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BOND, SURETY—FILED WITH APPLICATION FOR LIVESTOCK DEALER'S LICENSE—SURETY NOT LIABLE FOR DEFAULT IN PAYMENT FOR LIVESTOCK SOLD BY APPLICANT PRIOR TO ISSUANCE OF LICENSE BY DEPARTMENT OF AGRICULTURE — SECTIONS 1177-71 THROUGH 1177-83 G. C.

SYLLABUS:

A surety on a bond filed with an application for a livestock dealer's license, pursuant to Sections 1177-71 to 1177-83 of the General Code, is not liable thereon for a default in payment for livestock sold by the applicant prior to the issuance of a license to him by the Department of Agriculture.

Columbus, Ohio, May 26, 1949

Hon. A. W. Marion, Director, Department of Agriculture
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your recent inquiry for my opinion, which reads as follows:

“Under the provisions of Section 1177-73, General Code, an applicant for a livestock dealer's or broker's license is required to furnish proof to the Department of its financial responsibility by filing a surety bond.

“Such bond is conditioned for the payment of a judgment against the applicant furnishing the bond, the arising out of the failure of the applicant to conduct his business in accordance with the requirements of the law or for non-payment of obligations in connection with the purchase and sale of livestock, and contains a provision requiring that at least ten days prior notice in

writing be given to the Department by the party terminating such bond in order to effect termination.

“The bond also contains a provision that it becomes effective on the date of the issuance of the license by the Department.

“In view of the above, we respectfully request your opinion, whether or not the suretyship under a bond that has not been terminated by the required written notice of termination, is liable, in the event of a default in payment for livestock by the principal, and when no license has been issued by the Department?”

The pertinent sections and parts of sections of the General Code, including portions of the section to which you refer, which are relevant to the question of liability of a surety on the bond of a livestock dealer, read as follows:

Section 1177-72. “No person, co-partnership, association or corporation shall act as a dealer or broker without first being licensed so to do as provided in this act. No agent shall act for any dealer or broker unless such dealer or broker is duly licensed, and has designated such agent to act in his behalf and notified the department in his application for license, or given official notice in writing of the appointment of such agent and requested the department to issue to such agent an agent’s license. Such dealer or broker shall be accountable and responsible for contracts made by said agents.”

Section 1177-73. “* * * No license shall be issued by the department until the applicant shall have furnished proof of financial responsibility in an amount and in the form hereinafter provided for. Such proof may be in the following forms:

“(a) A bond of a surety company authorized to do business in this state, or with individual sureties, owning unencumbered real estate within this state, subject to execution and worth above all exemption double the amount of the bond, in the form prescribed by, and to the satisfaction of the department, conditioned for the payment of a judgment, or judgments, against the applicant furnishing the bond and arising out of the failure of such applicant to conduct his business in accordance with the requirements of this act or for non-payment of obligations in connection with the purchase and sale of animals. * * *

“Any person damaged by any violation of the provisions of this act, or by any misrepresentation or fraud *on the part of the broker or dealer licensed hereunder* may maintain an action at law against such broker or dealer and the surety or sureties on the bonds herein provided for, or either of them, or for the application of the deposit furnished the department. The aggregate

liability of the surety or sureties for all such damage shall in no event exceed the amount of bond.

“Unless the person damaged shall file his claim with the dealer or broker, the surety or sureties and the department within ninety days from the date of the alleged violation of the provisions of this act, or within ninety days after the discovery of fraud or misrepresentation on the part of the person complained against, he shall be barred from maintaining an action on said bond or for the application of said deposit. Such bonds and deposit agreements shall be in the form prescribed by the department. * * *”
(Emphasis mine.)

Section 1177-80. “Whoever violates or refuses to comply with any of the provisions of this act, shall, upon conviction in a summary proceeding, be sentenced to pay a fine of not less than twenty-five dollars or more than one hundred dollars and costs of prosecution, and, in default of payment of fine and costs, shall be sentenced to imprisonment for not less than ten nor more than thirty days, and for each subsequent violation a fine of not less than one hundred dollars or more than five hundred dollars and imprisonment for not less than ninety days or more than six months, or both, and the costs of prosecution.”

From the wording of these statutes it is apparent that it is unlawful for any person to be engaged as a “dealer” or “broker” of livestock, as defined by Section 1177-71 of the General Code, unless he is the holder of a license for such purpose. Conversely, should any person act as such “dealer” or “broker” prior to the issuance to him of the license prescribed by the statutes he would be in violation of the law. Section 1177-80 prescribes the penalty for such violation. It is definitely not within the purview of the above quoted sections of the General Code to bond an unlicensed “dealer” or “broker” but on the contrary to require a bond only of one who is licensed. Congruously with this statutory intent one of the provisions contained in the standard form of bond furnished applicants for such licenses reads as follows:

“This bond shall become effective on the date of issuance of the license by the Department of Agriculture.”

A bond is a contract to pay a certain sum of money to the obligee either at a day named or it may be conditioned that if the obligor does some particular act, the obligation shall be void, or it may provide that the obligation shall remain in full force in the event the obligor does or fails to do some particular act. The latter is the more common form.

8 Am. Jur. page 708. A bond given pursuant to a statute for the observance of a law is to be construed and enforced in connection with, and according to, the statute pursuant to which it is given, and interpreted according to the purpose and meaning of the legislative enactment. *Secrest, et al. v. Barbee*, 17 O. S. 426; 8 Am. Jur. pages 708 and 709. The rules applicable to the construction of contracts generally are applicable to the construction of the conditions of bonds. 5 O. Jur. page 658. It is a fundamental rule of the law of contracts that contracting parties may stipulate conditions precedent to the existence of the contract or to liability upon promises made therein. When such conditions precedent do not exist or occur there can be no recovery against a party to such contract. This has been aptly stated in *Wm. J. Van Aken Organization, Inc. v. Zack*, 67 N. E. (2nd) 728, 45 O. L. Abs. 469, wherein the court, in the first branch of the syllabus say:

“An action for breach of contract will not lie where the contract in question is dependent upon condition precedent unless the obligor has made an enforceable promise that such condition exists or shall occur.”

This same general rule would apply to the right of a party for whose benefit a bond was executed in any action brought by him on the bond and the failure of the existence or occurrence of the condition precedent would defeat his right of recovery.

In the situation you present the bond in question specifically stipulates the time it is to become effective. From the wording of this stipulation I am of the opinion the words used make the issuance of a “dealer’s” license a condition precedent to the validity of the bond.

In view of the foregoing, I am of the opinion that, both, by the express terms of the bond and by the intent and purpose of the statutes requiring its execution, there can be no liability on the surety on such bond for defalcations of the principal which occur prior to the issuance of a livestock dealer’s license by your department.

You are, therefore, advised that a surety under a bond filed with an application for a livestock dealer’s license is not liable for a default in payment for livestock sold by such applicant prior to the issuance of a license to him by the Department of Agriculture.

Respectfully,

HERBERT S. DUFFY,
Attorney General.