LIQUOR: No authority given to compromise and settle liquor bonds. State must accept $2,000.00
BONDS: in the event of a violation, or nothing, if law is not violated.

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Mr. Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Hassett:

We have received your recent letter, which reads as follows:

> "I have filed two suits on behalf of the State of Missouri against the principal and corporate sureties setting up a forfeiture of liquor bonds and asking that the penal sum of $2,000.00 in each instance be forfeited and paid over to the State for the benefit of the Henry County school fund.
>
> Will you please advise me as to the propriety of a settlement of a case of this nature for a sum less than the penal amount set forth."

We presume that you refer to the statutory liquor bonds required of dealers licensed to sell liquor by the drink. The Supreme Court of Missouri recently held that where the conditions of such a statutory liquor bond requiring the faithful performance of all duties imposed by law upon the licensee and the faithful performance of all the requirements of the Liquor Control Act are breached, the state may recover the full amount of the bond, without proof of actual damage. State vs. Wipke 133 S. W. (2nd) 354. In other words, the court there held that the bonds of dealers licensed to sell liquor by the drink are forfeiture rather than indemnity bonds. In the Wipke case, the court said, l.c. 357:

"The question which then arises is: Where the condition of such bond is breached, is it incumbent upon the State to prove actual damage, or is the State entitled to recover the full amount of the bond merely by showing a breach thereof? Stated otherwise, is the bond an indemnity bond or a forfeiture bond?

In 11 C.J.S., Bonds, Sec. 130, p. 510, we find: 'Where a statute requires the execution of a bond to the state, or to the United States, for a fixed penalty, conditioned for a compliance with the laws in the respects named therein, the penalty named in the bond is the measure of damages for its breach, or rather is a punishment inflicted by the sovereign for the violation of a pledge to observe its law, unless the statute under which the bond is given or the bond itself, read in the light of the statute, indicates a less or different measure.'

In the case of City of Paducah v. Jones, 126 Ky. 809, 104 S. W. 971, loc. cit. 975, the Court of Appeals of Kentucky said:

* *.

The question of the amount of damages caused by the violation of the law by the principal does not, and cannot, enter into the question. It is not contemplated that the recovery should be for any less sum than that fixed. It would be totally impracticable if not impossible in an action by the city on the bond to arrive at any measure of damage, except the amount stipulated. In an action upon a bond properly executed, the only legitimate subject of inquiry is whether or not the conditions of the bond have been broken. If it has, the sureties by the letter of their undertaking

agree that they will pay a certain sum. * * * * *.'

It is to be noted that Section 13a, in speaking of the bond, provides that 'any violation of such conditions, duties or requirements shall be a breach of said bond.' Of course, if the condition of a bond is breached, it necessarily follows that the obligee is entitled to be paid damages. In this case we think the damage recoverable is the face of the bond; it was required and given to secure performance by means of a forfeiture, and for that reason it is an aid to the State in enforcing its laws. We hold that a sale of whiskey by a licensee holding only a 5 per cent liquor license, as admitted by the stipulation, is a breach of the condition of the bond and that the State may recover the full amount thereof without proof of damages, for it would be impossible for the State to prove that it suffered any pecuniary damage by an illegal sale of whiskey to a liquor inspector.

The respondents tacitly admit that this is the law, provided the bond is only for the observance of the law, for in their brief they say: 'From a review of all of the authorities on the subject under consideration, including those relied upon by appellant in its brief, it may be concluded, we think, that if the bond is conditioned for the observance of some law of the sovereign, and nothing more, the measure of recovery for breach, unless the bond, or the statute under which it was given, indicates that a less, or different, measure was intended, is the full penalty of the bond, because it is regarded as the punishment fixed by the sovereign for the violation of law.'

> It follows from what we have said that the trial court erred in its ruling, * * * * * *."

A similar situation was involved in the case of Clement vs. Empire State Surety Company, 110 N.Y.S. 418. In that case, the court held that the State Commissioner of Excise was without authority to make an agreement with the surety on a statutory liquor bond, after its violation, by which the surety might relieve itself of liability by paying the penalties for violations of other such bonds upon which it was also surety; that neither the commissioner, nor the courts had any authority whatsoever to lessen the statutory penalty prescribed to secure an observance of the law; that the statute did not contemplate a reduction in the amount of the penalty in a liquor bond based upon doubtful liability or chances of success in maintaining an action for the breach, for if the conditions of the bond were broken, the amount of the recovery is fixed and absolute and if not, there is nothing due whatsoever. The court said, l.c. 422:

> "Furthermore, we are of the opinion that the State Commissioner of Excise was without authority to make such an agreement. No such authority is expressly conferred upon him by the liquor tax law, nor by any other statute to which our attention has been called or of which we are aware. If it exists at all, it must be by implication. The bond is to the people of the state of New York. The State Commissioner of Excise is the custodian of it. He is authorized to maintain an action in his name, as commissioner, to enforce the payment of the penalty for a breach of its conditions, and required to pay over the moneys collected to the State Treasurer. Liquor Tax Law, Sec. 18.

To that end he may employ counsel and attorneys to bring the action. Liquor Tax Law, Sec. 10. Having the power to maintain the action, the duty necessarily devolves upon him of determining whether sufficient grounds exist for such an action. That carries with it the authority of determining whether, after an action has been commenced, it shall be prosecuted or discontinued; but it gives him no right to change the conditions of the bond, since that is fixed by the express provisions of the statute. The primary object of the bond is to secure an observance of the law, and the penalty named is what the state exacts for a failure to comply with the conditions under which the right to traffic in liquor has been given. The amount thereof is fixed by statute, which neither the courts nor the State Commissioner of Excise may lessen. Lyman v. Berlmutter, 166 N. Y. 410-413, 60 N. E. 21. While the State Commissioner of Excise may determine at a given time whether sufficient grounds exist to warrant prosecuting an action upon the bond, that determination is not absolute, so as to bind either himself or his successor in office not to commence an action upon such a bond in the future. His duty in that respect is somewhat like that of the Attorney General in passing upon an application to bring an action to oust an alleged intruder from a public office, and it has been held that the determination of the Attorney General refusing to bring such an action is not binding upon his successor in office. People v. McClellan, 118 App. Div. 177, 103 N. Y. Supp. 146, affirmed in 188 N. Y. 618, 81 N. E. 1171. The State Commissioner of Excise must necessarily act upon the information which he then has. He may

> reach the conclusion therefrom that the evidence is insufficient to warrant bringing the action, when, in fact, the law has been violated, and, if he afterward discovers that fact and is satisfied that such violation can be established, it then becomes his duty to prosecute the action for a breach of the conditions of the bond, and recover the penalty therefor. The statute does not contemplate a reduction in the amount of the penalty, based upon doubtful liability or chances of success in maintaining the action. If the conditions of the bond have been broken, the amount of the recovery is fixed and absolute. If not, there is nothing due. In no view of the case, did the defendant make out a defense, and the verdict should have been directed for the plaintiff."

As in the above case, no authority is expressly conferred upon anyone to compromise and settle the liability or supposed liability on a statutory liquor bond for an amount less than the face value thereof, that is, $2,000.00. If such a right exists at all, it must be by implication. The bond runs to the State of Missouri. In the Wipke case, supra, the Supreme Court held that the State of Missouri is authorized to maintain an action to enforce the payment of the penalty for a breach of its conditions. Since the state can maintain the action, the duty necessarily devolves upon the sta e to determine whether sufficient grounds exist for such an action. The state undoubtedly has the right to determine whether or not any particular action should be commenced or, if an action has been commenced, whether it should be prosecuted or discontinued. However, the state apparently has "no right to change the conditions of the bond, since that is fixed by the express provisions of the statute," As in the New York case, the primary object of the bonds of dealers licensed to sell liquor by the drink in Missouri "is to secure an observance of the law, and the penalty named is what the state exacts for a failure to comply with the conditions under which the right to traffic in liquor has been given."

The Wipke case held that such is the purpose of the

bonds. The New York court then said that "the amount thereof is fixed by statute which neither the courts nor the state commissioner of excise may lessen." The New York court then went on to say that "the statute does not contemplate a reduction in the amount of the penalty, based upon doubtful liability or chances of success in maintaining the action. If the conditions of the bond have been broken, the amount of the recovery is fixed and absolute. If not, there is nothing due."

We think the same is true in connection with our own statutes and statutory bonds issued pursuant thereto. Neither the statutes nor the bonds appear in any way to contemplate a reduction in the amount of the penalty under any circumstances, whether based upon doubtful liability, chances of success, or otherwise. If the conditions of the bond are broken, the amount to be recovered is $2,000.00. If the conditions of the bond have not been broken, then there is nothing due. It is either $2,000.00 or nothing.

There are a number of cases holding that when a right is given to a state or a political subdivision to maintain an action, that any such power to sue implies and carries with it the right to compromise and settle the litigation for an amount less than that sued for or demanded. Several cases hold that the attorney general of the state has the power to compromise litigation since it is a part of the authority given him to conduct the same. However, every case announcing this doctrine deals with the collection of taxes, including the question of validity and amount of the assessments, and also other types of demands which were not liquidated or the amount fixed by law. However, we have found no case which announces a rule contrary to that given in Clements vs. Empire State Surety Company, supra, wherein the amount due and owing as a forfeiture under certain conditions is definitely fixed by statute.

CONCLUSION

We conclude, therefore, that no power is given authorizing the State of Missouri, or any of its political subdivisions

to compromise or settle the liability of the statutory bond required of dealers selling liquor by the drink for an amount less than the penal sum thereof, that is, $2,000.00. The law does not contemplate a reduction in the amount of the penalty based upon doubtful liability or chances of success in maintaining the action. If the conditions of the bond have been broken, the amount of the recovery is fixed and absolute. If not, there is nothing due. The state undoubtedly has the authority to determine whether or not a given action should be commenced, or if an action has been commenced, whether it should be prosecuted or discontinued. However, it does not have the right to change the conditions of the bond as to the amount since that is fixed by the express provisions of the statute. It appears, therefore, that neither the courts nor any officer of the state may accept in settlement an amount less than the full penalty of the bond.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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