of Sureties.

The Department of Agriculture is not liable in damages for an error of judgment in approving sureties on bonds, but is liable in case of malice, fraud or corruption.

The approval of personal bonds should be discouraged as much as possible.

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My dear Mr. Davis:

You have requested an opinion from this Department as to whether your Department is liable in damages in the event that a personal bond is approved by your Department and it later develops that the sureties are insufficient.

By Section 33 of Chapter 216 of the Laws of 1921, public warehousemen, and other dealers referred to therein, are required to "give a bond with good and sufficient sureties, to be approved by the Commissioner of Agriculture, to the state of Montana, in such sum as the Commissioner may require, conditioned upon the faithful performance of the acts and duties enjoined upon them by law."

It is apparent from this section of the statute that the act of the Commissioner of Agriculture, in fixing the amount of the bond and in approving the sureties thereon, involves the exercise of discretion upon the part of the Commissioner of Agriculture, and the act is not a ministerial one. It is a fundamental principle of law that as to acts of public officers, discretionary in their nature, there is no liability for negligence or for errors of judgment.

The rule is stated in 22 Ruling Case Law, Section 162, page 485, as follows:

> "But no action lies for the negligent performance of an official duty which is judicial or discretionary in its nature, however gross or corrupt such neglect may be. The remedy in all such cases is by indictment or impeachment."

In Section 163 it is said:

> "Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption. This immunity from civil liability for a mistake in judgment extends to errors in the determination both of law, and of fact."

The rule is likewise stated in 29 Cyc., page 1443, as follows:

> "While officers are liable for negligence in the performance of ministerial duties, no such liability is recognized in the case of discretionary or judicial duties. * * * In the third place are the vast number of officers not holding courts, but discharging executive and administrative functions, whose discharge involves the exercise of judgment and discretion. Such officers are not liable for mistaken exercise of such discretion. * * * There are, however, a few cases which actually decide that if the act complained of has been done with corrupt motives or malice there is a liability to the person injured."

To the same effect are the cases of Roerig v. Houghton (Minn.), 175 N. W. 542; Keifer v. Smith (Neb.), 173 N. W. 685; Hicks v. Davis (Kan.), 163 Pac. 799.

In People v. May, 251, Ill. 54, 95 N. E. 999, the Supreme Court of Illinois had this question before it in a case in which action was brought against a clerk of the district court for damages occasioned by the act of the clerk in accepting as sole surety on a bond a nonresident of the State who was wholly insufficient. The contention was made in that case that the act of the clerk in approving the surety on the bond was judicial in its character, and that it could not be made the basis of civil liability, unless done maliciously or corruptly.

The court stated the general rule as follows:

> "Official action which is the result of judgment or discretion is judicial in its nature, and an officer clothed with judicial power will not be held liable in damages for an act within the scope of his jurisdiction, done in good faith in the exercise of such power."

The court, however, intimated some doubt as to whether the general rule thus announced would be applicable to the act of a clerk in determining the responsibility of a surety on a bond.

Of this the court said:

> "If it be conceded that this principle applies to the act of a clerk in determining, from his own investigation and judgment, the financial responsibility of a proposed surety—a question upon which the decisions are not uniform—still it has no application here, where the objection is that the surety was a nonresident, and could not, under any circumstances, be accepted. The question committed to the judgment of the clerk was the sufficiency of the security. The law, as we have held, required the surety to be a resident of the state. As to this requirement there was no discretion.
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> "The duty of the clerk was fixed and certain, and was therefore ministerial. Official duty is ministerial, when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.
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> "Though the same officer may be charged with the performance of judicial as well as ministerial duties, the judicial privilege will not protect him in the exercise of his ministerial functions only. People v. Bartels, 138 Ill. 322, 27 N. E. 1091. The fact that the clerk may be required to ascertain whether the proposed surety is a resident of the state does not affect the ministerial nature of his duty. In the case cited the court quotes with approval from the case of Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65, as follows: 'That a necessity may exist for the ascertainment, from personal knowledge or by information derived from other sources, of the state of facts on which the performance of the act becomes a clear and

specific duty, does not operate to convert it into an act judicial in its nature. Such is not the judgment or discretion which is an essential element of judicial action.'"

In the case of Huebner v. Nims, 94 N. W. 180, the Supreme Court of Michigan had this question under consideration and said:

"It is for the board to determine the amount for which the bond shall be given, and the sufficiency of the sureties. In deciding these essentials it is acting at least quasi judicially, and for an error of judgment its members are not to be mulcted in damages. In Reed v. Conway, 20 Mo. 22, it is said: 'I do not think it necessary to cite further authorities to support the general propostion I laid down, viz., that where a ministerial officer does an act as a judge, or does a judicial act, which is within his power and jurisdiction, then, although an injury may arise to another, yet such officer is not liable to a civil action by the injured party, unless it be proved that the act was willful and malicious. The cases from Denio go further, and exempt such officer thus acting from all liability to civil action, however malicious or corrupt his motives. Without agreeing to or dissenting from the views of the court in the two cases last cited, the authority of the highest courts in England and our country will bear out the propostion that the ministerial officer, acting judicially within his jurisdiction, is not liable, unless his acts be willful and malicious.' See the many cases cited therein; also Edwards v. Ferguson, 73 Mo. 686; Chamberlain v. Clayton, 56 Iowa, 331, 9 N. W. 237, 41 Am. Rep. 101, and cases there cited."

It is my opinion, therefore, that your Department is not liable in damages for an error of judgment in the exercise of discretionary powers relating to the determination of the sufficiency of sureties on bonds, but is liable only in the case of malice, fraud or corruption. As a matter of practice, however, the approval of personal bonds should be discouraged as much as possible, for the reason that an individual may be sufficient surety today and by reason of a change of circumstances be wholly insufficient tomorrow.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.