

COUNTY OFFICERS
SURETY BOND:

Consent and approval of County Court for
surety bond should be secured in advance.

April 7, 1943

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Hon. Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Hibbard:

The Attorney General wishes to acknowledge receipt of your letter of April 1, 1943, requesting an opinion from this office as follows:

"Will you kindly advise me as to your interpretation of Section 3238 R. S. Mo., 1939, as it applies under the following circumstances:

It has been the custom and practice in Marion County to accept a surety bond from the county treasurer as well as other county officers. However, at no time has the County Court ever advised the County Treasurer or any other officer that they would require a surety bond but have merely insisted that a good and sufficient bond be filed. The County Treasurer through his attorney is now asking the County Court to pay the premium on the County Treasurer's bond which was given and accepted under the circumstances I have just described.

In view of the recent case in the Supreme Court of Missouri, Motley et al vs. Calloway County, 149 S. W. 2nd, 875, will you kindly give me the benefit of your interpretation of this statute as it applies under the facts I have described."

Section 3238, R. S. Mo., 1939, referred to in your letter was enacted as House Bill, No. 125, by the 59th General Assembly, and is found in Laws of 1937, at page 190.

The portion of this section, pertinent to your inquiry, is set out in the case of Motley vs. Callaway County was referred to in your letter and is quoted herein:

"Whenever * * * any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer * * * shall be required by law of this State, or by charter, ordinance or resolution, or by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such * * * county * * * to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri, and the cost of every such surety bond shall be paid by the public body protected thereby."

At the same session of the General Assembly, Section 12133 R. S. Mo., 1929, was reenacted as a part of House Bill No. 20, Laws of 1937, page 427, this Section is as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

Under the situation described in your letter, it may be argued that the treasurer by furnishing a surety bond has manifested his election to furnish that type of surety, and that the County Court by receiving and approving such bond has complied with the terms of Section 3238, supra.

If these were the only statutory provisions relating to the type of surety, which the County Treasurer could furnish, such argument would carry great weight. However, it is desired to call to your attention, Section 5906, R. S. Mo., 1939, which is in part as follows:

"Any company having a paid-up capital of not less than two hundred thousand dollars, organized and incorporated under the laws of this or any other state of the United States, or any foreign government, for the purpose of transacting the business of becoming surety on bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust, and which has complied with all the requirements of the law regulating the admission of such companies to transact business in this state, may, on production of evidence of solvency satisfactory to the court, judge, clerk, head of department or other officer, person or persons authorized to approve the same, become and be accepted as surety on the bond, recognizance or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the state; and if such surety company shall furnish satisfactory evidence of its ability to provide all the security required by law, no additional security may be exacted, but other security may, in the discretion of the official authorized to approve such bond or obligation, be required; and such surety company may be released from its liability on the same terms and conditions as are by law prescribed for the release of individuals, it being the true intent and meaning of this article to enable corporations, created for

that purpose, to become surety on any bond recognizance or other writing in the nature of a bond, in the same manner that natural persons may, subject to all the rights and liabilities of such persons. * * *
(Underscoring ours)

This section was in existence at the time of the enactment of Section 3238, and the reenactment of Section 12133 R. S. Mo., 1939, which is now Section 13795, R. S. Mo., 1939.

It is apparent that prior to the enactment of Section 3238, the officer had the privilege of furnishing a surety bond at his own expense, if he desired to do so. The Section 3238, supra, therefore, only had the effect of authorizing the county to pay the costs of a surety bond, in the event the officer elected to furnish the bond and the governing agency of the political body protected by the bond, followed the terms of Section 3238.

There have only been two cases involving this section of the statutes before the appellate courts, the case of Motley vs. Callaway County, 149, S. W. (2d) 875, referred to in your letter, and the case of Boatright vs. Saline County, No. 38298 in the Supreme Court not yet officially reported. In neither of these cases is a situation similar to that mentioned in your letter discussed. In the Motley case, supra, the court, in discussing the constitutionality of Section 3238, used the following language at l. c. 877:

"The Legislature, no doubt taking notice of the results of some of these during recent depression periods, considered that surety company bonds could give better protection to public funds in the custody of public officers. It, therefore, authorized such a bond for county officers if the officer elected to furnish it and the county court approved it. It also recognized that to require an officer to pay the premiums therefor would have the effect of reducing his actual net compensation. So when consent and approval for

the officer to purchase such a bond at public expense was given in advance by 'the public body protected,' it was required to pay the cost. * * * * The 1937 Act only authorized the county to make an agreement for this type of bond, and, if it did so in advance, to pay for it when it was furnished. * * *" (Underscoring ours)

It may be said of these passages that they are obiter dictum and were not necessary for the purpose of determining the question under discussion, namely, whether the payment of the premium of an officers bond, with public funds, was a public purpose, but the two expressions seem to give a clear indication of the view of the court. And this is especially true of the last sentence above quoted.

At this point it is desired to call attention to a brief quotation from the Boatright case, supra.

"It is apparent the Legislature intended the county to be liable only in case the County Court consented thereto and approved the giving of such bond. County Courts are courts of record and can speak only by and through the records."

Under the situation described in your letter, there is no mention of any record having been made by the court, consenting to the giving of the surety bond by the treasurer, and agreeing to pay the premium for such bond.

CONCLUSION

The question is close and there should be a case brought

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at sometime to have this section construed. But until the section is construed on the proposition mentioned in your letter, it is the opinion of the writer that a county officer who desires to have the county pay the premium for a surety bond, should follow what is said in the Motley case and get the consent and approval of the county court in advance to the giving of such surety bond.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

WOJ/mh