UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 12 | Number 4 Article 18

6-1-1934

Suretyship -- Extent of Liability on Sheriff's Official Bond

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a judgment which is unconscionable for fraud, accident, or mistake whereby defendant was prevented from setting up a meritorious defense will be enjoined. But the power does not extend to relieve from judgments on account of errors or irregularities on which the judgment was founded.[23] Although it would seem that the Federal court could hardly expect, by accepting the prayer for relief as conclusive of the amount involved, to limit the state courts to this interpretation, the language of the principal case suggests that a recovery for more than the amount prayed for at the time removal was denied would be deemed a fraud on the jurisdiction of the Federal courts.[24] For this reason the judgment might be enjoined.

JOE EAGLES.

Suretyship—Extent of Liability on Sheriff's Official Bond.

In *State of North Carolina ex rel. Wimmer v. Leonard*[1] the relator was wrongfully shot by a North Carolina sheriff. Action was brought in a Federal court on the sheriff's official "process bond," which contains a clause for the faithful execution of office. *Held,* a demurrer to the complaint was properly sustained. Such a general clause of faithfulness in all things in an official bond is limited to the specific duties mentioned therein, *i.e.* in the "process bond" the due execution and return of process, and the payment of money and fees collected.

Wrongful acts of a public official which render him personally liable to a person injured thereby have been placed in three categories: acts done by virtue of office, acts done under color of office, and those done by the official in his private capacity. All courts hold that the sureties on the officer's official bond are not liable for acts of the latter type.[2] Many courts hold that a bond conditioned for the faith-

[23] Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. ed. 205 (1920); National Surety Co. of N. Y. v. State Bank of Humboldt, 120 Fed. 593 (C. C. A. 8th, 1903); Horton v. Stegmyer, 175 Fed. 756 (C. C. A. 8th, 1910).

[24] Brady v. Indemnity Ins. Co. of North America, *supra* note 1, ("Having the right to determine the amount she would claim, the filing of a suit for such amount in the State court was not in our opinion a fraud on the jurisdiction of the Federal court.").

[1] 68 F. (2d) 228 (C. C. A. 4th, 1934).

[2] Feller v. Gates, 40 Ore. 543, 67 Pac. 416 (1902) (constable received money from execution debtor under contract not to serve execution, the constable to repay money on reversal of judgment on appeal. *Held,* a personal act, so sureties on his official bond not liable for conversion of the money.); Citizen's State Bank of Wheeler v. American Surety Co., 65 S. W. (2d) 778 (Tex. 1933) (sheriff filed list of fees, including several unlawful ones and received

ful performance of the duties of office include only those acts done by virtue of office,[3] but the tendency of most courts is to include acts done under color of office as well.[4] The first named view involves a distinction between acts done under color of office and those by virtue of office, and the second, a distinction between acts done under color of office and those done by the officer in his private capacity. The factual distinctions thus made, however, have led to much variance in authority as to the extent of the terms "by virtue of office"[5] and "under color of office."[6]

Unlike most jurisdictions North Carolina requires three bonds of a sheriff: two conditioned specifically for the proper collection of state and county taxes, respectively, and one conditioned specifically for the due execution and return of process, and the payment of fees and money collected, and generally "for the faithful execution of his office as sheriff."[7] The concluding clause of the "process bond" has been the subject of much controversy. The earlier cases held to the narrow view that a general clause of faithfulness in all things in an

a deficiency certificate, which he sold to bank. *Held,* such sale was neither by virtue nor under color of office, but merely a personal transaction of the sheriff in his private capacity).

[3] Bassinger v. United States Fidelity & Guaranty Co., 58 F. (2d) 573 (C. C. A. 8th, 1932) (no recovery where plaintiff injured during arrest without warrant, the sheriff believing he had committed a felony); State v. Fidelity & Deposit Co. of Md., 147 Md. 194, 127 Atl. 758 (1925) (sheriff's bond not liable for his unauthorized arrest and mistreatment of plaintiff on a charge of having aided another to escape).

[4] Kosowsky v. Fidelity & Deposit Co. of Md., 245 Mich. 266, 222 N. W. 153 (1928) (sheriff unlawfully assaulted plaintiff and imprisoned him. *Held,* bond is liable for nonfeasance, misfeasance, and malfeasance by sheriff, *virtute officii* or *colore officii.*); Wieters v. May, 71 S. C. 9, 50 S. E. 547 (1905).

[5] Brown v. Weaver, 76 Miss. 7, 23 So. 388 (1898). Sheriff's bond liable for deputy's act (of shooting misdemeanant fleeing to escape after arrest as having been done by virtue of office); *cf.* Richards v. American Surety Co. of N. Y., 171 S. E. 924 (Ga. 1933) (Deputy's shooting plaintiff to prevent escape from arrest held under color of office); MURFREE, OFFICIAL BONDS (1885) 471 (contending that where a man doing an act within the limit of his official authority exercises that authority improperly or abuses the discretion placed in him he is acting by virtue of office.).

[6] Lewis v. Treadway, 211 Ky. 140, 277 S. W. 309 (1925) (if arresting officer is armed with no writ, or an utterly void one, and there is no statute which gives him authority to do the act without process, then there is no color of office); *cf.* State v. Roth, 330 Mo. 105 49 S. W. (2d) 109 (1932) (if he assumed to act as an officer, whether under a valid process, or a void one, or no process whatsoever, the officer's bond is liable); see American Guaranty Co. v. McNiece, 111 Ohio St. 532, 146 N. E. 77 (1924) (a dictum to the effect that some courts hold the question of liability for wrongful acts done under color of office is *sui generis,* and dependent upon the particular circumstances of each case; State v. Freeman, 61 S. W. (2d) 459 (Tenn. 1933) (the term "under color of office" implies an evil or corrupt motive).

[7] N. C. CODE ANN. (Michie, 1931) §3930.

official bond was limited to the specific duties mentioned therein.[8] There is also early North Carolina authority to the effect that such a general clause merely requires the sheriff faithfully to execute the specific duties of his office, and does not cover any abuse or usurpation of power.[9]

That the official bond, so construed, was insufficient for public security, and that legislative action broadening the scope of the bond was needed was pointed out in several cases.[10] In 1883 Section 354 of the present Code was enacted, which provides in part, ". . . and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of office." This section was construed as broadening the scope of the official bond so as to cover both acts done by virtue of office and those done under color of office,[11] with the latter term liberally interpreted.[12]

However, in *Sutton v. Williams*,[13] decided in 1930, the court reverted to the older authority in holding that the general clause of the "process bond" was limited to the specific duties which were provided for in the bond, and that even if not so limited the clause merely requires the affirmative performance of the duties of office. Although Section 354 and the cases based upon it were before the court in the briefs of counsel,[14] no mention was made of such authority in the court's opinion. The Federal court in the principal case was thus justified in recognizing this decision as the latest pronouncement of the local law. This case serves, however, to call

[8] Crumpler v. Governor, 12 N. C. 52 (1826); Eaton v. Kelly, 72 N. C. 110 (1875); Holt v. McLean, 75 N. C. 347 (1876); see South v. Maryland, 18 How. 396, 15 L. ed. 433 (U. S. 1856).

[9] State v. Long, 30 N. C. 415 (1848) (no recovery where a sheriff took a money deposit in lieu of a bail bond and refused to return on defendant's surrender and demand. Butts v. Brown, 33 N. C. 141 (1850) (sheriff's bond not liable for a simple trespass committed by him under color of office); *cf.* State v. Wade, 87 Md. 529, 40 Atl. 104 (1898).

[10] State v. Long, Butts v. Brown, both *supra* note 9; Holt v. McLean, *supra* note 8.

[11] State *ex rel.* Kivett v. Young, 106 N. C. 567, 10 S. E. 1019 (1890); Joyner v. Roberts, 112 N. C. 114, 16 S. E. 917 (1893); Warren v. Boyd, 120 N. C. 56, 26 S. E. 700 (1897); State *ex rel.* Board of Com'rs. v. Sutton, 120 N. C. 298, 26 S. E. 920 (1897).

[12] Warren v. Boyd, *supra* note 11 (a constable's bond held liable for false imprisonment of the plaintiff, even though done without legal process or color of process).

[13] 199 N. C. 546, 155 S. E. 160 (1930) (sheriff's bond held not liable for injury caused by negligence of a prisoner whom sheriff had wrongfully allowed freedom as a trusty).

[14] So found by the Federal court in the principal case.

attention to the conflicting lines of authority in North Carolina on the subject, and to the need for definitive legislative action. While a complete revision of the system of sheriff's bonds probably would be best, it is submitted that the adoption of the following statute would clarify the existing confusion and afford the public that degree of security which seems desirable:

> No clause for the faithful execution of his office, found in the official bond of any public officer, shall be construed as limited to the specific duties therein enumerated, but every such clause shall render such officer and the sureties on his official bond liable to any person injured by any wrongful or unauthorized act done by said officer by virtue or under color of office.

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Trial—Power of Court to Dismiss an Action or Defense Upon Opening Statement of Counsel.

Plaintiff, as administrator, brought an action to recover for the death of his infant son, who was drowned after falling through an unguarded hole in the defendant's wharf. It was contended that the wharf, together with sandpiles thereon, brought the case within the doctrine of attractive nuisance. After the opening statement of the plaintiff's counsel, a verdict was directed for the defendant on the ground that it was not stated in such opening that the alleged nuisance was visible from the highway. *Held,* error. It was inferable from counsel's statement that the wharf and sandpiles could be readily seen from a near-by street.[1]

The privilege of making an opening statement is afforded counsel in order that he may outline his proofs to the jury and aid them in their understanding of the case to be presented.[2] It should be no more than an informal summary of the intended evidence, and cannot take the place of pleadings in determining the issues to be tried,[3]

[1] Best v. District of Columbia, 54 Sup. Ct. 487, 78 L. ed. 635 (1934).

[2] Paige v. Illinois Steel Co., 233 Ill. 313, 84 N. E. 239 (1908); State v. Sheets, 89 N. C. 583 (1883); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929), §561. Nor should the counsel be permitted to argue the merits under the guise of sketching his own case, Posell v. Herscovitz, 237 Mass. 513, 130 N. E. 69 (1921).

[3] Hunter Milling Co. v. Allen, 65 Kan. 158, 69 Pac. 159 (1902); Douglas v. Marsh, 141 Mich. 209, 104 N. W. 624 (1905); Mocre v. Dawson, 220 Mo. App. 791, 277 S. W. 58 (1925). The party should not be confined in the introduction of evidence to the statements made in the opening. Winfield v. Feder, 169 Ill. App. 480 (1912); Marcy v. Shelburne Falls & C. St. Ry. Co., 210 Mass. 197, 96 N. E. 130 (1911); Petherick v. Order of the Amaranth, 114 Mich. 420, 72 N. W. 262 (1897).