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Pleading and Practice--Splitting a Cause of Action on Injunction Bonds

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ty into that state. But the mere acquisition of property, construction and operation of a plant, whether in carrying out a governmental or proprietary function, does not of itself interfere with that sovereignty. It is suggested, therefore, that the court, in the instant case, applies a better criterion.

F. P. C.

PLEADING AND PRACTICE — SPLITTING A CAUSE OF ACTION ON INJUNCTION BONDS. — The plaintiff sues on one of two injunction bonds which were executed by the principal defendant with different sureties. In a prior suit the plaintiff recovered the full penalty of one of the bonds, placing in issue all its items of damages, which greatly exceeded the penalty of the bond. The conditions of the two bonds were identical and the same items of damages were tendered in each suit. *Held*, that the plaintiff's recovery on one of these bonds precludes his right to a judgment on the other, he having litigated all his items of damages in the prior action. *State v. Continental Coal Co.*¹

These statutory² bonds were executed as a condition precedent to the taking effect of a preliminary injunction³ purporting to save harmless the defendant enjoined, from any damages incurred by reason of the injunction in case of its dissolution.⁴ In the absence of these bonds there is no common-law liability for such damages unless the injunction was applied for maliciously or without probable cause,⁵ and it is suggested that the statute providing for the execution of such bonds does not create any extrinsic liability. It would seem that in the absence of any such extrinsic liability the defendant could be liable only upon the bonds, a separate cause of action accruing on each by the breach of the condition thereof.⁶ A person having several causes of action

¹ 186 S. E. 119 (W. Va. 1936).

² W. VA. REV. CODE (1931) c. 53, art. 5, § 9.

³ *Conley v. Brewer*, 85 W. Va. 725, 102 S. E. 607 (1920); *Meyers v. Land Co.*, 107 W. Va. 632, 149 S. E. 819 (1929).

⁴ See *Meyers v. Land Co.*, 107 W. Va. 632, 643, 149 S. E. 819 (1929).

⁵ *Glen Jean R. Co. v. Kanawha R. Co.*, 47 W. Va. 725, 35 S. E. 978 (1900); *Notes* (1926) 45 A. L. R. 1517; L. R. A. 1916E, 1282; (1916) 14 R. C. L. 479. See *State v. Marguerite Coal Co.*, 104 W. Va. 324, 326, 140 S. E. 40 (1927). In *Gorton v. Brown*, 27 Ill. 488 (1862) the court held where a bond was required the remedy on the bond was exclusive even though the injunction was obtained maliciously and without probable cause.

⁶ Courts have apparently assumed that the breach of the condition of a bond gives rise to a cause of action. *Roach v. Gardner*, 9 Grat. 89 (Va. 1852); *Chicago R. Co. v. Cimarron*, 68 Okla. 7, 170 Pac. 909 (1917); *White v. Clay's Ex'rs*, 7 Leigh 68, 81 (Va. 1836); *State v. Pingley*, 84 W. Va. 433, 100 S. E.

against another may maintain an action on any of such causes without injuring his right to proceed upon any of the others.⁷ The fact that they may all be joined in one action,⁸ or that they arise out of the same transaction,⁹ is immaterial. Therefore it would follow that the plaintiff should be allowed his separate actions upon these bonds whether or not joinder is permissible under our statute.¹⁰

The court applies this statute as if there were but one instrument in the case, basing this premise on the authority cited which holds that these sureties on separate bonds are bound as co-sureties the same as if on one instrument for the purpose of contribution.¹¹ *Quaere*: Does the fact that these sureties are bound as on one instrument for the purpose of contribution permit these two bonds to be treated as one for the purpose of pleading? To further support its application of this statute the court cites the statutes of several states as having provisions "more or less" similar to our own and also cases purported to be decided under those statutes permitting joinder in similar circumstances. However, the terms of these statutes are somewhat broader than ours and would more likely permit such joinder.¹² It is therefore suggested that our statute applying to "any instrument" cannot be so construed as to apply.

216 (1919); *Ballard v. Logan*, 68 W. Va. 655, 70 S. E. 558 (1911); *Gorton v. Brown*, 27 Ill. 489, 494, 81 Am. Dec. 245 (1862); *Sewell v. Huffstetler*, 83 Fla. 629, 645, 93 So. 162 (1922).

⁷ *Robbins v. Harrison*, 31 Ala. 160 (1857); *Danciger v. American Express Co.*, 192 Mo. App. 106, 179 S. W. 806 (1915); *Paton v. Doyne*, 74 N. J. L. 319, 65 Atl. 843 (1907); *Cook v. Conners*, 215 N. Y. 175, 109 N. E. 78 (1915); *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228 (1911); *Rex v. Sheriff*, 1 Barn. & Adol. 672, 109 Eng. Rep. 936 (1831).

⁸ *Olsen v. Whitney*, 109 Fed. 80 (1901); *Loughridge v. Morris*, 68 Okla. 80, 171 Pac. 451 (1918).

⁹ *Baumhoff v. St. Louis & K. Ry. Co.*, 205 Mo. 248, 104 S. W. 5 (1907); *Cannon v. Cox*, 98 S. C. 185, 82 S. E. 399 (1914); *International & G. N. Ry. Co. v. Concrete Invest. Co.*, 201 S. W. 718 (Tex. Civ. App. 1917). See *Naugle v. Naugle*, 89 Kan. 622, 132 Pac. 164 (1913).

¹⁰ W. VA. REV. CODE (1931) c. 55, art. 8, § 7.

¹¹ *State v. Continental Coal Co.*, 186 S. E. 119, 121 (W. Va. 1936).

¹² CAL. CODE CIVIL PROC. (Deering, 1923) § 383: "Persons severally liable upon the same obligation or instrument . . . and sureties on the same or separate instruments, may all or any of them be included in the same action at the option of the plaintiff. . ." KANS. REV. STAT. (Long, Smith & Farrelly, 1923) c. 60, art. 6: "The plaintiff may unite several causes of action in the same petition, whether they be such as have been heretofore denominated legal or equitable, or both. But the causes of action so united must affect all the parties to the action, except in actions to enforce mortgages or other liens." NEB. COMP. STAT. (1922) § 8601: "Plaintiff may unite several causes of action . . . when they are included in either of the following classes: The same transaction or transactions connected with same subject of action; contracts

However upon the facts of this case its result is clearly justifiable. In suing separately upon two distinct causes of action the judgment on the first operates as an estoppel only as to points and questions actually litigated and determined.¹³ It is believed that since the plaintiff placed all its items of damages before the jury where each was contested in the first action that they may be considered within the above rule, as points or questions litigated. Therefore the plaintiff would be estopped to use them in this second action.

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E. W. E.

PRINCIPAL AND AGENT — CREATION OF THE AGENCY RELATION.

— Judgment was taken against *C*, constable, and *S*, accommodation surety on *C*'s constable bond. *C*'s mother, *M*, paid the judgment with money borrowed from *S*, giving her promissory note secured by deed of trust. *M* brings suit against *S* on the theory that she is equitable assignee of the judgment. *S*, in his answer, alleged that when *M* paid the judgment it was with the intention "of paying the same on behalf of her son, for the purpose of saving . . . [*S*] . . . blameless on account of his gratuitous undertaking." *M* demurred to the answer. Demurrer overruled. On certificate before Supreme Court of Appeals, ruling affirmed. *Held*, that where a judgment

express or implied . . . " § 8602: "The causes of action so united must affect all the parties to the action, and not require different places of trial." N. C. Code (1935) § 507. Same as above. OKLA. COMP. STAT. (Bunn, 1921) § 266. Same as above. OHIO GEN. CODE (Page & Adams, 1910) §§ 11306, 11307. Same as above. TEX. COMP. STAT. (1928) art. 1989. "In suits brought by the state . . . against any officer . . . or depository . . . giving more than one official bond, the sureties on each and all such bonds may be joined as defendants in the same suit whenever it is difficult to determine when the default sued for occurred and which set of sureties on such bonds is liable therefor."

These cases with the exception of *Powell v. Powell*, 48 Cal. 234 (1874), and *Siebern v. Meyer*, 11 Ohio Dec. 344 (1886), permit such joinder without reference to any statutory provisions whatsoever. Furthermore, none of these cases involve injunction bonds. Two of the cases cited, *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673 (1878), and *Lewis v. Gams*, 6 Mo. App. 138 (1878), are not even in point, the former involving suit on only one bond and the latter being a statutory proceeding for administration of an estate and not a suit on the bonds.

¹³ (1917) 15 R. C. L. 450. See *Hudson v. Iguano Land & Mining Co.*, 71 W. Va. 402, 408, 76 S. E. 797 (1912); *Pomeroy National Bank v. Huntington National Bank*, 72 W. Va. 534, 537, 79 S. E. 662 (1913); *Cromwell v. County of Sac*, 94 U. S. 351, 353, 24 L. Ed. 195 (1876); *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 48, 42 L. Ed. 355 (1897).