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Insurance -- Fidelity Bonds -- Renewals as Affecting the Liability of Surety

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excluded from jury duty on account of sex" should operate to make statutes passed pursuant thereto mandatory rather than "directory."[37]

Although some state courts require the defendant to show that his rights were prejudiced,[38] the opposing view and the one adopted by the Supreme Court of the United States appears to be the better one. It is logical to conclude that, in a state where trial by jury for the most part[39] has meant trial by a jury of men only, one who has been tried by a jury composed of eligible men received a "fair trial" even though women eligible for jury duty had been intentionally excluded from the jury lists. Nevertheless, the more important consideration is whether or not there has been an intentional violation of the state laws by local officials in the selection of jurors. It is submitted that, when it is shown in a North Carolina court that women were intentionally and systematically excluded from the jury list, defendant's motion to quash the indictment or challenge the array should be sustained.[40]

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Insurance—Fidelity Bonds—Renewals as Affecting the Liability of Surety

On July 10, 1929, the plaintiff indemnity company issued to the defendant bank its fidelity bond covering any loss, not exceeding $10,000, which defendant might sustain as a result of the defalcations of its cashier "while in any position in the continuous employ of the employer after 12 noon 15 July 1929 but before the employer shall become aware of any default on the part of the employee and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen." The bond could

[37] Art. I, §13 of the N. C. CONST. which states "No person shall be convicted of any crime but by unanimous verdict of a jury . . ." has been construed to guarantee to every person whether a citizen of this state or not a trial by jury (except in petty misdemeanors). State v. Cutshall, 110 N. C. 538, 544, 15 S. E. 261, 262 (1892).

[38] People v. Parman, 14 Cal. (2d) 17, 92 P. (2d) 387 (1939); State v. James, 96 N. J. L. 132, 114 A. 553 (1921). *Contra:* Walter v. State, 208 Ind. 231, 195 N. E. 268 (1935). Noted (1935-36) 11 IND. L. J. 386.

[39] Mr. Justice Devin dissenting in *State v. Emery* stated: "In some counties [in North Carolina] the names of qualified women are included in the jury lists. So that if we should hold now that women were qualified to serve on the jury, it would effect no change, but would only give added authority to a practice already grown up." 224 N. C. 581, 591, 31 S. E. (2d) 858, 865 (1944).

[40] It is questionable if mandamus by a voter to require the county commissioners to prepare a jury list without excluding women will lie inasmuch as N. C. GEN. STAT. (1943) §9-1, as amended in 1947, gives the commissioners a certain amount of discretion in selecting the jury list from the names of those eligible to serve. Board of Education of Alamance County v. Board of Com'rs of Alamance County, 178 N. C. 305, 100 S. E. 698 (1919); Dula v. Board of Graded School Trustees of Lenoir, 177 N. C. 426, 99 S. E. 193 (1919); State *ex rel.* Passer v. County Bd., 171 Minn. 177, 213 N. W. 545, 52 A. L. R. 916 (1927) (specifically denying mandamus when women were excluded). *Contra:* Davis v. Arthur, 139 Ga. 74, 76 S. E. 676 (1912) (a religious group had been excluded).

be cancelled by the employer giving written notice to the surety and by the surety giving thirty days notice to the employer. The bond was kept in force by payment of a stipulated annual premium until the closing of the bank in February 1942. After the bank closed, it was discovered that the cashier was short $297,735.51. The defendant, having ascertained the years in which the defalcations occurred, filed a claim for $81,731.00 on the theory that each renewal of the bond constituted a new bond and covered losses during each succeeding year to the extent of the penal sum of the bond. Plaintiff tendered $10,000, contending that its bond was for a single penalty of $10,000 for any and all defalcations occurring during the life of the bond from 1929 to 1942 and instituted an action for a declaratory judgment. *Held:* The bond guarantees payment of any loss not exceeding $10,000 sustained by defendant at any time during the continuous service of the cashier. The language is clear and unambiguous. It covered losses occurring during the life of the bond to the extent of $10,000. It must be presumed the parties intended what the language used clearly expresses and the contract must be construed to mean what on its face it purports to mean.[1]

This question of whether a fidelity bond and renewals thereof constitute separate and distinct contracts, or only one continuous contract usually arises in two different ways. It may arise, as in the principal case, where the insured is attempting to hold the surety liable for the face penalty of the bond for each year, so that its total potential liability is the penalty multiplied by the number of terms or years for which the bond has been in effect.[2] The rationale of the insured is that if a loss occurs to the full amount of the bond during some year, he would be entitled to that amount whether he had a bond thereafter or not; therefore unless the bonds for later years cover later losses to the extent of the amount of the later bonds he is receiving nothing for the later premiums.

However, the question arises just as often with the employer and the surety on the opposite sides of the fence. Most fidelity bonds contain a "discovery of default" provision which provides that the surety is only liable for losses discovered during the currency of the bond or within a limited period after its termination. Here the insured often

[1] Hartford Accident & Indemnity Co. v. Hood, 226 N. C. 706, 40 S. E. (2d) 198 (1946).

[2] Aetna Casualty & Surety Co. v. First National Bank of Weatherly, Pa., 103 F. (2d) 977 (C. C. A. 3d, 1939); Massachusetts Bonding & Ins. Co. v. Board of County Com'rs, 100 Colo. 398, 68 P. (2d) 555 (1937); Quinlan & Tyson v. National Casualty Co., 311 Ill. App. 369, 36 N. E. (2d) 470 (1941); Michigan Mortgage-Investment Corp. v. American Employers' Ins. Co., 224 Mich. 72, 221 N. W. 140 (1928); Krey Packing Co. v. Employers' Liability Assur. Corp., —— Mo. App. ——, 127 S. W. (2d) (1939); Hood, Comr. of Banks v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934); Bradley v. Fidelity & Casualty Co. of New York, 141 Pa. S. 85, 14 A. (2d) 894 (1940).

invokes the rule of one continuous contract in order to hold the surety for losses occurring under the early periods of the bond which would otherwise be barred by the discovery clause or the statute of limitations.[3] Hence, a holding, as in the principal case, that the bond and renewals constitute but one continuous contract is not in all cases adverse to the interest of the insured.

The primary question in each case has not been, as often stated, whether a renewal creates a new contract, but rather what liability as a matter of fact the parties intended to create.[4] Did they intend the penalty named to be the maximum liability, regardless of the number of renewal premiums paid; or did they intend a separate liability for each renewal premium? It has been said that no conflict exists among the jurisdictions on this subject; that each court has faced the problem of construing a particular instrument; the terms of that instrument being the governing factor.[5] However, it appears from the excerpts of the terms of the bonds that there is some difference in the matter of interpretation.[6]

The answer to this question whether the parties intended successive yearly liabilities to be added together, or only one continuous liability for the duration of the bond, is usually found in the terms of the bond itself, or in the language of the renewal certificates. The compensated surety has never been regarded as a favorite of the law. The rule of *strictissimi juris,* applicable to ordinary suretyship agreements is not applied in the case of a compensated surety, hence where the language is ambiguous, that meaning is adopted which is most favorable to the insured.[7] (If

[3] Proctor Coal Co. v. United States Fidelity & Guaranty Co., 124 F. 424 (C. C. A. 5th, 1903); Chatham Real Estate & I. Co. v. United States Fidelity & Guaranty Co., 18 Ga. App. 583, 90 S. E. 88 (1916); Rankin v. United States Fidelity & Guaranty Co., 86 Ohio 267, 99 N. E. 314 (1912); Jernette v. Fidelity & Casualty Co. of New York, 98 Ky. 558, 33 S. W. 828 (1896); Green v. United States Fidelity & Guaranty Co., 135 Tenn. 117, 185 S. W. 726 (1916); American Indemnity Co. v. Mexia Independent School District, —— Tex. Civ. App. ——, 47 S. W. (2d) 682 (1932).

[4] Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, 13 F. (2d) 474, 476 (E. D. Ill. 1926): "Whether a formal new contract is made at the end of the year, however, is manifestly not the test, . . . So the question here is what did the defendant buy the first year, what did he buy the second year, and what did he buy the third year." Michigan Mortgage-Investment Corp. v. American Employers' Ins. Co., 244 Mich. 72, 221 N. W. 140 (1928), the majority of the court, admitting the existence of two contracts, held that extension of liability beyond the penalty named would render the "aggregate liability" clause meaningless (a clause limiting the aggregate liability under successive bonds to the face amount of one).

[5] Note (1926) 42 A. L. R. 834.

[6] For example, compare Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, 13 F. (2d) 474 (E. D. Ill. 1926) with Lenord v. Aetna Casualty & Surety Co., 80 F. (2d) 205 (C. C. A. 4th, 1935), both construing bonds which contained no termination date.

[7] ARANT, SURETYSHIP (1931) §40; Bank of England, Ark. v. Maryland Casualty Co., 293 F. 787 (E. D. Ark. 1923); Hardford Accident & Indemnity Co. v. Swedish Methodist Aid Ass'n, 92 F. (2d) 649 (C. C. A. 7th, 1937).

this principle were followed, it would seem that the result would depend on which construction the employer were asserting.) However, there is no question of construction where the bond specifically states that it shall be non-cumulative or where there is an unambiguous provision limiting recovery to a single stated amount, which is often the case.[8] However, the bond may be a "statutory bond," in which case, the statutory requirements will be read into the bond and determine the liability.[9] The answer may also be determined by the terms of the bond, as construed by the acts of the parties.[10] Many courts determine whether the fidelity bond or contract has within it a termination date, and if there is such a termination date, each renewal is considered to be a new contract, and liability is cumulative.[11] But where the bond is for an indefinite term, providing for a yearly premium, there is a single continuous contract, and liability is not cumulative, but limited to the amount stated in the bond.[12] One court stated that if the surety had on the record the actuarial statistics on which the premium was based, it would materially assist a determination of what the premiums bought.[13] However, it doesn't seem that this valuable aid has ever been furnished the courts.

Some courts, in holding the bond and renewals to be one continuous contract, have drawn an analogy between the situation and insuring and renewing insurance on a house against fire, where on renewal, the insured does not secure fire insurance protection to double the face amount of the policy.[14] However, there is a difference which destroys the effect

[8] United States Fidelity & Guaranty Co. v. Barber, 70 F. (2d) 220 (C. C. A. 6th, 1934); Sheetz v. J. R. Dager & Co., 46 Ohio App. 32, 187 N. E. 637 (1933); Michigan Mortgage-Investment Corp. v. American Employers' Ins. Co. of Boston, 224 Mich. 72, 221 N. W. 140 (1928); Jacksonville v. Bryan, 196 N. C. 721, 147 S. E. 12 (1929); Bradley v. Fidelity & Casualty Co. of New York, 141 Pa. S. 85, 14 A. (2d) 894 (1940); Maryland Casualty Co. v. Farmers State Bank & Trust Co., —— Tex. Civ. App. ——, 258 S. W. 584 (1924).

[9] Jaeger Mfg. Co. v. Massachusetts Bonding & Ins. Co., 229 Iowa 158, 294 N. W. 268 (1940) (since statute required a new bond each year, the court disregarded an "aggregate liability" clause and held liability to be cumulative); Hood, Com'r of Banks v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934).

[10] Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2d, 1938), where the insured remained silent in the face of an "aggregate liability" clause.

[11] Maryland Casualty Co. v. First Nat. Bank of Montgomery, Ala., 246 F. 892 (C. C. A. 5th, 1917); Standard Accident Insurance Co. v. Collingdale State Bank, 85 F. (2d) 375 (C. C. A. 3d, 1936); Mayor of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754 (1902); United States Fidelity & Guaranty Co. v. Williams, 96 Miss. 10, 49 So. 742 (1909); Alex Campbell Milk Co. v. United States Fidelity & Guaranty Co., 146 N. Y. S. 92 (1914); Bradley v. Fidelity & Casualty Co. of New York, 141 Pa. S. 85, 14 A. (2d) 894 (1940).

[12] Aetna Casualty & Surety Co. v. First Nat. Bank, 103 F. (2d) 977 (C. C. A. 3d, 1939); State Bank v. Fidelity Co., 206 Wis. 413, 240 N. W. 154 (1932).

[13] Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2d, 1936).

[14] Lenord v. Aetna Casualty & Surety Co., 80 F. (2d) 205 (C. C. A. 4th, 1935); National Bank of North Hudson at Union City v. National Surety Co., 105 N. J. Law 330, 144 A. 576 (1929); State of Okla. *ex rel.* Freeling v. New Amsterdam Casualty Co., 110 Okla. 23, 236 P. 603 (1925); Fourth & First Bank & Trust Co. v. Fidelity & Deposit Co. of Maryland, 153 Tenn. 176, 281 S. W. 785 (1926).

of the analogy as far as it has any bearing on the intent of the parties. When the owner of the house renews, he usually knows at the time there has been no loss under the policy during the previous year. However, where the employer renews a fidelity bond there may have already been a loss, without his knowledge. Hence it cannot be said that the employer intends only one liability as the insured obviously does in fire insurance. Further, there is normally the certainty of a new risk in the case of the fire policy, whereas in that of the surety bond if the full amount is already recoverable under the old bond there is no risk covered by the new unless the bonds are cumulative.

The rationale of the insured, mentioned above, to the effect that his premiums paid subsequent to a loss exceeding the amount of the bond would buy him nothing unless liability is to be cumulative has been accepted by some courts as a basis for holding that the parties intended liability to be cumulative.[15] One court, feeling that it could not hurdle an "aggregate liability" clause held the surety liable for only one penalty, but did accept this rationale in ordering the surety to refund the premiums collected subsequent to the defalcation on the ground of mutual mistake.[16] However, the employer is not getting absolutely nothing for his money even if there was a prior defalcation; he is getting an extension of the time in which to discover and report the loss. This is hardly the full measure of what he paid for, but in many instances it gives the employer an advantage of which he makes use.[17]

The principal case is not the first case in which this question has been before the North Carolina Supreme Court. In *Jacksonville v. Bryan,*[18] the court held the surety liable for only one penalty where the bond contained an "aggregate liability" clause. The court recognized that the insured, no doubt, thought he had paid for cumulative liability, and recommended relief by the surety companies or the legislature.

In *Hood, Com'r of Banks v. Simpson,*[19] which was distinguished in the principal case, the North Carolina court held that a fidelity bond, renewed annually when the cashier was elected and was required to execute a bond, was not a continuous contract, but every renewal thereof constituted a separate and distinct contract imposing cumulative

[15] Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul, 13 F. (2d) 474 (E. D. Ill., 1926); Standard Acc. Ins. Co. v. Collingdale State Bank, 85 F. (2d) 375 (C. C. A. 3d, 1936); Hood, Com'r of Banks v. Simpson, 206 N. C. 748, 175 S. E. 193 (1934).

[16] Hack v. American Surety Co. of New York, 96 F. (2d) 939 (C. C. A. 7th, 1938).

[17] Proctor Coal Co. v. United States Fidelity & Guaranty Co., 124 Fed. 424 (C. C. A. 5th, 1903); Florida Cent. & P. R. v. American Surety Co. of New York, 99 Fed. 674 (C. C. A. 2d, 1900); Ladies of Modern Maccabees v. Illinois Surety Co., 196 Mich. 27, 163 N. W. 7 (1917); Green v. United States Fidelity & Guaranty Co., 135 Tenn. 117, 185 S. W. 726 (1916).

[18] 196 N. C. 721, 147 S. E. 12 (1929).

[19] 206 N. C. 748, 175 S. E. 193 (1934).

liability on the surety. Even though the cases are factually distinguishable, the court in the *Simpson* case reiterated the principle that such contract should be liberally construed to accomplish the purpose for which they were made, and quoted with approval the view that the parties could not have intended the second and third year's premium to buy nothing if there were a defalcation during the first year to the extent of the penalty. The court quoted from *Aetna Casualty & Surety Co. v. Commercial State Bank of Rantoul*[20] as follows: "No sane man would say that this was the intention of the defendant, and the court is most loathe to believe that this was the intent of the plaintiff, a widely known insurance company, dependent upon the good will and esteem of the public and its customers for its commercial welfare, so to frame its contract of indemnity as to extract premiums from the insured without giving anything in return. Brief indeed would be its life of business prosperity and public esteem, were it known that it would be guilty of such a game of 'heads I win, tails you lose.'" The case quoted from involved a bond which contained no termination date, just as the bond in the principal case. However, the North Carolina court in the principal case, apparently rejects this view, for the court did not hesitate to make the imputation, but held that such an intent was clearly expressed in the bond. The position of the North Carolina court then, seems to be that the presence, or absence, of a termination date is the deciding factor, although most of the cases cited in support of the result reached are cases involving bonds which contain an express unambiguous limitation of liability.[21]

As a result of this case we have the anomalous situation in North Carolina of many employers paying sizable yearly premiums for nothing but time in which to discover a prior loss, and the surety, not assum-

[20] 13 F. (2d) 474 (E. D. Ill., 1926).

[21] Bank of England, Ark. v. Maryland Casualty Co., 293 Fed. 783 (E. D. Ark. 1923), "This bond may be renewed from year to year at the option of the employer by and with the consent of the company and in case of any such renewal the company's liability on behalf of the employee shall be in all respects as though this bond had been originally written for a term including the period of such renewal." Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2d, 1936), renewal schedule explicity provided that "this list shall be deemed a part of the original bond and not a new obligation, nor shall it create a cumulative liability"; Hack v. American Surety Co. of New York, 96 F. (2d) 939 (C. C. A. 7th, 1938): "We, however, have been unable to hurdle or circle a clause of the contract in the instant case which provides that 'in no event shall the aggregate liability of the surety for any one or more defaults of the principal during any one or more years of the suretyship exceed the amount specifically set forth in said bond'"; Chatham Real Estate & Improvement Co. v. United States Fidelity & Guaranty Co., 18 Ga. App. 588, 90 S. E. 88 (1916). Continuation certificate read: "hereby continues in force Bond No. 1052-5 . . . subject to all covenants and conditions of said original bond"; Jacksonville v. Bryan, 196 N. C. 721, 147 S. E. 12 (1929), the bond contained an aggregate liability clause; State *ex rel.* Freeling v. New Amsterdam Casualty Co., 100 Okla. 23, 236 P. 603 (1925): "the receipt expresses on its face that it is the payment of the second annual premium on a certain and distinct bond, No. 112."

ing the risk of a loss, but the risk of a discovery. As pointed out above, this is hardly the full measure of what the employer intends to pay for.

Several remedies have been suggested in this field.[22] However, these remedies serve only to give the insured cumulative liability and as seen above, he must have, not only separate coverage for each year, but a longer time in which to make discovery, in order to be completely covered. This desired coverage could be obtained, in the case of bank employees by the Commissioner of Banks, in so far as he is required to approve the form of the bond.[23] However, in the case of the ordinary employer, legislative action would be required in the form of a "standard fidelity bond."

J. T. RENDLEMAN.

Landlord and Tenant—Trade Fixtures—Right of Lessee of Deceased Life Tenant to Remove

In *Haywood v. Briggs*,[1] the North Carolina Supreme Court held that the lessees of a deceased life tenant did not have the right as against the remaindermen to remove from the leased land two large tobacco warehouses erected thereon by the lessees pursuant to the terms of the lease which provided that all improvements, fixtures and property placed thereon were to remain the property of the lessees and were to be removable at the termination of said lease, but in which lease the remaindermen had not joined. The lessees based their claim to the right of removal on the right of a tenant to remove trade fixtures; and no claim was made on the basis of the right reserved in said lease which admittedly was not binding on the remaindermen, but which clearly indicated the intent of the parties thereto. In consideration of the uncertainty of the estate of the lessor, bond was given by the lessor to protect the peaceful possession of the lessees for the term; which bond was to become of full force and effect if the lessees were ousted during the term by reason of the death of the lessor or for any reason not the fault of the lessees. However, if the bond were enforced, the improvements were to become the property of the lessor. Although it was seven months after the death of the lessor when the right of removal was sought to be invoked, the lessees without having reached an agreement with the remaindermen were still in possession, having retained the use of the warehouses for a complete tobacco season.

Although it is somewhat difficult to conceive of large warehouses as

[22] Note (1928) 27 MICH. L. REV. 442 suggests legislative action to prohibit use of aggregate liability clause; also suggests practical solution of bonding with a different surety each year to secure cumulative liability.

[23] N. C. GEN. STAT. (1943) §53-90.

[1] Haywood v. Briggs *et al.*, 227 N. C. 108, 41 S. E. (2d) 289 (1947).