LIABILITY: Sureties on bail bond conditioned for the appearance of
BAIL BONDS: defendant in court in a criminal proceeding at a given time are discharged from the obligations of the bond because of the fact that principal is confined in the State Penitentiary of Missouri, having been prosecuted and convicted of a second and different offense before date for appearance in accordance with provisions of the bond. March 13, 1951

3-20-51

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Honorable Ralph B. Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri

Dear Mr. Nevins:

We have your recent letter requesting an opinion of this department. Your letter is as follows:

> "One Loren M. Young was charged by complaint in Magistrate Court of Hickory County with crime of armed robbery and upon preliminary examination was bound over to Circuit Court and on November 20th, 1950, filed application for change of venue and change was granted to Greene County and was to have appeared on January 8th, 1951 in the Circuit Court of Greene County, but on that date was in jail at Harrisonville, Missouri, on a charge of assault with intent to kill, and burglary and larceny charges. Judge Collinson of the Circuit Court of Greene County set the case for trial on January 29th, 1951, and the defendant Loren M. Young did not appear as he had entered a plea of guilty to the charges in Cass County on the 13th day of January, 1951, and was incarcerated in the State Penitentiary at the date he was to appear for trial in Greene County.
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> "The crime for which he is now serving sentence in the State penitentiary was committed subsequent to the giving of bond in Hickory County on November 20th, 1950, for his appearance in Greene County circuit court on January 8, 1951.
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> "Is the state entitled to a forfeiture of the recognizance or are the sureties entitled to release due to the fact that the defendant is in the State Penitentiary of Missouri?"

Honorable Ralph B. Nevins

Section 544.640, RSMo 1949, pertaining to the forfeiture of recognizances, reads as follows:

> "If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."
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> (First underscoring ours.)

The question immediately occurs, in connection with the section just quoted, as to what constitutes such sufficient cause or excuse for the failure of the defendant to appear at the trial at the time designated as to relieve the sureties on the bail bond from liability. There are several cases which set up three types of excuses that are acceptable. There are such cases in different states and both in the state and Federal courts. One of the most recent cases is the Missouri case of State v. Wynne, 204 S.W. (2d) 927, 356 Mo. 1095. We quote as follows from the opinion of the court in that case at S.W. l.c. 929:

> "The courts generally hold that the sureties are discharged as a matter of law when the return of the defendant is prevented by (1) an act of God; (2) an act of the law; (3) an act of the obligee, the state where the criminal charge is pending. (Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Id., 36 Conn. 242, 4 Am. Rep. 58; 8 C.J.S., Bail, § 76, p. 147.) * * * * "

We shall consider the questions, first, as to whether or not, when subsequent to arraignment on one charge and the execution of a bond conditioned for the appearance of the defendant in court at a given time the defendant is arrested and prosecuted in another county in this state and convicted and confined in the penitentiary, all prior to the date fixed

in the bond for his appearance in court for trial for the first offense, his failure to appear at said trial is due to an act of the law; and second, whether or not, under such circumstances his failure to appear is also due to an act of the obligee, the state where the criminal charge is pending.

We find Missouri authority for the proposition that in cases in which the arrest, conviction and imprisonment for the second offense occurs in a state other than Missouri, the defendant's imprisonment and consequent inability to attend the Missouri trial does not relieve the sureties of liability. This is the case of State v. Horn, 70 Mo. 466, the following is a quotation from the opinion of the court at l.c. 467:

> " * * * The defense was that Horn was prevented from performing the conditions of the recognizance by reason of his arrest in Illinois and his trial and conviction and sentence to the penitentiary of that State. This defense was held invalid. This was so held, in accordance with the opinion of the circuit court of the United States in United States v. Van Fossen, 1 Dill. C. C. 406, and of the Supreme Courts of Tennessee in Devine v. The State, 5 Sneed, 623, and of Connecticut in Taintor v. Taylor, 36 Conn. 242. As we concur in these opinions it is unnecessary to examine the questions decided and therefore affirm the judgment. * * * * "

After research, however, we have been unable to find any case in which any Missouri appellate court has discussed circumstances under which the conviction and imprisonment for the second offense was in and resulting from an action arising in another county of the State of Missouri. We are of the opinion that there is a definite distinction between the two sets of circumstances for the reason that in a case in which the defendant is tried and convicted of a second offense by a court in another county of Missouri before the day for his appearance at the trial for the first offense that trial and conviction and imprisonment in the penitentiary is an act of the State of Missouri, executed pursuant to the law of the state, and is, therefore, an act of the law, and also that trial and conviction and imprisonment is an act of the State of Missouri, the obligee in the bond which was given for the appearance of the defendant at the proposed trial for the first offense. And while it is true as above stated that we find no Missouri case passing upon this set of circumstances, we do find cases from other jurisdictions.

In the case entitled In Re James, decided by the United States Circuit Court of the Western District of Missouri, reported in 18 Fed. 853, the circumstances, although slightly different from the set of circumstances before us for consideration, nevertheless involved the same legal principle which is under consideration in this opinion, whereas we have before us a situation in which the second arrest was made and the prosecution, conviction and confinement in the penitentiary obtained by the officials representing the State of Missouri in another Missouri county, which said arrest, conviction and confinement rendered it impossible for the sureties on the bail bond, given to assure the attendance of the defendant at a trial pursuant to the first arrest also in this state, to produce the defendant in court according to the provisions of the bond. The James case above cited was a case in which, subsequent to the giving of a bail bond for appearance in a Missouri court conditioned for the appearance of the defendant Frank James at the state court trial, the Federal authorities arrested James and sought to take him to Alabama to be tried in a Federal court located in Alabama, and the sureties on the bond conditioned for the appearance of James in the Missouri state court instituted a proceeding in the United States Circuit Court for the Western District of Missouri to prevent the United States Marshal from taking James out of the state and seeking the transfer of custody of the prisoner from the Federal authorities to the sureties in the state court bond in order that they might produce the prisoner at the trial in the Missouri court. The United States Circuit Court in its opinion held that the proposed act of the Federal authorities in taking the defendant James out of Missouri, which act would render it impossible for the sureties on the bail bond to deliver him for trial in the Missouri state court, was "an act of the law" within the meaning of the authorities, which act of the law would prevent the sureties from procuring the attendance of James at the trial in the state court, and that said "act of the law," therefore, would result in the release of the sureties from the obligations of the bond. The Federal circuit court, however, turned the defendant over to the state court on another ground. The court, after quoting the Missouri statute, supra, discussed the question of the release of the sureties as follows, l.c. 858:

"It is claimed that the terms employed, 'without sufficient cause or excuse,' were intended to meet cases like the present. The intention of the section in the main would seem to be to lay down definite rules for declaring forfeitures or recognizances and for proceedings to enforce them. Without undertaking to give a definite construction to the section of the statute under consideration, I strongly incline to the opinion that it applies to the present case. But whether it does or not, my views, aside from the statute, are that in a case where the bondsmen are not charged or being chargeable with neglect, and a court of competent jurisdiction wrested the prisoner from them, that this is, in the language of the authorities, 'an act of the law,' and can be set up in defense to a suit on the bond. The sureties being able to do this, they cannot be injured by the removal. So far, then, as the sureties of James are concerned, treating their obligation from a mere legal standpoint, they incur no responsibility, and their obligations and rights do not stand in the way of a removal. But it is otherwise with the state. Its release has already been discussed, and the implied rights of the state shown. These rights sufficiently appear and are brought to the attention of the judge by the joint jailers, the sureties, and cannot be ignored."

In the case of People v. Meyers, 8 P. (2d) 837, a California case, the defendant, who was obligated to appear at a trial in Oakland, was arrested in San Francisco and tried and convicted for another offense prior to the date for appearance in Oakland in answer to the first charge. The following is a quotation from the opinion of the Supreme Court of California at l.c. 838 of 8 P. (2d):

> "The obligation assumed by defendants to produce the accused was absolute, and there is no room for interpretation of the contract. The sole defense was impossibility of performance, and the contention is that performance was prevented by operation of law and by act of the other party to the contract. Since the other party is, in this case, the state, the two excuses become one. There is, of course, no doubt as to the sufficiency of an excuse for performance by sureties upon such grounds. County of Los Angeles v. Maga, 97 Cal. App. 688, 276 P. 352; 3 Williston, Contracts, § 1944.
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> "Certain principles relating to such a situation have been the subject of judicial consideration in this state and elsewhere. One is that the mere arrest and incarceration of a person released on bail does not exonerate the bail, if the accused is at liberty subsequently and at the time he is required to appear on the first charge. In such case performance by the sureties is possible. County of Los Angeles v. Maga, supra. If, however, he is still in custody at the time of the hearing on the first charge, the liability of the sureties is, under some of the authorities, suspended, and, under others, wholly exonerated. But all are substantially in accord on the point that during the custody the surety cannot perform and the bail cannot be forfeited. See McDonald v. Commonwealth, 213 Ky. 570, 281 S.W. 538, 45 A.L.R. 1034; State v. Funk, 20 N.D. 145, 127 N.W. 722, 30 L.R.A. (N.S.) 211, Ann. Cas. 1912C, 743; Belding v. State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26; 3 Williston, Contracts, § 1944. Although our Penal Code, § 1567, permits the bringing of an imprisoned person before a court upon its order, there is nothing in the section

> nor in the cases construing it to indicate whether a bondsman could avail himself of its provisions. But it is unnecessary to consider the meaning of this statute, in view of the facts of the instant case. We are satisfied that on principle, and under the better authorities, the incarceration of Mrs. Breed operated to suspend the liability of defendants. Such, apparently, was the view of the court, since no attempt was made to forfeit the bail during the time of her imprisonment.
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> "In order to give judgment for plaintiff, this court would have to hold that the act of a creditor which deliberately attempts to make performance impossible does not impair the right of that creditor to demand full performance of the other party, where, by the exercise of extraordinary efforts and the disregard of obvious hazards, the latter may later find it possible to perform. We are not prepared to lay down such a rule. The delay and unusual hazards caused by the deliberate act of the creditor is a sufficient excuse. The state, acting through its officers in one county, cannot hold defendants liable for failure to perform, when such performance was delayed, hindered, and finally made, for all practical purposes, impossible, by the state acting through its officers in another county."
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> (Underscoring ours.)

We direct attention to the fact that this opinion holds that the sureties are relieved both because the act of the state in prosecuting, convicting and imprisoning the defendant for the second offense was an act of the law, and because the act of the state in so doing was an act of the obligee in the bond.

We also quote from the case of Scrivner v. State, 48 P. (2d) 332, l.c. 333:

> " * * * Where one is charged with crime and gives and executes bond for his appearance with surety, or has been convicted of crime

> and executes an appeal bond with surety, conditioned upon his appearance in court and submitting to the judgment of the court, if affirmed, and afterwards is arrested and kept in custody on another crime in the same jurisdiction and by the same authorities, and thereby prevented from appearing according to the condition of his bond and submitting to the judgment of the court, and his sureties are thereby rendered unable to produce the principal in court to submit to said judgment, they are thereby exonerated as such sureties. (State of) North Dak. v. Funk, 20 N.D. 145, 127 N.W. 722, 30 L.R.A. (N.S.) 211 (Ann. Cas. 1912C, 743); Woods v. State, 51 Tex. Cr. 595, 103 S.W. 895; People v. Robb, 98 Mich. 397, 57 N.W. 257.'"

We are of the opinion that these holdings by the two courts above mentioned, in the absence of any Missouri authority to the contrary, justify us in the opinion that where, after a defendant has given bond to appear at a trial for one offense in the State of Missouri and is subsequently prosecuted, convicted and imprisoned by the State of Missouri in an action arising in another county before the date for his appearance at the first trial, the circumstances warrant the release of the sureties on the bond for appearance at the trial for the first offense from all further liability.

CONCLUSION

We are accordingly of the opinion that the sureties on the bond executed by Loren M. Young on November 20, 1950, in Hickory County, Missouri, are not liable under said bond for the reason that at the date of the proposed trial, when the defendant was to appear, he was imprisoned in the state penitentiary as a result of his prosecution in Greene County, Missouri, which prosecution was subsequent to the execution of the bond in Hickory County, and due to said imprisonment could not appear at the designated time for trial in the Circuit Court of Hickory County.

Respectfully submitted,

APPROVED:

C B B

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