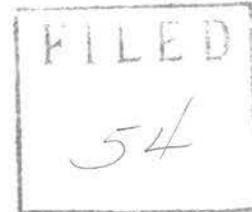


IN RE: Right of non-resident sureties to withdraw on petition from bond of county collector.

Sec 2846 to 2852 inc } R.S. Mo
2943 to 2952 inc } 1929

February 20, 1933



Hon. Minor C. Livesay,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

In re: Release of Surety Co.,
Collectors Bond on removal from
county of surety.

Dear Sir:-

Your letter of February 13th, received and pertinent part thereof reads as follows:

"The facts are as follows: The County Collector gave a bond at the time of his election which was accepted by the then County Court. One of the signers of this bond was Willard Stevens. Since that time Mr. Stevens has moved to another county and now wishes to be discharged from liability on this bond. He has notified the principal of his intention but the other signers on the bond have had no notice.

"The question presented by the above facts is whether the collector is required to give a new bond, acceptable to the County Court, and thereby release the old signers including the person who has removed from the County, as provided in Sections 2846 to 2852 inclusive, or whether the person wishing to be discharged may petition the Court, without consulting the other bondsmen, for discharge under sections 2943 to 2952 inclusive and that the County Court may find that the bond is sufficient without additional bond. That is does the last above listed Missouri statutes apply to County officers or merely to public utilities etc."

The sections 2846 to 2852 and 2943 to 2952 inclusive, R.S. Mo. 1929 have in substantially the same form been on our statute books since 1872.

Sections 2846 and 2848, 2849, 2850, R. S. of Mo. of 1929, provide as follows:

"Section 2846--The sureties of all clerks, sheriffs, constables, collectors and other county officers shall be residents of the county in which the bonds to which they become parties, by reason of being sureties for any of the said officers, shall be executed."

"Section 2848--When it shall come to the knowledge of any court whose duty it is to approve the official bonds of any of the officers named in Section 2846, that a surety of any of the said officers has become a non-resident of the county in which his official bond was executed and required to be filed or has died, become insolvent or otherwise insufficient, said court shall make an order requiring the officer for whom any such surety executed the bond, on a day therein named, to appear and show cause why he should not give additional security.

"Section 2849--If upon investigation of the matter it shall appear that any surety has become a non-resident of the county in which the bond is filed, died, become insolvent or in any other wise insufficient, the court shall require the officer for whom such surety executed the bond to give additional security by a day named; and in default thereof, the said office shall be forfeited, and the same shall become vacant, and the facts shall be certified to the court or officer whose duty it is to fill such vacancy.

"Section 2850--When the additional bond is given and approved, the former sureties shall thereby be discharged from any misconduct of the principal after the approval of the bond. "

The above sections 2846, 2850, are in Chapter 15, R. S. Mo. 1929.

In Chapter 16, R. S. Mo. 1929, are the following sections also referred to in your letter along with your reference to the hereinabove set forth sections 2846, 2850.

"Section 2943--Any person bound as surety in any bond given by any officers, including executors, administrators, guardians, curators, receivers, trustees and depositories, to secure the faithful performance of the duties of such officer, may, on his petition in writing addressed to the court authorized by law for the time being, to take and approve such official bond, be discharged from all future liability on such official bond.

"Section 2944--The petition shall set forth the facts upon which the application for discharge is founded, and shall be verified by the affidavit of the petitioner thereto annexed.

"Section 2945--A notice in writing of such intended application together with a copy of the petition, shall be personally served on the principal of the bond, at least fifteen days before the making of the application."

Section 2946 provides for service of notice by publication if principal cannot be personally served.

"Section 2947-- The court to whom the petition is addressed shall hear the application, and may on examination thereof, in their discretion, make an order requiring the principal in such bond to give a new bond with sureties for performance of his official duties.

"Section 2948--If such bond be given, it shall be taken, approved and filed in the same manner that the official bond of such officer is required by law to be taken, approved and filed.

"Section 2949--When such new bond is taken, approved and filed, it shall immediately operate as a discharge of all the sureties in the former bond from all liability arising from any subsequent misconduct or default of the principal therein, and such sureties shall thenceforth be liable on such bond only for such breaches thereof as shall have happened prior to the taking, approving and filing of the new bond."

Section 2950 provides if new bond not given within sixty days after order made therefor, the official's office shall from thenceforth be vacated and the court shall certify such vacancy to the court or officer having power to name said official's successor which shall be immediately done.

Section 2951 gives a surety paying money on account of his being surety on such bond the same remedy against his principal and co-sureties as is provided in this same Chapter 16, against principals and co-sureties in bonds, bills and notes for the payment of money or delivery of property.

Section 2952 provides remedies in Chapter 16 available against and by executors in all cases where same could be maintained against the executors, testators or intestates, if living.

The hereinabove set forth sections are all you refer to in your letter.

Your letter states the surety "has moved to another county and now wishes to be discharged from the bond. He has notified the principal of his intention but not the other signers on the bond."

I understand your letter above quoted to ask the two following questions:

First--Mr. Stevens, the surety having notified the county collector, his principal, he has removed from Morgan County and desires release from further liability as bondsman is the collector required to give another bond under the hereinabove quoted provisions of Sections 2846 to 2950 inclusive, Chapter 15, R.S. Mo. 1929, the same being the sections which provide on removal of a surety from the county, that the county court upon having knowledge of such removal shall require a new bond if on investigation the court finds the surety has become a non-resident; or can the surety, Mr. Stevens, without consulting the other bondsmen, secure his discharge from future liability by petitioning the county court under the provisions of Sections 2943 to 2952 inclusive of Chapter 16, R.S. Mo. 1929, which last named sections provide any person bound as surety on a bond for any officer including executors etc. etc. may by notice in writing to his principal on petition filed with proper court be discharged from future liability on said bond, if the court in its discretion makes an order requiring the principal to give a new bond.

Replying to your first part of first question, I beg to say your letter does not state whether or not the notice given the principal was in writing. But if it has not been so given in writing it can be and I will assume here in the notice was in writing. As you know, Section 2848 Chapter 15, provides,

"When it shall come to the knowledge of any court whose duty it is to approve the official bonds of any of the officers named in Section 2846, (and county collector is named in Section 2846) that a surety of any of the said officers has become a non-resident of the county in which his official bond was executed and required to be filed * * * said court shall make an order requiring the officer for whom any such surety executed the bond on a day therein named to appear and show cause why he should not give additional surety."

and the succeeding section 2849, Chapter 15, provides if an investigation the court finds the surety has become a non-resident of the county, "the court shall require the officer for whom the surety executed the bond to give additional security etc."

In my opinion, if it comes to the knowledge of the county court of Morgan County, Mr. Stevens, a surety on your collector's bond has removed from the county it is the duty of your county court to immediately make an order, after proper notice as hereinafter suggested requiring the county collector to show cause why he should not give additional security, and I think the court, should, after investigation if it finds it is a fact the surety has become a non-resident of the county, require the county collector to give a new bond.

These sections 2846-2850, Chapter 15, provide a method of removal on initiative of the county court without waiting for a non-resident surety to return and inform the court he is a non-resident.

The two chapters, 15 and 16, above referred to conclusively show it is the policy of the State that sureties on all bonds of county officials must be residents of the county in which the bond is executed approved and filed.

Section 2846, Chapter 15, R. S. Mo. 1929, hereinabove set forth provides as one of the qualifications for suretyship on a county official bond that,

"The sureties of all clerks, sheriffs, constables, collectors and other county officers shall be residents of the county in which the bonds to which they become parties, by reason of being sureties for any of the said officers, shall be executed."

You will observe Section 2848 is mandatory in its provisions--it uses the word "shall make an order, etc." thereby imposing a specific duty to act on the county court if and when it has knowledge of sureties removed from the county.

The mere giving of a notice by the surety to the principal even though in writing will not release the surety on a county collector's bond under the provisions of Section 2843, R. S. Mo. 1929.

If proceedings be initiated by the county court, care should be taken to see that all the statutory requirements are complied with and the statutory ground of removal of Mr. Stevens from the county should be set out in the order of the court as the basis for its action.

I refer to this because our Supreme Court in case of Wood Adm. vs. Williams et al, 61 Mo, 63, wherein a new Administrator's bond was given in lieu of an old one and the record did not disclose any of the statutory grounds for giving the new bond, the court held the

sureties on old bond were still bound and sureties on new bond bound because not being a statutory it was a voluntary bond and binding and in the opinion the court, 61 Mo. l.c. p. 66 said:

"The second bond does not seem to have been given in conformity to any statute though it is evident that was the effort and intention of the parties to make a bond which would relieve Jones who intended to leave the State from any further liability as surety for Williams. The record does not disclose that any notice was given or that any of the statutory causes for this proceeding existed. * * *
***** but the existence of some one of the grounds provided by statute for taking a new bond and discharging the sureties of the old one would seem to be indispensable."

In case of State ex rel. Saline Co. vs. Sappington et al, where the county court ordered a new bond for a county Treasurer and in place of giving one bond for \$20,000.00 the Treasurer gave two bonds for \$10,000 each which the court accepted and the Supreme Court held both the sureties on the old and the new bond were bound because the statute provided for a single bond for \$20,000 before sureties on old bond would be released from liability.

The order of the court in the last mentioned case required two bonds for Ten Thousand Dollars each and the Supreme Court said the order did not comply with the statute calling for a single bond.

Replying to second part of your first question which as I read your letter is, can the surety by complying with the provisions of Section 2943-2952, Chapter 16, R. S. Mo. 1929 procure a release from future liability on the Morgan County Collector's bond; In other words, do sections 2943-2952 apply to release of sureties on bond of a county collector.

Clearly these two Chapters 15 and 16, are a related and united part of a remedial process prescribed for qualifying sureties on official county bonds and for removal and release of sureties and therefore they should be construed each as a part of the plan prescribed by the statute for protection of sureties and of taxpayers against default or misconduct of county officials.

An examination of the statutory history of sections 2943-2952, R.S. Mo. 1929 reveals that these two sections appeared in the Revised Statutes of Mo. of 1879 in Chapter 66, thereof as Sections 3906 to 3913 inclusive in same form as now same appears as sections 2943-2952, except after word "officer" in line 2, of section 2943

R. S. Mo. 1929, and before the words "to secure" in line 5 of said section 2943, there has been inserted by amendment of the 1879 statute the following words, to-wit;

"including executors, administrators, guardians, curators assignees, receivers, trustees and depositories"

but such amendment does not affect legally the question of statutory construction, we are now to deal with respecting the said sections 2943-2952.

The direct question is, do said sections 2943-2952 afford a method of release of surety on county collectors bond grounded on fact, surety has become a non-resident of the county? I have found only one case in Missouri bearing directly on this question. There may be others but my diligent search therefor, has been unrewarded: And I find no case in Missouri subsequent to this one citing this particular case as authority on the single question above suggested. Likewise I have been unable to find a case in Missouri overruling or criticising it on the question herein involved.

Sections 2943, 2944, 2945 and 2946, R. S. Mo. 1929 provide any person bound as surety on bond for an officer may be discharged from future liability thereon by petition addressed to court authorized to approve said bond by written notice to the principal given fifteen days before making of the application and if principal unavailable for personal service then service by publication may be had: And then 2947 provides the duty of the court in the following language:

"Section 2947--The court to whom the petition is addressed shall hear the application, and may * * * in their discretion, make an order requiring the principal in such bond to give a new bond.* * *"

The intent of Chapters 15 and 16, R. S. of Mo. of 1929 is to protect the tax-payers from loss occasioned by default or misconduct of the county officials. To carry out this intent, the Legislature first prescribed one must be a resident of the county before he is qualified to sign as surety a county official's bond: Second, that if a surety on an official's bond becomes a non-resident of the county and knowledge of this fact comes to the county court, it is the duty of the county court to ascertain if surety has become a non-resident and if so to require a new bond of the official: Third, that failure of the official to furnish new bond vacates his office and on certification by county court of failure of official to give new bond, to official given power to fill vacancy, successor to the officer so removed must be appointed.

This is a summary statutory removal from office without intervention of court for sole purpose of protecting the public interest.

The policy of the State as announced in these statutory provisions is that to protect the public funds in custody of county officials

bonds with solvent sureties who are residents of the county must be kept in full force and effect.

The above method of protecting the public interest is by action on the initiative of the county court. Now when a bondsman comes and announces he has become a non-resident and petitions the court for release and that a new bond be required of the official, we find much the same procedure is provided: First, the statute says the county court shall hear the petitioner's application: Second, the court "may" in its discretion order a new bond to be given: Third, if and when the new bond is given and approved and filed the bondsmen is released from future liability.

It is true the literal reading of the language used in section 2947 conveys a power to county court with an apparent discretion to use it or not as they deem proper.

I am however, of opinion when a bondsman on county collector's bond removes from the county and petitions the county court to release him from future liability on ground of his non-residence, it is first: The duty of the court to give petitioner as early a hearing on his application as is possible: Second, that if on such hearing the fact is established the bondsman has become a non-resident of the county it is the duty of the county court to order the collector to give a new bond. I base my opinion on the sound principle that when the public welfare demands it then the power to act is a duty to act,

We see here the power given the county court on petition of bondsmen to require a new bond. To allow a bond to remain in force with a non-resident as one of the sureties is in direct violation of Section 2846, R. S. Mo. 1929 providing all sureties on county official's bonds must be residents of the county.

We see the next sections 2848-2849 providing if court learns of non-residence of surety, "said court shall make an order requiring **** the officers on a day named to *** show cause why he should not give additional security!" And if investigation reveals non-residence of a surety, "the court shall (not may) require the officers to give additional security."

By these sections of the statute the State declared if surety becomes non-resident public welfare demands new bond be given and therefore the grant of power to county court to act when surety becomes non-resident makes it the duty of the court to act.

The same public welfare demands that in case of a bondsman petitioning for release on ground of non-residence, the county court should act and require a new bond."

The intent of the law in requiring county court to compel new bond on its initiative on learning of non-residence of a surety is to protect the public interest: The intent of the law in granting the power to the county court to require the giving of a new bond on petition of bondsmen for release on ground he has become a non-resident, is to protect the public interest.

This construction is in conosance with the authorities. Mr. Endlich in his work on statutory construction, pp. 400,401 says:

"And when the real design of the Legislature in ordaining a statute, although it be not plainly expressed is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect even though in so doing, the exact letter of the law be sacrificed or though the construction be contrary to the letter, and this rule holds good even in criminal statutes, of course if the meaning of the Legislature is clear every technical rule of construction must yield, and though the words used to express that meaning be not apt for the purpose they will be so construed as to serve the same."

The design of these statutes as to sureties is to have at all times sureties who are residents of the county wherein the bond is filed. And so, in case of State ex rel. Mo. Life Ins. Co. vs. King, 44 Mo. p.283, where the facts were the law of Missouri required a Life Insurance Company to have \$100,000 of its capital paid in and invested in stock or bonds of the State of Missouri, ***or in notes or bonds secured by mortgages on deeds of trust on unencumbered real estate worth at least double the amount loaned thereon, etc.

"The insurance commissioner refused to accept a first mortgage on Illinois farm as part of notes or bonds on unencumbered real estate on ground the statute required the mortgage must be on Missouri real estate although the statute was silent in regard to where the land should be situated,"

And the Supreme Court, 44, Mo. l.c. pp. 284 -285 said:

"It must be conceded the law is indefinite in regard to where the land shall be situated. The only positive requirement is that the real estate shall be unencumbered, and worth at least double the amount loaned. But what was the intention of the law-makers? It is generally true that where words used in a statute are clear and unambiguous there is no room left for construction: But when it is plainly perceivable that a particular intention though not previsely expressed must have been in the mind of the Legislator that intention will be enforced and carried out and made to control the strict letter."

And in *Kiddick vs. McNair, Gov. of Mo.*, 1 Mo. l.c. 150, the Court says:

"In giving a construction to a statute one question always presents itself to the consideration of the court, viz: What was the intention of the Legislature?"

Applying these rules of construction above set forth, we find the intent of the Legislature was to have all bondsmen on official bonds resident of county wherein bond was made: Also plain intent all all officials should at all times have legally sufficient bond with legally qualified sureties ther on and one of qualifications of sureties is local residence.

If it be held that it is the duty of county court on showing petitioner is non-resident to require a new bond there can be no possible chance for loss to the tax-payers because the retiring non-resident bondsman is liable for all breaches of bond to date new bond is approved and if county official cannot give new bond the new official when appointed must give a new bond and the old bond by the very language of the statute holds until the new one is approved. The whole object of the bond is to protect the public interest and that is best attained by making it the duty of the county court on petition for release of a non-resident surety to require a new bond.

In *Steinar Vs. Franklin County*, 48 Mo. p. 167, the Court said:

"When * * * the public good requires it the word "may" used in a law should always be construed to mean "shall".

The public welfare and good demands giving a new bond when one surety becomes a non-resident of the county and these provisions of the statute herein considered in my opinion mean that shall be done no matter whether the county court moves under Sections 2848, 2849 or the non-resident bondsman moves in the matter under Section 2943, to 2952.

The Supreme Court of Missouri in *State ex rel. vs. Bell*, 99 Mo. p. 569 has held that a surety on a public administrator's bond may file a petition for release on the ground he has become a non-resident of the county and that the county court has the authority under the provisions of sections 2943, 2952, R. S. of Mo. 1929, to order a new bond given and to accept the same and after approval of the new bond the sureties on the old bond are released from future liabilities. It is true this opinion was rendered upon sections 3906-3912 inclusive of the statutes of Mo. of 1879, but these sections of the 1879 statute have been carried forward in the various revisions and now appear as Sections 2943-2952, R. S. of Mo. 1929.

The court said in above case, 99 Mo. l.c. 575, 576, after setting out in full sections 3906 to 3912 inclusive R. S. of Mo. 1929:

"That the language of these latter sections include public administrators, as well as other officers is evident at a glance unless it is affected by the provisions of law relating to the special subject of administration. Plaintiff claims that the terms of Section 307 above quoted limit sureties of a public administrator to the mode and grounds mentioned in sections 28 to 31 (R. S. 1879) in moving for a discharge from future liability on the bond and thereby exclude resort by them to the proceedings under sections 3906 to 3912 * * * we think that language does not evidence any intent of the law-makers to exclude public administrators and their sureties from the benefits of Chapter 66, Revised Statutes of 1879 (Sections 3906 and following) or to engraft an exception against them upon a rule apparently designed to apply to all public officers alike."

This is only ~~case~~ I find in Missouri on this particular point.

I understand your second question to be whether or not in event petition filed by surety and court finds he is a non-resident can court declare remaining sureties on bond sufficient and release the non-resident surety. In my opinion, most emphatically NO. Suppose all the remaining sureties had become insolvent and the non-resident was the only solvent one and the court could and did release him the result would be the county would be without a solvent bond given by the collector, and in case of a corrupt or careless court, the door would be opened wide for perpetrating a fraud upon the tax-payers by allowing the county collector to remain in office with practically no bond and in violation of the express terms of the statute.

The court in the Nolan case in 99 Mo., l.c. 577, expressly said this could not be done. The court said:

"It is next asserted that the approval of the new bond (which the statute makes essential to release the old sureties) was void because made at a special term of the probate Court."

In my opinion it was and is one of the outstanding intentions of Chapters 15 and 16, R. S. Mo. 1929, that a surety on county collector's bond can only be released by giving, accepting and approving and filing of a new bond by an order of the county court!

It is my opinion on county court finding on petition of non-resident surety that petitioner is a non-resident of county that county court has but one course to pursue and that is to order a new

bond given by the county collector.

I have replied to your letter as I understand same. If any further information you wish, will be glad to give it if within my power.

Respectfully,

EDWARD C. CROW

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APPROVED:

ROY MCKITTRICK
Attorney General