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Contracts to Indemnify Bail in Criminal Cases

Cover Page Footnote

Member of New York Bar

CONTRACTS TO INDEMNIFY BAIL IN CRIMINAL CASES

JAMES V. HAYES†

ANYONE who has even a passing acquaintance with the law of bail cannot help but react as did the Vice Chancellor in *Wildes v. Dudlow*,¹ when he said, "I am surprised to find that there has been so much conflict." The conflict is not confined to those cases which deal with the validity of contracts to indemnify bail, nor is the conflict new. Whether or not the diametrically opposed rules now adhered to in different jurisdictions will ever be brought into agreement lies hidden behind the veil of the future.

To appraise properly the divergent views now prevalent, since no synthesis can be made of them, it is necessary to inquire into the nature of bail itself, its purpose and its development. All these considerations must be given their proper weight before any judgment can be ventured.

The History of Bail

Bishop, in his work on Criminal Procedure, gives a good definition of bail. He writes:

"To bail an arrested person is to deliver him in contemplation of law, yet not commonly in real fact, to another or others who become entitled to his custody, and responsible for his appearance when and where agreed in fulfilment of the purpose of the arrest. Bail, the noun, denotes either the process of bailing (in which sense 'bailment' is sometimes employed as its synonym), or the one or more persons who thus are made the custodians and sureties."²

Bail usually takes the form of either a bail bond or a recognizance. A recognizance is defined by Blackstone as:

" . . . an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like."³

A bail bond is a written contract running to the state from the accused as principal with his bail as surety. The consideration in either case "is the release of the offender from custody."⁴

Both Lord Coke⁵ and Bouvier⁶ derive the word, bail, from the French verb *bailler*, meaning "to deliver." The word, bail, is used both as a noun

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1. L. R. 19 Eq. 198, 201 (1874).

2. 1 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) 197.

3. 2 BL. COMM. *341.

4. *Ewing v. United States*, 240 Fed. 241, 247 (C. C. A. 6th, 1917).

5. 3 LAW CONTRACTS 279.

6. BOUVIER, LAW DICTIONARY (Baldwin's Libr. ed. 1928) 108.

and as a verb. As a noun it means either the security given for the release of a prisoner, or the one who gives the security. As a verb it describes the action by which a prisoner's release is obtained in exchange for security.

The beginnings of bail are lost in antiquity. We know that it existed at the early Roman law.⁷ It was the duty of the Proconsul to determine whether accused persons "should be sent to prison, delivered to a soldier, or committed to the care of their sureties, or to that of themselves."⁸ In arriving at his determination the Proconsul was to consider "the nature of the crime of which the defendant is accused, or his distinguished rank, or his great wealth, or his presumed innocence, or his reputation."⁹ Speaking of the duties of the Proconsul, Scott says:

"The Divine Pius stated in a Rescript, in Greek, to the people of Antioch, that anyone who was ready to furnish sureties for his appearance should not be placed in prison, unless it was evident that he had committed so serious a crime that he should not be entrusted to the care of any sureties, or soldiers; but that he must undergo the penalty of imprisonment before suffering that for the crime of which he is guilty."¹⁰ (*sic*.)

Early in the law, we find that the bail bound themselves for their principal "body for body, property for property."¹¹ It seems that this "body for body" binding meant all that it suggests, and that the bail suffered the punishment imposed upon his principal if the principal were not available.¹² Not later than the thirteenth century, however, this rigid rule, if it ever really did exist,¹³ had been relaxed, and the bail escaped with amercement.¹⁴ The "body for body" rule indicates that the practice of bail was derived from the more ancient practice of giving hostages.¹⁵ Esmein suggests a somewhat different origin. He points out that in cases of wager of battle in France under the old criminal procedure of accusation by formal party, even though the crime charged involved the loss of life

7. 4 WOOD, *INSTITUTE OF CIVIL LAW* (1721) 393 *et seq.*

8. 11 SCOTT, *THE CIVIL LAW* (1932) 21.

9. *Ibid.*

10. *Id.* at 22.

11. 4 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1924) 525; HOLMES, *THE COMMON LAW* (1881) 250; ESMEIN, *HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* (1913) 69; 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1923) 590.

12. 4 HOLDSWORTH, *op. cit. supra* note 11, at 525; HOLMES, *loc. cit. supra* note 11; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 11, at 589.

13. Esmein contends that the "body for body" formula was not carried to its logical conclusion and that the punishment incurred by the criminal was not inflicted on his bail, who, rather, was mulcted in pecuniary damages, which sometimes were very heavy. ESMEIN, *op. cit. supra* note 11, at 69.

14. 2 POLLOCK AND MAITLAND, *loc. cit. supra* note 11. BOUVIER (Rawle's 3rd rev. ed. 1914) at page 187, defines amercement as "a pecuniary penalty imposed upon an offender by a judicial tribunal."

15. HOLMES, *op. cit. supra* note 11, at 248 *et seq.*

or limb, both the accused and the one offering combat were imprisoned, and could then be set at liberty on sufficient bail "for it was essential that the adversaries should prepare themselves for the combat."¹⁶ Pollock and Maitland have still another explanation. According to them the willingness to allow men accused of crime to go free on bail or mainprize was not due to any love of abstract liberty. On the contrary,

"Imprisonment was costly and troublesome. Besides, any reader of the eyre rolls will be inclined to define a gaol as a place that is made to be broken, so numerous are the entries that tell of escapes. The medieval dungeon was not all that romance would make it; there were many ways out of it. The mainprize of substantial men was about as good a security as a gaol. The sheriff did not want to keep prisoners; his inclination was to discharge himself of all responsibility by handing them over to their friends."¹⁷

Whatever its roots may have been, we are certain, at least, that in very ancient times they grew into the tree we know as bail. According to Mr. Justice Holmes, who derived it from the earlier practice of giving hostages, bail is one of the most ancient contracts known to the law.¹⁸

Originally it took two forms, one known as bail and the other as mainprize. Today the two words are "used promiscuously oftentimes for the same thing, and indeed the words import much the same thing . . . but yet in a proper and legal sense they differ."¹⁹ The real difference between the two is this: In the case of mainprize the surety did no more or less than to promise by recognizance to pay a stated sum in the event the prisoner defaulted. The mainpernor was thus a simple surety for the appearance of the prisoner. In the case of bail on the other hand the surety promised to pay the designated sum in the event of the prisoner's default, and, at the same time, had committed to him the responsible custody of the prisoner, thus making him both a surety and a jailer.²⁰

In early English practice, two different writs represented the two different practices of bail and mainprize, in the case of the former the writ *de homine replegiando* being used, and in the case of the latter the writ of mainprize.²¹ The former was much like the writ of replevin, except, of course, that it was directed to a prisoner rather than to a chattel.²² After the statute of 1275, which set forth the conditions for the release on bail of prisoners, and which was held to be applicable both to the writ of main-

16. ESMEIN, *op. cit. supra* note 11, at 71.

17. 2 POLLOCK AND MAITLAND, *op. cit. supra* note 11, at 584.

18. HOLMES, *loc. cit. supra* note 11.

19. 2 HALE, P. C. (1st Am. ed. 1847) 124.

20. 4 HOLDSWORTH, *loc. cit. et seq., supra* note 11; 9 HOLDSWORTH, *op. cit. supra* note 11, at 105 *et seq.*

21. 9 HOLDSWORTH, *op. cit. supra* note 11, at 105 *et seq.*

22. *Ibid.*

prize and to the writ *de homine replegiando*, the differences between the two gradually disappeared.²³

Although originally all accused of crime, even of the most serious felonies, were admitted to bail,²⁴ various exceptions were made from time to time as the law grew alternately more strict or more lax.²⁵ Statutes were enacted both to deny bail in certain crimes and to correct the opposite abuses of allowing bail too freely and not freely enough. The problems of who should be admitted to bail and under what circumstances are not new. This pendulumlike swinging of the law finally ceased with the enactment of the English Bill of Rights,²⁶ guaranteeing the right of bail, and barring the exaction of excessive bail.

The Right to Bail

In the United States, the right to bail is guaranteed in the Federal jurisdiction by the Eighth Amendment to the Constitution, which provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Every state except Illinois²⁷ has a somewhat similar provision in its constitution. Article 1, Section 5 of the Constitution of the State of New York, which can be taken as typical, provides:

"Excessive fines shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained."

These provisions are nothing more than declaratory of the law as it existed prior to their adoption. It should be remembered, however, that after conviction and pending appeal, there is no constitutional right to bail.²⁸

23. *Ibid.*

24. 4 BL. COMM. *298.

25. 9 HOLDSWORTH, *op. cit. supra* note 11, at 107 *et seq.*; 4 HOLDSWORTH, *op. cit. supra* note 11, at 525; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 11, at 585.

26. 1 W. & M. SESS. 2, c. 2 (1688).

27. BEELEY, *BAIL SYSTEM IN CHICAGO* (1927) 34.

28. Thus, in *People v. Lohmen*, 2 Barb. 450 (N. Y. 1848), the defendant had been convicted of a misdemeanor, and the conviction had been affirmed by the General Term of the Supreme Court. He thereupon sued out a writ of error to the Court of Appeals. While in custody awaiting the judgment of the Court of Appeals a writ of *habeas corpus* was sued out to obtain his release on bail. Denying the writ, the court said:

"Nor do I agree with the counsel for the prisoner, that in the present case the only question for my determination is whether bail will secure the appearance of the prisoner to abide by the judgment of the Court. Bail in criminal cases rests upon a different basis. The reason for taking bail is, that the guilt of the prisoner is doubtful. When the guilt is past dispute, he ought not to be bailed. The law then demands that his punishment

The right as it exists in this country is of the same quality as the right to bail in England under the Bill of Rights. The character of the right was well illustrated in the case of *Regina v. Badger*.²⁹ The accused had been arrested as a result of his participation in the Chartist riots which plagued England in the early Forties of the last century. He offered as bail two financially responsible individuals of good character. The magistrate rejected them for the sole reason that they had attended meetings of a labor union in which the defendant was interested. The refusal was undoubtedly occasioned by the public clamor of the times and by the injunction issued to all magistrates by the government to enforce the law strictly. None the less the court, while admitting the good faith of the magistrates, condemned their lack of a proper judicial approach to the matter before them, and pointed out that the prisoner should have been released.

The right to bail is not absolute and may be, and usually is, regulated by statute. While a proper court may admit to bail even in cases of treason,³⁰ and while this is a departure from the older rule which barred bail in capital cases,³¹ and while the only limitation placed on the courts is not to exact excessive bail,³² still the courts, in deciding whether or not to admit a particular prisoner to bail, may consider other elements than the mere amount.

In an old New York case, *People v. Ferris*,³³ the prisoner was charged with grand larceny. He had been found in possession of the stolen property. The court's opinion denying the application for bail not only enunciates a sound rule but gives New Yorkers an interesting glimpse of the uses to which one of the islands in the East River was put more than a century ago:

"Ferris is one of the gang of felons that for some time past have infested the city and vicinity; carrying their plunder and the fruit of their crimes, to that well known establishment, Ward's Island, in the East River, above the city. By the vigilance of the police officers of this city, this nest of depredators and thieves has been broken up and some of them convicted. They were found in the actual possession of large quantities of stolen property. Now, the practice of this Court has been, when a person was found in the possession of the articles stolen, not to bail him. This has been our constant practice, and we can see no good cause to alter it in reference to

shall be certain—and will not tolerate any facilities for his escape." *People v. Lohmen*, *supra* at 454. See also *United States v. St. John*, 254 Fed. 794 (C. C. A. 7th, 1916).

29. 4 Q. B. 468, 114 Eng. Reprints 975 (1843).

30. *United States v. Stewart*, 2 Dall. 343 (U. S. 1795); *United States v. Hamilton*, 3 Dall. 17 (U. S. 1795).

31. CHASE'S BLACKSTONE (4th ed. 1918) 1001.

32. *Ibid.*

33. 1 Wheeler's Crim. Cas. 19 (N. Y. 1822).

the prisoner. It is a general rule that embraces the case before us; we therefore refuse the motion."⁷

The practice of giving bail is regulated by statute in every state. In almost all states it is required that the bail be a resident and a householder or freeholder therein.³⁴ In other states it is provided that the bail may be rejected unless they reside within the county in which the case is pending.³⁵ In some states it is provided that one surety is sufficient,³⁶ while others require at least two sureties,³⁷ and still others require no co-surety if the one surety is a surety company.³⁸ Many states require that the bail have a net worth at least equal to the amount of the recognizance,³⁹ while other states require that the bail have a net worth at least twice the amount of the recognizance.⁴⁰

34. ALA. CODE ANN. (Michie, 1928) § 3376; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 5162; CAL. PEN. CODE (Deering, 1935) § 1279; IDAHO CODE ANN. (1932) § 19-2810; IND. STAT. ANN. (Burns, 1933) § 9-1031; IOWA CODE (1935) § 13619; MONT. REV. CODE ANN. (Choate Supp., 1928) § 12142; NEV. COMP. LAWS (Hillyer, 1930) § 11116; N. M. STAT. ANN. (Courtright, 1929) § 105-2308; N. Y. CODE CRIM. PROC. (Gilberts, 1936) § 569; N. C. CODE ANN. (Michie, Supp. 1935) § 781; N. D. COMP. LAWS ANN. (Supp. 1925) § 7504; ORE. CODE ANN. (1935) § 13-1317; R. I. GEN. LAWS (1923) § 16; S. C. CODE (Michie, 1932) § 258; UTAH REV. STAT. ANN. (1933) § 104-44-14.

35. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 5162; CAL. PEN. CODE (Deering, 1935) § 1279; IDAHO CODE ANN. (1932) § 19-2810; IND. STAT. ANN. (Burns, 1933) § 9-1031; MONT. REV. CODE ANN. (Choate, Supp. 1928) § 12142; N. M. STAT. ANN. (Courtright, 1929) § 105-2308; OHIO GEN. CODE (Page, Supp. 1934) § 13524; UTAH REV. STAT. ANN. (1933) § 105-44-14.

36. ARK. DIG. STAT. (Crawford & Moses, Supp. 1931) § 450; ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 38, § 615; IND. STAT. ANN. (Burns, 1933) § 9-1031; IOWA CODE (1935) § 13619; MASS. ANN. LAWS (Lawyer's Co-op. 1933) c. 226, § 3; MO. STAT. ANN. (Vernon, 1932) § 3578; N. M. STAT. ANN. (Courtright, 1929) § 105-2308; N. Y. CODE CRIM. PROC. (Gilberts, 1936) § 569; OHIO GEN. CODE (Page, Supp. 1934) § 13524; R. I. GEN. LAWS (1923) § 16.

37. ALA. CODE ANN. (Michie, 1928) § 3376; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 5162; CAL. PEN. CODE (Deering, 1935) § 1279; IDAHO CODE ANN. (1932) § 19-2810; MONT. REV. CODE ANN. (Choate, Supp. 1928) § 12142; NEV. COMP. LAWS (Hillyer, 1930) § 11116; N. C. CODE ANN. (Michie, Supp. 1935) § 781; N. D. COMP. LAWS ANN. (Supp. 1925) § 7504; ORE. CODE ANN. (1930) § 13-1317; S. C. CODE (Michie, 1932) § 258; TENN. CODE (Will. Shan. & Harsh, 1932) § 11669; UTAH REV. STAT. ANN. (1933) § 105-44-14; WIS. STAT. (1935) § 361.20.

38. IND. STAT. ANN. (Burns, 1933) § 9-1031; N. M. STAT. ANN. (Courtright, 1929) § 105-2308; N. Y. CODE CRIM. PROC. (Gilberts, 1936) § 569; R. I. GEN. LAWS (1923) § 16; VT. PUB. LAWS (1934) § 1243.

39. ALA. CODE ANN. (Michie, 1928) § 3376; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 5162; IOWA CODE (1931) § 13619; MO. STAT. ANN. (Vernon, 1932) § 3578; N. Y. CODE CRIM. PROC. (Gilberts, 1936) § 569; R. I. GEN. LAWS (1923) § 6310, § 16.

40. ARK. DIG. STAT. (Crawford & Maset, Supp. 1931) § 450; CAL. PEN. CODE (Deering, 1935) § 1279; IDAHO CODE ANN. (1932) § 19-2810; ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 38 § 615; IND. STAT. ANN. (Burns, 1933) § 9-1031; MONT. REV. CODE ANN. (Choate, Supp. 1928) § 12142; NEB. COMP. STAT. (Supp. 1931) § 29-901; NEV. COMP. LAWS

While the particular requirements vary from state to state, there is no state that by statute or by its case law prevents a court from considering as determinants of the amount of bail, the prisoner's character, his previous criminal record, the doubt, if any, that exists regarding his guilt and the probability of his appearance at the time set for trial. From time immemorial these considerations have always been accorded prime importance by the courts.

The Bail as Jailer

Even before the old writ of mainprize fell into disuse and the simple suretyship it represented was displaced by bail in the true sense, the bail was considered to be the prisoner's jailer.⁴¹ This was true also in France.⁴² An old anonymous case⁴³ puts the rule in this colorful language, "The bail have their principal always on a string, and may pull the string whenever they please, and render him in their own discharge." In the Federal jurisdiction, the same relationship has been reduced to statute, providing:

"Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense."⁴⁴

This rule, making the bail a jailer, has resulted in several interesting decisions. In *Ex parte Lyne*,⁴⁵ a prisoner out on bail appeared as a witness in another case. Immediately upon concluding his testimony he was taken by his bail to be surrendered. A motion to discharge him was denied, the court stating: "A witness who had given bail was always supposed to be in custody of his bail, even whilst he was attending as a witness in court." In *Adamy v. Parkhurst*,⁴⁶ a non-resident had been arrested and was later released on bail. While still in the jurisdiction he was served with process in another case. The court held him im-

(Hillyer, 1930) § 11116; N. M. STAT. ANN. (Courtright, 1929) § 105-2303; N. C. CODE ANN. (Michie, Supp. 1935) § 781; N. D. COMP. LAWS ANN. (Supp. 1925) § 7504; OHIO GEN. CODE (Page, Supp. 1934) § 13524; ORE. CODE ANN. (1930) § 13-1317; S. C. CODE (Michie, 1932) § 258; TENN. CODE (Will. Shan. & Harsh, 1932) § 11669; TEX. STAT. REV. (Vernon, 1936) § 277; UTAH REV. STAT. ANN. (1933) § 105-14-14; WIS. STAT. (1933) § 361.20.

41. 2 HAWK., P. C. (8th ed. 1824) 140; 1 HALE P. C. (1st Am. ed. 1847) 325; HOLMES, *op. cit. supra* note 11, at 249; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 11, at 589; WHARTON, CRIMINAL PLEADING AND PRACTICE (9th ed. 1889) § 62.

42. ESMEN, *op. cit. supra* note 11, at 71.

43. 6 Mod. 231, 87 Eng. Reprints 982 (1669).

44. Rev. Stat. § 1018 (1875), 18 U. S. C. A. § 599 (1927).

45. 3 Stark. 132, 171 Eng. Reprints 798 (1822).

46. 61 F. (2d) 517 (C. C. A. 6th, 1932).

mune from the service of process until the indictment was disposed of, even though he was physically at large, because he was in the custody of his sureties as jailers, and such custody was a continuation of the imprisonment. A view, the direct opposite of that in the *Adamy* case, was taken by the New York courts on substantially similar facts in *Netograph Mfg. Co. v. Scrugham*.⁴⁷ In the *Netograph* case the court held the service good on the theory that the only non-residents immune from service are those who come voluntarily into the jurisdiction, and that a prisoner out on bail cannot be said to have come into the jurisdiction voluntarily as his bail are really his jailers. Recognizing the existence of a contrary view, the court said:

"Under such circumstances he cannot be said to be free to come at will, and when he submits himself to the directions of the courts having cognizance of the charge against him, he does not act voluntarily, but under compulsion of law. We are aware that this view is apparently at variance with some decisions in other jurisdictions, notably in England, but we think the administration of justice will be best subserved by keeping the rule of privilege within the reason upon which it rests. That reason fails unless the person claiming the privilege is a free moral agent who may come into or depart from the jurisdiction or not as he pleases."

So great is the bail's power as a jailer that if the bail be forfeited he may arrest the fugitive summarily.⁴⁸ If the fugitive has gone to another jurisdiction the bail need not resort to extradition because the fugitive is still constructively considered to be within the control of the first state.⁴⁹ Lest there be any misunderstanding, it should be made clear that the bail are not jailers in a physical sense. All that is meant by the expression is that they might at any time, for reasons sufficient to themselves, surrender the prisoner, and thus exonerate themselves. An excellent statement of the rule is found in *Reese v. United States*:⁵⁰

"By the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is, in point of fact, in this country at least, subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court and, to the extent necessary to accomplish this, may restrain him of his liberty. This power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties when he is admitted to bail, that he will not

47. 197 N. Y. 377, 90 N. E. 962 (1910).

48. *Ex parte Salinger*, 288 Fed. 752 (C. C. A. 2nd, 1923).

49. *In re Von der Ahe*, 85 Fed. 959 (C. C. W. D. Pa. 1898); *Fitzpatrick v. Williams*, 46 F. (2d) 40 (C. C. A. 5th, 1931).

50. 9 Wall. 13 (U. S. 1869).

depart out of this territory without their assent. There is also an implied covenant on the part of the Government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him."

In the *Reese* case, incidentally, it was held that the bail was discharged because the prosecution had indefinitely adjourned the trial of the case without their knowledge or consent, thus varying the terms of their recognizance.

Many other cases dealing with what constitutes an act sufficient to discharge the bail give illustrations of the bail's position as a jailer. A few examples will suffice. In *Devine v. The State*,⁵¹ it was held that the arrest of the prisoner in another state for another crime between the time he was bailed and the time his case was called for trial did not discharge the bail as they "... had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded." A similar situation was presented in *Taylor v. Taintor*.⁵² There again the court held that the arrest in another jurisdiction did not discharge the bail. Speaking of their rights as jailer, the court said:

"They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee."

In Kentucky, at least, the rule of *Taylor v. Taintor* is somewhat modified. There the bail of one under indictment for felony do not act at their peril when they permit the accused to leave the State on a visit, and they are not absolutely liable in the event he is prevented from returning in time for his trial because of an unavoidable accident to his person.⁵³

Truly, a prisoner released on bail may accurately express both his position and the principle involved in the cases by saying: "I am out on bail; I am still in jail."

51. 5 Sneed 622 (Tenn. 1858).

52. 16 Wall. 366 (U. S. 1872); see also *State v. Merrihew*, 47 Iowa 112 (1877).

53. *Hargis v. Begley*, 129 Ky. 477, 112 S. W. 602; 23 L. R. A. (N. S.) 136 (1903). The principle finds expression, too, in cases where the bailed person has become insane. There are two Kentucky cases, in one of which, *Briggs v. Commonwealth*, 185 Ky. 340, 214 S. W. 975 (1919), the prisoner was adjudicated insane and confined to an institution, whereupon the bail was held to be discharged. In the other, *Commonwealth v. Allen*, 157 Ky. 6, 162 S. W. 116 (1914) the prisoner went insane and disappeared. There was no adjudication of insanity, he was not in the custody of the state, and his bail was held not to be discharged.

Contract to Indemnify Bail

We have seen that bail is a means used through the centuries to enable those accused of crime to maintain their liberty, until they have been found guilty, upon the giving of adequate security for their appearance when needed. We have seen, too, that the cases generally consider the bail to be the accused's jailer, that in theory when one is out on bail, his imprisonment is deemed to be continued. The primary interest of society when it releases a prisoner on bail is not to barter a specified amount of cash or property for the prisoner's future freedom, but rather to receive every reasonable assurance under the circumstances that the accused will be on hand when his case is called for trial. Society is injured, even though the full amount of the bail posted is paid to it, if the accused fails to put in an appearance. Of course, the charge still stands, and the fugitive may be tried whenever he is apprehended. When the bail make good the forfeiture, they do nothing more than release themselves.

As bail operates at the present time, there is an alarming number of forfeitures.⁵⁴ Society is ill-served indeed when its bail system produces frequent forfeitures and an equal or almost equal number of fugitives, who are free to continue their criminal careers. These considerations are of pertinence in a review of the cases dealing with contracts to indemnify bail.

In England it is well settled that contracts to indemnify bail are unenforceable as against public policy.⁵⁵ While a few American jurisdictions have adopted the English rule,⁵⁶ the majority American rule is that such contracts are good and enforceable.⁵⁷ The text writers are of little help in setting forth any definite rule.⁵⁸

54. Legis. (1921) 21 COL. L. REV. 592; BEELEY, *op. cit. supra* note 27, at 156.

55. Jones v. Orchard, 16 C. B. 614; 139 Eng. Reprints 900 (1855); Wilson v. Strugnell, 7 Q. B. D. 548 (1880); Herman v. Jeuchner, 15 Q. B. D. 561 (1885); Consolidated Exploration & Finance Co. v. Musgrave (1900) 1 Ch. 37; King v. Porter (1910) 1 K. B. 369.

56. Dunkin v. Hodge, 46 Ala. 523 (1871); Slater v. Jacobitz, 3 Colo. App. 127, 32 Pac. 184 (1893).

57. Leary v. United States, 224 U. S. 567 (1912); McCormick v. Boylan, 83 Conn. 686, 78 Atl. 335 (1910); Simpson v. Robert, 35 Ga. 180 (1866); Anderson v. Spence, 72 Ind. 315 (1880); Ellis v. Norman, 19 Ky. L. Rep. 1798, 44 S. W. 429 (1898); Maloney v. Nelson, 144 N. Y. 182, 39 N. E. 82 (1894); Maloney v. Nelson, 158 N. Y. 351, 53 N. E. 31 (1899); Fagin v. Goggin, 12 R. I. 398 (1879); Reynolds v. Harral, 2 Strob. 87 (S. C. 1847); Essig v. Turner, 60 Wash. 175, 110 Pac. 998 (1910); Carr v. Davis, 64 W. Va. 522, 63 S. E. 326 (1908); Carr v. Sutton, 70 W. Va. 417, 74 S. E. 239 (1912).

58. "In view of the fact that contracts for the indemnity of sureties upon bail bond in criminal cases have been frequently enforced in the courts, it is strong evidence that they have been presumed, by the bar and bench, to be legal." PINGREY, SURETYSHIP AND GUARANTY (2d ed. 1913) § 416.

"If the principal do not appear, and the recognizance be forfeited, and paid by the bail;

The earliest English case dealing with the subject is that of *Jones v. Orchard*.⁵⁹ There the bail brought action against his principal on an implied indemnity for the costs which the bail had been forced to pay, his principal having failed to do so. There had been no default of appearance on the principal's part. While the court allowed recovery, holding that an implied indemnity to pay the costs was not against public policy, it expressly refrained from passing on the legality of indemnity in case of a personal default, stating:

"It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded, and that such contract would be contrary to public policy, inasmuch as it would be in effect giving the public the security of one person only, instead of two."⁶⁰

A few years later *Cripps v. Hartnoll*,⁶¹ dealing with an express promise of indemnity running from a third person, the father of the defendant, to the bail, held such a promise not within the Statute of Frauds but an original agreement. The case did not consider the public policy involved in such an agreement, although Baron Pollock said, "Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him." Although the *Cripps*

yet the principal shall remain open and liable to the law whenever he can be taken, for the penalty in the recognizance is no other than as a bond to compel the bail to a due observance thereof, and has no connection with the principal; they could not sue him thereon, for money paid to his use, or on his account, for it was paid on their own account, and for their own neglect; but having paid it, they are wholly exonerated, though the offender remains liable for his offence." HIGMORE, *BAIL* (1783) 204.

"The principal undertakes impliedly to indemnify the bail from all expences fairly arising from his situation as bail. If, therefore, the principal absconds, so that he cannot be rendered, the bail may take every proper step to secure him, and the principal will be liable to the bail for the expenses thereby incurred." 3 PETERSDORFF, *ABRIDGEMENT* (Am. ed. 1829) 200.

While Petersdorff's comment has been relied on as authority for the proposition that an indemnity contract in a criminal case is good, it is likely that Petersdorff intended to enunciate nothing more than the rule in civil cases. He cites as his authority *Fisher v. Fallows*, 5 Esp. 171, 170 Eng. Reprints 775 (1804), which was a civil case. In this connection it is interesting to note that even the authority on which Petersdorff relied may not be trustworthy. Lord Denman, speaking of *Espinasse's Reports* in *Small v. Nairne*, 13 Q. B. 840, 844, 116 Eng. Reprints 1484, 1486 (1849) said:

"I am tempted to remark, for the benefit of the profession, that *Espinasse's Reports*, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt or hesitation; and a special reason was given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports."

59. 16 C. B. 614, 139 Eng. Reprints 900 (1855).

60. *Jones v. Orchard*, 16 C. B. 614, 624, 139 Eng. Reprints 900, 904 (1855).

61. 4 B. & S. 415, 122 Eng. Reprints 514 (1863).

case was silent on the public policy involved, it might be argued that if the court thought such a contract against public policy, it would have said so. If there were no later cases the *Cripps* case might conceivably be urged as an authority for the proposition that an indemnity agreement is good.

However, in 1880 we find the case of *Wilson v. Strugnell*,⁶² in the Queen's Bench Division. There one Manners, who was charged with embezzlement, had been released on bail posted by the defendant Strugnell. Manners had paid Strugnell £100, the amount of the bail, as security. Later Manners defaulted, and still later, was adjudicated bankrupt, the plaintiff being appointed his trustee. There had been no forfeiture. The action was brought to recover from Strugnell the indemnity paid to him by Manners. The court gave as its reason for allowing recovery that a contract to indemnify bail was against public policy in that it deprived the public of the security of the bail. It mentioned that aside from this consideration it felt it was bound by the holding in *Jones v. Orchard*.

Later in *Herman v. Jeuchner*,⁶³ the court allowed the plaintiff, who had been ordered to post a bond for his good behavior for two years, to recover from his surety the indemnity he had paid. The case renounces the principle that an indemnified surety lacks a proper interest in caring for the observance of the necessary condition by the principal, and that, accordingly, a contract to indemnify a surety is against public policy. The case goes further than any of the prior decisions in that it permits the principal to recover the amount of indemnity from his bail.

A somewhat different fact situation, but the same principle, were involved in *Consolidated Exploration and Finance Company v. Musgrave*.⁶⁴ There the defendant went bail for one Ainsworth and one Jordan, who were charged with criminal fraud. Ainsworth apparently had some connection with the plaintiff. Ainsworth and Jordan agreed with the defendant to deliver to him as indemnity for the bail certain preference shares in the London Woolen Co., title to which was vested in the plaintiff. After the shares had been delivered to the defendant, and the bail posted, Jordan absconded, and the bail was estreated.⁶⁵ An authorization for the delivery of the shares to the defendant was contained in the plaintiff's minute book. Holding that the contract between Ainsworth

62. 7 Q. B. D. 548 (1880).

63. 15 Q. B. D. 561 (1885).

64. (1900) 1 Ch. 37.

65. A forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon, was said to be estreated. BOUVIER, LAW DICTIONARY (Baldwin's Libr. et. 1928) 366; 4 BL. COMM. *253.

and Jordan on the one hand, and the defendant on the other, was illegal and void, the court ordered the defendant to return the shares to the plaintiff, thus according to a third party indemnitor the right to recover the indemnity paid bail.

These cases settled the law of England so that it can now be said unequivocally that a contract to indemnify the bail is illegal and void in England as against public policy, whether the contract runs to the bail from the accused person or from some third person. But the English courts have gone further than any other jurisdiction and to a limit which many would consider extreme in *King v. Porter*.⁶⁶ There they held that an agreement to indemnify the bail in a criminal case constituted a criminal conspiracy, even though there was no allegation in the indictment and, of course, no finding by the jury, that it was entered into with intent to obstruct and pervert the course of justice. In the course of its opinion, the court said:

"It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice."

In this country only two states, Colorado⁶⁷ and Alabama,⁶⁸ have held indemnity agreements to be bad, and in the Alabama case it was found as a fact that the bail had been posted and the indemnity agreement entered into in order to facilitate the escape of the prisoner. Likely, any state would hold bad an indemnity agreement entered into for the purpose of obtaining the freedom of the prisoner so that he could escape.

The earlier Federal cases all held that an agreement to indemnify the bail was against public policy, the reasoning being the same as that of the English cases.⁶⁹ The effect of these rulings was set aside, how-

66. (1910) 1 K. B. 369.

67. Slater v. Jacobitz, 3 Colo. App. 127, 32 Pac. 184 (1893).

68. Dunkin v. Hodge, 46 Ala. 523 (1871).

69. United States v. Ryder, 110 U. S. 729 (1883); United States v. Simmons, 47 Fed. 575 (C. C. S. D. N. Y. 1891); United States v. Greene, 163 Fed. 442 (C. C. W. D. Va. 1908); United States v. Lee, 170 Fed. 613 (S. D. Ohio 1909).

ever, by *Leary v. United States*,⁷⁰ where the court found nothing objectionable in an indemnity running from the accused to his bail. The holding in the *Leary* case, however, is not by any means that a court must accept willy nilly any bail offered to it. Witness the most recent pronouncement by any Federal court on the subject, *Concord Casualty and Surety Co. v. United States*.⁷¹ There the lower court had entered an order restraining the plaintiff from acting as surety or indemnitor in the District Court for the Southern District of New York for three years. While it reversed the order on the ground that the District Court had no power to enter it, the Circuit Court of Appeals said:

"The Court is not without protection if the surety company is deemed a poor moral or unsafe risk. . . . Like any other financial risk in giving an undertaking or guaranty, a moral risk as well as the material risk is involved. It is the personal responsibility—the presence of the prisoner—that a bail bond requires. When a defendant is called upon to pay his obligation to society, it is not the sum of the bail bond that society asks for, but rather the presence of the defendant for imprisonment."

The earliest American case allowing a recovery on an indemnity, is that of *Reynolds v. Harral*.⁷² The court there made no mention of the public policy involved except to express the opinion that "no practical mischief" would result from allowing the bail to recover from his principal on an implied indemnity. The opinion did not cite any authorities in criminal cases, but said that no authority had been found which gave the bail in a criminal case less rights than those enjoyed by bail in civil cases. The obvious difference between bail in a civil case, which is given merely as security for a sum of money, and the bail in a criminal case, which is given as security for the production of a prisoner to answer a charge of crime, apparently never occurred to the learned court.

This difference is illustrated by the action of the court in *People v. Ingersoll*,⁷³ which was a civil action that grew out of the exposure of the notorious Tweed ring in the City of New York. The action was to recover over \$6,000,000. The case deals with the justification of bail in the sum of \$500,000 on behalf of Ingersoll. It appears that valuable property was conveyed by different friends of Ingersoll to his bail prior to the attempt to justify. As the conveyances were absolute and thus became the bail's property, the court felt that no harm was done to the People by approving the offered bond.

A Rhode Island court upheld a contract of indemnity in *Fagin v.*

70. 224 U. S. 567 (1912).

71. 69 F. (2d) 78 (C. C. A. 2d, 1934).

72. 2 Strob. 87 (S. C. 1847).

73. 14 Abb. Pr. (N. S.) 23 (N. Y. 1872).

Goggin.⁷⁴ Here again the court did not discuss the question of public policy involved. In fact, the case arose on a demurrer interposed by the plaintiff to the defendant's plea of infancy, and the only point discussed by the court was the sufficiency of the plea of infancy in an action brought on behalf of the bail to recover from his infant principal the sums he had been forced to pay because of the recognizance. The court sustained the demurrer on the ground that an infant may bind himself by any contract he is authorized by law to make, and that the giving of a recognizance is such a contract. This case, like the *Reynolds* case, is of little help in the present discussion. In *Anderson v. Spence*,⁷⁵ an Indiana court held that an oral contract of indemnity between the principal and his bail is an original contract not within the Statute of Frauds. This case went no further than did the *Cripps* case in England, the court not mentioning the consideration of public policy.

The first real American authority is the New York case of *Maloney v. Nelson*.⁷⁶ The action was one brought to foreclose a mortgage given to Maloney, who with another was bail for one O'Brien to secure Maloney in the event the bail was forfeited. O'Brien failed to appear for his trial and the bail in the sum of \$10,000 was, in fact, forfeited, but it did not appear as a fact in the case that Maloney had paid the \$10,000 penalty or any portion of it. Accordingly, judgment was rendered against Maloney, but in its opinion the court said with respect to the defense that such a contract was against public policy:

"This leaves it unnecessary to consider the other defenses set up in the answer of the defendant Nelson, although we must say that the claim that the defendant's contract was void as against public policy, does not impress us as being a good defense, at least in this state."

Subsequently, Maloney paid the \$10,000, and instituted a new action.⁷⁷ The Court of Appeals, sustaining the judgment of foreclosure granted by the court below, said the indemnity was not against public policy:

"As to the second ground relied upon to defeat the action, viz., that the bond and mortgage were void as against public policy, the question is an open one in this state, so far as decision is concerned, but the view of this court was expressed in *Maloney v. Nelson* (*supra*). The court said: 'This leaves it unnecessary to consider the other defenses set up in the answer of the defendant Nelson, although we must say that the claim that the defendant's contract was void as against public policy, does not impress us as being

74. 12 R. I. 398 (1879).

75. 72 Ind. 315 (1880).

76. 144 N. Y. 182, 39 N. E. 82 (1894).

77. 158 N. Y. 351, 53 N. E. 33 (1899).

a good defense, at least in this state.' It is true that in some other jurisdictions, as is pointed out in the very careful opinion of the Appellate Division, it has been suggested, if not decided, that it is against public policy to allow bail to become indemnified, the reason given being that the object for which the bail is required is to assure the appearance of the prisoner to answer the charge against him, and that necessarily the bail had a direct pecuniary interest in preventing the escape of the prisoner, which he would not have were he fully indemnified. That is not the public policy of this state; for the giving of bail in criminal cases is regulated by statute, and the legislature has, by its provisions, provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money; he may have his choice either to give a bond with sureties, or make a deposit of money. It is the loss of the money deposited, or the assurance that the sureties will be obliged to pay the amount of the bail, that is relied upon to secure the presence of the accused. It, therefore, cannot be said to be a part of the public policy of this state to insist upon personal liability of sureties, for there need not be such personal liability in any case if the accused make a deposit of money in lieu of bail, as provided by the statute."

It would be difficult to quarrel with the reasoning of the Court of Appeals in this case, where a state, such as is the case in New York, allows one accused of crime freedom from jail upon the making of a mere cash or property deposit. It cannot be said that the period of his bail is in any sense a continuation of his detention. He has no jailer other than himself. The state looks only to his desire to preserve his own property to assure his presence at trial. If that be so, then the consideration so important to the English courts that there be some person other than the accused to assure his presence and to take the means necessary to produce him in the event he absconds, does not exist. If the accused, instead of depositing cash or property for his release, gives that cash or other security to another who delivers a recognizance to the state, the state occupies precisely the same position as it would have occupied if the accused had made a deposit of cash. That being so, there can be no objection in principle to a contract of indemnity in a jurisdiction which permits the release of a prisoner on his deposit of cash or other property. In fact, there can be no objection, since property seems to be the only reliance of the state, to the granting to bail in a criminal case in such a jurisdiction the same rights that are enjoyed by bail in civil cases. The decision, therefore, in *Badolato v. Molinari*,⁷⁸ that in New York there ran from the principal to his bail an implied contract of indemnity is perfectly sound.

Other states have adopted the reasoning of the New York Courts. It was on the *Maloney* cases that the United States Supreme Court

78. 106 Misc. 342, 174 N. Y. Supp. 512 (Sup. Ct. 1919).

relied in the *Leary* case. The Court there speaking through the late Justice Holmes, said:

"The only matters that seem to us to need argument are the questions of public policy and laches. As to the former the ground for declaring the contract invalid rests rather on tradition than on substantial realities of the present day. It is said that the bail contemplated by the Revised Statutes (§ 1014) is common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundium*,⁷⁹ although a trace of the old relation remains in the right to arrest. Rev. Stat. § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for \$40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the government what person ultimately felt the loss so long as it had the obligation it was content to take. The law of New York recognizes the validity of contracts like the one alleged, and without considering whether the law of New York controls we are content to say merely that the New York decisions strike us as founded in good sense."⁸⁰

As a result of the decision in the *Leary* case, it has since been held that the federal statute⁸¹ does not require the giving of common law bail, and that a District Judge has no right to refuse to accept cash bail offered by a prisoner.⁸²

In West Virginia, a novel theory has been advanced to sustain the holding in *Carr v. Davis*,⁸³ that an indemnity running from a third person to the bail is not against public policy. In the case just mentioned, the West Virginia Court relied on the *Maloney case*. It pointed out that there were no prior West Virginia or Virginia decisions, but said that it was a matter of general acceptance by the bench and bar that contracts to indemnify bail were valid.⁸⁴

79. The term, *mundium*, was derived out of old French law and indicated a tribute paid by a church or monastery to their seignorial *avoués* and *vidames* as the price of protecting them. BLACK, LAW DICTIONARY (3d ed. 1933) 1212.

80. *Leary v. United States*, 224 U. S. 567, 575 (1912).

81. "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense." Rev. Stat. § 1014 (1896), 18 U. S. C. A. 591 (1927).

82. *Rowan v. Randolph*, 268 Fed. 529 (C. C. A. 7th, 1920).

83. 64 W. Va. 522, 63 S. E. 326 (1908).

84. In support of this contention it cited Pingrey on Suretyship, who makes a rather startling statement that contracts to indemnify bail in criminal cases have been frequently

The case of *Carr v. Davis* was decided on demurrer, and the court holding the complaint good, remanded the case for further proceedings. It came up again under the name of *Carr v. Sutton*.⁸⁵ The question of public policy was again raised. The court declined to reconsider its decision, but held that since the bail had failed in his duty to his indemnitor to be a proper custodian or jailer of the principal, in that he carelessly allowed the principal to escape, and did not diligently search for him, his indemnitor was released from any obligation to indemnify him. The Judge who wrote the opinion had dissented in the prior case, and explained the prior case in this fashion:

"It was mainly because of this onerous duty and obligation⁸⁶ imposed by law upon bail, that the judges concurring in the opinion of the court in *Carr v. Davis*, *supra*, were persuaded to hold a bond of indemnity given bail not void as against public policy. Their notion was that by taking the bond bail could not, without endangering his security, neglect or become indifferent to the obligations of his bond. In my individual opinion the correctness of that decision can rightly be predicated upon no other theory."

If the theory of the first case was that an indemnity agreement was not against public policy because of the heavy duty resting on the bail, and his need to perform that duty carefully to preserve his right to indemnity, then the court in the first case studiously avoided all mention of it.

Thus, we find that there are two schools of thought or theories of law as to the validity of contracts to indemnify bail. In jurisdictions which adhere to the old notion of bail as permitting the release of the prisoner to one who will have a personal and property interest in producing him for trial and thus be his jailer, it is perfectly sound to hold that an agreement to indemnify the bail, thus eliminating his interest in producing the prisoner, since he stands to suffer no loss, is against public policy. On the other hand, in jurisdictions where a prisoner may secure his release by means of a mere cash or property deposit with the court, it is equally sound to hold that contracts to indemnify the bail are not against public policy since the state has made clear that it is its policy not to rely on any supposed jailer but on the mere cash and property itself, and is in as good a position if it holds the bond of indemnified bail as it would be if it held a deposit. In jurisdictions, however, where common law bail still exists and cash or property de-

enforced in the courts. The authority of Pingrey's statement is highly questionable as is a statement made by Petersdorff to the effect that there is an implied agreement running from the principal to the bail to reimburse the bail in the event the principal absconds. See note 58 *supra*.

85. 70 W. Va. 522, 74 S. E. 239 (1912).

86. The court here is speaking about the duty of bail to a jailer or psuedo jailor.

posits by the prisoner are not accepted, it would be unsound to hold as valid a contract to indemnify the bail.

Only one state, Louisiana, has covered the subject by statute. The Louisiana statute provides:

"Any contract made to indemnify any surety against loss on any bail-bond made or to be made by such surety shall be void and any security deposited in connection with such contract shall be forfeited to the State; provided, that this Article shall not apply to surety companies legally authorized to do business in the State."⁸⁷

While these authorities show that up to the present time the general trend in the American jurisdictions is to hold valid and enforceable a contract to indemnify bail in criminal cases, the vast majority of the states have not yet been called upon to pass on the question one way or another, so far as the reported cases tell us.

The Social Aspect

Which rule works better? Apparently neither is perfect. Certainly in New York it cannot be said that the system of bail has been improved by permitting cash deposits and upholding the validity of indemnity agreements. On the contrary, this practice has led to abuses that have been the subject of investigation and the cause of much concern to the law enforcement officers of the state.⁸⁸ Many suggestions have been made for improving the bail system in New York.⁸⁹ It is noticeable that no one who has studied the problem has found any fault with surety companies as such.⁹⁰ A hint dropped by Magistrate Simpson during

87. LA. CODE CRIM. PROC. (Dart, 1932) art. 90.

88. Legis. (1921) 21 COL. L. REV. 592.

89. In a letter to the Board of Estimate and Apportionment dated November 16th, 1925, the Prison Committee of the Association of Grand Jurors of New York County suggested the centralization of all courts having the authority to release prisoners on bail, a central bureau to scrutinize bail transactions, the limitation of the power to admit to bail to a few officials, fingerprinting before fixing bail, and the refusal to bail of experienced and professional criminals. They argued that money and property bail were a poor guarantee to society, and pointed out that, in the first six months of 1925, forty-two prisoners out on bail were rearrested and in all but six cases were charged with serious crimes. The same Prison Committee writing to Hon. Caleb S. Baumes, Chairman of the New York State Crime Commission, on October 16, 1926, denounced alliances between criminal lawyers and bondsmen in "dingy offices". THE PANEL, a publication of the New York County Grand Jury in its November and December, 1933, issues, set forth twenty proposals for improving criminal law and procedure in Federal courts, including refusal of bail to notorious offenders, making the jumping of bail a felony (it is a felony in New York, N. Y. PENAL LAW § 1694 a), the abolition of bail on appeal, and the abolition of bail when a Federal prisoner contests removal to another Federal district.

90. The October 16, 1926 letter from the Prison Committee of the Association of Grand Jurors of New York County to Hon. Caleb S. Baumes, mentioned in the preceding note. Legis. (1921) 21 COL. L. REV. 592.

an investigation of bail evils in 1921 that New York might discard her present theories and go back to the older practice has been adversely criticized as overlooking "the altered social conditions which have made bail impersonal; these cannot be changed back by legislation."⁹¹ Just what social conditions have been changed, and how they have been changed, so as to render impossible a return to the system of personal bail, is not made clear. There is no indication, for example, that the operation of the older theory in England, a country whose social conditions are not so very foreign to our own, has worked any great injustice. One cannot help but be impressed in any discussion of the relative merits of the two practices, by the strong dissenting opinion in the West Virginia case of *Carr v. Davis*,⁹² wherein it is said:

"Public policy and the law demand a different decision. The poorest man, if honest, can find bail. The richest man, for whom those knowing him would not vouch without indemnity, should not be allowed to furnish bail by virtually purchasing it. The mere fact that indemnity is furnished indicates that confidence is not reposed. Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. . . . Upholding indemnity, in any form, under contract implied or express, in effect, allows one to be his own surety for his appearance. Thus he or his friends may buy his freedom from answering the law. This was never contemplated. And we should not permit it to be contemplated now that the question is one of the first instance here. Why provide for a bail piece, intended to promote justice, and then destroy its effect and utility? Why open the door to barter freedom from the law for money?"

The paramount consideration of the state in releasing an accused person prior to his trial is, and should be, that he will be present when his trial is called. If an accused person is permitted to deposit cash or property, or to indemnify those who go bail for him by giving the cash or property to them instead of delivering it to the court, the temptation to jump bail is undoubtedly great. Only thus can the large number of forfeitures that bother our criminal courts be explained. If, on the other hand, he is not permitted to secure his freedom by a mere deposit of cash and property and is not permitted to indemnify his bail, surety companies will likely withdraw from the bail bond business, and the accused person will be forced to obtain personal bail.

Personal bail is not, of course, perfect. Its requirement opens the field to the professional bondsmen.⁹³ The professional bondsmen, however, can easily be regulated by statutes establishing central bail bureaus

91. Legis. (1921) 21 COL. L. REV. 594.

92. 64 W. Va. 522, 535, 63 S. E. 326, 331 (1908).

93. BEELEY, *op. cit. supra* note 27, at 39 *et seq.*

which maintain a ready record of all the bondsmen's transactions, and making every bail bond a lien on the bondsmen's property. Such statutes have already been suggested.⁹⁴ It would seem that a return to the older practice, the elimination of a cash or property deposit by the accused, the barring of contracts to indemnify bail and of the delivery of security to bail and the meticulous regulation and control of professional bondsmen, thus at one and the same time preventing straw bail and forcing those accused of crime to secure personal bail, would go a long way toward eliminating forfeitures, not to mention the scandalous situation caused by criminals on bail continuing their criminal careers. Certainly it could hardly produce a state of affairs any worse than that under which many American jurisdictions now suffer.

Not everything new is better than everything old. This is especially true of practices involving the human element. Perhaps our forefathers were wiser in their generation than we are in ours. There is nothing to be lost by a return to the older method. Such a change is nothing more or less than a renewed substitution of real bail for bail in name, the latter being strikingly similar in effect to the mainprize of ancient days, which was abandoned in favor of bail coupled with the jailer element. It can be accomplished by simple statutory enactments. It may well result in a better administration of our law. There is no reason why it should cause any injustice to those accused of crime, for to quote again the dissenting opinion in the *Carr* case:

"The poorest man, if honest, can find bail. The richest man, for whom those knowing him would not vouch without indemnity, should not be allowed to furnish bail by virtually purchasing it. The mere fact that indemnity is furnished indicates that confidence is not reposed."⁹⁵

94. See the Communications of the Prison Committee of the Association of Grand Jurors of New York County, note 88 *supra*.

95. *Carr v. Davis*, 64 W. Va. 522, 535, 63 S. E. 326, 331 (1908).