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Detroit Savings Bank v. Zeigler

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RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

DETROIT SAVINGS BANK v. ZEIGLER.

Such interchange of assistance between officers of a bank, as temporary need may require, is fairly within the contemplation of the appointment of such an officer, and the sureties on his bond are liable for a default made while he was temporarily filling the place of another officer.

The receiving teller of the savings department of a bank, while filling the place of the general teller, during the latter's temporary absences, embezzled moneys of the bank: *Held*, that the sureties on a bond, given by him for the faithful performance of his duties, were liable for the money so taken.

ERROR to the Superior Court of Detroit.

John H. Bissell and *Otto Kirchner*, for appellant.

John D. Coneley, for appellees.

The opinion of the court was delivered by

COOLEY, J.—This suit is upon a bond given by defendant Herman H. Zeigler, as principal, etc., the other defendants as sureties, to secure to the plaintiff the faithful performance of Zeigler's duties as teller. The bond is dated February 10th 1877. The penalty named is $5000, and the condition is as follows: "The condition of this obligation is such, that whereas the above bounden Herman H. Zeigler has been appointed receiving teller savings department, and by the terms of the by-laws of said bank, is made responsible for all such sums of money, property and funds of every description, as may from time to time be placed in his hands by the cashier, or otherwise come into his possession as receiving teller. Now, therefore, the condition of the foregoing obligation is such that if the said Herman H. Zeigler shall faithfully and honestly discharge the duties of his said office, and shall faithfully apply and account for all such moneys, funds and valuables, and shall deliver the same, on proper demand, to the board of directors of said bank, or to the person or persons authorized to receive the same, then the foregoing obligation shall be void, otherwise to remain in full force and virtue."

At the time when this bond was given and Herman Zeigler entered upon the performance of his duties, his brother, Charles Zeigler, was the general teller of the bank. As such he had charge

of commercial deposits and payments, and was also the superior of Herman Zeigler, whose duty it was to account to him at the close of each business day for the money received in the savings department for that day. It seems to have been customary in the bank, if for any reason the general teller was temporarily absent, for the receiving teller of the savings department to take his place while his absence continued, and the cashier of the bank testified that he directed this, and understood it to be the duty of the receiving teller of the savings department to comply with the direction. Such temporary absences occurred while Herman Zeigler was such receiving teller, and he took his brother's place while they continued. The case shows that of the moneys which came to his hands while thus temporarily acting for his brother, he embezzled a sum larger than the penalty of the bond. His brother was privy to the embezzlement.

1. This suit is in *assumpsit;* and it is objected that *assumpsit* will not lie. That at the common law the action must have been debt, is conceded; but the statute provides that "in all cases arising upon contracts under seal, or upon judgments, when an action of covenant or debt may be maintained, an action of *assumpsit* may be brought and maintained in the same manner in all respects as upon contracts without seal." Comp. Laws, sect. 6194. Counsel for the defence make an ingenious argument to convince us that this statute is not applicable to a penal bond without covenants. We do not agree in this. We think the intent of the statute is made plain in its words: to permit the action of *assumpsit* to be brought "in all cases" where before an action of debt might be brought on a contract under seal. This is such a contract and such a case.

2. The second objection to a recovery is more specious, and goes to the merits. It is that there has been no breach of the bond. The moneys for which Herman Zeigler failed to account did not, it is said, come to his hands as receiving teller of the savings department of the bank, or in the performance of his duties as such; but they came to his hands while he was temporarily performing the duties of another office. But this bond is not conditioned that he shall faithfully perform the duties of any other office, or account for moneys that might come to his hands by virtue of any other trust; and his sureties can not be supposed to have contemplated when they undertook to be responsible for his conduct as receiving teller

of the savings department, that they were making themselves responsible for his conduct in some other position, to which he might be assigned, and of which the duties might be different and the responsibilities greater. This, in short, is the argument for the defence.

Abstractly considered, this argument is undeniable. The sureties upon an official bond undertake for nothing which is not within the letter of their contract. The obligation is *strictissimi juris;* and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent. *Paw Paw* v. *Eggleston*, 25 Mich. 36, 40; *Detroit* v. *Leadbeater*, 29 Id. 24; *Johnston* v. *Kimball*, 39 Id. 137; *Bullock* v. *Taylor*, Id. 187; *United States* v. *Boyd*, 15 Pet. 187; *State* v. *Cutting*, 2 Ohio 1; *McCluskey* v. *Cromwell*, 11 N. Y. 593; *Weonston* v. *State*, 73 Ind. 175. This is familiar law, and rests on sound reason. But has this law any application to the facts of this case? The judge of the Superior Court thought it had, and turned the case out of court. We are not satisfied he was correct in this.

The bank, it appears, was one which had two departments; a savings department, and a commercial department. It had for both one cashier and one general teller; and the money does not appear to have been kept separate, but was brought daily into a common fund. The receiving teller was subordinate to the general teller, as well as to the cashier. The exact duties of the receiving teller of the savings department do not seem to have been particularly defined, except as the designation of the office would define them, or as they would be indicated by the condition of the bond. He was to be responsible for all such sums of money, property and funds as the cashier might place in his hands as such teller, and also for all such other money, property and funds as might otherwise come into his hands as such teller. His duty was to account faithfully for all these. When the teller should stand at his desk and receive savings deposits, he would of course receive them as receiving teller; and it might also be said that he would receive them because they were placed in his hands by the cashier, who, as chief financial officer of the bank, had placed him at that post. But if the defence is correct in the view taken of this officer's duties, it is not very manifest that the cashier could have had any occasion to intrust him with moneys otherwise. He simply received what

was paid in, and handed it over to the general teller. What occasion could have arisen for putting other moneys into his hands as receiving teller merely?

But we think this view is too restricted and narrow. Every such appointment is made with the general course of business in such institutions in mind, and it must contemplate that what is customary will take place. If it is customary for one officer to assist another when the need arises, we must assume that he expected to render such assistance, and that by implication he undertook to do so as a part of his official duty. And if he was bound to have this understanding of his undertaking and his duty, his sureties were bound to have the like understanding. The number of officers of a bank will vary with the extent of the business and with its needs. There may be only a president and cashier, but there will commonly be a teller, and there may also be a vice-president, assistant cashier, one or more assistant tellers, and such number of book-keepers, messengers and other assistants as the business may require. When a cashier and a teller are sufficient for all the ordinary needs of the bank, is a cashier performing an official act when, in the temporary absence of the teller, he steps to the teller's place and receives a deposit? Or is the teller acting outside his duty when, under corresponding circumstances, at the cashier's request, he answers the ordinary calls at the cashier's table. We think not. We think any such interchange of assistance as temporary need may require, is fairly within the contemplation of any appointment to such a place, of the undertaking in accepting it and of any official bond that might be given by the appointee. If this were not so, every officer in a bank would require an assistant, or the business of the bank would come to a stop whenever temporary illness or any necessity whatever should, for any time, however short, take him from his desk. We agree entirely with the defence that it is not legally competent to impose new duties upon an officer to the prejudice of his sureties, but we do not think such a temporary assignment is a case of that nature. The officer is merely giving the temporary aid which must have been contemplated in his employment; and if he were to refuse to give it when having no better reason than that he did not consider it a part of his business, he would have been likely to be regarded by his superiors as altogether too unaccommodating for their purposes. It would not be too much to expect a dismissal under such circumstances.

We need not say whether a dismissal would be strictly justifiable, for we do not think the needs of this case require a decision upon that point. It is enough in this case to note that Herman Zeigler did not refuse. As receiving teller of the savings department he was called upon to take the place of the general teller temporarily, and he took it and received moneys which he embezzled. The moneys were confided to him by the cashier, because of his being such receiving teller, and because in the opinion of the cashier, which Zeigler himself did not contest, it was proper that he should receive them under the circumstances. They therefore came to his hands, because of his office and under circumstances justifying their being confided to him as such. The cases of *Minor* v. *Mechanics' Bank*, 1 Pet. 46; *Rochester City Bank* v. *Elwood*, 21 N. Y. 88; and *German-American Bank* v. *Auth*, 87 Penn. St. 419, are in point.

The judgment must be reversed with costs and a new trial ordered.

The other justices concurred.

I. Two cases of importance have been decided recently upon the liability of sureties on official bonds. One was decided in the New York Court of Appeals, and is known as the *National Mechanics' Banking Association* v. *Conkling*, reported in full in 15 Cent. Law J. 373, for Nov. 10th 1882. The other was decided in the Supreme Court of Michigan, and is the particular case to which this note is appended. The two cases taken together are illustrative of the two general classes under which the cases may be arranged which relate to the liability of sureties on the official bonds of private officers.

1. In the *National Mechanics' Banking Association* v. *Conkling*, *supra*, the facts were as follows. A bookkeeper in a bank had given bond conditioned for the faithful discharge of his duties as such, "or the duties of any other office, trust or employment relating to the business of said association which may be assigned to him." He was afterwards promoted to the position of receiving teller, and while acting in that capacity embezzled the funds of the bank. The question was, whether, according to the conditions of the bond, the sureties were liable for the embezzlement thus committed. The question was a nice one, and the conclusion that they were not liable was reached, as the court declared, "not without some hesitation and doubt." We doubt not the case was correctly decided, the reasoning of the court is satisfactory and convincing. The recital in such bonds undertaking to express the precise intent of the parties, controls, said the court, the condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key. *London Assurance Co.* v. *Bold*, 6 Ad. & El. (N. S.) 514; *Hassell* v. *Long*, 2 M. & S. 363; *Pearsall* v. *Summersett*, 4 Taunton 593; *Peppin* v. *Cooper*, 2 B. & A. 431; *Barker* v. *Parker*, 1 T. R. 287; *Liverpool Water Works Co.* v. *Atkinson*, 6 East 507; *Tradesmens' Bank* v. *Woodward*, Anthon's Nisi Prius R., 2d. ed. 300. "This is a case where the general words subsequently used must be controlled and

limited by the recital. A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris*, and must not be extended by construction." Consequently the sureties were not liable for a default committed after the appointment of their principal to another position than that of bookkeeper. They undertook for his fidelity only while he was bookkeeper. "But if, while bookkeeper, the duties of any other office, trust or employment relating to the business of the bank were assigned to him, their obligation was also to extend to the discharge of those duties." The above case is, by reason of the broad language of the condition of the bond, a striking illustration of the principle that the sureties on an official bond are not liable for defaults committed by their principal after his promotion to a different position than that specified in the bond. A principle of law about which there is no kind of doubt in ordinary cases. See, *Manufacturers' Bank* v. *Dickerson*, 41 N. J. Law 449, where the bond was conditioned for the performance of the duties of an assistant clerk in a bank, and the principal was promoted to the position of bookkeeper, the sureties were held not liable for his default, while holding the latter position.

2. The particular case, on the other hand, represents another class of cases. In that case the bond was conditioned for the faithful performance of the duties of a receiving teller. The principal in the bond was holding that office at the time of the default, but was temporarily acting as general teller, in the absence of that officer, and while acting as such was guilty of embezzlement. The bond appears to have been loosely drawn. Had it contained the condition which we have seen was inserted in the bond in *National Mechanics' Banking Association* v. *Conkling*, *supra*, no question could have arisen as to the liability of the sureties. But notwithstanding the general character of the bond the sureties were held liable, and there can be little doubt but that the holding was correct. In *Rochester City Bank* v. *Elwood*, 21 N. Y. 88, the bond was conditioned for the faithful discharge of the trust reposed in the principal as assistant bookkeeper. The court held it to be an engagement that he would not avail himself of his position to misapply or embezzle the funds of his employer, and that it was immaterial that the embezzlement was committed while the bookkeeper was keeping a journal, which, when he entered upon his duties, and usually, was kept by the teller, and that fraudulent entries were made in such journal to cover his default. In *German-American Bank* v. *Auth*, 87 Penn. St. 419, the question arose on the bond of a bank messenger, conditioned that he should conduct himself honestly and faithfully as such messenger. The sureties were held liable for money stolen by him from the bank, and it was held to be wholly immaterial whether he was acting at the time within the scope of his employment as messenger or not. In *Minor* v. *Mechanics' Bank of Alexandria*, 1 Peters 46, it was held that the official bond of a cashier of a bank must be construed to cover all defaults in duty which might be annexed to the office from time to time, by those authorized to control the affairs of the bank: that the sureties in the bond were presumed to enter into their contract with reference to the rights and authorities of the president and directors under the charter and by-laws. Opposed to these cases stands the solitary case, so far as we have been able to discover, of *Allison* v. *Farmers' Bank*, 6 Rand (Va.) 204. In that case it was held, by a divided court, that the sureties were not liable for a felonious taking of money by a bookkeeper, from the drawer of a bank. The case was decided upon the theory that the sureties did not intend to bind themselves that their principal should not commit a felony.

3. Intermediate between the two

classes of cases above considered comes the recently decided case of the *Home Savings Bank* v. *Traube*, 75 Mo. 199. In that case it was held that the fact that the bookkeeper of a bank performed the duties of teller also, would not relieve the sureties in his bond, which had been given for the faithful performance of his duties as bookkeeper, from liability for errors committed in that capacity, unless the errors were in some way connected with some proper act on his part as teller, or were superinduced by his employment as such.

4. In *Union Bank* v. *Clossey*, 10 Johns. 271, s. c. 11 Id. 182, the bond was conditioned that the principal would "well and faithfully perform the duties assigned to and trust reposed in him, as first teller," &c. It was held to apply to his honesty and not to his ability, and that the sureties were not liable for a loss arising to the bank from his mistake, but only for a breach of trust. In *American Bank* v. *Adams*, 12 Pick. 303, it was held that a bond faithfully to perform the duties of teller bound the obligors to a responsibility for reasonable and competent skill and due and ordinary diligence in the performance of his office and not for his honesty alone. In *Minor* v. *Mechanics' Bank of Alexandria*, 1 Peters 46, the condition of an official bond that he should "well and truly" execute the duties of cashier, was held to include not merely honesty but reasonable skill and diligence. In *Batchelor* v. *Planters' National Bank*, 78 Ky. 435, after asserting a cashier's duty to supervise the action of his subordinates, it is said: "The acceptance of the cashier's bond does not preclude the bank or its directors from designating the business of a subordinate, and the character of the work to be done by him. When not interfering with the duties properly belonging to the cashier, such action on the part of the board cannot affect the liability of the sureties, and if in the opinion of the board, the subordinate can discharge the duties of both the teller and general bookkeeper, his appointment to both positions will not release the sureties of the cashier, although the bond may have been executed when the subordinate was acting only in the one capacity."

II. It may be interesting in this connection to refer briefly to some of the principles which govern the liability of sureties on the official bonds of public officers.

1. It seems to be held in general that the liability of public officers is absolute for the moneys received by them in their official capacity. The fact that they may have been robbed, or the money stolen through no fault or neglect upon their part, or that the bank in which they kept their accounts has failed, is no excuse for a failure to pay the money over: *Cox* v. *Blair*, 76 N. C. 78; *Havens* v. *Lathene*, 75 Id. 505; *State* v. *Clarke*, 73 Id. 255; *Perley* v. *Muskegon*, 32 Mich. 132; *Commonwealth* v. *Comly*, 3 Penn. St. 372; *Taylor* v. *Morton*, 37 Iowa 550: *Union* v. *Smith*, 39 Id. 9; *County of Redwood* v. *Tower*, 28 Minn. 45; *County of Hennepin* v. *Jones*, 18 Id. 199; *County of McLeod* v. *Gilbert*, 19 Id. 214; *Thompson* v. *Board of Trustees*, 30 Ill. 99; *United States* v. *Dashiel*, 4 Wall. 182; *United States* v. *Prescott*, 3 Id. 587; *United States* v. *Keehler*, 9 Id. 83; *Boyden* v. *United States*, 13 Id. 17; *United States* v. *Thomas*, 15 Id. 337; *Morbeck* v. *State*, 28 Ind. 86; *Rock* v. *Stinger*, 36 Id. 346; *Steinback* v. *State*, 38 Id. 483; *New Providence* v. *McEachron*, 33 N. J. Law 339; *Colerain* v. *Bell*, 9 Metc. 499; *Muzzy* v. *Shattuck*, 1 Denio 233; and *State* v. *Harper*, 6 Ohio St. 607. The subject was considered by the Supreme Court of Maine in 1879, and a contrary conclusion was reached: *Cumberland* v. *Pennell*, 69 Me. 357. His liability was there held to be that of a bailee for hire.

In *State* v. *Clarke*, 73 N. C. 255, it was held that county commissioners had

no authority to release a sheriff from his obligation to pay over county moneys which had been lost or stolen through no fault of his. In *Board of Education* v. *McLandsborough*, 36 Ohio St. 227, it was held to be in the power of the legislature to grant such relief. But in *People* v. *Supervisor*, 16 Mich. 254, and in *Bristol* v. *Johnson*, 34 Id. 123, it was held that the legislature had no such power, as it amounted to the auditing of a private claim, a thing forbidden by the constitution of that state.

2. Where a public officer executes an official bond which is not required by statute, such bond is void for want of a consideration: *State* v. *Heisey*, 56 Iowa 404. And where a statutory bond goes beyond the requirements of the statute, it is, for the excess, without any obligatory force: *United States* v. *Ellis*, 4 Sawyer 592. Where an officer is required to perform a duty special in its nature, and to give a special bond for its faithful performance, no liability attaches to his general bondsmen for a default in the performance of the special duty, in the absence of any declaration that they shall also be liable: *Board of Supervisors* v. *Ehlers*, 45 Wis. 281; *Commonwealth* v. *Toms*, 45 Penn. St. 408; *State* v. *Johnson*, 55 Mo. 80; *Williams* v. *Morton*, 38 Me. 52; *State* v. *Young*, 23 Minn. 551; *State* v. *Corey*, 16 Ohio St. 17; *Henderson* v. *Coover*, 4 Nev. 429; *Waters* v. *State*, 1 Gill 302; *People* v. *Moon*, 3 Scam. 123.

3. Where the statute prescribes that an officer shall hold during a stated term, and until his successor is elected and qualified, the question arises, whether the sureties will be liable for delinquencies committed after his stated period has elapsed, but before his successor has been appointed or qualified? The authorities are not harmonious. Some few cases hold that the sureties will continue liable after the stated period has elapsed, and until the successor has been actually appointed and qualified: *Long* v. *Seay*, 72 Mo. 648; *Thompson* v. *State*, 37 Miss. 518; *State* v. *Berg*, 50 Ind. 496; *Placer County* v. *Dickerson*, 45 Cal. 12; *State* v. *Daniel*, 6 Jones (N. C. Law) 444; *Sparks* v. *Bank*, 9 Am. Law Reg. (N. S.) 365. But if the officer is himself re-elected or re-appointed, and thus becomes his own successor, and fails to give a new bond, the sureties on the original bond will not be liable for a default occurring in the second term: *Savings Bank* v. *Hunt*, 72 Mo. 597; *Harris* v. *Babbitt*, 4 Dillon 185.

The weight of authority, and the better considered cases, hold that the bond is only intended to cover the reasonable time necessary to enable a successor to be elected and qualified, and that if a default takes place after such reasonable time has elapsed, the sureties will not be liable: *Bigelow* v. *Bridge*, 8 Mass. 275; *Chelmsford* v. *Demarest*, 7 Gray 1; *Dover* v. *Twombly*, 42 N. H. 59; *Welch* v. *Seymour*, 28 Conn. 387; *State Treasurer* v. *Mann*, 34 Vt. 371; *Mayor, &c.*, v. *Horn*, 2 Harr. (Del.) 190; *Insurance Co.* v. *Smith*, 2 Hill (S. C.) 590; *South Carolina Society* v. *Johnson*, 1 McCord 41; *Committee of Public Accounts* v. *Greenwood*, 1 Desaus. (S. C.) 450; *County of Wapello* v. *Bingham's Adm'r*, 10 Iowa 40; *Council of Montgomery* v. *Hughes*, 65 Ala. 201; *Harris* v. *Babbitt*, 4 Dillon 185. In the case last cited, Mr. Justice DILLON says that even if a contrary rule should be recognised in the case of public officers, and he appears to be clearly of opinion that it should not, it certainly should not be adopted in the case of officers of private corporations whose continuance in office under such circumstances would be due to the neglect of the officers entrusted by the corporation to manage its affairs. The results of their negligence should be visited upon the corporation, and not upon the sureties. A leading case on this whole subject is that of *Lord Arlington* v. *Merricke*, 2 Saund. 403, which came before Lord HALE. The bond

recited that the principal had been appointed deputy-postmaster for the term of six months, and was conditioned for his good behavior during all the time he should continue deputy-postmaster. He continued in office two years, and made default. The sureties were held not liable. See, too, *Kitson* v. *Julian*, 4 E. & B. 854.

4. While sureties are not liable by reason of the subsequent imposition by statute of new and different duties materially changing the character of the office, they are nevertheless liable for the faithful discharge of the duties of the officer, existing at the time of signing the bond, where those duties have not been substantially or materially changed. The bond remains a binding obligation for what it was originally given to secure: *Gaussen* v. *United States*, 79 U. S. 584; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *Commonwealth* v. *Holmes*, 25 Gratt. 771; *Supervisors of Monroe County* v. *Clarke*, 25 Hun 286: *Hatch* v. *Attleborough*, 97 Mass. 533; *People* v. *Vilas*, 36 N. Y. 459. The case of *Pybus* v. *Gibb*, 6 E. & B. 902, is not recognised as good law in this country. In that case the bond was given for the faithful discharge of the duties of high bailiff, the jurisdiction of the court being fixed by statute. After the giving of the bond the jurisdiction of the court was enlarged, materially altering the duties of the bailiff. The sureties were held not even liable for misconduct, which was within the jurisdiction of the statute in force at the time the bond was given. To that extent it would seem to be opposed to the American authorities.

In Alabama, under the Code, sureties are liable for acts done in the discharge of duties subsequently imposed: *Morrow* v. *Wood*, 56 Ala. 1; *McKee* v. *Griffin*, 66 Id. 211.

5. The general rule, of course, is that sureties are only liable for a defalcation which takes place during the term for which the bond was given: *Stern* v. *People*, 96 Ill. 475; *Bissell* v. *Saxton*, 66 N. Y. 55. And the sureties will not be made liable for a defalcation during a preceding term by the fact that their principal had, during the term for which the bond was given, property out of which he might have provided funds to make good the default: *Bissell* v. *Saxton*, 77 N. Y. 191. Where an officer has misappropriated funds during his first term, and in his second term actually pays into the public treasury all the funds received by him during such second term, but applies a portion of such funds to the extinguishment of the liabilities incurred by him during his first term, the sureties on the second bond will be liable to the extent of such appropriation: *State* v. *Sooy*, 39 N. J. Law 539; *Seymour* v. *Van Slyck*, 8 Wend. 403; s. c. 15 Id. 19; *State* v. *Smith*, 26 Mo. 226; *Inhabitants of Sandwich* v. *Fish*, 2 Gray 298; *Gwynne* v. *Burnell*, 7 Cl. & Fin. 572; *Attorney-General* v. *Manderson*, 12 Jur. 383. In *Hoboken* v. *Kamena*, 41 N. J. Law 438, an officer was a defaulter during his first term, and it was sought to hold the sureties on the bond for the second term. Counsel urged, as matter of law, that the money received during the second term must be considered as appropriated to make good the misappropriations of the first term, and that, thereby, it would appear that he had not faithfully and truly performed all the duties of the second term. The court, however, viewed the subject in a different light, and the sureties for the second term were held not liable.

6. Where an officer holds for several consecutive terms, and is found to be a defaulter at the end of his last term, it will be presumed, in the absence of proof, that the entire default occurred during the last term: *Kelly* v. *State*, 25 Ohio St. 567: *Kagay* v. *Trustees of Schools*, 68 Ill. 75. If, at the commencement of his second term, he reports

a certain sum in his hands, and gives bond to account for and pay over moneys coming to his hands during the term, the sureties on the bond for the second term will be responsible for the money so reported to have been in his hands, and will not be allowed to show that the defalcation in fact occurred during a previous term, so as to throw the liability on the sureties for the first term: *Roper* v. *Sangamon Lodge*, 91 Ill. 518; *Cawley* v. *People*, 95 Id. 249; *Morley* v. *Town of Metamora*, 78 Id. 394; and see *Board of Education* v. *Fonda*, 77 N. Y. 359: *United States* v. *Boyd*, 15 Pet. 187. Where the officer fails to make a report at the close of his first term, and to make a settlement, it will not be presumed that he paid the funds of the first term to himself as his successor, and the sureties on the first bond will be liable: *Coons* v. *People*, 76 Ill. 383.

7. Sureties on the official bond of a public officer are liable for acts done *virtute officii*, but not for those done *colore officii*: *Huffman* v. *Koppelkom*, 8 Neb. 344; *Ottenstein* v. *Alpaugh*, 9 Id. 237.

The liability of sureties on official bonds is not generally measured by the law requiring the sureties, but by that imposing the duties on the officer: *Dyer* v. *Covington Township*, 28 Penn. St. 186.

Of course no action can be maintained on an official bond for any misfeasance of any officer which is not within the terms of the condition of the bond, or in contemplation of the law requiring the bond: *Furlong* v. *State*, 58 Miss. 717.

8. In *Vann* v. *Pipkin*, 77 N. C. 408, the law fixed the term of office at two years, but required the bond to be renewed annually. The bond was given in September 1872, but was not renewed in September 1873, although the principal continued in office. The statute declared that a failure to renew the bond should create a vacancy in the office. The bond was conditioned for the faithful collection and payment of the taxes received during his term of office. The default occurred in 1874. The sureties were held liable. The court said the failure to renew the bond did not of itself create a vacancy in the office, and that it was necessary that proceedings should first be taken to declare the office vacant.

HENRY WADE ROGERS.

United States Circuit Court, Northern District of Texas.

LAWRENCE *v.* NORTON.

An assignment for the benefit of those of the assignor's creditors who should release him, with a reservation of the surplus to the assignor himself, is fraudulent and void as to the creditors not releasing.

Statutes allowing preferences among creditors should be strictly construed, and assignments creating such preferences should be held void, when not in strict compliance with the terms of the law.

A Texas statute authorized any debtor to make an assignment for the benefit of such of his creditors only as would consent to discharge him, and provided that in such case the benefit of the assignment should be limited to such creditors. *Held*, that the statute must be confined in its operation to assignments which transferred all of the debtor's property for the benefit of creditors, and did not validate an assignment by which the debtor reserved to himself an interest in the surplus after paying the releasing creditors.