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Suretyship -- Liability on Bond in Excess of Statutory Penalty

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It may be the last supposition explains why this particular error became a cause for reversal. For it has been held that if the judge states the law incorrectly in his instructions, he may later recall the jury and correct the mistake; or, that if the judge fails to make this correction, a proper verdict will cure the error.  

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Suretyship—Liability on Bond in Excess of Statutory Penalty.

The defendant surety company executed an official bond with a penalty of $25,000. The statute requiring such bond specified an amount "not more than $15,000." In a summary proceeding provided by statute for cases of default on official bonds, held, that since the surety acted voluntarily and accepted premiums on the larger amount, it is estopped to deny the validity of the bond, and recovery may be had for the full amount.

When a statutory bond supersedes the statute in the amount of its penalty, three possibilities arise: the bond may be (1) void, (2) valid up to the statutory amount, (3) valid to the full amount of its penalty.

Where the excessive penalty is extorted *colore officii*, or is not given voluntarily, bonds have been held completely void. But where the larger penalty is voluntarily assumed, the general rule is that the bond is good to the full extent of the penalty if not prohibited by

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[4] Bail bonds have been held void where the sheriff required a larger penalty than the court directed: Barringer v. State, 27 Tex. 553 (1864); Neblett v. State, 6 Tex. App. 316 (1879); Roberts v. State, 34 Kan. 151, 8 Pac. 246, 6 Am. Crim. Rep. 61 (1885); Waugh v. People, 17 Ill. 561 (1856). Appeal bonds have been held void where the court exacted a larger penalty than the statute required: Commonwealth v. Wistar, 142 Pa. 373, 21 Atl. 872 (1891); Newcombe v. Worster, 7 Allen 198 (Mass. 1863); An official bond was declared void where an excess penalty was extorted *colore officii* by superior officers: United States v. Humason, 6 Savy. 199, Fed. Cas. 15421 (1879). Embargo bonds have been held void for the same reason: United States v. Morgan, 3 Wash. C. C. 10, Fed. Cas. 15809 (1811); United States v. Gordon, 1 Broc. 190, Fed. Cas. 15232 (1811), writ of error dismissed in 7 Cranch (U. S.) 287, 3 L. ed. 347 (1813).
statute.\(^5\) However, there are a few cases which hold that recovery cannot be had for a greater amount than the statute provides.\(^6\)

Closely analogous to the present situation is that in which the bond supersedes the statute by requiring certain conditions for which the statute does not provide. The general rule is that if the added or extra-statutory conditions are separable from those required by the statute, they will be rejected as mere surplusage,\(^7\) since the bond is measured by the statute.\(^8\) This rule has been applied to practically every type of bond,\(^9\) even where the extra-statutory conditions are


\(^7\) United States Fidelity Co. v. Iowa Telephone Co., 174 Iowa 476, 156 N. W. 727 (1916) (bond in compliance with a municipal ordinance to insure restoration of excavated streets).


\(^9\) This rule has been most commonly applied in the case of a contractor's bond: Wholesale Grocer Co. v. Prutsman, 1 La. App. 731 (1926); John H. Murphy Iron Works v. United States Fidelity and Guaranty Co., 169 La. 163, 124 So. 768 (1930); State v. Jackson and Co., 137 La. 945, 69 So. 751 (1915); Miller v. Bonner, 163 La. 332, 111 So. 776 (1927); Philip Carey Lumber Co. v. Maryland Casualty Co., 201 Iowa 1063, 206 N. W. 808, 47 A. L. R. 495 (1926); Nebraska Culvert and Manufacturing Co. v. Freeman, 197 Iowa 720, 198 N. W. 7 (1924); Charles City v. Rasmussen, 232 N. W. 137; 72 A. L. R. 638 (1930); Monona County v. O'Connor, 205 Iowa 1119, 215 N. W. 803 (1927); American Surety Co. v. School District, 117 Neb. 6, 219 N. W. 583 (1928). Other kinds of bonds where the rule has been applied are: Dallas County v. Perry National Bank, 205 Iowa 672, 216 N. W. 119 (1927) (depository bond); Lee v. Waring, 3 Desaas Eq. 57 (S. C. 1809) (official bond of a state treasurer); United States v. Howell, 14 Wash. C. C. 620, Fed. Cas. 15405 (1826) (official bond); Skellinger v. Yendes, 12 Wend. 306 (N. Y. 1834) (official bond of a constable); Zapf v. Ridenhour, 198 Iowa 1066, 200 N. W. 618 (1924) (broker's bond); Curtis v. Michaelson, 206 Iowa 111, 219 N. W. 49 (1928) (liability insurance bond); Pratt v. Wright, 54 Va. 175, 67 Am. Dec. 767 (1856) (guardian's bond); Branch v. Richmond Cold Storage Co., 146 Va. 630, 132 S. E. 848 (Virginia 1926).
voluntarily assumed.\textsuperscript{10} If the excess conditions be extorted \textit{colore officii}, the bond will be declared absolutely void by some courts.\textsuperscript{11}

\textit{Contra} to the general rule, however, there are cases which hold that where the extra-statutory conditions are voluntarily assumed\textsuperscript{12} for a sufficient consideration,\textsuperscript{3} the bond will be enforced to the full extent as a valid common law obligation or voluntary bond,\textsuperscript{14} provided it is not repugnant to any statute or contrary to public policy.\textsuperscript{15} A few courts hold that after deriving the benefits secured by the bond the surety will be estopped to deny its validity.\textsuperscript{16}

In following the weight of authority in regard to excess penalties the instant case lays down a rule that is both reasonable and just, since (1926) (suspending bond); State v. Read, 164 La. 315, 113 So. 860 (1927) (peace bond); Yost v. Ramey, 103 Va. 117, 48 S. E. 862 (1904) (executor's bond); Sheppard v. Collins, 12 Iowa 570 (1861) (attachment bond); State v. Castleberry, 23 Ala. 95 (1853) (bastardy bond); Probate Court v. Adams, 27 R. I. 97, 60 Atl. 769, 8 Ann. Cas. 1028 (1905) (executor's bond); Lowe v. Guthrie, 4 Okla. 287, 44 Pac. 198 (1896) (official bond of a city clerk); See Ainsworthy v. Territory, 3 Wash. Terr. 277, 14 Pac. 590, 591 (1892) (ball bond); State of Ohio v. Findlay, 10 Ohio 51, 54 (1840) (official bond of a county treasurer); Sochet v. Sochet, 70 Colo. 19, 196 Pac. 192, 193 (1921) (\textit{ne exeat} bond); Sauer v. Fidelity and Deposit Co., 192 Ky. 718, 234 S. W. 434, 436 (1921) (policeman's bond).


\textsuperscript{11} United States v. Tingey, 5 Pet. (U. S.) 115, 8 L. ed. 66 (1831) (purser's bond); District of Columbia v. Waggman, 4 Mackey 328 (D. C. 1886) (real estate agent's bond); See State ex rel Griffith v. Purcell, 31 W. Va. 44, 5 S. E. 301, 314 (1888) (injunction bond).

\textsuperscript{12} Slutter v. Kirkendall, 100 Pa. St. Rep. 307 (1882) (attachment bond); Franklin Bank v. Cooper, 36 Me. 179 (1853) (official bond of cashier covering past receipts as well as future property); United States Fidelity and Guaranty Co. v. Rainey, 120 Tenn. 357, 113 S. W. 397 (1908) (official bond); Manitowoc Co. v. Truman, 91 Wis. 14, 64 N. W. 307 (1895) (depository bond); Fitzgerald v. Neal \textit{et al.}, 113 Ore. 103, 231 Pac. 645 (1924) (public contractor's bond); Ring v. Gibbs, 26 Wend. 502 (N. Y. 1841) (bond to release a ship); State ex rel Griffith v. Purcell, supra note 11.

\textsuperscript{13} Fidelity and Guaranty Co. v. Rainey, supra note 12; Manitowoc Co. v. Truman, supra note 12.

\textsuperscript{14} Coons v. People, 76 Ill. 383 (1875) (official bond of a county collector); Chadwick v. United States, 3 Fed. 750 (C. C. D. Mass. 1880) (collector's bond); Taylor v. Fleckenstein, 30 Fed. 99 (C. C. D. Ore. 1887) (bail bond); cases cited, supra note 12. It is interesting to note that Virginia applies this rule only to a contractor's bond: Aetna Casualty Co. v. Earle-Lansdell Co., 142 Va. 435, 129 S. E. 263 (1923).

\textsuperscript{15} Taylor v. Fleckenstein, supra note 14; City of Philadelphia v. Shaller, 14 Phila. 135 (Pa. 1880) (official bond of a tax receiver); Manitowoc Co. v. Truman, supra note 12; Coons v. People, supra note 14; Duke v. National Surety Co., 130 Wash. 276, 227 Pac. 2 (1924), judgment affirmed on rehearing, 131 Wash. 700, 230 Pac. 102 (1924) (bank's bond).

the surety in executing an official bond is presumed to know the terms of the statute under which he executed the bond.\(^7\)

In certain respects the case is unusual; it is a strong holding in that the statute specifically provided that the bond be "not more than $15,000"; and it was decided on the basis of estoppel, which basis might be seriously questioned since it is difficult to see wherein the surety was estopped as to the state.

It is of especial interest to note that the case involved a summary proceeding under the statute. The summary remedy has been declared constitutional in North Carolina,\(^8\) but its use has been denied where the penalty superseded the statute\(^9\) as in the present case, the reason assigned by the court being that since the bond was not in conformity with the statute, it was not a statutory bond to which the summary remedy would apply. As there is no essential difference between the then existent statute on summary remedy\(^10\) and the one now in force, the present case is apparently a direct reversal of the previous holding.

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**Taxation—Discriminatory License Classifications—Limitations of Equal Protection and Commerce Clauses.**

The 1931 General Assembly of North Carolina imposed a license tax of $50 per truck upon persons, firms or corporations who sell fresh fish, fruits or vegetables and who do not maintain a permanent place of business in the State, but exempted persons, firms or cor-

\(^7\) See Fogarty v. Davis, 305 Mo. 288, 264 S. W. 879; 880 (1929) (school contractor's bond); Crawford v. Ozark Insurance Co., 97 Ark. 549, 134 S. W. 951, 952 (1911) (statutory bond); 9 C. J. 34, §56.

\(^8\) Anonymous Case, 2 N. C. 29 (1794) (judgment against receivers of public monies); Oats v. Darden, 5 N. C. 500 (1810) (summary remedy against a sheriff); Broughton v. Haywood, 61 N. C. 380 (1867) (summary proceeding against sureties for Clerk and Master in Equity).

\(^9\) State Bank v. Twitty; Henderson v. Matlock; Governor v. Witherspoon, all *supra* note 5.

\(^10\) Acts of North Carolina Assembly of 1795, c. VIII, §5: "And be it further enacted that when any constable or constables in any county within this state shall or may have received any money in virtue of his office or appointment as constable, and shall fail to pay the same to the person or persons entitled to receive it, that then and in that case it shall and may be lawful upon motion made in the court of the county in which said constable resides for said court to give judgment against said constable or constables and his or their securities for all sum or sums of money so received and collected, together with costs, and to award execution thereon in the same manner as other executions issuing from said court, *provided*, such constable has ten days previous notice of such motion..."