

State Warehousemen's Act is limited to the penalty named in the particular bond.

August 28, 1933.

You request an opinion on the following question submitted to you by the Massachusetts Bonding and Insurance Company, such company having furnished a number of bonds under the Warehousemen's Act:

"Have you ever obtained an expression from the Attorney General of the State of Montana if the surety on the license bonds for public warehouseman, grain dealers, or track buyers is liable under your laws, and the form of bond that you require, to all persons who have suffered loss by reason of the default up to the penalty of the bond or is the total liability of the surety to all persons limited to the penalty of the bond? Assuming that the penalty of the bond is \$5000, is the maximum liability of the surety to all persons in the sum of \$5000, in the aggregate, or is the surety liable to each and every person up to the sum of \$5000?"

Chapter 40, Part III of the Civil Code of 1921, comprising sections 464 to 509 inclusive, is entitled "Official Bonds" and relates specifically to bonds of state officers, but section 503 of the chapter is as follows: "The provisions of this chapter as the same shall be in force after amendment by this act, shall apply to all official bonds, and to the bonds and undertakings of receivers, executors, administrators, and guardians, and to bonds and undertakings given in injunction proceedings, and to all bonds and undertakings required by law to be given and approved by any court, judge, board, person, or body; and, except as to requirements of such approval, the provisions shall apply to all bonds given or required by law to be given in attachment proceedings, criminal actions or proceedings, bail bonds, appeal bond, and all bonds given or required to be given in any legal proceedings or action in any court of this state." The phrase in this section, "all bonds and undertakings required by law to be given and approved by any court, judge, board, person, or body," etc., we believe to be broad enough to bring your warehouse bonds within its provisions.

Opinion No. 331

**Warehousemen—Bonds—Sureties
—Liability, Amount of.**

HELD: The liability to all persons of the surety on bonds given under the

Section 483 of said Chapter is as follows: "No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought, from time to time, and judgment recovered thereon by the State of Montana, or by any person to whom a right of action has accrued against such officer and his sureties, until the whole penalty of the bond is exhausted." It will be noted that actions may be maintained under this section until the whole penalty of the bond is exhausted, and the "penalty" is the limit of recovery against any surety.

If it could be said that these statutes are not specifically applicable to warehousemen bonds still their provisions are persuasive in showing what is meant by the "penalty" as applied to sureties in measuring the liability thereunder. While these statutes are not fully clear on this point we think the rule laid down in court decisions are. In *Farmers Co-op. Mer. & S. Asso. v. National Surety Company*, 17 Fed. (2) 527, it was held that the assured can recover only the amount of the penalty named in the bond. There are numerous decisions along the same line.

In the above case suit was brought to recover on a fidelity bond. Defalcations of principal were established in excess of \$6000. The penalty of the bond was \$5000. Because the bond was renewed from year to year, and an annual premium was paid for each year plaintiff claimed to be entitled to the full protection of the penalty of the bond for each year. Recovery was restricted to a total of \$5000.00, the penalty named in the bond.

Nothing beyond the penalty named in the bond can be recovered from the surety. *Clark & Tubbs, executors, v. Bush*, 3 Cowen's Reports 151 (N. Y.).

The concern expressed by the bonding company no doubt arises from the uncertainty in the wording of the form of the bonds prepared by your department for warehousemen. The uncertainty occurring in the paragraph next to the last and is as follows:

"If the saidshall indemnify the owners of grain stored in said warehouses against loss * * * then this obligation to be null and void, otherwise to remain in full force and effect."

We are of the opinion that this clause would be construed along with the other provisions of such bonds to limit the liability of the surety to all losses of all owners of such stored grain to the amount of the penalty named in the particular bond.