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## Limitation of Actions--Public Officer's Bond

K. P. S.

*West Virginia University College of Law*

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self-contradictory admission and admissions ordinarily serve substantive testimonial purposes, on what basis has the court excluded it on the issue of negligence? The court indicates that a judgment rendered upon a plea of guilty would have been admissible as an admission for this purpose had it arisen on the *same* facts.

R. C. K.

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LIMITATION OF ACTIONS—PUBLIC OFFICER'S BOND.—*D*, a commissioner of the County Court of Barbour County, was paid forty dollars a month for a period of seven months during 1938. The correct pay rate for this period was fifteen dollars per month. The State brought an action of assumpsit to recover the overpayment. *Held*, that the five-year statute of limitations barred the action. *State ex rel. Alderson v. Holbert*, 56 S.E.2d 114 (W. Va. 1949). The State then brought an action of debt on the official bond against *D* and his surety to recover the money wrongfully paid to the principal. *Held*, that an action of debt brought on an official bond of a public officer is not barred if brought within ten years of the accrual of the cause of action [W. VA. CODE c. 55, art. 2, § 6 (Michie, 1949)]. *State ex rel. Alderson v. Holbert*, 58 S.E.2d 796 (W. Va. 1950).

It appears from all the West Virginia cases in point that the court was dedicated to a view contrary to that expressed in the principal case. This was the opinion expressed by Judge Lovins in his dissent. All of these cases follow the same pattern. An action is brought by a private citizen against the officeholder and the surety on his official bond after the expiration of the period of limitation for charging the officeholder with the tort itself. A typical example of this series of cases is *Town of Clendenin ex rel. Fields v. Ledsome*, 129 W. Va. 388, 40 S.E.2d 849 (1946). The *D* police officer and his surety were sued in covenant by the town on behalf of Fields who was negligently injured by fire while in the town jail. *Held*, that the action was barred by the running of the one-year statute of limitations for a tort action. The other cases are: *State ex rel. Sabatino v. Richards*, 127 W. Va. 703, 24 S.E.2d 271 (1945) (action against constable and surety to recover statutory penalty), and *Byrd v. Byrd*, 122 W. Va. 115, 7 S.E.2d 705 (1940) (action against surety and deputy sheriff who shot sheriff). These previous decisions recognize the principle that a tort claim may not be waived to extend the statute of limitations

to that of an action on the bond, yet in the principal case the quasi-contractual claim is waived for the longer limitation on the bond. The court in the principal case purported to distinguish both the *Clendenin* case and the *Sabatino* case, *supra*, on the ground that these were not actions upon the bonds of the public officers. All these preceding cases were against the sureties on the official bond in addition to the officeholder. The cause of action against the surety could not exist except through the liability on the bond.

The authorities used by the court in the principal case are not directly in point with the case. The three cases used contain statements which would appear to sustain the holding in the principal case yet the fundamental rule in each of these cases can have no application to the factual situation of the principal case. In *Jennings v. Taylor*, 102 Va. 191, 45 S.E. 913 (1903), the Virginia court, in respect to a trust fund in the hands of an officeholder, held that no statute of limitations was applicable to an action against the officeholder and a ten-year limitation was applied to the surety. The second cited case, *Arnold v. Hawkins*, 79 W. Va. 205, 90 S.E. 678 (1916), uses the *Jennings* case, *supra*, for its only authority in point and holds no statute of limitations applies. The syllabus in this case, which is quoted in the principal case, does not show the fact that the *Arnold* case treated the money involved as a trust *res*. If the court in the principal case intended to raise this quasi-contractual claim to the status of a trust, it is not so indicated; so the trustee situation involved in the first two cited cases would be questionable authority for the court's holding. The final case used as authority in the principal case, *Fidelity & Casualty Co. of New York v. Lackland*, 175 Va. 178, 8 S.E.2d 306 (1940), involved an action against the surety on an official state road bond. The Virginia court applied the general rule that the running of the statute against the principal debtor does not destroy the debt, which the surety agreed to pay, but simply bars an action against the principal debtor. The Virginia bond as pointed out in *Fidelity & Casualty Co. v. Copenhagen Contracting Co.*, 159 Va. 126, 165 S.E. 528 (1932), carries this condition: "and shall promptly pay . . . for labor and material incurred by the principal." The West Virginia bond of contractor, W. VA. CODE c. 38, art. 2, § 39 (Michie, 1949), also provides that the surety shall pay for labor and material furnished the principal. If the action in the principal case were on an official bond of a contractor or if the official bond of an officeholder were the same as that of a contractor, the result would have

been satisfactory. However, the statutory bond of a public officer does not provide that the person executing it shall pay the debts of the officeholder, as shall be pointed out later, and if the instant bond contained such a condition not conforming with the statute, it would be considered as surplusage and the court would discharge it from the instrument, *Proudfoot v. Greathouse*, 130 W. Va. 587, 45 S.E.2d 489 (1947). Accordingly, the *Fidelity* case, *supra*, is a weak support on which to rest the decision of the principal case.

Probably a better rule would have been that the statute of limitations of five years would bar the action in the principal case. In reaching this conclusion, there are two statutes to consider, namely, the statute setting the limitation of ten years for actions on an official bond and the statute setting forth the elements of the bond. The statutory bond reads: ". . . shall be conditioned upon the faithful discharge by the principal of the duties of his office or employment, and upon accounting for and paying over, *as required by law*, all moneys which may come into his possession by virtue of the office or employment." W. VA. CODE c. 6, art. 2, § 3 (Michie, 1949). (*Italics supplied.*) The claim in the principal case, a simple quasi-contractual obligation, would not be a duty of the office; it was a duty of the officeholder and hence would be within the second element of the bond. This element, the paying over of money, is prefaced with the condition *as required by law*. The court held in the first action that any effective remedy the State had against *D* was barred; accordingly, he was not *required by law* to reimburse the State. It seems that no condition of the bond has been violated on which a liability can fasten. An official bond does not increase or extend the principal's duties, obligations or liabilities. *State ex rel. Boone National Bank of Madison v. Manns*, 126 W. Va. 643, 29 S.E.2d 621 (1944), and *Sabatino v. Richards, supra*. In examining the two statutes together it appears that the legislature intended that after ten years no action might be maintained on an official bond, but if the principal cause of action, outside the bond itself, should be barred by a shorter limitation, then this limitation would bar an action on the bond.

The apparent effect of the decision is to have a dual set of limitations affecting actions on the bonds of public officers, one for actions by the various agencies of the state and another for actions by private citizens seeking to hold officers and their sureties liable on the bond.

K. P. S.