COLLECTOR: BONDSMEN: 1. Sureties on a Collector's bond are not liable beyond the liability of their principal.

2. Collectors and sureties are relieved if funds are lost by failure of a legal depository even though the bond contains the phrase 'collect and pay over.'

5-13

May 10, 1935

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter addressed to General McKittrick, wherein you request an opinion regarding the following question,

> "We are advised that an opinion has recently been issued by your Department which holds that the depository liability upon a County Collector's funds is not a liability of the Collector's bondsmen.
>
> Under this interpretation, we would like to know if the security given to the County by a County depository will apply to the Collector's account when the County depository has been designated by the County Court as the Collector's depository?
>
> We would further like to know what stipulation should be made in a Collector's bond which is furnished in accordance with the opinion which removes the depository liability from the Collector's bond that will cover the statutory requirement which calls upon the Collector to collect and pay over. Wherein there is further statutory provision that the only

payments the Collector may make out of the Collector's account is the pay over that completes his monthly distribution of collection.

Due to the fact that the time allotted to the Collectors to qualify is so short, we would appreciate an early opinion on these questions."

You state in the first paragraph of your letter that you have been informed that this department has recently rendered an opinion, wherein it was held that, 'the depository liability upon a County Collector's funds is not a liability of the Collector's bondsmen."

We assume that you refer to an opinion rendered by this department on February 13,1935, to Hon. P. C. Breit, Prosecuting Attorney, Savannah, Missouri, (copy of which opinion is herewith inclosed) wherein it was held that if the county court selects a county depository in accordance with the provisions of the new section relating to the bond of a collector, the county collector would be relieved of liability by reason of the failure of such designated depository, but there was no disposition of the question as to whether or not the collector's bondsmen would be liable. We shall therefore proceed to answer that question.

I.

THE SURETIES ON A COLLECTOR'S BOND ARE NOT BOUND BEYOND THE LIABILITY OF THE PRINCIPAL

Having held in the opinion to the Prosecuting Attorney of Andrew County that the collector was relieved of liability in the event of the failure of the depository, provided the depository was selected in accordance with Section 9885, page 463, Laws of Missouri 1933, which is as follows:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St.Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any two months of the year preceding his election or appointment, plus ten per cent. of said amount; Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, 1909, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties."

We consider the question as to whether or not the bondsmen may be liable.

The case of Stix Dry Goods Co. v. Bonding & Surety Co. 273 Mo. l. c. 390, wherein the court said,

> "We think it sufficiently appeared from the pleadings and proof of plaintiff that no such delivery or even offer of delivery was ever made by plaintiff. This may be deduced from the pleadings and from the facts that the letters of plaintiff to defendants advised the latter that it

had 'exercised its (our) option to require the payment of $8000 in advance of the delivery and laying any carpets,' as pursuant to the terms of the contract of sale, it was authorized to do. Plaintiff insists that it may upon such a state of the evidence recover the full penalty of the bond sued on, without showing delivery of the goods, or any offer to deliver them, without showing that the goods were made up or laid, and without showing any actual damage accruing to it from defendant Ottawa Realty Company's breach of the conditions of the contract. The assignments of error of defendants, each specifically, and in effect collectively, deny most strenuously the right of recovery of the full penalty of the bond upon these facts. Within the above respective contentions lies the only question presented upon this appeal.

We premise that it is among the conceded law of the case (a) that since the bond in suit referred to the contract, and the contract in turn referred to the bond, this bond is to be construed in the light of the terms of the contract (Forst v. Leonard, 112 Ala. 298; Sewing Maching Co. v. Winchel, 107 Ind. 260; Jordan v. Kavannaugh, 63 Iowa, 152), and (b) that the liability of the surety upon the bond here can in no event exceed that of the principal therein, (Stevens v. Partridge, 109 Ill.App.486; Barrie v. Seidel, 30 Mo.App. 559). So much being conceded, is plaintiff entitled to recover the full penalty of the bond? We think not."

CONCLUSION

We are, therefore, of the opinion that in the event the collector is not liable on his official bond,

for acts or misappropriations, the bondsmen are not liable. A surety cannot be held liable beyond the liability of his principal.

II

THE COLLECTOR'S BOND CONTAINING THE CLAUSE "THAT HE WILL FAITHFULLY COLLECT AND PAY OVER ALL STATE, COUNTY AND OTHER REVENUE," CANNOT BE BOUND TO PAY FUNDS, WHICH, ACCORDING TO LAW HE WOULD BE RELIEVED FROM PAYING.

Section 9885, quoted under the first question, while repealing the old section 9885, is in many respects similar, in that the first part and the first proviso are identical. If the collector qualifies by giving bond and no action is taken by the county court as contained in the next proviso, then, and in that event, the old form of bond and its liability remains identically as in the past. But if the county court, as contained in the next provision, which appears to be a discretionary matter with the county court, exercises its power, and the county being less than 75,000 population "may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184." The question then arises whether or not the bond containing the clause "that he will faithfully and punctually collect and pay over all state, county and other revenue" would render the county collector and his sureties liable in the event of the failure of the depository, and further, whether or not the terms of the bond should be changed.

The statute containing the provisions permitting the county court to select a depository, Section 9885 quoted supra, states that the same may be done at the May term. The present year of 1935 is the year in which the collector is required to qualify for four years on March 1, hence we assume that all of the collectors qualified by giving the old form of bond. We herewith quote from

decisions which have bearing on the point involved. In the Case of State v. Simmons 284 Mo. l. c. 671, the court said:

> "It has been held that a recognizance is not vitiated by reason of its containing more than the statute prescribes because 'the stipulation in the bond not required by a statute may be rejected as surplusage and the bond still be regarded as a statutory bond.' (Woods v. State, 10 Mo. l. c. 700.) Likewise, when a bond 'falls short of the statutory enumeration in such manner as to be more favorable to the party executing it,' such party cannot complain because it contains enough to make him liable for the penalties prescribed. (Flint ex rel. Lumpkin v. Young, 70 Mo. 221, l. c. 226.) Those cases imply that a statutory forfeiture cannot be adjudged for failure to comply with a condition which the statute does not recognize."

In the decision, State to the use v. Cochrane 264 Mo. l. c. 593, the court, in discussing the bond which broadens its obligation, said:

> "The vital question in this case is whether or not the bond in suit is a valid and enforcible obligation under the principles of the common law. It was executed by appellant for a price paid or promised. The Surety Company desired a premium, and to gain that, executed the bond in suit. It had no relationship to the business conducted by the Cochrane Grain Company and no connection with its occupation other than for an agreed consideration to indemnify the public against the breach of certain duties imposed upon its principal by law.
>
> It entered into that contract without any other coercion than a motive of profit. The italicized conditions of the contract as

set out in the statement disclosed an agreement on the part of the signers in substance that the principal will not only comply with the statutory regulations specified in the Act of 1907, but will also comply with the law of Missouri applicable to the calling of a public warehouseman. If no statute had ever been enacted regulating that business, the common-law obligations would still subsist. Hence, if we should concede for the argument only, that all statutory provisions on the subject are at an end, still the duty was imposed upon the principal by the nature of his business and his receipt for the goods, to surrender the property upon proper demand, or to show a valid reason for refusal. The fact that the bond in question embodied conditions to comply with the statutory regulations does not prevent the enforcement of other obligations expressed, which, though not prescribed by statute, were the common law duties attached to the business of public warehousemen.

It is a settled principle of law in this State that a voluntary bond not opposed to public policy and resting on a sufficient consideration is enforcible or binding as a common-law obligation. (Barnes v. Webster, 16 Mo. 258; State ex rel Jean v. Horn, 94 Mo.162; Henoch v. Chaney, 61 Mo. 129; LaCrosse Lbr.Co. v. Schwartz, 163 Mo. App.659; State ex rel. McKown v. Williams, 77 Mo. 463, 467; State to use v. Finke, 66 Mo. App. 238; State ex rel. v. O'Gorman, 75 Mo. l. c. 378.)

In view of the specific provisions in the bond in question which broadened its obligation, so as to cover any failure

on the part of the principal to comply with the laws of Missouri, we see no escape from the application of the rule laid down in the above cases."

Likewise, in the case of Newton v. Cox 76 Mo. l. c. 353, the court, in discussing statutory bonds, said:

"It is conceded, and there can be no question, that if the bond in suit is a statutory bond, the court had jurisdiction. R. S. Secs.235, 236, 252. But two questions are presented by this record for consideration, both arising on the plea to the jurisdiction: 1st, Is the bond a statutory bond? 2nd, Was it necessary to allege in the sci. fa. that demand was made upon the executor to satisfy judgment before the issuance of the execution against him?

The condition of the bond prescribed by the statute is that the executor shall: 'Faithfully administer said estate, account for, pay and deliver all money and property of said estate, and perform all other things touching said administration required by law, or the order or decree of any court having jurisdiction.' The condition of the bond pursued the statute, except that the words, 'or the order or decree of any court having jurisdiction,' are omitted, and the words, 'touching such executorship,' are substituted for the words, 'touching said administration.'

In the State to the use of Cameron v. Berry, 12 Mo. 377, it was held that: 'Where the bond merely fell short of the statutory enumeration, in such a manner as to be more favorable to the party executing it, he could not be permitted to complain if,

after it had answered all his purposes, he was held liable to its penalties.' In Hoshaw v. Gullett, 53 Mo. 208, a forthcoming bond in an attachment suit, executed by defendant and his sureties, but not in exact, though substantial conformity, with the requirement of the statute, was held a good statutory bond. See also Flint v. Young, 70 Mo. 222."

CONCLUSION

As stated in the beginning, the new Section 9885 embodies the old section in its entirety, and by adding the two additional provisos lessens the amount of the bond of the collector and relieves, according to the opinion rendered by this department to Mr. Breit and written by Assistant Attorney General Hewitt, the collector of liability in the event of the failure of a legally selected depository, and the first question that the bondsmen would also be released from liability, if a depository is legally selected. We are of the opinion that the phrase "that he will faithfully and punctually collect and pay over all state and county money," does not in anywise injure the state and county nor in anywise place an undue burden or hardship on the collector and his sureties, and that it is not necessary to make any change in the wording of the bond. By the terms of the bond the collector is required to faithfully perform his duties and to pay over and deliver all moneys, which, by law or legally, he is required to do. A collector could only be required to collect and pay over only the money which, by law, he would be required to collect and pay over regardless of the terms of the bond. If, therefore, a depository is selected and the same becomes defunct or fails, according to the Breit opinion the collector and his bondsmen are relieved and no action could be brought against the collector and his bondsmen for the money lost in the legal depository, for the reason

he would not be required, as a matter of law, to collect and pay over that amount.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC