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## Bail – Unauthorized Acceptance by Police Order

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# CASES NOTED

## BAIL — UNAUTHORIZED ACCEPTANCE BY POLICE ORDER

The defendant, chief of police, accepted a cash deposit in lieu of bail for the release of a prisoner even though this was not authorized by statute. When the accused failed to appear to answer the charges, the defendant misappropriated the money, and the municipality prosecuted him for embezzlement. On appeal the conviction was reversed. *Held*, where the chief of police does not have statutory authority to accept a cash deposit in lieu of bail for the release of a prisoner, the prosecuting city does not acquire such legal property interest as will warrant a conviction for embezzlement.<sup>1</sup> *Scarboro v. State*, 62 S.E.2d 168 (Ga. 1950).

"To bail" is to deliver an accused to his surety to secure his appearance in court to answer the purpose of his detention.<sup>2</sup> "Bail" is the security deposited by a surety, who procures the release of the prisoner by becoming responsible for the appearance of the accused at the designated time and place.<sup>3</sup> The contract binding the relationship between the surety and the government is sealed and is known as "bail bond."<sup>4</sup> The sole object of bail bond in criminal cases is to assure the presence of the accused,<sup>5</sup> all other considerations being secondary.<sup>6</sup> The authority to set and grant bail is judicial or quasi-judicial<sup>7</sup> and is an inherent function of a court which has the power to hear and determine the case at issue.<sup>8</sup> At common law police officers did not have this authority,<sup>9</sup> such authority depending upon statutory grant.<sup>10</sup> Bail granted without authority is void and does not bind the released prisoner or his surety.<sup>11</sup>

The bond can be met in almost any way in which any other legal obligation can be satisfied: by the deposit of a certified check,<sup>12</sup> govern-

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1. GA. CODE ANN. § 26-2801 (1933).

2. *State v. Springer*, 206 La. 312, 19 So.2d 147 (1944).

3. *Whipple v. People*, 40 Ill. App. 301 (1890).

4. *State v. Clark*, 234 Iowa 338, 16 N.W.2d 722 (1943).

5. *Varholy v. Sweat*, 153 Fla. 571, 15 So.2d 267 (1943).

6. *Badolato v. Molinari*, 106 Misc. 342, 174 N.Y. Supp. 512 (Sup. Ct. 1919).

7. *Berkowitz v. United States*, 90 F.2d 881 (8th Cir. 1937).

8. *Sauskelonis v. Herting*, 89 Conn. 98, 94 Atl. 368 (1915).

9. *Badolato v. Molinari*, *supra* note 6.

10. *Principe v. Ault*, 62 F. Supp. 279 (1945); *Young v. Stoutamire*, 131 Fla. 525, 179 So. 797 (1938); *Campbell v. Reno County*, 97 Kan. 68, 154 Pac. 257 (1916); *Fleenor v. Commonwealth*, 308 Ky. 1, 213 S.W.2d 313 (1947); *State v. Altone*, 140 Me., 210, 35 A.2d 859 (1944); *Snyder v. Gross*, 69 Neb. 340, 95 N.W. 636 (1903); *Doane v. Dalrymple*, 79 N.J.L. 200, 74 Atl. 964 (1909); *People ex rel. Donovan v. Rounati*, 258 App. Div. 585, 17 N.Y.S.2d 199 (1st Dept. 1940); *Ex parte Henderson*, 27 N.D. 155, 145 N.W. 574 (1914); *Ahsmuhs v. Bowyer*, 39 Okla. 376, 135 Pac. 413 (1913).

11. *Bongiovanni v. Ward*, 50 F. Supp. 3 (D.C. Mass. 1943).

12. *Campbell v. Reno County*, *supra* note 10; *Ahsmuhs v. Bowyer*, *supra* note 10.

ment bonds,<sup>13</sup> or cash.<sup>14</sup> With an authorized acceptance of bail, the court or officer acts as the state's agent, giving the state a legal interest in the fund.<sup>15</sup> However, when there is an unauthorized deposit of cash in lieu of bail bond, there is a conflict as to the final disposition of the fund. One line of cases holds that where cash is deposited without authority in lieu of bail bond the release of the prisoner is void; and the deposit belongs to the accused<sup>16</sup> or the depositor<sup>17</sup> and is subject to immediate refund.<sup>18</sup> Another view is that the fund should be paid to the governmental unit's treasury as if a recognizance,<sup>19</sup> and neither the depositor nor the accused nor their assignees have any right to it without the requisite appearance.<sup>20</sup> Nor can recovery be had in most jurisdictions from the bondsman of an officer who takes an unauthorized cash deposit for the release of a prisoner.<sup>21</sup> As in the instant case, the officer is held in some jurisdictions to be the trustee for the depositor<sup>22</sup> or the accused;<sup>23</sup> while at least one court found that where a magistrate was authorized to set and accept bail bond, but accepted a cash substitute, he acted as trustee for the state, making the release action valid.<sup>24</sup>

For many years the defendant in the noted case had taken thousands of dollars in lieu of bail bond for the release of prisoners in his custody. This action was acquiesced in by the municipality, which had always accepted the money. Although the Georgia Code gives authority to sheriffs

13. *Davis v. United States*, 47 F. Supp. 176, *aff'd*, 135 F.2d 1013 (1942); *State ex rel. Oberrender v. Coleman*, 149 Fla. 720, 7 So.2d 1 (1942).

14. *State ex rel. Oberrender v. Coleman*, *supra* note 13 (each of two sureties put up \$500 of the required \$1,500 in bonds and offered \$500 in cash which was refused; held, that the refusal was a denial of the right of bail).

15. *Barron v. State*, 150 Ark. 417, 234 S.W. 271 (1921); *Tulare County v. Fenn*, 47 Cal. App. 413, 190 Pac. 855 (1920); *but see Paton v. Teeter*, 37 Cal. App.2d 477, 99 P.2d 699 (1940) (where cash deposit in lieu of bail was turned over to the state by the accepting officer, the forfeiting depositor was estopped to deny the authority in the police officer to act for the state).

16. *Rodman v. Superior Court*, 13 Cal.2d 262, 89 P.2d 109 (1939); *Trevathan v. Mutual Life Ins. Co.*, 166 Ore. 515, 113 P.2d 621 (1941) (police officer has the authority to take neither cash nor property).

17. *State v. Altone*, *supra* note 10 (by statute); *Doane v. Dalrymple*, *supra* note 10 (trustee for depositor); *Brasfield v. Town of Milan*, 127 Tenn. 561, 155 S.W. 926 (1913) (when prisoner failed to appear, depositor could recover); *cf. Snyder v. Gross*, *supra* note 10 (bondsman of justice of peace is not liable to depositor).

18. *Brown v. O'Connell*, 36 Conn. 432 (1870); *Trevathan v. Mutual Life Ins. Co.*, *supra* note 15 (prisoner escaping on motorcycle which had been impounded to secure his appearance was held to have superior right of possession over police).

19. Defined as an obligation of record by which a duty is secured. See *Capital Garage Co. v. Gordon*, 99 Vt. 83, 130 Atl. 756 (1925).

20. *Bryant v. City of Brisbee*, 28 Ariz. 278, 237 Pac. 380 (1925); *Kirschbaum v. Mayn*, 76 Mont. 320, 246 Pac. 953 (1926); *Moss v. Summit County*, 60 Utah 252, 208 Pac. 507 (1922).

21. *Snyder v. Gross*, *supra* note 10. *Contra*, *Litvinchuk v. Fassendbender*, 305 Ill. App. 230, 27 N.E.2d 305 (1940). *Cf. Lennen v. Town of Belleville*, 117 N.J.L. 156, 189 Atl. 652 (1937) (magistrate holds cash in trust for the accused regardless of who made the deposit).

22. *Snyder v. Gross*, *supra* note 10.

23. *Badolato v. Molinari*, *supra* note 6.

24. *Ahsmuhs v. Bowyer*, *supra* note 10 (the court implied that the magistrate could be held for embezzlement if and when apprehended).

and constables to accept bail bond,<sup>25</sup> it makes no mention of police officers, and there is no provisions for taking cash substitutes. Since embezzlement is a statutory offense<sup>26</sup> requiring that a definite legal relation exist between the embezzler and the embezzled,<sup>27</sup> the finding that the accused was a trustee for the depositor rather than for the municipality furnished a legally sufficient rationale for the majority opinion. The dissent reasoned that the absence of any specific inhibition in the Code against the acceptance of a substitute for bail bond, together with the long period of ratification of the defendant's acts gave such color of authority to the chief of police as would warrant finding the necessary relation to sustain the conviction for embezzlement.<sup>28</sup>

It is submitted that such strict adherence to the letter of the statute prevented the merited punishment of a public official for an intended criminal act which, under the agency rationale of the minority, was punishable. There being no judicial remedy left under the decision, it appears highly desirable for the Georgia General Assembly to correct this anomalous situation by appropriate legislation.

### CONFLICT OF LAWS—CONTRIBUTION OF JOINT TORT-FEASORS RESIDENTS OF DIFFERENT STATES

Plaintiff, an Ohio corporation, and defendant, a Pennsylvania resident, as joint tort-feasors caused an accident in Ohio. Plaintiff paid an Ohio judgment to an injured third party and sought indemnity or contribution from the defendant in a Pennsylvania action. The Court of Common Pleas granted full indemnity. *Held*, that indemnity cannot be granted where plaintiff is a joint tort-feasor and that application of the Ohio law, which is contra to Pennsylvania statute, precludes relief by way of contribution. *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368 (1951).

The law with respect to indemnity and contribution is basically clear. While indemnity is a right to full reimbursement<sup>1</sup> which springs from a contract,<sup>2</sup> contribution is an apportionment of damages,<sup>3</sup> a right arising out

25. GA. CODE ANN. § 27-902 (1933).

26. GA. CODE ANN. § 26-2801 (1933); *Hughes v. United States*, 4 F.2d 686 (8th Cir. 1925); *Fitch v. State*, 135 Fla. 361, 185 So. 435 (1938).

27. *People v. Hayes*, 365 Ill. 318, 6 N.E.2d 645 (1937).

28. *Scarboro v. State*, 62 S.E.2d 168, 169 (Ga. 1950) (dissenting opinion by Atkinson, Presiding Justice).

1. *Fidelity & Cas. Ins. Co. of N. Y. v. Sears, Roebuck & Co.*, 124 Conn. 227, 199 Atl. 93 (1938); *Mo. Dist. Tel. Co. v. Southwestern Bell Tel. Co.*, 338 Mo. 692, 93 S.W.2d 19 (1935); *Lasher v. Montgomery Ward & Co.*, 253 App. Div. 564, 3 N. Y. S. 2d 32 (1938).

2. *George's Radio v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Shannon v. Mass. Bonding & Ins. Co.*, 62 F. Supp. 532 (D. C. La. 1945); *Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180 (1895); *Little v. Miles*, 213 Ark. 725, 212 S.W.2d 935 (1948).

3. *St. Lewis v. Morrison*, 50 F. Supp. 570 (D. C. Ky. 1943); *In re Lohr's Estate*,