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Discussion of Recent Decisions

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James R. Hemingway, '30.....Editor
Roger Severns, '32.....Assistant Editor

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DISCUSSION OF RECENT DECISIONS

LEGISLATION AGAINST PRACTICE OF LAW BY CORPORATIONS AS CONFLICTING WITH POWER OF SUPREME COURT TO PUNISH FOR CONTEMPT.—An original proceeding was recently instituted in the Supreme Court of Illinois by information in the name of the People, on the relation of the Illinois State Bar Association and the Chicago Bar Association, against the People's Stock Yards State Bank, a banking corporation of Illinois, as respondent, seeking to have respondent punished for contempt of the Supreme Court for engaging in the practice of law, and also to enjoin it from continuing such practice.[1] Among the important issues presented for consideration to the Supreme Court were whether the legislature has the power to prohibit a corporation from practicing law and whether or not such a statute excludes the power of the Supreme Court to punish for contempt a corporation which engages in the practice. These issues necessitate an inquiry as to whether the legislature has power to determine who shall or who shall not practice law, and if it has that

[1] People ex rel. Illinois State Bar Association and the Chicago Bar Association v. People's Stock Yards State Bank, 344 Ill. 462.

power, whether a statute prohibiting corporations from practicing law detracts from the inherent power of the Supreme Court to regulate the conduct of its officers and others by contempt proceedings.

The Supreme Court of Illinois held that it was within the power of the legislature to prohibit a corporation from practicing law and to provide a penalty for a violation thereof. They also held that such statute does not exclude the power of the Supreme Court to punish by contempt, nor in any way detract from the inherent power of the Supreme Court to regulate the conduct of its officers and others by contempt proceedings.

Briefly, the court reasoned that the judicial power is vested by the Constitution solely in the courts;[2] that the grant of such judicial powers to the courts included all the powers necessary for complete performance of its judicial functions; that the jurisdiction and power of the Supreme Court with respect to the admission of attorneys to the practice of law are inherent and implied; that, as a part of such inherent power the Supreme Court has always had the power to discipline or dis-bar attorneys for misconduct, such attorneys being "officers" of the Supreme Court and their conduct as such being subject to supervision by said court; that the Supreme Court has power, necessarily implied from the powers heretofore mentioned, to punish unauthorized persons for usurping the privilege and office of acting as an attorney; that the Supreme Court has power to punish one guilty of unauthorized practice of law by contempt proceedings for acts committed either before the Supreme Court, in the trial courts, or outside of court; that a corporation cannot be licensed to practice law, either directly or indirectly by the hiring of lawyers to carry on the business of practicing law for it; that the legislature of Illinois has made provision prohibiting the practice of law by a corporation, and provided a penalty for the violation of the same;[3] that it was within the power of the legislature to make such provision; and that such provision or statute does not exclude the power of the Supreme Court to fix punishment for contempt of said court involved in the usurpation by a corporation of the office of attorney.

In the case of *State* v. *Cannon*,[4] the Supreme Court of Wisconsin was recently confronted with similar questions, although the respondent was an individual and not a corporation. The legislature of Wisconsin enacted a law restoring to the respon-

2 Constitution of Illinois, Article 6, Section 1; Article 3.

3 Cahill's Ill. Rev. St. 1931, ch. 32, secs. 224-228.

4 240 N. W. 441.

dent his license to practice law, which had been revoked by the Supreme Court.[5] The Supreme Court then held the act of the legislature unconstitutional as an encroachment on the judicial power. The court, considering the respective functions of the legislative and judicial bodies, held that the legislature has the power to exact of those desiring to practice law such qualifications as, in the legislature's judgment, are necessary to protect citizens from becoming unconscious victims of dishonesty or incompetence; that courts cannot license as attorneys those not possessing the qualifications deemed by the legislature necessary for the protection of public interest; but that the statutory qualifications required of attorneys cannot preclude the court from fixing additional qualifications deemed necessary by the court for the proper administration of judicial functions; that the qualifications required by the legislature constitute only the minimum qualifications and merely limit the class from which the court must make its selections; and that admission of attorneys to practice is a judicial function, the legislature not having the power to compel courts to admit to the bar persons deemed by the courts unfit to exercise the prerogatives of attorneys at law. This late Wisconsin decision thus clearly indicates that the court has the ultimate power of determining who shall or shall not practice law, and that the court cannot be deprived of this power by legislation.

In Georgia, where the power to grant charters to corporations is vested in the courts by a statute which specifically excepts the classes of corporations which may not be so chartered, but in terms neither authorizes nor prohibits the formation of a corporation to practice law, the Supreme Court recently held in the case of *Boykin, Solicitor General* v. *Hopkins et al.*[6] that the court could not, even by implication, charter a corporation for that purpose, as a corporation could not possibly comply with the conditions required for admission to the profession.

Among others, the following states have typical statutes: Arkansas, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Rhode Island, Utah, and Washington.[7]

5 Laws (Wis.) 1931, ch. 480.

6 162 S. E. 796 (Ga. 1932).

7 2 Ark. Laws, 1929, Act. 182; La. Rev. Stat. Ann. (Mar. Supp. 1926), 55-56; Md. Ann. Code (Bagby, 1924), Art. 27, sec. 19; Mass. Gen. Laws (1921), ch. 221, secs. 46-47; Mich. Comp. Laws (1929), ch. 197, sec. 10175; Mo. Rev. Stat. (1929), ch. 78, secs. 11692-93; N. J. Comp. Stat. (Supp. 1924), secs. 52-214 p-r (Supp. 1930) 52-214t; N. Y. Cons. Laws (1930), ch. 41, secs. 280, 271a; Ore. Code Ann. (1930), secs. 32-504 to 32-506, 22-1213; R. I. Gen. Laws (1923), ch. 401, sec. 6238; Utah Laws (1927), ch. 78, sec. 345; 2 Wash. Comp. Stat. (Remington, 1922), sec. 3231 (9)—(applies to trust companies only).

These statutes, so common among the states, accepted as constitutional, are in themselves an indication that the legislature not only can but has excluded corporations from the field of legal practice.

In the case of *People* v. *People's Trust Company,*[8] the trust company was convicted for violation of section 280 of the New York Penal Code, which forbids the practice of law by a corporation.

In the case of *In re Eastern Idaho Loan and Trust Company,*[9] the respondent was held to have violated the Idaho Statute prohibiting a corporation from practicing law, and was also held to be actually guilty of contempt of the Supreme Court by virtue of such practice. The Idaho statute throws light on both angles of this question, namely, the power of the legislature to prohibit a corporation from practicing law, and also the power of the Supreme Court to punish such corporation for contempt of court. It provides that "If any person shall practice law . . . or hold himself out as qualified to practice law in this state without having been admitted to practice therein by the Supreme Court and without having paid all license fees now or hereafter prescribed by law . . . he is guilty of contempt both in the Supreme Court and District Court for the District in which he shall so practice or hold himself out as qualified to practice."

In Montana, unlawful practice is made contempt by a statute, which is construed in the case of *In re Bailey,*[10] wherein the Supreme Court said, speaking of the acts of the respondent, "It is not contested that the foregoing acts, if they constitute contempt at all, are a contempt of this court. Indeed, this could scarcely be questioned, in view of the provisions of Title V, Part I, Code of Civil Procedure, whereby the authority to admit attorneys to practice is vested solely in this court."

In another later Montana case,[11] the Supreme Court said, again speaking of the acts of respondent, "It cannot be questioned that . . . respondent was engaged in practicing law in the district court of Lincoln County. . . . Neither can it be questioned that in thus engaging in the practice he was guilty of contempt of *this* court."

In Vermont and in New Jersey we find authority for the fact that unlawful practice of law constitutes contempt, in the

[8] 180 App. Div. (N. Y.) 494.

[9] 49 Idaho 280.

[10] 50 Mont. 365.

[11] 54 Mont. 476.

absence of statute. In *In re Morse,*[12] the Supreme Court of Vermont said, "This brings us to the question whether this court has authority to punish for contempt one who, pretending to the office of attorney, practices law before the courts of this state. It is true we have no constitutional or statutory provision on the subject, but none is necessary, nor is it necessary to search the common law for authority, since such authority is fairly to be implied from the express power conferred on this court in the matter of licensing attorneys. The rule of constitutional interpretation announced in *McCullough* v. *Maryland,*[13] that that which was reasonably appropriate and necessary to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it, and as there is nothing in the inherent nature of the power to deal with contempt that causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject. Our conclusion is that this court has implied power to punish for contempt persons pretending to practice as attorneys before the courts of this state . . ."

In the Morse case, the court also said, "It is claimed, too, that since the respondent's operations were confined to the justice courts he is not amenable to this court. But we think that if he is answerable anywhere, for the offense charged, it is this court. He is not charged with having violated a mandate of the inferior court, or with misbehavior in that court, but rather with intruding himself into an office of this court, pretending to act under the authority and with the sanction of this court. The right to act as an attorney is everywhere recognized as a privilege of a personal nature, not open to all, but limited to persons of good moral character, possessing special qualifications ascertained and certified after a long course of study, both general and professional. . . . Authority to confer or withhold this privilege is usually confided to the courts. . . . (Act No. 63 of 1906, now G. L. 1591) provides: 'Justices of the Supreme Court . . . shall make, adopt and publish and may alter or amend rules regulating the admission of attorneys to the practice of law before the courts of this state.' We need not pause to consider whether prior to this enactment this court had authority to deal with persons pretending to practice law as attorneys before the justice courts, for certain it is, it now has precisely the same authority concerning such persons that it has respecting like offenders in this or the county courts."

In the case of *New Jersey Photo Engraving Company* v. *Carl Schonert and Sons,*[14] there is to be found dicta to the effect

[12] 98 Vt. 85.
[13] 4 Wheat. 316.
[14] 95 N. J. Eq. 12.

that "practicing law in our state, without being duly licensed [constitutes] a contempt of court . . . for which the offender may be adequately punished by the court in which the offense is committed."

This illustrates the attitude of the courts of two states without statutory provision for the fact that unlawful practice constitutes contempt, New Jersey holding such practice to be contempt of the court in which the offense is committed, and Vermont holding that such practice constitutes contempt of the Supreme Court as well, thus going still further to support the doctrine laid down by the Illinois Supreme Court in the case of *People* v. *People's Stock Yards State Bank.*

In the case of *People ex rel. Karlin* v. *Culkin,*[15] Mr. Justice Cardozo, speaking for the Court of Appeals of New York, in sustaining the right and duty of the New York courts to investigate ambulance chasing and "any other practices obstructive or harmful to the administration of justice," told of a similar investigation in early English times. He said, relating to the English investigation: "In Easter term, 9 Eliz. 1567, the Lord Chief Justice of the Common Pleas delivered a charge to a jury made up of officers, clerks, and attorneys, who had been summoned by special writ to inquire into wrong doing by officers of the court. This was not a grand jury in the usual sense, for the Common Pleas was not a court of criminal jurisdiction. The ordinary courts of criminal jurisdiction were the King's or Queen's Bench and the Courts of the Justices of Assize, Oyer and Terminer and Gaol Delivery. The special jury was instructed to inquire into falsities, erasures, contempts, and misprisions '*de omnibus falsitatibus, de rasuris, de contemptibus, et de misprisionibus.*' Those guilty of falsities were the ambulance chasers of the day. 'A falsity,' said the Lord Chief Justice, 'is where a man will outwardly set a shew, a face, and countenance that he doth well, and truly knowing inwardly and to himself that this is not so but mere subtlety and falsehood, as, for example, if he will sue forth of purpose false process, or wittingly of himself will minister a false and foreign plea, not taking it of his client.' An erasure, as its name imports, is a wrongful alteration of a record of the court. A contempt is committed by 'such as contemn and break our orders and rules, and will not obey the orders of this court; within this are not only officers, clerks, and attorneys contained, but also any other stranger that contemneth the same.'"

This early English doctrine goes far toward supporting the holding of the Illinois Supreme Court in the instant case. It states the admitted proposition that attorneys may be guilty

[15] 248 N. Y. 465.

of contempt of court and also any stranger who contemns and breaks the court rules.

In California and New York, there is also authority, though less direct, for the proposition held by the Illinois Supreme Court. The codes of both of these states provide that a corporation may be formed for any purpose for which individuals may lawfully associate themselves. The Supreme Courts of both states have held, in the cases of *People* v. *Merchant's Protective Corporation*[16] and *In re Co-Operative Law Company*,[17] that such provisions have no application to the practice of law by a corporation. The courts of these states have lent at least indirect support for the proposition that the legislature can prohibit a corporation from practicing law, by virtue of their construction of these statutes to exclude the practice of law by a corporation.

Having seen that legislatures may unquestionably prohibit corporations from practicing law, reference must now be had to some of the authorities dealing more particularly with the power of the Supreme Court to punish for contempt, and the influence over that power which the legislature may or may not exert. "Since the constitution vests the judicial power in designated tribunals, it follows that the essentials of jurisdiction there conferred are unalterable and indestructible and can neither be increased nor diminished by the legislature, nor can the inherent powers of the courts thus established be abrogated or abridged. . . . The legislature cannot in the absence of constitutional provisions, limit or regulate the inherent power of courts to punish for contempt."[18]

There are many cases in various jurisdictions supporting the doctrine stated above. In the case of *State* v. *District Court of First Judicial District in and for Lewis and Clark County*,[19] the court held that the legislature may prescribe modes of procedure in contempt proceedings, but it cannot take away or abridge the court's power to inflict punishment for contempt.

In the case of *Ex parte Garner*,[20] the court held that the legislature may not, whether by procedural rules or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of a constitutional court to punish for contempt.

16 189 Cal. 531.

17 198 N. Y. 479.

18 6 American and English Encyclopedia of Law (2nd Ed.), p. 1048, and cases there cited.

19 58 Mont. 276.

20 179 Cal. 409.

In the case of *Ex parte Le Mond,*[21] the court held that the legislature has no power to take away, abridge, impair, limit or regulate the power of courts of record to punish for contempt.

Illinois is not a stranger to similar judicial pronouncements. In the case of *William O'Neil* v. *People,*[22] it was held that the court might punish for contempt despite the fact that the act might likewise constitute a statutory crime, and that respondent might be indicted for the same offense. And in *People* v. *Peters,*[23] the court reiterated that the power to punish for contempt is inherent.

In the case of *People ex rel. John Rusch* v. *Robert White,*[24] the court held that the power to punish contempt being inherent in the courts, the legislature may not restrict their jurisdiction in contempt proceedings; but that it may aid their jurisdiction or enlarge their powers by declaring certain improper conduct to be a contempt which was not theretofore so regarded. It has no power, however, to make that a contempt which in the nature of things cannot be a contempt, or to punish crimes as such by contempt proceedings.

The conclusion is inevitable that the Supreme Court of Illinois, in the case of *People* v. *People's Stock Yards State Bank,* where the court so definitely answered the question dealt with in this discussion, did so upon ample reason and authority, thus lending great support to the profession's ethical standards, and going far to secure to the public the confidence in the profession which those standards merit.

RIGHT OF SURETY ON A BAIL BOND TO ARREST HIS PRINCIPAL IN ANOTHER STATE AND RETURN HIM TO THE STATE WHERE THE BOND REQUIRES HIS PRESENCE WITHOUT RESORTING TO EXTRADITION.—If a surety has a right to recapture his principal and return him to the state from which he fled, is not such surety, as an individual, asserting a prerogative right which a state with its sovereign power cannot assert? A state must conform to the technical procedure of extradition to effectuate the end accomplished by a surety without even resorting to the aid of legal process. However, a review of the historical basis for the decisions which assert such right in the surety, dispels the apparent anomaly.

21 295 Mo. 586.
22 113 Ill. App. 195.
23 395 Ill. 223.
24 334 Ill. 465.

In an early case reported in England in 1704[1] the court in its opinion says: "The bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge; they may take him up even upon a Sunday, and confine him until the next day, and then render him; . . . and the doing it on Sunday is no service of process, but rather like the case where the sheriff arrests by virtue of a process of court on Saturday, and the party escapes, he may take him on a Sunday for that is only a continuance of the former imprisonment."

The right of a surety on a bail bond to recapture his principal without resorting to process is in its essence vastly different from the necessity of a state to recapture a fugitive through the medium of extradition. The surety's power is not such as is implied by operation of the law. Such right arises from the private undertaking implied in the furnishing of the bond. When bail is furnished the principal is remanded to the custody of the surety. This custody follows the principal wherever he may go. The principal has placed in the surety the power to arrest him at any time and surrender him to the court and, if necessary, to restrain him of his liberty: to this extent the surety becomes a jailor.[2]

This doctrine is affirmed in the case of *In re Von Der Ahe*,[3] a case originating in the courts of Pennsylvania, from where it was taken to the courts of the United States. A writ of habeas corpus was sued out by the petitioner Chris Von Der Ahe against Nicholas A. Bendell commanding the respondent to show by what right he holds and deprives the petitioner of his liberty. The respondent contended he possessed the right to detain the petitioner by virtue of these facts: One Baldwin had brought in the Court of Common Pleas of Allegheny County, Pennsylvania, an action of trespass for malicious prosecution against Von Der Ahe; under the laws and practice in Pennsylvania, the suit was begun by the issuance of a capias, by virtue of which capias Von Der Ahe was arrested by the sheriff of the county; to procure his release from custody and avoid imprisonment, Von Der Ahe had one Nimick become his bail on a capias bond, the condition of which was that Von Der Ahe "shall satisfy the condemnation money and costs, or surrender himself unto the custody of the sheriff of Allegheny County, or in default thereof, that the said W. A. Nimick, the above named bail, will do so for him." Von Der Ahe was thereupon released and

1 Anonymous, 6 Mod. 231.

2 Reese v. United States, 9 Wall. 13.

3 85 Fed. 959.

upon a trial of the case judgment was rendered in Baldwin's favor and affirmed by the Supreme Court of Pennsylvania. Von Der Ahe failed to pay the judgment or surrender himself to the sheriff. Accordingly Nimick, the bail took out a bail piece, which is the form of process under the Pennsylvania statutes, authorizing the respondent to execute the same and to take, seize and surrender to the sheriff of Allegheny County the said Von Der Ahe. In pursuance of this authority the respondent took Von Der Ahe into custody in St. Louis, Mo., and by force brought him back to Pittsburgh for delivery to the county sheriff. Whereupon the petitioner sued out this writ of habeas corpus contending such arrest was unwarranted and contrary to article 5 of the Amendments to the Constitution of the United States in that he was deprived of his liberty without due process of law. In denying the writ, the court, in its opinion said: "The arrest of a principal by his bail is based on the relationship the parties have established between themselves, and not on any process of the court; and hence the bail may make the arrest in another state than that where the bond is given, and transfer him thereto, without infringing his right under the Federal Constitution to due process of law. . . . It is well settled that bail from another state [New York] may arrest his principal in this state [Pennsylvania] . . . and take him out of the state for the purpose of surrendering him in discharge of his recognizance. . . . When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment."

Although the contract with his bail may appear to place the principal in involuntary servitude for the duration of the bail, it is by this means that the principal may escape actual incarceration in prison. His liberty is certainly far less restrained than it would be if he were within the prison cell. However, the law of necessity must place some inhibition upon the principal's freedom to insure his appearance in court at trial, for the object of bail is to insure his presence in court. Consequently to effectuate this end, the law allows the principal to contract with a surety as he does. The doctrine conforms to principles of legal right. It aids the principal and protects the surety. Inasmuch as the bail, with few exceptions, forfeits the bond if he fails to produce the principal for trial, he is given the right, as the courts say, to restrain the principal so far as necessity demands.

With the advent of compensated sureties the reason for the protection afforded at common law to gratuitous sureties fails. A single case will serve to illustrate the strictness with which forfeitures against sureties are construed. One Gingrich was

arrested for committing an assault with a knife upon one Elizabeth Gingrich. He was arrested and charged with the offense and gave bail with good and sufficient security for his appearance at the next term of court to answer the charge and stand trial. During the interim between the accusation and the next term of court, the principal was indicted by a grand jury for an assault with intent to kill and murder. At the day set for trial the accused failed to appear and his recognizance was taken and declared forfeited. Thereupon a *scire facias* issued against the surties. Upon the trial of the *scire facias,* the sureties in defense to a judgment against them upon their bond contended that at the time of the forfeiture of the bond and for a long time prior thereto the principal was in another state, sick and disabled and could not be removed nor brought and surrendered to the trial court without great danger of the loss of his life. The court sustained a demurrer to the plea, ruling that the fact that the principal was ill in anoher state was not sufficient to discharge the surety on the bond.[4] Nor is it an answer to a *scire facias* on a recognizance that a principal is confined in another county or another state on a different charge.[5] Of course, the purpose of a recognizance is in its essence to insure the appearance of the person accused of the offense and not to penalize the sureties or provide for a source of revenue to the state.[6] But it is nevertheless settled law that bail will only be exonerated where the performance of the condition is rendered impossible by act of God, by act of the obligee, or by law, but the exoneration even within these three classes is limited and restricted. Where the principal dies before the day of performance, the case is within the first category; where the court before which the principal is bound to appear is abolished without qualification, the case is within the second; if the principal is arrested in the state where the obligation is given and sent out of the state by the governor, upon the requisition of the governor of another state, it is within the third. However, when the bail of a party arrested have suffered him to go into another state, and while there he is, after forfeiture of the recognizance, delivered up upon the requisition of the governor of a third state for a crime committed in it, convicted and imprisoned in such third state, the bail are not discharged from liability on their recognizance on a suit by the state where the person was first arrested.[7] There has in this instance been no such act of law as will discharge the bail. Because the recognizance is strictly

4 Gingrich v. The People, 34 Ill. 448.

5 Mix v. The People, 26 Ill. 32.

6 The People v. Evanuk, 320 Ill. 336.

7 Taylor v. Taintor, 83 U. S. 366.

construed against the bail, the bail may take his principal when and where he pleases.[8] If this were not so the bail might often be exposed to great and unnecessary hazard.[9]

The doctrine that the bail may take his principal anywhere and return him for trial in the state wherein he was charged has been so firmly established that the Supreme Court of New York as early as 1810 confirmed the right of the bail to break open the outer door of the dwelling house to take the principal.[10] One Pierpont Edwards as surety together with Nicolls became obligated on a recognizance in New Haven, Connecticut. Nicolls removed to New York. At about 12 o'clock at night while Nicolls and his family were in bed, Ingersoll, agent for Edwards, and others demanded the house to be opened or they would break it open. Nicolls did not open the door and soon after they broke open the outer door, found Nicolls rising and commanded him to dress. They hurried him to the river, and pushed him into a boat without his hat or overcoat, which were afterwards brought to him. When Nicolls asked why he was treated in that manner, one Morgan said he had a bail-piece and authority to carry him to Connecticut. Nicolls thereupon sued Ingersoll for assault and battery and false imprisonment. The court in affirming the verdict and judgment rendered for the defendant by a jury in the trial court said: "The verdict authorizes us to presume that a demand was made before entry. . . . That the bail may break open the outer door of the principal, if necessary, in order to arrest him, follows, as a necessary consequence, from the doctrine that he has the custody of the principal; his power is anologous to that of the sheriff who may break open an outer door to take a prisoner, who has escaped from arrest."

In Illinois in case of *People* v. *Paulsen*,[11] the court said: "A surety who has entered into a recognizance for the appearance of one accused of crime is entitled to arrest such person at any place in the state." And it has been as definitely established that a person who enters into a recognizance for the appearance in court of a defendant may arrest and return such defendant wherever he may be found even though he be in another state, and the surety may authorize another to arrest the principal for the purpose of returning him.[12] The Illinois Statutes provide that "In all cases of bail, under this act, it

8 Ex parte Edward Lafonta, 2 Rob. 495; Ruggles v. Corey, 3 Conn. 419.

9 Parker v. Bidwell, 3 Conn. 84.

10 Nicolls v. Ingersoll, 7 Johns. 145.

11 146 Ill. App. 534.

12 Sallee v. Werner et al., 171 Ill. App. 96.

shall be lawful for the bail to arrest and secure the body of the principal, until a surrender can be made to the sheriff of the county where the suit may be pending or to the court to which the process was returnable and may, by indorsement upon the back of a duly certified copy of the bail bond, authorize any other person to arrest, secure and surrender the body of the principal."[13] And again the Illinois Criminal Code provides, "For the purpose of surrendering the principal, the sureties or any of them may arrest the principal at any place or may authorize any other person to make the arrest.[14] Also "the sureties or any of them may require the sheriff, coroner, or any constable of the county where the principal may be found, to make the arrest within his county, by producing a certified copy of the recognizance, and, in person or by agent, accompanying the officers to receive the person arrested.[15] On such surrender, and delivery to him of a certified copy of the recognizance, the sheriff or warden shall take such person into custody, and by writing, acknowledge such surrender, and thereupon the sureties shall be discharged from such recognizance, upon payment of all costs occasioned by any proceedings upon the recognizance."[16]

It cannot strongly be doubted that a surety on a bail bond may arrest his principal in another state and return him to the state where the bond requires his presence without resorting to extradition. We have seen that the courts have almost universally held that the principal, by his contract of bail, places himself voluntarily in the custody of his surety.

During the reign of the early common law, sureties were, to a great extent, gratuitous. They received no compensation for the risk undertaken. Hence the doctrine of *strictissimi juris* was involved. The contract of bail was construed in favor of the surety. That is why the courts allow the principal to contract with the surety so as to place himself within the custody of the surety. Normally, on principle of public policy, a man may not contract so as virtually to enslave himself. The authorities evolve the principle here expressed upon the doctrine of contract. It is said that the principal may permit the assertion of such rights by the surety to affect his, the principal's, freedom pending the trial.

But with the advent of the compensated surety need the doctrine asserted by the courts be so extensive in its operation?

[13] Cahill's Ill. Rev. St. 1931, ch. 16, sec. 18.
[14] Cahill's Ill. Rev. St. 1931, ch. 38, sec. 644.
[15] Cahill's Ill. Rev. St. 1931, ch. 38, sec. 645.
[16] Cahill's Ill. Rev. St. 1931, ch. 38, sec. 647.

A surety, under our present system of jurisprudence is generally remunerated for the risk he undertakes. If, as has been seen, the surety may enter the home of the principal to recapture and return him to the jurisdiction requiring his presence for trial, may such surety assert his rights in defiance of the officers of that other state? Consider the following example. The principal has left the jurisdiction wherein he has been charged, and the surety has recaptured him for the express purpose of returning him to the original jurisdiction. While under such custody the principal escapes and immediately commits a breach of the peace. Can it be said that the surety can claim the custody of the principal in defiance of the officers who arrest him for such breach of the peace? It is not logical that the sovereign right of the state should be subjected to a prior right possessed by the surety.

In fewer words, to what further extent may the surety assert himself as implied from the powers he now apparently possesses? The process should be one of restriction and not of expansion. The tendency of the Illinois Statute[17] is to alleviate to a degree the liability of the bail for the non-appearance of the principal when such non-appearance is not caused by the fault or negligence of the surety. Consequently, as the bail is protected, he need not assert the drastic powers as expressed in the early New York case above cited. The trend of decisions should foster the inhibition of such prerogatives. Courts may well follow the thought expressed in the Criminal Code of Illinois.

[17] Cahill's Ill. Rev. St. 1931, ch. 38, sec. 649(6).