

BAIL--RIGHT OF SURETY TO PURSUE PRINCIPAL WHO HAS FLED

Introductory

Surety upon a bail bond or other undertaking have the right to surrender their principal at any time, and to this end may pursue and seize him wherever they may find him, even though that be in another state. While the law is well settled and hardly open to argument on this point there has been at times a failure to understand the reason for the rule, and this strictly private right has been confused with the governmental process of extradition. The two remedies are distinct and independent and are only to be confused through lack of understanding of the nature and origin of the relationship of bail and principal.

Nature of the Relationship

It is a somewhat common error to suppose that a defendant released upon bail is thereby relieved from all custody and restraint and is under no obligation except that of appearing in court at such times during the prosecution of his case as the law requires. Inherent in this mistaken conception is the thought that the purpose of the device of bail is to recover the penalty of the bond upon default in appearance. This is the opposite of the truth. **The primary purpose of bail is, and always has been, the retention of control over the defendant to the end that justice might be administered.** The modern system is but a development of the common law. It has been called:

"An ancient and extremely vigorous form of suretyship or hostageship, which rendered the surety liable to suffer the punishment that was hanging over the head of the released prisoner." **2 Pollock & M. History of Eng. Law, p. 589.**

Thus, while in a sense the defendant is given a degree of freedom, in contemplation of the law the dominion of the court is continued in the person of the surety, and there is no such relaxation or abandonment thereof as would require new process to reassert. This fundamental concept is essential to an undertaking of the rights which arise out of the relationship. In but slightly varying language the same idea has been expressed by the courts from early times:

"The doctrine is well settled that, when bail is given, the principal is regarded as delivered to the custody of the sureties. Their dominion is a continuance of the original imprisonment. *** **Taylor v. Taintor**, 16 W all, 366, 21 L. Ed. 287; **State v. Lingerfeit**, 109 N. C. 75, 14 S. E. 75. The books have clearly expressed this idea in regard to the relation of the principal to his bail, and the authorities are pretty well agreed upon it. A man's bail are looked upon as his jailers of his own choosing, and the person bailed is, in the eye of the law, for many purposes esteemed to be as much in the prison of the court by which he is bailed as if he were in the actual custody of the proper jailer." **2 Hawk, P. C. 140.** " * * * It is also said that, when the obligation of the bail is assumed, the surety becomes in law not only the jailer of his principal, as his custody is constructively a continuance of the original imprisonment, but, though he cannot confine him except where actually necessary, and temporarily, for the purpose of surrender, he is subrogated to all the other rights and means which the state possesses to make his control of him effective" **Pickelsimer v. Glazener**, 173 N. C. 630, 92 S. E. 700. And see **Netrograph Mfg. Co. v. Scrugham**, 197 N. Y. 377. 90 N. E. 962; **Com. v. Miller**, 105 Pa Super, 56, 160 A. 240; **C. J. Sec., Vol. 8, p. 39, n. 74.**

"Under a bail bond or recognizance the principal is, upon filing of the bond, released in the custody of his bondsmen. He is still, constructively, in the custody of the law. The dominion of the surety is a continuance of the original imprisonment." **In re Lexington Surety & I. Co.** 272 N. Y. 210, 5 N.E. (2nd) 204.

"The surety, in assuming the obligation of bail, becomes in the law the jailer of his principal and has custody of him. This custody is merely a continuance of the original imprisonment. The sureties are subrogated to all rights and means which the state possess to

make the control effective. * * * **Crain v. State**, (Ot. Cr.App.—Okla.) 90 Pac. (2nd) 954, quoting Am. J., Vol. 6, p. 112, Sec. 165.

"At common law, when bail was given, the principal relieved from the custody of the law, he was regarded, not as freed entirely, but as transferred to the friendly custody of his bail." **State v. Schenk**, 138 N.C. 560, 49 S. E. 917.

Right to Surrender

If it were true that the principal obtained his freedom except in a limited physical sense it would follow that he would have no obligations beyond that of making appearance when required and, correspondingly that the sureties would be limited to a contractual right to enforce this obligation. But the rule is clear that the sureties may relieve themselves at any time from the responsibilities of custody by surrender of the principal into the custody from which he was taken by giving bail.

"The obligation of the bail in this class of case is to produce the principal before the court upon demand, and at any and all times surrender him in accordance with its mandates. But this obligation is one of which the bail may be relieved at any time by voluntary surrender of the principal. In contemplation of the law the principal is in the custody of his bail, who may take him where he pleases and detain him or surrender him into court into custody of the sheriff who has process against him or, if the bail concludes his principal meditates flight, or for any reason desires no longer to be held responsible for the appearance of the principal, he may cause him to be imprisoned in the common jail of the county, and thus exonerate himself from his obligation." **People use of Masterson v. Hathaway**, 296 Ill. 42, 68. N. E. 1053.

"It has long since been said that the bail have their principal on a string which they may pull whenever they please and surrender him in their discharge. (6 Modern 231 **Pickelsimer v. Glazener**, *supra*. Cf. **Ex parte, Chance**, (D). C. Tex.) 2 Fed. Supp. 393.

Right to Arrest

It is equally clear that in order to effectuate their right to relieve themselves from the responsibility of

custody the sureties have the right to arrest their principal. This may be done in person or by agent and may be accompanied by the use of such force as is reasonably necessary. No new process is necessary. In effect the arrest amounts to no more than the taking into actual custody of one already under his dominion. The scope of the right was stated in **Com. v. Brickett, 8 Pick. (Mass.) 138** as follows:

"By the common law the bail has the custody of the principal and may take him at any time and in any place. The taking is not considered as the service of process, but as a continuation of the custody which had been, at the request of the principal, committed to the bail. The principal may, therefore, be taken on Sunday. The dwelling house is no longer the castle of the principal, in which he may place himself to keep off the bail. If the door should not be opened on demand at midnight, the bail may break it down, and take the principal from his bed, if that measure should be necessary to enable the bail to take the principal.

The Supreme Court of the United States in the case of **Taylor v. Taintor 16 Wall, 366** used the following language, which has been quoted in the decisions ever since:

"(The sureties) * * * whenever they choose to do so may seize him and deliver him up in their discharge; and if this cannot be done at once, they may imprison him until it can be done. They may pursue him to another another state; may arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner."

Also, see **Pickelsimer v. Glazener**, supra, and cases collected in 73 A. L. R. 1370; **Cartee v. Stat**, 162 Miss. 272, 139 So. 620; **U. S. v. Lee**, (D. C. Ohio) 17 Fed.

It is not necessary that the surety make the arrest in

person. He may delegate the right to another as his agent.

"I see nothing, on general principles, against allowing this power to be exercised by an agent or deputy; and no case is to be found where the right has been denied. It is a general rule of law even with respect to public officers, that their ministerial acts may be performed by deputy and with respect to private individuals, the law recognizes that act of an authorized agent as equal to that of the principal; and there is no principal of policy which renders it necessary to make this an exception." **Nicolls v. Ingersoll, 7 Johns, 154.** And see cases cited herein.

The sureties are not required to have a warrant or order of court. The right of bail to seize the principal arises from the nature of the undertaking and does not depend on new process. The rule is said to rest upon the reason that the seizure "is likened to the rearrest by the sheriff of an escaped prisoner." **Taylor v. Taintor, supra.**

"It is sufficient to say * * * that in immemorial legal theory the petitioner never was discharged from custody. The giving of the recognizance by him only operated to transfer the custody of his person from the sheriff to his sureties. Thenceforth, they instead of the sheriff, were his jailers. There was, therefore, no occasion for the issuance and service of a new order of arrest nor for a warrant of commitment." **Re Siebert, 61 Kan. 112, 58 Pac. 971.**

This was the rule at common law, though in some places the use of a bailpiece was recognized. In some jurisdictions today it is required that the sureties provide themselves with a certified copy of the bond or recognizance. But, as pointed out by the Supreme Court of New York in **Nicolls v. Ingersoll, 7 Johns. 154:**

"The power of taking and surrendering is not exercised under any judicial process, but results from the nature of it, but is merely a record or memorial of the delivery of the principal to his bail on security given."

See **Am. J. Vol 6, p. 112, Sec. 167; 3 A. L. R. 188; 73 A. L. R. 1370.**

Arrest in another state. The right of the sureties to pursue their principal into another state and to arrest him there was well recognized in the early decisions and has been reaffirmed in the later ones.

"Bail have no power to arrest the principal in a foreign country. **Reese v. S. 9 Wall, 13.** But, as between the states of the American Union, the bail of one held to answer in one state may arrest the principal in another state, and no requisition is necessary." **Salles v. Werner 171 Ill. App. 96.**

"In the relation in which the several states composing the Union stand to each other, the bail in a suit entered in another state have a right to seize and take the principal in a sister state. * * * **Respublica v. Goler of Philadelphia 2 Yeates 263.**

"The next inquiry is as to the right of bail to take the principal out of the state in which the recognizance was entered into. I do not perceive how any question of jurisdiction can arise here. The power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. * * * It cannot be questioned by that bail in the common pleas would have the right to go into any other county in the state to take his principal. This shows that the jurisdiction of the court in no way controls the jurisdiction of the state affect this right is between the bail and his principal. * * * Their authority arises more from contract than from the law; and as between the parties, neither the jurisdiction of the court nor of the state controls it; and so bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another according to the law there. * * * If the principal is to be considered as standing in the situation of the prisoner who has escaped from the arrest of the sheriff according to the language of one of the cases, can there be any reasonable doubt but a sheriff, in such case, would have a right to pursue and arrest his prisoner, in a neighboring state; and, by parity of reasoning, bail must have the like authority." **Nicolls v. Ingersoll, 7 Johns, (N.Y.) 145.**

It will be noticed that the exercise of the right to arrest has a dual aspect; on the one hand the surety is considered as enforcing a contract, and on the other he is

looked upon as acting as an officer of the court and thus subrogated to some of the rights of the state. The right itself, however, is in no sense derivative, as has been seen. Proceedings in extradition have become so much the usual thing that the private right of the surety has been somewhat overlooked, or even confused with the former. The distinction is made clear in the later cases:

"The right of the surety to recapture his principal is not a matter of criminal procedure but arises from the private undertaking arising from the furnishing of the bond. It is not a right of the state but of the surety. If the State desires to reclaim a fugitive from his justice in another jurisdiction it must proceed by way of extradition in default of a voluntary return. It cannot invoke the right of a surety to seize and surrender his principal, for this is a private and not a governmental remedy. It is equally true that the surety if he has the right is not required to resort to legal process to detain his principal for the purpose of making surrender. There is no conflict between the rights. Extradition can only be exercised by the government at the request of the government. Surrender by bail can be exercised only by the individual who is bail. The remedies are separate and distinct. As long as the principal remains within the jurisdiction the right of the bail to arrest and surrender him with process is conceded. As this right is a private one and not accomplished through governmental procedure, there would seem to be no obstacle in its exercise wherever the surety finds the principal. Needing no process, judicial or administrative, to seize his principal, jurisdiction does not enter into the question." **In re Van der Ahe, 85 Fed. 959** * * *

The right of a surety to seize his principal in another state entitles him to return him to the state he left and where the bond requires his presence. The right of seizures without the accompanying right of return to the state where the bail was furnished would be without value. * * *

The right of bail are not identical with those of the prosecuting government. They arise out of the relationship of principal and his bail, and are not altogether the result of subrogation to the rights of the government. * *

* The bail can surrender his principal before bond is forfeited and arrest for that purpose without process.

The state, however, cannot. The state can remove a defendant from another state only by extradition. It does not follow that the surety is under a like disability in returning the principal to the state from which he fled, to those surrender him. * * * Bail does not acquire the right to seize and surrender the principal from the state through subrogation, since the state has no sue right itself. It is an original right that arises from the relationship between the principal and his bail, and not one derived through the state." **Fitzpatrick v. Williams**, (C. C. A. 5), 46 Fed. (2nd) 40, 73 A. L. R. 1305. Cf. **In re Van der Ahe**, (7 Pa. D. R. 131; 20 Pa. Co. Ct. 305), 85 Fed. 959.

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