SURETYSHIP

Liability of Bondsman for Acts of a Justice of the Peace

An action was instituted in the Court of Common Pleas of Adams County by Stacey S. Jones against Grooms, a justice of the peace, and the sureties on his official bond. The plaintiff alleged false imprisonment by reason of an improper order by the justice for commitment to jail for contempt of court, said order being made without authority of law. The trial court sustained the demurrer of all the defendants. The plaintiff prosecuted error to the Court of Appeals, which court reversed the holding as to the defendant justice, and sustained the judgment as to the defendant sureties. The court held that the defendant justice had committed an improper judicial act for which he could be held liable in a civil suit for damages. *Jones* v. *Grooms*, 56 Ohio App. 351; 10 N.E. (2d) 958, 25 Ohio Abs. 39, 9 Ohio Op. 408, (1936).

A definite difference exists between the powers of justices' courts, which have only limited jurisdiction, and the powers of the courts of general jurisdiction. A justice of the peace has jurisdiction only by virtue of statute, and hence, the jurisdiction can be exercised only to the extent of the statute, for it is a special authority conferred by legislature, upon a tribunal, otherwise having no power to act in such a case. Therefore, it must be pursued in strict accordance with the manner prescribed. *Place* v. *Taylor*, 22 Ohio St. 317 (1872); *Steele* v. *Karb*, 78 Ohio St. 376, 85 N.E. 580 (1908); *Klein et. al.* v. *Lust et. al.*, 110 Ohio St. 197, 143 N.E. 527, (1924); *Robbins* v. *Clemmens*, 41 Ohio St. 285, (1884); *Marvin* v. *State*, 5 N.P. 209, 7 Ohio D. 204, (1898).

The Ohio General Code requires a justice of the peace to give a satisfactory bond before assuming his duties. The statute provides that the bond of a justice of the peace "* * * shall be conditioned that the justice shall well and truly pay over all money which may come into his hands by virtue of his commission, and faithfully perform every *ministerial* act enjoined upon him by law." Ohio Gen. C. 1721.

The acts performed by a justice of the peace fall into three categories; ministerial acts, strictly judicial acts, and improper judicial acts. Ministerial acts are those which the justice is required to perform in a particular way—that is, those acts which are of a clerical nature, and as to which he has no discretion about the manner of their performance. Judicial acts are those which involve consideration, judgment, or the exercise of discretion. *Place* v. *Taylor, supra; Fairchild et. al.* v. *Keith et. al.*, 29 Ohio St. 156, 7 Dec. Rep. 162, 1 W.L.B. 227, (1876); *Gaylor et. al.* v. *Hunt et. al.*, 23 Ohio St. 255 (1872).

No civil action lies against a judicial officer or his sureties while he acts in the exercise of his judicial functions, so long, at least, as he remains within his prescribed jurisdiction. Public policy and preservation of judicial independence and thought make such a rule expedient. *Fairchild* v. *Keith, supra; Stallcup* v. *Baker,* 18 Ohio St. 544 (1869); *Truman* v. *Walton,* 59 Ohio St. 517, 53 N. E. 57 (1899); *Brinkman* v. *Drolesbaugh,* 97 Ohio St. 171, L.R.A. 1918F, 1132, 119 N.E. 451 (1918). A justice of the peace is liable for negligence in or omission to exercise his ministerial duties, and an action may be maintained against him and the sureties on his official bond therefor. *Carpenter* v. *Warner,* 38 Ohio St. 416 (1882); *Place* v. *Taylor, supra*; 24 Ohio Jur., p. 319. If a judicial officer acts wholly without jurisdiction or exceeds his jurisdiction, his judicial office can afford him no protection. *Harmon et. al.* v. *Gould,* Wright 709 (1834); *Taylor* v. *Alexander,* 6 Ohio 144 (1833); *Brinkman* v. *Drolesbaugh, supra.* On the existence or nonexistence of jurisdiction depends immunity from, or liability for, acts done by a person while acting in a judicial capacity.

The bond given by the sureties in the principal case was conditioned that the justice should faithfully perform the duties of his office. Such a provision might reasonably be construed as covering all misfeasances and malfeasances of the justice and not merely nonperformance of ministerial duties. The problem is one of interpretation and enforcement of contracts. The conditions prescribed by the statute will necessarily be assumed to be in the official bond. *Place* v. *Taylor, supra.* If there are additional obligations therein, they are a part of the contract which the surety has voluntarily assumed. There is as much logic and merit in enforcing such obligations as in enforcing any common law agreement. The language of the bond was broad enough to cover the justice's derelictions of duty of which the plaintiff in the principal case was complaining. Had the surety read the statute, he could have ascertained the extent of liability that would be necessary for him to incur to comply with the statutory requirements. It does not appear that it would be placing too great a burden upon the surety to hold him to the full letter of his contract. "It is a principle too well established to require the citation of authorities that 'as a party consents to bind himself, so shall he be bound.' " *Ideal Brick Co. et. al.* v. *Gentry et. al.,* 191 N.C. 636, 132 S.E. 800 (1926). If this argument were to be accepted, the defendant surety's liability would be commensurate with that of the defendant justice's.

Ordinarily a bond is not required of judicial officers, for their duties are such that their conscience must be the sole guaranty of the faithful

performance of their offices. But justices of the peace have to perform both judicial and ministerial duties, as aforementioned, and their duties in certain connections necessitate the receipt of money from third persons. The legislation requiring bonds is to make more adequate the remedies available to innocent persons, by way of redress if the public officer is execution proof, in case of injury caused by such public officers in the performance of their duties. *Denn* v. *Heckman*, 12 Ohio St. 181 (1861); *Hale* v. *Commonwealth ex rel. Grady*, 8 Pa. (8 Barr.) 415 (1848). It seems that the strict enforcement of the bond according to its terms, as above suggested, would effectuate the legislature's obvious intent—that is, to afford the public adequate security.

Assuming that the legislative intent depicted above is accurate, it could well be said that the courts of Ohio are interpreting the statute incorrectly, and are not placing upon it the broad interpretation intended. When the statute required the justice to furnish an official bond covering duties, for delinquencies in respect to which he would have been liable personally without a bond, it seems that the state undoubtedly assumed that the surety on the bond must assume a co-extensive liability. Unless the surety assumed the precise liability imposed upon the justice there was no point in requiring a bond with surety. It might well be contended that the legislature did not mean "ministerial duties" in the sense in which that phrase is sometimes used, but intended that the bond should cover all cases of judicial impropriety for which the justice could be held liable.

Although there is authority to the contrary, it is arguable that the court in the principal case has incorrectly held that a commitment for contempt is the exercise of a judicial power. The Supreme Court of Ohio has held in several cases that a commitment for contempt is not an exercise of judicial power. *De Camp* v. *Archibald*, 50 Ohio St. 618, 35 N.E. 1056, 40 Am. St. Rep. 692 (1893); *Beenkenstein v. Schott, Sheriff*, 92 Ohio St. 29, 110 N.E. 633 (1915); *Ex parte Bevan*, 126 Ohio St. 126, 184 N.E. 393, 12 Ohio Abs. 598 (1933). In the latter case the court held that the power to commit for contempt was "so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function whether he will or will not commit." Each of the three cases cited for the proposition involved a notary public, but the same rule may reasonably be applied to a justice of the peace who exceeds his statutory authority. Under this theory, the surety in the principal case would have been held liable, for the justice committed an improper ministerial or non-judicial act.

Thus, the defendant surety could have been held liable in the prin-

cipal case on the theory that the bond that he signed was conditioned for the faithful performance of duties by the defendant justice, said bond in fact covering the misconduct for which the plaintiff sought damages. If the Ohio courts are reluctant to hold the surety to a greater extent of liability, by strict enforcement of the bond than that allegedly contemplated by the statute the defendant surety could still be held liable by the court's adoption of the view expressed in the notary public cases. If it were held that a commitment for contempt is a ministerial act, the bond on which suit was brought would cover such misconduct. However, if the courts would not deem such a position tenable, liability on the part of the surety could still be imposed on the assumption that the legislature intended the liability of the surety to be co-extensive with that of the justice of the peace. On this theory, a broader interpretation of the phrase "ministerial duties," as used in the statute, would have to be placed thereon than was made in the principal case. It is possible to construe the statute to cover all but proper judicial acts done within the justice's jurisdiction. If none of these positions is acceptable to the courts of Ohio, it would seem that the statute should be amended to afford adequate redress, when considered in the light of the legislature's obvious purpose in requiring such bond to be given as a prerequisite to the justice entering into the performance of his duties.

MARGARETTA BEYNON

TRUSTS

DEVIATION FROM THE TERMS OF A TRUST

Rufas A. Washburn, in his will, devised certain property to his executrix, in trust, providing that the property shall not be sold during the lifetime of his wife, Bessie Washburn, "but the first charge upon the income shall be a liberal provision for my said wife, during the balance of her natural life." By a subsequent item, the will provides that a sum shall be paid for the support of a blind granddaughter, this provision to continue as long as the wife shall live. "But the same shall only be paid out of the excess remaining after a comfortable maintenance for my said wife is provided." The residue of the estate was devised to a son and a daughter. Since the death of the testator, the property has fallen into disrepair to such an extent that the income has been greatly reduced. Necessary repairs and taxes will more than consume the income and there will be nothing left to supply "a liberal provision for my said wife." The wife, as executrix and trustee under the will, asks