

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

LEGISLATIVE RESEARCH COMMITTEE

State House, Augusta, October 7, 1942.

Re: Bonding of State Officials.

LEGISLATIVE RESEARCH COMMITTEE

State House, Augusta, October 7, 1942.

Re: Bonding of State Officials.

State House, Augusta, Oct. 7, 10:00 A.M.

MR. WEBBER: Now on this question of bonds, I think I can perhaps summarize what we have done up to the present time, and then we can have some general discussion that may carry us on.

We find in the law, first, the Treasurer's bond, which is provided for by the Constitution, and the Constitution says that it must be for the faithful discharge of his trust, which makes it clear that without changing the Constitution you are going to have in any event what we call a faithful performance bond.

Now I think we have had some discussion of this before in the Committee, so that you gentlemen know in a general way the problem as between faithful performance bonds and honest and fidelity bonds, but, to state that again: The Legislature has gone ahead and by separate enactment has fixed the amount of the Treasurer's bond at \$150,000 and then has set up quite an elaborate condition for his bond, carrying out the constitutional provision of faithful discharge of the trust; and one of the things for the consideration of this Commission, as I see it, in trying to draft a good bond law is whether or not, knowing that we cannot in any event get away from a faithful performance bond on the Treasurer's bond, we should bother with it at all, or whether we should leave the Treasurer's bond statute as is and simply concern ourselves with all the other bonds.

Now there is no other bond given by any official or employee that has for any constitutional reason to be a faithful performance bond: it is simply a matter of policy on those bonds whether they should be faithful performance or honesty.

Now, as you know, there are almost as many laws as there are bonds, and they are all different: some are faithful performance, and probably more are faithful performance than any other kind, some are the honesty and fidelity, and some you might say don't really say.

Everybody who has studied this problem up to the present time agrees that we should have a uniform bond law. Now this is really the newness of the problem that we have been trying to tackle. We all agree that where a faithful performance bond is given by the head of a department, if he is protecting himself properly and is on his job he will undoubtedly require bonds to be given to him and for his protection by practically all if not all of the employees in his department.

Now if we follow any sort of a policy of protecting the State by having bonds running directly to the State, which we feel is very desirable and necessary, we are certainly going to run into multiplicity of bond premium. We are also going to run into multiplicity of bond premium because he might properly require a bond to be given to him for his protection by an employee, where from the State's

point of view on the basis of necessity and fidelity there is no real exposure on the part of that employee, but he takes the bond because there is a negligence exposure rather than an honesty exposure, and there we have got a premium which is at least questionable from our point of view.

Mr. Mossman and Mr. Hayes and Mr. Perkins and I have all come to the feeling that we want an honesty and fidelity bond in every case except the case of the treasurer, but at the same time we realize that there is plenty we don't know about the bond business, and that is the principal reason for having Mr. Foster down here. We want to know if we are overlooking important and valid reasons why we should have the faithful performance coverage. We have justified ourselves in sticking to the honesty and fidelity bond on the basis that we think that the number of instances where there might be a recovery under faithful performance but could be no recovery under simple honesty and fidelity are apt to be so few in number -- and that I think ties in with the experience of the State of Maine -- that the State can well afford to be a self-insurer as to these cases. We recognize there is an exposure, but we think the State can better afford to be a self-insurer as to that exposure and simply cover the honesty and fidelity.

Also, we feel that cases which fall within faithful performance but wont fall within honesty and fidelity are

the type of case which are full of the seeds of litigation and more tenuous, and there is a reluctance on the part of the enforcing authority of the State to proceed where honesty and fidelity is not involved but something that would fall under faithful performance is. And that is evidenced by the fact that there has been manifest reluctance to proceed on Belmont Smith's bond in the Runnells' case and on the bond of Fred Robie in the case of the Auburn robbery; and I think that reluctance undoubtedly stemmed from the fact that everybody knew there was no question of honesty and fidelity on the part of Belmont Smith and Fred Robie involved, and so nothing was ever done; and I think it is very apt to be found true in the future, regardless of who the Attorney General or anybody else in authority may be, that there will be a manifest reluctance to proceed on simple faithful performance with no honesty and fidelity involved.

Now I will ask my henchman here who worked with me on this if I have fairly stated the subject matter to you as far as we have got. I drafted with this gentleman some language that we thought might serve the purpose on the honesty and fidelity form of coverage, and it had the words "faithfully and honestly account" and then went on and told what they would account for; and the companies who were asked to pass on this indicated they thought the use of that word "faithful" would give rise to an assumption, no matter what you used for the verb, that

faithful performance was indicated, and that it was an unhappy word to use and might lead to difficulties, and Mr. Devlin supplied me with U.S.F. & G. forms from which I might borrow some language that might be helpful, and I think we all agree that perhaps we had better try to redraft the language. And I think now, at the risk of being somewhat repetitious, but with the idea of fixing this in your mind and also with the ideal of developing the language which I would like to have Mr. Foster and Mr. Devlin criticize -- and, incidentally, they have sent in some material -- I will read off the record the tentative first draft, which I have not even had a chance to go over with these gentlemen, but what might form the nucleus of our report on this bond situation.

(Draft read off the record by Mr. Webber)

MR. WEBBER: Now that, gentlemen, is their draft.

MR. LIBBY: May I ask a question while I have it in mind, Don? You say there would be a substantial saving to the State. Have you figured about what the saving would be on that new bond?

MR. WEBBER: No; because I do not think it is possible yet. You see that can only be determined when Mr. Mossman and Mr. Hayes make a survey of what they consider to be the exposure risk in each instance and then determine what ratio it is reasonable to apply in bonding against that exposure risk, and then balance the result they get in

premium against what we are paying. We simply have a combined judgment, from what we find of the present helter-skelter bond situation in Maine, that there will be a saving, and, if there is no saving, we will at least get a sound, sensible coverage, which we do not now have, for the same amount of premium we are now paying.

MR. HAYES: There is a saving, as I understand, between the fidelity form and the faithful performance form. I am going to say roughly, in my opinion, the fidelity form of bond will cost the State probably not over half what the faithful performance bond would cost.

MR. LIBBY: Now when he says that, Mr. Libby, he does not mean there is any difference in premium per unit of policy as between faithful performance and fidelity, because there is not: they are the same; but what he means is we will get away from a certain multiplicity of bonds, unnecessary bonding and duplication which now exists.

MR. POULIN: I understand you will be eliminating bonds running to the department heads?

MR. WEBBER: That is right, with the possible exception of the Treasurer's department.

Now to try to keep this in logical order, I am going to suggest that we discuss the Treasurer's bond situation first. We start with this situation: it has got to be a faithful performance bond, but that is the only "must" about it. The amount the Legislature can determine: if they think \$150,000 is not enough, they can

raise it or they can decrease it.

The Treasurer has not followed in the past of requiring faithful performance bonds to run from every employee in his department, and there are some ten or twelve of them, to him. Frankly, I think that indicates a certain laxity on the part of the Treasurer, because I think a treasurer who was aware of the risk would have made that requirement. He has one or two bonds running to him, but the rest run to the State. As long as he must in any event give a faithful performance bond under the Constitution, he will be well within his rights in the future, and future treasurers as they come along will be, in insisting that every employee in there give a bond running to him.

Now we have a little difference of opinion here. I personally have come to the conclusion that what we ought to do is take a bond from the treasurer, a faithful discharge bond which is big enough, let him take bonds from his employees running to him, and we will have no direct bonding from those employees to the State; and we will proceed to reduce the exposure insofar as possible by changing the mechanics in the treasurer's office.

Now this is the situation we find in the treasurer's office, and I doubt if anybody has realized how serious it was. I certainly had no idea it was this serious until just recently, and I think Mr. Mossman feels the same way. We haven't had what might be called a working treasurer: Mr. Downs, as we all know, has been the man who, as Deputy Treasurer

has run the office, been there on the job all the time and has done the work.

Now we have a very, very large amount of negotiable securities plus substantial amounts of cash, fluctuating from time to time, in the vault in the treasurer's office all the time. There are two keys, apparently, which would permit two people to go to the vault at the same time, but the custom has been for Mr. Downs to retain both the keys and he has both the keys or did have just a couple of days ago when Mr. Mossman checked on it for me. So it is apparent that the only thing that has prevented a loss many times in excess of the Runnells incident has been the honesty and integrity of Mr. Downs, not another single, solitary safeguard.

MR. HAYES: Let me add one further word: I discovered this morning, my man tells me that Mr. Dows makes a practice of keeping the guard key and also the keys to the individual boxes in a drawer of his desk known to everybody in his office. I haven't had a chance to check on that, but my man tells me that is the practice.

MR. WEBBER: Now I feel that is something we must very definitely do something about, because we have no right to assume that Mr. Downs or anybody else is going to continue to be honest for another twenty-four hours. We all know Mr. Downs is a fine, competent gentleman, but that is just our good fortune and we can't base anything on that. That is as serious a situation as has come to the

attention of this committee since it has been in existence, in my opinion, and I think all these gentlemen think so too.

MR. PAYSON: May I ask one question there: What drawer in his desk does he keep the keys in?

MR. PERKINS: Don, I am a bit surprised you will get a surety company that will put a bond on Mr. Downs under the present circumstances.

MR. HAYES: Or on the treasurer.

MR. WEBBER: It is not much by comparison.

MR. HAYES: \$50,000.

MR. WEBBER: And probably how much in negotiable securities in there?

MR. HAYES: Two or three million dollars.

MR. DOW: We were told yesterday he has \$120,000 of cash in the drawer.

MR. HAYES: Not all of them are bonds.

I have had that same situation up with the treasurer several times in the last year or two, and recently I have written the treasurer, calling attention to the situation there, saying that gives the State, himself or his employees no protection at all, and virtually demanding that the guard key proposition be straightened out and handled rightly from now on. A copy of that memorandum went to the Governor, and I understand Mr. Downs is somewhat in the air since that was turned over.

Before taking that action I had a talk with Robinson of

the banking department, to find out what the general practice was in handling securities in the custody of banks where they run big accounts, and he said the banks to quite an extent used deposit boxes in Boston and New York for big amounts, and where they didn't do that they used a guard key proposition very thoroughly and two different people have the keys.

You people understand what I mean by guard key. It is one key, the same as in a safety deposit box, it is one key that has to be inserted into any one of the locks and turned. It does not open the lock at all. Only then is the key for the individual lock capable of opening the lock; so the person who holds the guard key cannot have access to the contents of the box at all: he doesn't have access, but that key has got to be turned. In the safety deposit boxes in banks they always turn their key before you can turn your key. There is the same possibility in existence in the new vault down here.

MR. WEBBER: Would this be a possibility? I might call attention to the fact there is no express authority in the present statute for the so-called deputy treasurer to do anything. All that the law says in substance -- I think I can state it nearly accurately -- is that the Chief Clerk in the treasurer's office shall be known as the deputy treasurer -- that is approximately what it says. Now might it not be possible to establish somewhat more

clearly the authority and duties of the deputy treasurer and then to provide that there shall be two keys in each case, that one shall be always retained by the treasurer and used only by him and one shall be retained and used only by the deputy treasurer; that in the event of the absence of the deputy treasurer he may by authority of the statute turn his key over temporarily to the Commissioner of Finance, we will say, taking a receipt therefor, who shall then have the power to use one of the keys while the deputy treasurer is absent, and in the case of the treasurer, in his absence, he may turn his key over to somebody else, like the Controller, so that we will provide for absences but always have dual control of keys.

MR. HAYES: It seems to me that is a detail that would be regrettable if it is necessary to put it on the statutes, and a better proposition would be to have the statute keep out of the detail there and have the Finance Commissioner and the State Auditor work out and enforce a proper thing, and if they don't the Research Committee may check them up and see they do it, because it seems to me that is an administrative detail.

The scheme that I have got in mind as a proposition, and the thing I suggested to Belmont, is that the guard key be kept entirely by the Finance Commissioner, or possibly the State Auditor. There is no objection to the State Auditor having it. That means that the Finance Commissioner has got to make available -- he doesn't have

to do that necessarily -- he can say he wont make it available unless there is a man from the Audit Department to see what goes on there. At the time the vault was being rebuilt and everything was moved downtown, at my insistence the then Finance Commissioner, Mr. Payne, had to go down there -- it was about two days work at the year's end checking securities -- and Fred Payne went down and unlocked the boxes and went home, but it happened my man was there.

The objection to the State Auditor having that guard key is that my policy has been, I think wisely, that the State Auditor should avoid any administrative action in connection with the State: in other words, his sole position is to check what goes on and holler if he don't like it, while the Finance Commissioner is distinctly the financial officer of the State of Maine.

One point that has come up between Mossman and myself in the last few days, I have gone on the theory -- and I think Mossman agrees with me -- that in a very intangible way the Finance Commissioner is more or less responsible for what goes on in the treasurer's office as affects the finances of Maine. You cannot support that by the statutes but only by commonsense. And as such it is more or less his province to see the finances of the State are rightly handled from the treasurer's office. That has been the policy Fred Payne and Mossman and I have worked on, and I

think Mossman has gotten after the Governor on anything that was going wrong in there. Is that about the way you feel, Jim?

MR. MOSSMAN: I think so.

MR. PAYSON: As a practical proposition, because of the cock-eyed set-up of that treasurer's office, you can't do a thing. He is elected by the Legislature.

MR. HAYES: That is right. I can say several times when I have gone to the Governor with something I thought should be corrected down there the Governor has never hesitated to lay the law down to Belmont. I have heard him lay it down pretty stiff.

MR. PAYSON: But if Belmont wants to tell him to go to **** he can?

MR. HAYES: Yes; but he has never taken that attitude. The treasurer is a law unto himself, yet the policy of the Governor, as I feel it, is he is Chief executive officer of the State and over every head of a department, whether elected by the Legislature or otherwise, with the single exception I have refused to allow him to say he is over me.

MR. WEBBER: You have raised the very point I have in mind: The only argument that could be made for incorporating what would otherwise be administrative detail in the statute is the fact that the treasurer ^{is} ~~is~~ technically responsible only to the Legislature, and if they tell him what he must do in regard to safety precautions then there

is no question but what he has got to do it.

MR. PAYSON: Would it be possible, Don, instead of doing the detailed work, to set up a procedure whereby certain administrative officers might lay down rules and regulations?

MR. FOSTER: May I make a suggestion: that the Legislature authorize the Governor and Council to prescribe administrative regulations for the operation of a state office.

MR. WEBBER: The only trouble with your suggestion, Mr. Foster, is there is a certain feeling current hereabout that sometimes we get better results when we do not leave things to the Governor and Council.

MR. FOSTER: I can appreciate that, but at the same time I feel as Mr. Hayes does, you can get into an awful mess with too much detail in the statute. The trouble is you freeze your procedure and might be freezing errors.

MR. MOSSMAN: There is one hold we have over the treasurer now: the law provides the State Controller shall provide methods of account for all state departments. Of course this is a little outside.

MR. HAYES: That has been lately questioned by Belmont. Hasn't there been a little friction on that?

MR. MOSSMAN: I don't know about the early days: there has not since I have been here.

MR. HAYES: Speaking of a remark made just now: Have you gentlemen noticed in the law, the proposed draft that Webber read, the coverage of bonds is subject to the approval

of the Governor?

MR. WEBBER: That was done very intentionally.

CHAIRMAN DOW: Do I understand if I am treasurer of the State of Maine, elected by the Legislature, under bond of \$150,000, that you prescribe that before I can go to work in the morning I must go to two boards in the State House and get the keys?

MR. MOSSMAN: It is not quite that bad, Bob, I do not think. I am not too familiar with the vault, but they can open the vault without these guard keys, and what they work with every day would be available without these keys. They don't have to go into these security boxes.

MR. HAYES: They only have to go into the security boxes at periods when coupons have to be cut or when there is sale of securities -- when there is sale of securities, or coupons to be cut, and at the time when we are auditing the contents of those boxes. Roughly, that would be on an average of two or three or four weeks.

MR. WEBBER: So that if you could eliminate in that way the risk as to negotiable securities, your bond would be ample to cover your current cash situation?

MR. HAYES: The current cash situation is low.

One thing that might be brought up along that line: On May 1, 1940, when I checked in Downs, we found that the current cash was \$20,000 to \$30,000 -- I am not talking about current income cash, I am talking about the cash they kept on hand in rolls and so forth. July 1st that was

cut down to zero, and it has been zero ever since, and the only cash other than securities in the vault is simply the current day's cash. They deposit practically every day. One time a man wanted to change a ten-dollar bill, and there wasn't ten dollars in cash in that office. There is practically no cash in the office today.

CHAIRMAN DOW: How about the vault?

MR. HAYES: I mean the vault: there is practically no cash kept there. The principal incoming money is in the form of checks except for the peak period of automobile registration.

MR. WEBBER: Now that gives you a picture of the practical situation that we should correct in some manner, and then it is a matter of policy as to what should be put into the statute if anything.

As far as the condition of the Treasurer's bond is concerned, there are two schools of thought on that. This that I have read to you this morning represented only my own thinking at the moment, and I certainly hold no particular brief for it on the treasurer's situation. My thought was that as long as we cannot get away from the faithful performance type, no matter what we do, we might just as well leave it alone. The legislature has prescribed a pretty full coverage under the constitutional provision, and all I suggested doing was changing it so that the bond would be deposited with the State Auditor instead

Secretary of State. Mr. Hayes, on the contrary, feels very strongly that although we have to include the faithful performance condition something in the nature of "faithful discharge of his trust" or words to that effect, with the additional language that goes in, he would like to see it brought into line with the uniform provisions found in our other bonds. That fairly states your position, Mr. Hayes?

MR. HAYES: And to bring up to date and to clarify in one place the entire bond statute laws of the State of Maine.

MR. PERKINS: I think outside of the treasurer's bond everybody in the treasurer's office will have a different type of bond than anybody else in the State, because if I am Treasurer of State I am going to require every one in my department to have a \$150,000 bond.

MR. HAYES: One question I was going to ask you in regard to your draft, Mr. Webber: Did you intend what you have got there should apply on the bonds of employees in the treasurer's office: did you intend those should run to the treasurer or to the State of Maine, and who sets the amount on the bonds of employees in the Treasurer's office?

MR. WEBBER: I think that my language would have to be clarified further to indicate that we are not doing anything really with anybody in the treasurer's office, just the treasurer, leaving him free to do as Mr. Perkins says, require a bond running to him from each employee in his department.

MR. HAYES: I think as you have got that now it might be open to question which way you did intend it, because you make an exception in the case of the treasurer but not in the case of employees in his department.

MR. WEBBER: Now have either Mr. Devlin or Mr. Foster any thoughts, now that you have got the picture in the Treasurer's office, any suggestion as to this treasurer's bond situation?

MR. ALEXANDER FOSTER: Well, of course the over-all suggestion that I intended to make I think would be applicable with equal force to the other offices.

MR. WEBBER: Why don't you go right ahead?

MR. FOSTER: I was going to suggest, if it was all right with you, that I would like to defer that until you have heard the other thoughts you have in your mind, then I can try and weave them all in together.

MR. WEBBER: I think we have reached the point now so the committee is pretty familiar with the whole problem, and I think we can go right along with your ideas now.

MR. FOSTER: Well, I listened with a good deal of interest to your suggested report, and I think any suggestion I could make would boil itself down to perhaps one proposition, and that is the question of faithful performance bond on your officials and department heads, that is policy-making appointees or elected officials. These people are required to take an oath of office that they will in substance

faithfully perform the duties of their office, and ever since bonds have been required of public officials it has followed that form of oath. It is an undertaking that he will comply with the duties he assumes and faithfully discharge them in substantially the same words as the oath he took.

I for one would feel that I would be ill-advising you people if I were to suggest anything but a faithful performance form for public officials. Now to be sure, the experience of the companies has been in the past that most of the losses arising out of public officials come from the dishonesty hazard which is involved, yet at the same time an official may cause a loss, he may cause a loss to the State -- let us leave surety out of the picture -- he may cause a loss to the State, he may cause a loss to individuals in a manner other than stealing the money or other property which may come into his car. He can misperform his duties to such an extent a loss would result or he can fail to perform those things which he is under obligation to perform or fail to do those things which he is under obligation to do to such an extent that loss will result; and inasmuch as you are considering bonding these people it would seem to me to be better to go out of the way and get the greatest or the maximum protection available to the State on these officials.

Now with respect to subordinates, I quite agree with you that perhaps the best coverage or the most desirable

under the circumstances, would be limited to the fidelity hazard, but I do not think you need consider abandoning the public official coverage for your policy-making officials simply because you fear the fact that he may require of his subordinates an equivalent bond out of precaution against the possibility of his responsibility for an act committed by the subordinate. The unfortunate part of that condition today is that all too often the public officials have little or nothing to say about the subordinates who are in their office. We all know how many subordinates get their appointment through political exigencies, and, at the same time, civil service regulations and requirements have progressed to such an extent that an official has little or nothing to say about the minor clerks in his office, and under those conditions it is imposing upon him a rather harsh obligation to make him responsible for their malfeasances or misfeasances. But I think in order to overcome that it is not necessary for you to abandon the maximum protection on the official himself. I would think that some statutory absolution of the official from responsibility from his subordinates -- let the statute clearly show the official is not responsible for the acts of his subordinates, that is not personally responsible for them -- and you could thereby get around this fear that you have about imposing upon him that responsibility through his official bond. It would seem to me that if the responsibility is there it is there, whether you have

a bond in the faithful performance form or whether you dont. The obligation on an official to perform his duties does not come into being by reason of the fact that he signs a bond: it comes into being by reason of the fact that he takes an oath that he will faithfully perform the duties of his office. Now the bond is not primary: it is secondary; it follows the oath, and there is not any greater responsibility through the bond than there is through the oath itself. In other words, if you had an official with sufficient independent means, let us say you had a man who is worth half a million dollars, worth enough so that he would have independent means far in excess of any surety obligation he would have to sign, he would have that responsibility on his own shoulders regardless of the amount of bond you require of him or regardless of the form of that bond. The mere fact that you require of him or anybody else a dishonesty form of bond would not absolve him from that individual responsibility if he had the means to respond.

So that I would like to suggest that you absolve him from that responsibility by the statute and then require from him a bond which follows the oath he takes, that is a faithful performance obligation. If you take less than the maximum protection, it seems to me almost like cutting off your finger in order to clip your fingernails. You have taken an extreme measure.

Now so far as the State Treasurer is concerned, the

Constitution requires that he shall furnish a bond for the faithful performance of the duties of his office, and then the statute goes a considerable distance beyond that and it sets out in detail he is responsible for the failure of his subordinates.

Now perhaps you could overcome the problem with which you are confronted by letting the State Treasurer and your other officials give a faithful performance obligation but then absolve them from responsibility for the duties of their subordinates, protecting yourself by the requirement that certain subordinates who have money or other property in their custody or who may have access to money or other property be bonded in such an amount as you people think necessary, or those to whom that duty should be delegated if necessary, in fixing those bond amounts, and then those subordinate people be bonded either with an individual or a schedule fidelity form, dishonesty form.

MR. WEBBER: Now practically, Mr. Foster, might it not work this way very easily: I am going to say that in probably the majority of cases a great deal of the work is actually transacted by the subordinates: the amount actually taken upon themselves by the heads of the departments varies of course in the individual, but that comes pretty near being a true statement. Now if the head of the department is absolved from any responsibility for the failure of the subordinate and the subordinate knows that the only risk that he is under of being sued by a bonding

company for default is on the basis of honesty or fidelity, and only failure to discharge a duty is involved, no honesty or fidelity is involved, it would be very, very simple for a loyal subordinate -- and many of them if not all of them are quite loyal -- to admit that the head of the department said, "Now, Agnes, you take care of that." And Agnes says, "Yes, I will," and Agnes didn't. The responsibility has been properly delegated to the subordinate, the head of the department is then absolved, the subordinate cannot be held for failure on the basis of performance, no lack of honesty and fidelity is involved, and there is no recovery. It is a perfectly possible and feasible racket, and we have seen instances in the State House over and over again of extreme loyalty on the part of subordinates to department heads. So we end up with a meaningless faithful performance bond from the head of the department, which carries with it as a burden the fact that every head of a department who is on his job -- and they are all going to be much more conscious of this bond situation than they have before -- is going to require a faithful performance bond -- no, that does not follow, because you have taken care of that with your absolution, you would eliminate faithful performance bonds running from the subordinates to the Heads of departments. But my first little story I told is still in the picture.

MR. FOSTER: I suppose that the conditions you outline could come about. There is nothing in your present proposal

would overcome that condition nor circumvent it: if your suppositious set of facts could come about with one form of bond it could come about on the other.

We are stating here that you cannot consider every possible set of circumstances. Surety people generally do not like to talk about these things, but there are and have been numerous cases where we were stuck in quite substantial amounts on officials who did not perform their functions in a proper way. For instance, there is a case which I think is still pending out in one of the larger communities of the country in which a county treasurer took some funds which were obtained through a refinancing operation and pro-rated those funds over all of the bondholders. A little bit later on it was determined that instead of pro-rating the funds he should have paid off certain bonds. How those bonds were to be determined or how it was to be determined which were to be paid off I do not know, whether it was by lot or serial number or what, but at any rate the companies got themselves involved in very substantial hazard by reason of that condition. Now there wasn't any stealing of funds. Presumably the fellow approached the task with the proper frame of mind and with some degree of diligence but apparently not enough. Nobody stole any money. He just paid the money to the wrong people, that is all. Now before they get through out there some surety companies are going to have to repay it.

There is another case which comes readily to my mind of an official -- and this happened to be a town official, but I think the example is good in any event -- who purchased certain things which were necessary to the community out of public funds but without securing prior approval of his governing body, and the company on his bond was responsible. He didn't steal the money: every nickel that he claimed was spent was actually spent, and the unfortunate part of it was that it was spent for public purposes and the community had the benefit of every nickel that was spent, and still because he didn't comply with the requirements of the statute in the spending of the money he was held responsible.

Then there is a case going into the other extreme -- this happens to be a sheriff's bond, but the dereliction could have been committed by anyone -- the sheriff refused to break up certain gambling devices which had been called to his attention as being in existence within his community. There were some coin machines or something like that. Somebody called on the sheriff and told him these machines were at a certain location and requested him to go down and break them up, and he didn't and suit was brought against him and he was found to be responsible. There you get the cases of non-feasance and misfeasance, the misfeasances innocent ones. Of course the non-feasance wasn't an innocent one, but at the same time loss resulted which was not a

loss through any dishonesty, no larceny, no embezzlement, no peculations, still there were losses to the communities.

Now it is just as impossible to sit here and conceive of the conditions which are likely to arise in the treasurer's office or in the auditor's office, or any one of the officials of this State, and try to determine from that in advance whether a dishonesty form of bond would or would not have covered it. But we do know that the greatest hazard involved in the official bond is the dishonesty hazard, and we also know without any uncertainty that there is a hazard in addition to that $\frac{1}{2}$ - it is a dishonesty hazard plus. Now as long as the plus hazard is there and as long as we deem it necessary to have an official bonded, why not go all the way and get him bonded all the way?

MR. WEBBER: In every one of these situations the bonding company has to pay and then the bonding company turns around and sues the fellow for its reimbursement up to the extent of his means, so when you compel him to give that faithful performance bond you subject him to a monetary risk which I believe is greatly enlarged over what his normal risk is, because the bonding company in any event will always proceed against him for reimbursement, whereas if he is not compelled to give a faithful performance bond ~~and~~ no bonding company is subjected to loss because of pure lack of judgment or whatever it may be. But without

dishonesty he is not subjected to a monetary risk; and I am going to say that in the large number of cases, practically all that will happen to him is that he will either be fired or his resignation compelled, which undoubtedly he is entitled to have happen to him, but he will not be punished further. I think it becomes a very important matter of policy as to whether, in the absence of dishonesty or infidelity, the State of Maine wants to subject its department heads, as long as they act in good faith, to that additional monetary risk which they get only by giving a faithful performance bond.

MR. FOSTER: I disagree with your argument in this respect: It is not the bond which obligates the official to the hazard: it is the oath of office he takes.

MR. WEBBER: Technically that is true, Mr. Foster, but practically it is not.

MR. FOSTER: The reason it is not true in a practical sense is because for the most part the pursuit of an individual is too difficult an undertaking. Where there is a surety in the picture people go to the surety -- and that is rightly so, that is why the surety is there -- the surety is there to guarantee what the official possibly may not be able to guarantee. That is why in my opening statement to you I suggested looking at this thing from the point of view of the man with adequate means, if you had an official who was worth a sufficient amount of money

so that this thing would be an obligation on his independent means. Now unfortunately you do not get officials of that character. I do not know -- I cannot speak disparagingly of your officials of the State of Maine, I don't know what their financial ability may be, but generally speaking you do not have millionaires holding public office.

(Off record)

MR. FOSTER: If you had such a man, the obligation that he would have would not come by reason of the fact that he signed a bond: it would be there by reason of the fact that he took an oath of office.

Now coming back to the responsibility of the individual, I am not entirely satisfied that it is wise public policy for an official to find himself free of any responsibility for misfeasance in the conduct of his office. I do not think that any man should undertake the performance of a public function with his mind free and clear of any concern over what might happen to him if he did not do his job right. I just don't believe that is good public policy.

MR. WEBBER: Well, Mr. Foster, is it good public policy to free and relieve him from responsibility for what his employees do?

MR. FOSTER: It is to this extent: If he has not any control or if his control of subordinates is either slender or remote, it is pretty harsh on him to ask him to be

responsible for their acts, yet it is not harsh to ask him to be responsible for his own acts.

MR. PAYSON: May I go back to your illustrations for a moment, Mr. Foster? I know you didn't intend to give every illustration you could of where a faithful performance bond might be useful, but you gave three illustrations, two of which I think would be covered by the treasurer's faithful performance bond -- the first one was a treasurer and the second was another town official -- but the treasurer certainly would have been liable for expending money he wasn't authorized to expend, so that the treasurer's faithful performance bond would have covered there. Your third one couldn't happen to the State of Maine, because the State cannot be sued for nonperformance by an official.

MR. FOSTER: Yes; but an official might be sued if what he did or failed to do resulted in damage to an individual.

MR. PAYSON: Yes; but the State has no loss there to protect itself against; and in the other two cases the treasurer's bond would have covered because the treasurer's bond has to be a faithful performance bond.

MR. FOSTER: One of the cases I cited, the first one, the refinancing operation, was a treasurer.

MR. PAYSON: But the treasurer would have been liable on his bond, because if there was no authorization for the expenditure then the treasurer certainly was responsible.

MR. FOSTER: That is right. I didn't cite those examples

in any sense of limiting the demonstration to the particular bonds involved.

MR. PAYSON: Yes; but in the first two cases the treasurer's bond would cover, and in the third case there would be no loss to the State anyway.

MR. FOSTER: Those were simply to show there was a hazard beyond the dishonesty hazard.

MR. WEBBER: Of course you noted we recognized that exposure in our statement here and dealt with it on the basis of the State becoming a self-insurer on those risks which we thought might be relatively few in number.

I have developed all I think I have on this subject.

(Recess)

MR. WEBBER: I think perhaps Mr. Mossman and Mr. Hayes may have some comments or discussion with Mr. Foster.

MR. MOSSMAN: Well, I have two thoughts -- there was one point I was talking about with Don during recess: I am, for example, now Commissioner of Finance here and was Controller, and the Controller definitely has charge of all the accounting for the State and a heavy responsibility as to the expenditure of State money.

Now I came in here from private business. If I had a similar job in private business it would be about half as difficult as that job is. In private business a question would come up to me and I would use my judgment on it and that is the answer. Here I cannot do that. The

question is: What is the law? And you have the burden of keeping within all of these laws and doing a job you would do outside probably for more money. Now why should I, assuming I am capable of holding a job like that outside, come in here and take a job that is more difficult and probably pays less money and has this tremendous liability attached to it on top of it? You are making it very unattractive for capable people to come in as public officials when you have this faithful performance hanging over them all the time. Isn't it the poorer calibre of man who would take that job, and the high type of man would just shy away from it?

MR. FOSTER: Well, of course the fundamental difference between public office and private business is that public office is a trust. In private business you go out and you make your own decisions, you pursue your own judgment. If your decisions are wise and your judgment is good, you are going to make a profit. In the conduct of public office we are not interested in profit: we do not undertake our duties with any profit motive in mind, and, in addition to that, we do not handle our own funds: we are not handling our own business, we are handling somebody else's business. Your losses in private business are your own.

MR. MOSSMAN: Not in a corporation.

MR. FOSTER: Yes they are, to the extent that you are an employee of the corporation. The corporation is operated by

its board of directors who in turn represent the stockholders. It is a step removed from the privately-owned business. At the same time, the difference between that and public office is so great there is hardly any comparison. Then bear in mind here is one other thing: You are employed by a corporation and have the management of that corporation, or, if it is not a corporation, if it is an individual employer, if your employer does not like the way in which you are conducting yourself you get your walking papers tomorrow morning. That is not so in public life.

CHAIRMAN DOW: It happened here two years ago: they got their walking papers the next morning.

MR. FOSTER: Yes; that was an unusual case. But, barring an unusual case of that nature, if I am thinking of the one you are, that does not happen.

MR. MOSSMAN: It happened here this year as a matter of fact.

MR. FOSTER: Well, you probably know many men who conduct themselves in such a way that they probably could not achieve success in private life if they were to conduct private business the way they conduct their official business, and yet at the same time if their conduct is short of scandalous you can't remove them. As a consequence, it is very necessary that these people be governed not so much by their own judgment as by the dictates and mandates of the Legislature. If a fellow were permitted to conduct himself uncontrolled by legislative mandate, I am afraid we

would have an awful mess on our hands in public life. And so the Legislature and those who are in authority set up rules and regulations for the conduct of that office, and when a fellow takes the office he obligates himself to conduct that office according to the rules and regulations which have been set out for him, not as he would like to do it -- it does not make a bit of difference what he would like to do. If he doesn't want the State Auditor on his neck in private business he says "Get out of here," but when he conducts himself in a public service, as a trustee of not his own funds but the funds of the public, he must have the State Auditor on his neck whether he likes it or whether he doesn't, and if he may disagree with the wisdom of the legislature in setting out requirements for him it does not make any difference: he must follow those requirements under penalty of suffering for it if he does not. So I think that whole thing is inescapable: it is just one of the hazards in public office, and if a man seeks public office he must seek it with that in mind.

MR. WEBBER: Yes; but it seems to me what Jim is saying is this: He says: If I make an error in judgment, not of honesty and good faith, I have got anyway the risk I am going to be discharged and out of a job, and, second, so far as I have private means, I suppose that I am subject to direct action by the State, if they see fit to take it, for my negligence in the performance of my duty,

violation of my oath of office and so forth, but now you propose to add to that a faithful performance bond which I know carries with it not just the chance that I will be gone after financially if I make a mistake but the certainty that a bonding company in all cases will do it.

MR. FOSTER: That is right.

MR. WEBBER: And he says, "I look on that from a practical viewpoint as being a great increase in risk," which makes a position which is only reasonably attractive to a good man -- and we all know that is so -- rather unattractive on the whole.

MR. FOSTER: Well, frankly, isn't that just as it ought to be? Shouldn't anybody who seeks public office go into public office with a full knowledge and realization that he is going to have to pay for the consequences of his misdeeds? If he is afraid of these misdeeds, it is far better he stay out of public office.

MR. HAYES: What do you mean by "misdeeds" -- you mean ones that would make him liable to a fidelity company---

MR. FOSTER: Let us take it in the broader sense, not simply he would have to pay back the money -- there still shouldn't be any argument on that -- but let us take it in the broader sense: the failure to perform his duties or the malperformance of them. Now then, so far as the certainty of his being called on if there is a bond present, that to my mind is one of the most desirable things of a

bond, because it removes from fellow officials who came in with you in the same administration -- the chances are you have been old pals for a long time preceding that and you have full confidence in them and one day you wake up to the fact that something happened. Now it becomes your responsibility to pursue him for that misdeed. Well, you don't like it. He is an old friend of yours, he has been a buddy and a pal, and so if you can find ways and means of excusing him you are going to do it. Now isn't it highly desirable for the State to have a vehicle for accomplishing that without putting the onus on the buddies and friends of the person who gets himself into trouble. Here you have got a bonding company that is a cold proposition; nobody cares at all about them; they are in here and they collected a premium to do that very thing; so you go to the bonding company and the State is made whole. Now then, the fellow who committed the misdeed should bear the responsibility for it, but let the bonding company pursue him. Why should you get yourself all tangled up in it? Gentlemen, if there is any feature of bonding that I think is desirable that is one, because it removes from the shoulders of officials the responsibility of doing these nasty, dirty little tasks which have got to be done.

MR. HAYES: Right along that line: in connection with municipal audit work, our department has taken a very

strong stand against personal surety bonds for two
~~REAS~~
reasons: One reason is because so often the surety is
no good, but the major reason has been in small towns, and
the larger places too, there is a very strong disinclination
to proceed against personal sureties which does not exist
anywhere near as much in proceeding against a bonding
company, which is the same principle you are bringing
out there.

MR. FOSTER: It is simply a different approach to the same
thing.

MR. HAYES: One question that comes to my mind, Mr. Foster:
I have had a good deal of connection with insurance ever
since I was a youngster, and I have come to feel that the
insurance premium is a pretty good measure of the hazard:
in other words, when they jump the insurance rate on
your house it is time to put on some more insurance, not
to cut it out, because the insurance companies have got
the hazard reduced right down to an actual measurable unit
or they go bust, and to my mind it is the same thing in
surety, and if from a practical standpoint the coverage
of a faithful performance bond is worth more to the people
on the receiving end why isn't it a bigger hazard to
the bonding companies and why do they continue to write
it at exactly the same price?

MR. FOSTER: If I may have a word to say off the record,
I shall endeavor to answer that question.

(Off record discussion)

MR. PERKINS: Mr. Foster, you say on public officials it has always been the custom to give a faithful performance bond. Now I can see from that they have never coded or segregated their experience on the dishonesty type of bond, in which event, not having any experience, they would use only one rate. For instance, if they have not got their business segregated, and there has got to be an exposure to determine the rate, and they only use one rate for both forms.

MR. HAYES; And, as I understand, in effect no matter what form we buy we get a faithful performance bond.

MR. FOSTER: That is true: whatever form you buy in Maine the surety would be a faithful performance obligation. If by statute you prescribe some other form then you would probably get what the statute requires.

MR. HAYES: So in effect when you buy a faithful performance bond you are paying ~~less~~ than it is worth, and when you are buying an honesty form of bond you are paying more than it is worth?

MR. FOSTER: I do not so understand.

MR. HAYES: Mr. Perkins said they had not coded their cases enough so that they had a measure of the separate hazard on the two forms. When you are buying a faithful performance bond you are paying too low a rate, and when you buy a fidelity you are paying too high a rate, because you are paying the average rate for both of them.

MR. FOSTER: No; that wouldn't follow, because on public

officials there has been no honesty form, with the possible exception of subordinate employees -- there may be instances where the honesty form was taken there. Let us limit our discussion to the official himself so we wont get confused. On the official himself there has been no bond written other than the faithful performance form, and where a bond other than the faithful performance form was written the courts have pretty generally said "your obligation is faithful performance regardless of what you say in your paper."

(Off record discussion)

MR. WEBBER: Suppose, Mr. Foster, that we should put the mandate into the law which only required honesty and fidelity and were unique in doing it, might we not than be in a proper position to say that because we are unique and because this mandate is in our law and you are not subject to any risk of recrimination by the court we are candidates for a lower rate and should be considered?

MR. PERKINS: Probably it would be just about a nickel or ten cents off.

MR. FOSTER: As I said to you before, I have nothing to do with rates; our organization does not consider rates at all. Rates for the companies are fixed by the rating bureau.

(Off record discussion)

MR. WEBBER: Jim, you said you had two thoughts, and you developed one of them. What was the other?

MR. MOSSMAN: The second was that the ramifications of this faithful performance bond seem to be rather broad. Would this be true? As this law is set up now the Commissioner of Finance and the State Auditor establish the amount of the bonds. If those are faithful performance bonds and the bonding company -- let me see -- if a subordinate does something and we collect on his bond and also on the bond of the department head, does the department head have any comeback on us for saying that the bond of his subordinate was not set at a sufficient amount? Is there a liability attached to the simple fact we specify the amount of the bond?

MR. FOSTER: No, I would not think so. After all, the best you can do is exercise good judgment. If you exercise good judgment, that ought to be the end of your job. But that brings you into a field that I thought perhaps this committee would see its way clear to wind up or terminate or settle one way or another, and that is the very thing you point out. If an official is going to be held responsible for his subordinates, then of course that official ought to be the fellow who sets the bond penalty on the subordinates: if it is his responsibility, then at the same time he ought to have the concurrent privilege of fixing the limit of that responsibility, and the State Auditor or no one else should go into office and say this fellow is going to have a \$5000 bond when as a matter of fact the official thinks for his own protection

he ought to have a \$50,000 bond. So that condition ought to be clarified by the pursuit of this proposal which was suggested: let the official not have that responsibility, let those people be independently bonded to the State.

MR. PERKINS: But you cannot do that on the Treasurer's bond.

MR. FOSTER: Not under the present statute, but if that statute were revamped probably you could.

MR. PERKINS: Then the treasurer coming in undoubtedly would be on his toes and say, "I have got a \$150,000 bond and everyone in this department will have a \$150,000 bond drawn to me."

MR. FOSTER: Not necessarily.

MR. PERKINS: But he could say that, and, under the circumstances, why couldn't he get away with it?

MR. MOSSMAN: As a matter of fact, he could still do that and wouldn't be fully covered if they went over \$150,000.

MR. PERKINS: Under the circumstances he might want a two million dollar bond on the deputy treasurer.

MR. FOSTER: It is not likely he would do that unless he was fearful of his independent means.

MR. PERKINS: Supposing you have a man with independent means of \$500,000, he wouldn't want to be Treasurer of State.

MR. FOSTER: What he would want to do is set up the

mechanical operation of the office so few people could get to the cash register to get their fingers in and bond them pretty heavily.

MR. PERKINS: What Jim brings up, if he and Mr. Hayes go in and say what the bond shall be and I am Treasurer of State and something goes wrong and they collect under my bond, I am going to sue those guys, and I think I can collect if they have got anything.

MR. FOSTER: You get yourself carried around in a vicious cycle, and it is pretty hard to tell where you are going to wind up, on account of the terminal velocity.

MR. MOSSMAN: That seems to be the difficulty about this thing that is before me, this faithful performance thing, there doesn't seem to be any terminal velocity at all.

MR. FOSTER: Aren't you a trifle confused? Aren't you assuming the obligation arises out of faithful performance on the bond rather than the obligation which the fellow has entirely independent of the bond? When a fellow takes his oath of office he has got that obligation whether there is a bond there or whether there is not.

Now let us leave the bond out of the picture entirely. If a fellow takes his oath of office he is obligated to all of these hazards: the bond neither adds to nor detracts from that obligation: the only thing the bond does in this picture, it facilitates collection on the obligation, but the obligation is there.

MR. WEBBER: But the obligation in the absence of the bond, Mr. Foster, as a practical matter, is not enforced to the extreme limit.

MR. FOSTER: I do not think you should propose to legislate on the shortcomings of what may have happened in the past nor upon the assumption you are never going to have a man in public office in this state who is not independently able to take care of these things, or when the time to enforce them comes around you presuppose the official who is obligated is going to be derelict in the performance of his duties. I do not think that is a proper premise for the approach to this problem. I do not mean to be critical, but I have felt that was the thread that ran through your proposal. You have said, "In the past we have had practical experiences with the fallacy of enforcement. Now because somebody in the past has failed to enforce why have it?" Is that a logical approach to the problem? The failure of an individual to enforce was certainly entirely apart from and tangent to the obligation. I don't know why they didn't do it. You may know. But, as far as I am concerned, it didn't make any difference why they didn't do it: it should have been done.

MR. WEBBER: I think it is based on the element of human nature, and human nature doesn't change.

MR. FOSTER: Well, if you arguing human nature, then let us go back over a much broader field than you have here.

I do not know how far back public officials have been bonded. Corporate suretyship has been in existence for perhaps seventy-five years. As an industry it is an infant one, and yet beyond the day of corporate suretyship officials have been required to be bonded. The suretyship of people of trust is referred to in the Old Testament, so in all probability there was a suretyship way back many thousands of years ago.

Now if that is any test of human nature, then the answer seems to be that human nature has found the necessity for this thing and has found it advantageous, rather than the unfortunate experience that you perhaps have witnessed up here. May you not assume that the experience you have had has been an exception rather than the rule? I have seen many instances where they have turned bitter cold on these things and they have gone out for the last ounce of blood, and when I say gone after blood they went after it, because I have been on the bitter end of some of these cases.

MR. WEBBER: What I say is I think there might very well be other people besides myself who would have this personal feeling -- and it is purely personal with me -- if the man who has charge of state purchases, and this example has been used before, should become aware that the price of coal, for example, was probably going up and he failed to place the order soon enough to get the coal before the

price went up, I can conceive that it might be perfectly proper to cause him to be removed from office for a dereliction which might result in quite a loss to the State of Maine, but my personal makeup is such I would not personally approve of suing him for the difference in price that was lost as long as he has not put any money in his pocket. There are people who draw that line, and that is what happens practically.

MR. FOSTER: On the other hand, if he did it because he was playing favors with some of his pals and no money came into his pocket but money came into somebody else's pocket, I don't see any reason why he should not be made to suffer for it.

MR. WEBBER: You are injecting another element, but I am confining it to pure failure in the exercise of sound judgment.

MR. FOSTER: If it were pure failure in exercise of sound judgment without any statutory inhibition, probably he would not be responsible. I do not know of any case where an official has been responsible for incorrect judgment if he exercised that judgment in a free fashion and honestly approached his problem; I do not know of any instance, and I do not think our courts would ever hold a man responsible for incorrect judgment.

MR. HAYES: I think Mr. Webber did not have the idea of incorrect judgment: it was a case where he failed to exercise correct judgment: The price of coal was going up and he

knew it and he went to the ball game and got so excited over the ball game he did not place the order.

MR. FOSTER: Of course if he deliberately walked out on his duties, then I think he ought to be held responsible, but if he had the alternative of ordering coal or not ordering coal and the price went up, I do not believe that he should be held responsible; but if he does not act in the face of conditions which he knows of and which would impel an ordinary man to act in the conduct of his private affairs, he should be held. Of course we are discussing a lot of hypothetical cases and reaching conclusions that the court might not reach, but I do not know how else you can approach the problem.

MR. WEBBER: Let me ask you this quite practical question; you and Devlin both I would like to draw into this. Suppose after this committee gives very careful consideration to all these many arguments on both sides of this proposition they should decide to go forward with an honesty and fidelity coverage and exclude the faithful performance and carry out a program similar to the one outlined, would this be of such concern to the bonding companies that they might be expected to oppose in the Legislature such legislation?

MR. foster: I don't know. I am frank to tell you I don't know. We talked about this to some extent, I conferred with Mr. Lewis, President of the Rating Bureau, and in

we sought the thoughts and ideas of several prominent public officials, underwriters and companies, and it seemed to be the unanimous opinion of all for me to recommend to you, either in writing or in person, that anything short of a faithful performance bond for public officials would be a disservice to the State. Now whether or not they would feel that way and go to the extent of opposing a recommendation of that character, I am frank to say I don't know.

CHAIRMAN DOW: Could I take that one step further, taking your same illustration: Supposing this committee did recommend it and, regardless of opposition, it became law, would the State have any trouble in buying those bonds?

MR. DEVLIN: As an underwriter, I would say no.

CHAIRMAN DOW: You would be in quite a pickle if you did that and no one would play ball with you.

MR. FOSTER: Let me make this clear: What I hope to achieve here is not any effort on my part to sell you people a bill of goods: I am trying to give you my honest opinion of what I believe to be the right path for you to pursue. I think I have demonstrated from what I have said that nothing I have said would be of particular advantage to any company or any group of companies.

^{Now} CHAIRMAN DOW: I recognize that, and I think the committee does. What we wanted was information and the viewpoint of a man who knows his business along that line.

MR. WEBBER: Of course, Mr. Foster, if we follow your program

we have either got to accept multiplicity of premiums involved in the head of the department requiring bonds from his employees to him or the absolution of each department head from the failure in the exercise of their duties on the part of his subordinates, which may or may not be sound public policy.

MR. FOSTER: You are proposing that anyhow, except in a different way. You are proposing to go farther than I have recommended. You are proposing to take from subordinate employees a dishonesty bond; you are proposing to take from officials a dishonesty bond, assuming the official has no responsibility beyond the dishonesty responsibility. Now that is farther than I have suggested you go. I have suggested you go all the way on the official, not two-thirds of the way or not nine-tenths of the way, but go all of the way on him, and then take from his employees the very selfsame thing you are proposing to take, the dishonesty bond, but because there may be a gap between the two you have bridged that gap for the official so that he does not have to bear that responsibility.

MR. WEBBER: By absolving him from responsibility for what his employees do or do not do?

MR. FOSTER: That is right. Now you believe you have accomplished that same thing or it might not exist when you propose two dishonesty bonds.

MR. WEBBER: Well, we believe this: that the heads of our

departments will not require a faithful performance bond running to them from their subordinates if they haven't had to give one themselves.

MR. FOSTER: Perhaps you are right.

MR. WEBBER: It is the bond that scares them, not the oath of office.

MR. PERKINS: In either event you are breaking the oath of office.

MR. FOSTER: No, you wouldn't break the oath, because the oath has limitations in the statute. You say you will perform the duties of your office.

MR. PERKINS: That covers everything in the department.

MR. FOSTER: Yes; but implicit in the obligation is compliance with the statute. If the statute says you do thus and so when doing something and you comply with that statute, you haven't violated your oath.

MR. PERKINS: I am absolving my clerks or they are absolving me for the acts they do.

MR. FOSTER: No they are not.

MR. PERKINS: If you have a faithful performance and dishonesty bond on them and you put it in the statute that I do not have to be responsible for their acts.

MR. FOSTER: Don't think of it in terms of you absolving them or their absolving you. The Legislature is the supreme authority under the Constitution, and out of the Legislature they define the hazards which you as a public official shall take, and they say this shall not be a hazard. Perhaps I have used the word "absolve" unfortunately; maybe

it should not have been there.

MR. WEBBER: I think maybe I used it first.

MR. FOSTER: To "absolve" presupposes something that is there. Now we are not going to legislate after one of these things happens and ask for a release.

MR. WEBBER: It negatives the responsibility.

MR. FOSTER: What you want the legislature to do is say from now on you do not have this responsibility you had yesterday.

MR. WEBBER: Has anybody else any questions? If not, we thank you very much Mr. Foster, and Mr. Devlin and Mr. Perkins.

MR. FOSTER: May I make one further suggestion I overlooked before and that is the subject of cancellation. Under the bond form that has been suggested, both your form and the one I have suggested, there is no need for a cancellation clause, it is a continuous form. If you get these continuous forms that run forever and a day there must be some way of escaping if there is danger of a person going sour, and ordinarily an obligation running to the State is not cancellable unless specific authority is found in the statute. There are a number of ways of remedying that, and I just suggest that whatever suggestions you make you keep that in mind, because unless there is a cancellation clause and unless it is authorized by statute you may find some difficulty with ~~wxxk~~ the continuous form of bond, because sometimes you get those bonds running on for a good

many years in the future and a person who is perfectly all right the day the bond was signed may not be all right ten years from now.

MR. WEBBER: One more thing I neglected to ask you: If these two gentlemen, Mr. Hayes and Mr. Mossman, should later come into the position of determining the amount of these bonds and who should be bonded, you feel they would be justified when they were estimating the exposure in taking into consideration the extent to which internal control through the audit department and the finance department has been increased during the last couple of years?

MR. FOSTER: Surely. I can demonstrate that by a simple hypothetical example. If I am running an office where everybody in the office can run up to the counter when somebody comes in and either pass out public property or take in money, quite naturally I would want every one of those people bonded for the fullest amount of whatever the exposure may be. On the other hand, if I had a cashier's cage and all the monetary transactions were conducted through the cashier's cage and nobody in the office but the cashier and assistant cashier got into that cage, then of course you would only need a bond on two people, whereas the other way around you would need a bond on everyone. The same is true of access to the vault: if everybody in the office can walk into the vault, then

everybody in the office has got to be bonded for
whatever you fellows think they might be able to get
away with.

(Off record discussion)
