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## Municipal Corporations-Officers Bonds

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MUNICIPAL CORPORATIONS—OFFICERS' BONDS.—Appellee, Sriver, was a duly appointed and qualified patrolman of the city of South Bend, Indiana, and gave bond for \$2,000 to the city as required by statute,<sup>1</sup> conditioned on the faithful performance of his duties as said patrolman.<sup>2</sup> The relator was unlawfully injured and arrested by said Sriver while in line of duty and now sues on this bond. Held, there can be no recovery by an individual for personal injuries on this kind of a bond. There is no statute giving the individual such a right of action and there is no indication in the statute requiring such bonds of any intent or purpose to make the policeman and his sureties liable upon the bond for torts committed upon a stranger to the contract. Neither is there a special agreement in the bond for liability of torts committed by Sriver, nor is the relator a privy to the contract or its consideration.<sup>3</sup>

This case squarely presents the question of who can sue on a bond given by a policeman to the city conditioned on the faithful performance of his duties. As was stated in the court's opinion, this is a case of first impression in Indiana.

If the problem be confined to cases involving personal injuries rather than any other kind of torts, to injuries sustained in the enforcement of criminal law rather than civil process, and where there are no statutes permitting suit on such bonds, there are comparatively few decisions in point. These decisions show a rather even split of authority on the question. The writer's tabulation shows five other states in accord with the principal case and six contra in result. The states denying recovery are: Tennessee,<sup>4</sup> Georgia,<sup>5</sup> Texas,<sup>6</sup>

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<sup>20</sup> That a plea of general denial to a complaint brought against a partnership in the firm name constitutes a waiver of the defect of designating the parties defendant. *Jones v. Martin* (1840), 8 Blackf. 351 (Ind.), *Peden's Adm. v. King* (1868), 30 Ind. 181, *Adams Express Co. v. Hill* (1873), 43 Ind. 157, *Hopper v. Lucas* (1882), 83 Ind. 43, *Meyer v. Wilson* (1906), 166 Ind. 651, 76 N. E. 748.

<sup>1</sup> Chapter 129, Sec. 44 of the Acts of 1905, found in Sec. 48-1244, *Burns' Ann. St.* 1933, and Sec. 11423 *Baldwin's Ind. St.* 1934.

<sup>2</sup> That said Sriver "do honestly and faithfully discharge and perform all and singular, his duties as such patrolman during the continuance in office as such in all things according to law; and faithfully and accurately account to this Board, and deliver to the proper officers all valuables, money or effects coming into his possession as such officer."

<sup>3</sup> *State ex rel. Abdiehl v. Sriver* (1936), — Ind. —, 1 N. E. (2d) 579.

<sup>4</sup> *Carr v. City of Knoxville* (1921), 144 Tenn. 483, 234 S. W. 328.

<sup>5</sup> *Alexander v. Ison* (1899), 107 Ga. 745, 33 S. E. 657, *Hopkins v. Watts* (1914), 141 Ga. 345, 80 S. E. 1001.

<sup>6</sup> *U. S. Fidelity & Guaranty Co. v. Jasper* (1909), 56 Tex. Civ. App. 236, 120 S. W. 1145.

Michigan,<sup>7</sup> Louisiana,<sup>8</sup> The states permitting recovery on such bonds are: Illinois,<sup>9</sup> Iowa,<sup>10</sup> Montana,<sup>11</sup> South Dakota,<sup>12</sup> Ohio,<sup>13</sup> California.<sup>14</sup>

The theory of the cases denying recovery, as set out in the principal case, is that the city is the obligee of the bond and the injured individual is not a party to the contract. There being no privity, an individual can only sue when there is a statute granting him this remedy. The cases denying recovery seem to have the approbation of the American Law Institute.<sup>15</sup>

The older cases granting recovery on these bonds do not give any reason for doing so. These cases give much space to the discussion of whether the officer's acts were by virtue of his office (*virtue officii*) or under color of his office (*colore officii*).<sup>16</sup> The modern cases repudiate this distinction as being artificial and illogical.<sup>17</sup> The cases allowing recovery seem to do so on the ground that the public was intended to be the beneficiary, or by reading in an implied condition that the sureties were to be liable for torts committed by the policeman. A considerable number of states expressly permit recovery on these bonds by legislative fiat.<sup>18</sup>

The writer is unable to concur with the A. L. R. annotation on this subject that the minority of states deny recovery.<sup>19</sup> A more nearly correct estimate would seem to be that six states deny recovery (including Indiana), six allow recovery in the absence of a statute and six (and possibly more) allow recovery because of the statute. It is only fair to say that several of these cases have been decided since that annotation was written—but it is equally sure that the

<sup>7</sup> *City of Eaton Rapids v. Stump* (1901), 127 Mich. 1, 86 N. W. 438.

<sup>8</sup> *Martin v. Magee* (1934), 179 La. 913, 155 So. 433.

<sup>9</sup> *People for Use of Johnson v. Morgan* (1914), 188 Ill. App. 250.

<sup>10</sup> *Scott v. Feilschmidt* (1921), 191 Iowa 347, 182 N. W. 949.

<sup>11</sup> *Erickson v. Anderson* (1926), 77 Mont. 517, 252 Pac. 299.

<sup>12</sup> *Hollister v. Hubbard* (1899), 11 S. D. 461, 78 N. W. 949.

<sup>13</sup> *Drolesbaugh v. Hill* (1901), 64 Ohio S. 257, 60 N. E. 202; *American Guaranty Co. v. McNiece* (1924), 111 Ohio S. 532, 146 N. E. 77.

<sup>14</sup> *Gomez v. Scanlon* (1909), 155 Cal. 528, 102 Pac. 12.

<sup>15</sup> American Law Institute, *Restatement of Contracts*, Sec. 145.

<sup>16</sup> See, for example, *Gerber v. Ackley* (1875), 37 Wis. 43, 19 Am. Rep. 751.

<sup>17</sup> *State ex rel. Meriwether v. Walford* (1894), 11 Ind. App. 392; *American Guaranty Co. v. McNiece* (1924), 111 Ohio S. 532, 146 N. E. 77.

<sup>18</sup> *Oskay v. Maloney* (1917), 85 Ore. 333, 166 Pac. 29; *State ex rel. Warren v. Bond* (1897), 120 N. C. 56, 26 S. E. 700; *Helgeson v. Powell* (1934), 54 Idaho 667, 34 Pac. (2d) 957, *Connelly v. American Bonding Co.* (1902), 113 Ky. 903, 69 S. W. 958, *Commonwealth v. Use of Rosenthal v. Teel* (1908), 33 Ky. L. Rep. 741, 111 S. W. 340; *Town of Lester v. Use of Richardson v. Trail* (1920), 85 W. Va. 386, 101 S. E. 732; *Curnyn v. Kinney* (1930), 119 Nebr. 478, 229 N. W. 894. Nebraska was apparently in line with the states not allowing recovery until 1930 when the court decided *Curnyn v. Kinney*. This decision turns on a statute (*Laws of Nebraska Chap. 13, Sec. 12*, found in *Sec. 12-112 Nebraska Compiled Statutes of 1929*) and cites *Cushing v. Lickert* (1907), 79 Nebr. 384, 112 N. W. 616, as being among those cases not allowing recovery on the bond. Yet this statute has been on the books since 1881. The court either forgot the statute in deciding *Cushing v. Lickert* or has placed a new interpretation on it in *Curnyn v. Kinney*. The latter alternative is rendered very dubious by the wording of the statute: "All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by the law of such principals, for the use of any persons injured by a breach of the condition of such bonds."

<sup>19</sup> 19 A. L. R. 73.

Louisiana court and the Indiana court cited this annotation as authority for the fact that a majority of states denied recovery on these bonds.

The result of the principal case is certainly harsh upon the individual who is injured. It is well settled that the city is not liable for the torts of its policemen.<sup>20</sup> This leaves the individual a cause of action against the policeman personally as his only recourse.

H. S. C.

STATUTE OF FRAUDS—PAROL MODIFICATION—LEASES UNDER THE STATUTE.—Appellee herein declared upon a written contract by the terms of which the appellee was to install, repair, and maintain an electric sign, and the appellant was to keep and use the sign for a period of thirty-six months and to pay the sum of twenty-one dollars and seventy cents per month, monthly in advance during the life of the agreement. The agreement further provided for an additional period of thirty-six months, at a price designated in the contract, unless at least thirty days before the expiration of the original term of the contract either party gave written notice to have the agreement terminated. The complaint alleged a breach of the contract after four monthly payments and asked judgment for a sum equal to an amount agreed upon by the parties in the contract to represent their actual loss in event of a breach. The lower court excluded evidence of parol modification of the contract, also a letter of compromise which had never been accepted. Held, the evidence was properly excluded.<sup>1</sup>

The principal case raises an interesting question involving the Statute of Frauds. The provision of the statute applicable to the case is: "No action shall be brought in any of the following cases, \* \* \* Upon any agreement that is not to be performed within one year from the making thereof. Unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting however leases not exceeding the term of three years."<sup>2</sup>

This provision of the statute has been generally construed to mean that if a contract cannot be performed within one year, it is within the statute and therefore must be in writing.<sup>3</sup> It is clear that in the principal case the contract was incapable of being performed within one year. As to the admissibility of evidence to show a parol modification of the written agreement, the authorities agree that where the statute of frauds requires a contract to be in writing, it cannot be modified, changed, or varied in its terms or provisions by a parol contract or agreement.<sup>4</sup> The parol evidence introduced for the

<sup>20</sup> City of Lafayette v. Timberlake (1882), 88 Ind. 330; Town of Laurel v. Blue (1890), 1 Ind. App. 128, 27 N. E. 301, Vaughtman v. Town of Waterloo (1895), 14 Ind. App. 649, 43 N. E. 467, Mayne v. Curtis (1920), 73 Ind. App. 640, 126 N. E. 699. See also Eugene McQuillin, Law of Municipal Corporations (2d Ed. 1928), Sec. 2837, Vol. 6, p. 873.

<sup>1</sup> Maglaris v. Claude Neon Federal Co. (1935), — Ind. —, 198 N. E. 462.

<sup>2</sup> Burns' Ann. Ind. Stat. (1933), Sec. 33-101.

<sup>3</sup> Groves v. Cook (1882), 88 Ind. 169, 45 Am. Rep. 462; Shumate v. Farlow (1890), 125 Ind. 359, 25 N. E. 432; Meyer v. E. G. Spink Co. (1921), 76 Ind. App. 318, 124 N. E. 757, 127 N. E. 455, Page, Contracts, vol. 2, 2247-8, Sec. 1300; Restatement of Contracts, Sec. 198.

<sup>4</sup> Bradley v. Hunter (1901), 156 Ind. 499, 60 N. E. 139; Carpenter v. Calloway (1881), 73 Ind. 418, Christian v. Highlands (1903), 32 Ind. App.