

*FAUST, assignee, v. BURGEVIN, et al.*

A bond given by one of several partners, on dissolution, to the retiring partner, conditioned to pay the debts of the firm and save him harmless, is not merely a bond of indemnity, but is broken by a failure to pay the debts due or to become due within a reasonable time; and a right of action accrues upon it.

*Appeal from Pulaski Circuit Court.*

HON. LIBERTY BARTLETT, Circuit Judge.

WATKINS & ROSE, for appellant.

The bond sued on was a bond of indemnity, but it was something more; and the question submitted is, whether upon this covenant Brugman could sue before he had himself paid the debts of the late firm, or some part of them. The literal import of the covenant is to pay the debts due within a reasonable time, and those not due, as they fall due; and when it is broken, a right of action accrues. The question of the measure of damages does not arise. See *Churchill v. Hunt*, 3 *Denio*, 324; *Thomas v. Allen*, 1 *Hill, N. Y.*, 146; *Lewis v. Crockett*, 3 *Bibb* 196; *Bryan v. Bufort*, 7 *J. J. M.*, 335; *Pope v. Davidson*, 5 *J. J. M.*, 400; *Parson on Con.*, 462, citing 9 *M. & W.*, 657;

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*Robinson v. Robinson*, 29 *Eng. Law & Eq.*, 212; *Ex parte Nagus*, 7 *Wend.*, 499; *Lethbridge v. Mytton*, 2 *B. & Ad.*, 722; *Carter v. Adamson*, 21 *Ark.*, 287.

GARLAND & NASH, for the appellees.

This action is on a bond for indemnity and nothing more. *Hough, Lamkin, et al., v. Perkins*, 2 *How. (Miss.)*, 724; *Dougllass v. Clark*, 14 *John.*, 177; 1 *Saunders*, 117, n. 1; *Taliaferro v. Brown*, 11 *Ala.*, 762. No cause of action can arise on the bond till the plaintiff is damnified, and he is not damnified till he has paid something. *Collinge v. Haywood*, *E. C. R.*, 36, 223; 9 *A. & E.* 633; *Reynolds v. Doyle*, *E. C. R.*, 396, 638; 1 *Man. & Gr.*, 753; *Sedg. on Dam. (3d ed.)* 311, 321; *Thomas v. Allen*, 1 *Hill*, 145; *Rockfeller v. Donnelly*, 8 *Cow.*, 623; *Jeffries v. Johnson*, 1 *Zabrinski*, 73; 18 *Ohio*, 47.

CLENDENIN, J.

This was an action of ejectment instituted in the circuit court upon the following instrument:

“Know all men by these presents, that we, Edmund Burgevin, as principal, and John T. Trigg and Henry M. Rector, as securities, are held and firmly bound unto Peter Brugman in the sum of twenty thousand dollars, well and truly to be paid, we bind ourselves, our heirs, executors and administrators, and each of them, firmly by these presents: as witness our hands and seals, this 29th day of August, 1860.

“Conditioned that whereas the said Burgevin & Brugman have heretofore been partners in the mercantile business in the city of Little Rock, Arkansas, under the name of Burgevin & Co., and whereas said partnership has been dissolved this day, upon terms agreed upon by the parties, one of which is that said Burgevin shall pay off and discharge all the debts now due or to become due by said partnership, of every name, nature and description, and hold the said Brugman entirely harmless in respect thereof. Now, if the said Burgevin shall



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In a case similar to the one we are considering, the Supreme Court of New York say: "As one of these debts was over due, and had not been paid when the suit was commenced, the condition of the bond was broken, and a good right of action shown." 3 *Denio*, 324. And this court, in the case of *Carter v. Adamson*, 21 *Ark.*, 287, upon a question and a bond like the one before us, say: "There being no time fixed in the covenant for the payment of the debts, it may be supposed that it was the intention of the parties that such of them as were due at the date of the contract should be paid immediately, and that such of them as were not then due should be paid at maturity. According to the current of adjudications, on the failure of Adamson & Higgins to pay such of the firm debts as were due at the date of the covenant within a reasonable time thereafter, or on their failure to pay such of them as were not then due within a reasonable time after maturity, the stipulation in the covenant for the payment of the debts was broken, a cause of action accrued to Carter."

In this view of the law, the judgment of the circuit court must be reversed, and the case remanded to that court, with directions to overrule the demurrer, and permit the defendants to plead.

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