BONDS: Sheriff has discretion only to determine
SHERIFFS: pecuniary responsibility of surety on bail
CRIMINAL LAW: bond, but cannot determine who may be surety. Refusal to allow responsible person to be surety may be remedied by mandamus or suit for false imprisonment.

October 27, 1950

11-1/50

Honorable Walter G. Kelly
Member
Missouri House of Representatives
9280 E. Breckenridge
Overland, Missouri

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Dear Sir:

This is in reply to your request for an opinion which we will reword for the sake of brevity.

> "I would like to ascertain what discretion the Sheriff has in accepting bonds in criminal cases. It is his custom to only approve certain bondsmen, although others are fully qualified, upon the theory that he may accept who he pleases and that is within his discretion. Likewise, he requires that the bondsmen have double the amount of the bond.
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> "Would appreciate receiving an opinion from you based upon the above inquiry."

In reply to your inquiry we believe the following statutes are applicable:

Section 3965, R.S. Mo. 1939:

> "When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment, or shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, or if the case is a misdemeanor, such officer may take bail, which in no case shall be less than one hundred dollars, and discharge

the person so held from actual custody."

Section 3966, R.S. Mo. 1939:

> "Sureties in recognizances in criminal cases and proceedings shall be residents of this state, and shall be worth over and above the amount exempt from execution, and the amount of their debts and liabilities, the sum in which bail is required; and the person or persons offered as sureties may be examined on oath in regard to their qualifications as sureties, and other proof may be taken in regard to the sufficiency of the same. The officer authorized to take any such recognizance is authorized to administer all necessary oaths in that behalf."

Section 3967, R.S. Mo. 1939:

> "Where more than one person is offered as sureties, they shall be deemed sufficient, if in the aggregate they possess the necessary qualifications. But no recognizance shall be taken unless the court or officer authorized to take the same shall be satisfied, from proof and examination on oath or otherwise, of the sufficiency of the sureties according to the requirements of this and the preceding sections."

In a very early New York case, People ex rel. Tully vs. Davidson, 67 Howard's Practice Reports (N.Y.) 416, l.c. 419, the Court held that the giving of bail constitutes a contract between the principal and his sureties, and the principal has a right to determine for himself whether he will assume the obligations of such a person or not. It cannot be imposed upon him against his will. * * * A prisoner is entitled to choose whether he will give any one else this dominion over him or will remain in the custody of the sheriff. * * * .

In the case of State ex rel. Garbutt vs. Charnock, 141 S.E. 403, 56 A.L.R. 1094, the Court considered the question of the exercise of discretion in determining the pecuniary ability of sureties to perform, and at l.c. 1097, stated as follows:

> "Were the sureties tendered pecuniarily able to fulfil the obligation? There is no question of their fitness otherwise. It is said that, in determining their ability to respond to the penal amount of the obligation, the clerk has discretion, which cannot be controlled by mandamus. It is quite true that the clerk exercises discretion in determining whether the sureties tendered are pecuniarily able to perform the obligation, if the condition be not performed according to the tenor thereof; but that discretion is not arbitrary and absolute. It must be reasonably and soundly exercised; otherwise, a clerk could always refuse to take unquestioned sureties, and successfully defend on the ground that he was exercising discretion, which could not be questioned. The result would be as pernicious as where excessive and impossible bail was required. The meaning of discretion generally is sound discretion. 'It must be governed by rule; it must not be arbitrary, vague, and fanciful, but legal and regular.' Rex v. Wilkes, 4 Burr. 2539, 98 Eng. Reprint, 334. See Rose v. Brown, 11 W. Va. 142.
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> "But, as we view the return, the nonacceptance of the sureties is not based on lack of their financial ability to perform, for their equities in the properties owned by them are far in excess of the penal sum of the recognizance (an averment supported by affidavits, and not attempted to be denied), but because

> there are liens which would be first in priority in case of sale by the state in satisfaction of the recognizance; not that the penal sum could not be realized, but because the liens would have precedence in case of sale by the state. This is not a sound reason on which rejection of the sureties can be based. It is fanciful and arbitrary. Fancied convenience is made to defeat a legal right to liberty. Under such a theory, a surety owning property worth $1,000,000 would be refused, because of a lien thereon, however, small and inconsequential.
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> "Under the familiar principle that discretion in the performance of a ministerial duty, where its exercise has been unsoundly and capriciously exercised will be controlled by mandamus, we have concluded to direct the peremptory writ as against the clerk, and without costs. See State ex rel. Hoffman v. Clendenin, 92 W. Va. 618, 29 A.L.R. 37, 115 S.E. 583; State ex rel. Noyes v. Lane, 89 W. Va. 744, 110 S.E. 180."
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> (Underscoring ours.)

Thus, we see that a sheriff is performing a ministerial duty when taking bail and he may not act in an arbitrary and unreasonable manner.

He does not have discretion to determine who may serve as bondsmen. The only question that the sheriff determines is the pecuniary ability of the sureties.

In your request you mention that the sheriff requires bondsmen to have double the amount of the bond. This is not a provision of law and the sheriff may not make such a requirement. Section 3966 only requires that the surety be worth over the amount in which bail is required.

The right to furnish bail in a reasonable amount is guaranteed by Sections 20 and 21 of Article I, Constitu-

tion of Missouri, 1945, which read as follow:

> "That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."
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> "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

In discussing these sections the Supreme Court of Missouri in the case of State ex rel. Corella vs. Miles, 303 Mo. 648, at l.c. 651, said:

> "Section 24, Article II, of the Constitution of Missouri, provides that any person charged with a felony, except in capital offense in certain cases, has a right to be released upon giving bail with sufficient sureties. It is a right of which a defendant cannot be deprived. (6 C.J. p. 953.)
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> "Section 25, Article II, of the Constitution of Missouri, provides that excessive bail shall not be required. The purpose of giving bonds is to secure the appearance of the defendant at trial, and when the Constitution forbids excessive bail it means that bail shall not be more than necessary to secure that attendance. (6 C.J. p. 989). * * * ."

Again, at l.c. 652, the Court said:

> "The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates Section 24, Article II, of the Constitution. For that is

> saying the offense is not bailable when the Constitution says it is."

In the event that the sheriff abuses his discretion in denying the right of persons in his custody to furnish bond with sureties of their own choosing, we believe that two courses are open for redress. In 35 Am. Jur. at page 54, the following rule is stated as to the use of mandamus to force the acceptance of sureties who are pecuniarily able to perform the obligation:

> "* * * Thus, the power of deciding the sufficiency of the affidavit to hold a defendant to bail and the amount of bail is a part of the judicial power of the court, and mandamus will not lie to re-examine its decision. But after the right to bail has been judicially determined, and the amount fixed, the determination of the sufficiency of the sureties and the taking of acknowledgment may be purely ministerial, and not judicial. It is quite true that the officer exercises some discretion in determining whether the sureties tendered are pecuniarily able to perform the obligation, if the condition is not performed according to the tenor thereof; but that discretion is not arbitrary and absolute. It must be reasonably and soundly exercised. If it is not, and as a consequence the sureties are rejected, mandamus will lie to compel their acceptance."

In the case of Baker vs. Tener, 112 S.W. (2d) 351, the Springfield Court of Appeals ruled that mandamus would lie to correct an abuse of discretion in setting an appeal bond at such an amount so as to, in effect, abrogate the right of appeal. At l.c. 355, the Court said:

> "It is the general rule that mandamus will lie where the inferior court re-

> fuses to exercise jurisdiction, or fails to exercise or perform some act requiring judicial discretion, but cannot be used to direct such inferior tribunal to exercise judicial discretion in any particular way. However, if there is a clear abuse of discretion by an inferior tribunal, then mandamus is the proper remedy to rectify the harm. * * * *."

Again, at l.c. 357:

> "After reviewing the case, we are of the opinion that the bond fixed by the judge of the probate court of Newton county, in the sum of $5,000 as a condition precedent to the appeal in the insanity proceedings filed against Nicholas Spangler was so excessive as to amount to an abuse of judicial discretion, and in effect abrogate respondent's right to appeal from the judgment of that court, and that therefore the writ of mandamus issued by the circuit court of Newton county was within the powers of that court, and that these powers, under the circumstances, were properly exercised."

Therefore, it would appear that the remedy of mandamus would be available in a case wherein the sheriff has abused his discretion in accepting sureties. In addition thereto, another remedy is available to those persons for whom bail has been refused by arbitrary and capricious action on the part of the sheriff. In 22 Am. Jur. at page 366, it is stated:

> "It is the duty of an officer or other person making an arrest to take the prisoner before a magistrate with reasonable diligence and without unnecessary delay; and the rule is well settled that

> whether the arrest is made with or without a warrant, an action for false imprisonment may be predicated upon an unreasonable delay in taking the person arrested before a magistrate or upon a denial of the opportunity to give bond, regardless of the lawfulness of the arrest in the first instance. * * * ."

In the case of Harbison vs. Chicago, R.I. & P.Ry. Co., 37 S.W. (2d) 609, 79 A.L.R. 1, at l.c. 613, the Court said:

> "The evidence tends to show that, after the search of the premises, the discovery of the intoxicating liquor, and the arrest of McCowan, under the search warrant by the deputy sheriff, defendant Filipczak requested and encouraged the deputy sheriff to lodge McCowan in jail and not permit him to give bond. Regardless of McCowan's guilt or innocence and regardless of the legality or illegality of his arrest, he had the lawful right to give bond. Const. art. 2, Sec. 24. The arrest was made at 11 o'clock in the forenoon. There was evidence that, as the sheriff and J. E. Kresse took McCowan to jail, they passed within 60 feet of the office of the justice of the peace who issued the search warrant; that McCowan was ready and able to give bond, so told the deputy sheriff, and requested that he be taken before the justice for that purpose; that they told McCowan they had no time to fool with him, denied his request, and lodged him in jail.
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> "It was the duty of the deputy sheriff to afford McCowan an opportunity to give bond, and, if he wrongfully denied him such opportunity his imprisonment thereafter was unlaw-

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> ful, and therefore false imprisonment for which the deputy sheriff would be liable. 25 C.J. 491, 495. * * * ."
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> (Underscoring ours.)

And, again, in Jackson vs. Thompson, 188 S.W. (2d) 853, the same rule was reiterated at l.c. 857:

> "Regardless of Jackson's guilt or innocence and regardless of the legality or illegality of his arrest, it was the duty of the constable to afford plaintiff an opportunity to give bond and if he wrongfully denied him such opportunity his imprisonment thereafter was unlawful, and therefore, false imprisonment for which the constable would be liable. * * * ."

For a sheriff to arbitrarily refuse to approve a surety on a bond is to effectively deny a right guaranteed by the Constitution. The right to furnish bail has been very much before the public recently. A fair sample of the sacredness of this right was given by Justice Jackson on the United States Supreme Court when he ordered that the top Communists of this Country be permitted to furnish bail pending appeal of their conviction. While recognizing the possible harm that those persons were capable of doing, he reiterated the position that the fundamental rights guaranteed all those in this Country must be preserved.

CONCLUSION

Therefore, it is the opinion of this department that a sheriff has discretion only to determine the pecuniary responsibility of the surety but does not have discretion to determine who may be a surety on a bail bond. Redress for refusal to allow a responsible person to become a surety may be had by mandamus and by a civil action for false imprisonment.

Respectfully submitted,

APPROVED:

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