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BAIL: DEVELOPMENTS IN THE AREAS OF FORFEITURE AND REMISSION

I. Introduction — A Procedural Glimpse at Forfeiture

To lawyers, defendants, and sureties, the law of forfeiture and remission of criminal bail bonds has proved particularly perplexing. This complexity in practical application has resulted primarily from a highly diverse treatment of the subject among the various jurisdictions. Characteristic of this diversification has been the notable absence of hard and fast rules governing remission, and the substitution instead of a system relying on the sound discretion of the judiciary.[1] Often this has resulted in an *ad hoc* treatment with serious consequences to the principal and his surety.[2] While this expansion of discretion has culminated in a discernible trend towards broader relief from a forfeiture, its analysis in terms of predictability has at times proved difficult. Notwithstanding this diversity, the subject of forfeiture and remission remains susceptible to some critical evaluation in terms of practical consequences to the principal and his surety.

The procedural aspect of a bail bond forfeiture has been generally standardized by statute into a mandatory court declaration or order of forfeiture upon the principal's noncompliance with any of the conditions of the bond or recognizance.[3] The forfeiture statute of Oklahoma is typical in this regard:

> If without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond or undertaking, either for hearing, arraignment, trial, or judgment, or upon any other occasion when his presence in court or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court *must* direct the fact to be entered upon its minutes, and the recognizance, bond or undertaking of bail or the money deposited instead of bail, as the case may be, is and shall be thereupon declared forfeited.[4]

Following the court declaration of forfeiture, the district attorney or state prosecutor should promptly[5] file with the court a petition stating the facts surrounding the principal's default which entitle the state to recover on the bond. The trial or district court in turn will issue a citation or other process in the nature of a *scire facias,* directing the principal (if available) and his surety to appear in

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1 Nearly all states, through so-called "remission statutes," have reposed some degree of discretion in the trial court either to set aside or to remit the penalty of a forfeited bail bond. The federal district courts in particular by virtue of FED. R. CRIM. P. 46(f)(2),(4), *infra* note 12, have wide discretion in this area of law.

2 In State v. Henderson, 356 Mo. 1072, 204 S.W.2d 774 (1947), the Supreme Court of Missouri refused to set aside a bond forfeiture where defendant's tardiness of 30-40 minutes caused a delay in the trial. In Taggart v. Linn County, 218 Ore. 94, 343 P.2d 1115 (1959), the Oregon Supreme Court upheld a remission of $1937 out of a total $2500 forfeiture in spite of the fact that the principal was not surrendered in court until some fourteen months after his default.

3 A recognizance differs from an ordinary bail bond in that it is a formal obligation of record entered into before the court and need not be signed by either the principal or his surety. A bail bond, on the other hand, is a contractual obligation under seal signed by the principal and his surety. The purpose and effect of the two obligations, however, are identical, and they will be used interchangeably throughout this article without regard to the technical distinction between them.

4 OKLA. STAT. ANN. tit. 22, § 1108 (1951). (Emphasis added.) For examples of comparable legislation see: CAL. PEN. CODE § 1305; ILL. ANN. STAT. ch. 16, § 37 (Smith-Hurd Supp. 1964); IND. ANN. STAT. § 9-3731 (Supp. 1964); MO. ANN. STAT. § 544.640 (1953); N.Y. CODE CRIM. PROC. § 593; ORE. REV. STAT. § 140.610 (1963). *But see* OHIO REV. CODE ANN. § 2937.35 (Supp. 1964), (order of forfeiture upon principal's default is permissive in the court's discretion).

5 The function of the *scire facias* proceeding is primarily to adjudicate the state's claim of liquidated damages for breach of contract and not to allow the surety sufficient time in which to search for and apprehend the defaulting principal. See People v. Johnson, 395 P.2d 19, 22 (Colo. 1964). A serious delay in the declaration of forfeiture following default may also operate to discharge the defendant and his surety from further obligation depending on the express terms of the bond. *Cf.* Commonwealth v. Miller, 189 Pa. Super. 345, 150 A.2d 585, 588 (1959).

court on a designated date and show cause why a final judgment of forfeiture should not be entered against them. It is generally during this intervening stage between the declaration of forfeiture and entry of final judgment that the defaulting defendant and his surety must present to the court their respective motions either to set aside the forfeiture by reason of a valid excuse or defense, or to remit the forfeiture, either partially or totally, due to some mitigating or extenuating circumstances in their behalf.[6] It the trial court at the termination of this civil proceeding[7] has neither set aside nor remitted the penalty of the forfeited bond or recognizance, it will enter a final judgment of forfeiture upon which execution can then issue. Remission of the forfeiture subsequent to the entry of final judgment will generally depend on statutory provision.[8]

II. Statutory Innovation — A Discretionary Approach towards Remission

Statutory inroads into the area of remission of bail bond forfeitures dominate the scene. Congress and most state legislatures have entrusted the remission of forfeitures to the "sound and reasonable" discretion of the trial court.[9] In *State v. Konvalin*,[10] the Supreme Court of Nebraska aptly characterized the nature of the trial court's statutory discretion: "The authority given to the district court to remit a part or all of the penalty of a bail bond is a sound discretion to be exercised not arbitrarily or capriciously but with regard to what is right and equitable under the circumstances and the law, directed by reason and conscience to a just result."[11] The distinctions between the various "remission statutes" will thus vary according to the legislative standards and conditions under which the trial courts must exercise their discretion. The results, of course, are quite diverse, varying from the extreme liberality of FED. R. CRIM. P. 46(f)(2),(4),[12] to the strictness of the Texas rule which articulates the only conditions under which a court will either set aside or remit a forfeiture.[13]

6 Jurisdictional time limitations as to the *scire facias* proceeding will vary accordingly, but generally fluctuate between 20-90 days. *E.g.*, Arizona (10 days), ARIZ. SUP. CT. (CRIM.) R. 72; California (90 days), CAL. PEN. CODE § 1305; Illinois (30-90 days), ILL. ANN. STAT. ch. 16, § 37 (Smith-Hurd Supp. 1964); Iowa (60 days), IOWA CODE ANN. § 766.6 (1950); New York (one year), N.Y. CODE CRIM. PROC. § 598; Ohio (20-30 days), OHIO REV. CODE ANN. § 2937.36(c) (Supp. 1964); Oregon (30 days), ORE. REV. STAT. § 140.620 (1963); Washington (60 days), WASH. REV. CODE § 10.19.100 (1961).

7 In nearly all jurisdictions the forfeiture proceeding is neither an adjudication of guilt nor a continuation of the original criminal proceeding against the accused, but solely a civil determination as to the liability of the defendant and his surety to the state for breach of contract. State *ex rel.* Ronan v. Superior Court in and for the County of Maricopa, 96 Ariz. 229, 393 P.2d 919, 920 (1964); State v. United Bonding Ins. Co. of Indianapolis, Ind., 244 La. 716, 154 So.2d 374, 378 (1963); Hargrove v. State *ex rel.* Dennis, 396 P.2d 675 (Okla. Crim. 1964). *Contra,* Hood v. State, 237 Ark. 304, 372 S.W.2d 588 (1963).

8 *E.g.*, FLA. STAT. ANN. § 903.28 (Supp. 1964); N.H. REV. STAT. ANN. § 597:32 (1955); N.C. GEN. STAT. § 15-116 (1953); OHIO REV. CODE ANN. § 2937.39 (Supp. 1964).

9 See, *e.g.*, United States v. D'Argento, 339 F.2d 925, 928 (7th Cir. 1964); Bryan v. State, 156 So.2d 885, 887 (Fla. App. 1963).

10 165 Neb. 499, 86 N.W.2d 361 (1957).

11 *Id.* at 362. Nebraska has adopted FED. R. CRIM. P. 46(f)(2),(4), *infra* note 12. In a similar case, State v. Seaton, 170 Neb. 687, 103 N.W.2d 833 (1960), the Supreme Court reversed the trial judge's decision for refusing to exercise his discretion in remitting at least part of the defendant's bail bond where the surety diligently but belatedly surrendered his principal in open court with minimal expense to the state as a result of the default.

12 FED. R. CRIM. P. 46(f):

> (2) The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. . . .
>
> (4) After entry of such judgment [if the forfeiture has not been set aside under subsection (2), a judgment of forfeiture is to be entered], the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

13 TEX. CODE CRIM. PROC. ANN. art. 436 (1954):

> The following causes, and no other, will exonerate the defendant and his sureties from liability upon the forfeiture taken:

Slightly over one-fifth of the American jurisdictions confide this remission power in the trial judge without any specific external limitations other than the standards of reasonableness and fairness in consideration of all the accompanying circumstances of the case.[14] The comparative latitude of the judge's discretion in this category[15] is obvious, yet the appellate courts have consistently refused to overturn the trial court's decision unless it represents a clear abuse of discretion overriding all bounds of reason. The statute of Minnesota typifies the broad extent of this discretion reposed in the trial court:

> When any action shall be brought in the name of the state against a principal or surety in any recognizance entered into by a party or witness in any criminal prosecution, and the penalty thereof shall be adjudged forfeited, the court may, upon application of any party defendant remit the whole or any part of such penalty, and may render judgment thereon for the state, according to the circumstances of the case and the situation of the party, and upon such terms and conditions as it may deem just and reasonable.[16]

The majority of state legislatures, however, have refused to yield the power of remission to this seemingly unrestricted discretion of the trial court, and have imposed specific limitations and conditions which must be met before the court in its discretion can grant relief. The range of variations is again manifold. Many jurisdictions, mindful of the proper function of a bail bond,[17] have conditioned the remission of a forfeiture to the trial court's discretion only upon a reapprehension or voluntary surrender of the principal within a reasonable or statutory period of time following the order or judgment of forfeiture, together with a mandatory setoff from the remission of all costs and expenses occasioned to the state by the principal's default.[18] This particular class of legislation may be designated as the

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> 1. That the recognizance or bail bond is, for any cause, not a valid and binding undertaking in law. . . .
>
> 2. The death of the principal before the forfeiture was taken.
>
> 3. The sickness of principal or some uncontrollable circumstance which prevented his appearance at court, and it must, in every such case, be shown from his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties unless such principal appear before final judgment on the recognizance or bail bond to answer the accusation against him, or show sufficient cause for not so appearing.
>
> 4. Failure to present an indictment or information at the first term of the court which may be held after the principal has been admitted to bail, in case where the party was bound over before indictment or information, and the prosecution has not been continued by order of the court.

The Texas legislature, however, has relegated remission to the courts' discretion in the instance where the principal has been arrested before entry of final judgment of forfeiture. See TEX. CODE CRIM. PROC. ANN. art. 439 (1954).

14 See, *e.g.*, CONN. GEN. STAT. REV. § 54-74 (Supp. 1964); MINN. STAT. ANN. § 629.59 (1947); N.H. REV. STAT. ANN. § 597:33 (1955); N.C. GEN. STAT. § 15-116 (1953); OHIO REV. CODE ANN. § 2937.39 (Supp. 1964); VT. STAT. ANN. tit. 13, § 7568 (1958); W.VA. CODE ANN. § 6242 (1961). See also FED. R. CRIM. P. 46(f)(2),(4) *supra* note 12.

15 The classification of various state statutes into categories is for purposes of clarification and explanation, and is in no way intended to be an exclusive delineation of the same since many state statutes may overlap into two or more categories. See, *e.g.*, ILL. ANN. STAT. ch. 16, § 37 *et seq.* (Smith-Hurd Supp. 1964).

16 MINN. STAT. ANN. § 629.59 (1947).

17 > The primary purpose of bail in a criminal case is not to increase the revenue of the state or to punish the surety but to insure the prompt and orderly administration of justice without unduly denying liberty to the accused whose guilt has not been proved . . . by placing him in the protective custody of a surety — a jailer of his own choosing — to insure his presence for trial at the call of the court without in any way delaying, impairing, or unduly burdening the administration of justice or in any manner prejudicing the state in its prosecution.

Shetsky v. Hennepin County, 239 Minn. 463, 60 N.W.2d 40, 46 (1953).

18 "Surrender and cost" jurisdictions, *e.g.*, COLO. REV. STAT. ANN. § 39-2-18 (1953); IOWA CODE ANN. § 766.6 (1950); ME. REV. STAT. ANN. ch. 115, §§ 7, 11 (Supp. 1963);

"surrender and cost" statute of which the Iowa Code is representative:

> Such judgment [of forfeiture] shall never be set aside unless, within sixty days from the date thereof, the defendant shall voluntarily surrender himself to the sheriff of the county, or his bondsmen shall, at their own expense, deliver him to the custody of the sheriff within said time, whereupon the court may, upon application, set aside the judgment and in such event the original appearance bond shall stand and the court may order refund of the amount of the judgment paid into the office of the clerk of the court. Such judgment, however, shall not be set aside unless as a condition precedent thereto the defendant and his sureties shall have paid all costs incurred in connection therewith.[19]

The advantages incident to such a statutory provision are obvious, for it places a premium on the surety's diligence and efforts in tracing and apprehending a defaulting principal, which is generally a potent factor in swaying the favorable discretion of the trial court.[20]

On the other hand, the promulgation of the "surrender and cost" statutes has precipitated mild disagreement in some jurisdictions which feel that such statutes provide little incentive or diligence in the first instance in preventing a principal's default, and create a situation where the defendant or his surety may acquire relief from a forfeiture at a predetermined price, limited to the cost and expense of the prosecution as a result of the default.[21]

A refinement of the "surrender and cost" statute, adopted by many jurisdictions, is what may be appropriately designated the "satisfactory excuse" statute, which will prove efficacious to the defendant and his surety only upon an affirmative showing of reasonable grounds for defendant's non-appearance. To invoke the discretion of the court under this statute the principal and surety must present a sufficient legal excuse or explanation of the principal's default, either at the time of non-appearance or at a later stage of the proceedings following the principal's reappearance in court. This provision seems to be the most prevalent among the American jurisdictions.[22]

The basis of this statutory refinement seems to be general reluctance on the part of some legislatures to entirely abandon the common law emphasis on the willfulness of the principal's default as a factor in the denial of remission. To such jurisdictions a satisfactory excuse and willful default are incompatible concepts and the existence of the latter would preclude relief.[23] As a consequence some courts have espoused this notion of willfulness at the expense of the recent trend towards liberality of relief where the terms of the bail bond have been substantially complied with, irrespective of the original willful default.[24] Where lack of willfulness becomes a requisite element, however, the trial court's discretion can

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MASS. ANN. LAWS ch. 276, §§ 69-70 (1956); MISS. CODE ANN. § 2493 (1956); MO. ANN. STAT. § 544.610 (1953); MONT. REV. CODES ANN. § 94.8706 (1947); ORE. REV. STAT. §§ 140.620, 140.650 (1963).

19 IOWA CODE ANN. § 766.6 (1950). For interpretation of § 766.6, see State v. Shell, 242 Iowa 260, 45 N.W.2d 851 (1951).

20 See McCrosky v. State, 235 Ark. 629, 361 S.W.2d 266 (1962); State v. Heslin, 389 P.2d 892, 895 (Wash. 1964). *But see* People v. Johnson, 395 P.2d 19, 23 (Colo. 1964).

21 See, *e.g.*, United States v. Ciena, 195 F. Supp. 511, 512 (S.D.N.Y. 1961); State v. Hinojosa, 364 Mo. 1039, 271 S.W.2d 522, 524 (1954); *Cf.* Public Service Mut. Ins. Co. v. State, 135 So. 2d 777, 779 (Fla. App. 1961).

22 *E.g.*, MD. ANN. CODE art. 26, § 33(b) (1957): "In all cases the court shall have the discretionary power to strike out the forfeiture of bond or collateral where the defendant can show reasonable grounds for his non-appearance." See also ARIZ. SUP. CT. (CRIM.) R. 74 (1956); ARK. STAT. ANN. § 43-724 (1964); MISS. CODE ANN. § 2491 (1956); MONT. REV. CODES ANN. § 94-8704 (1947); N.Y. CODE CRIM. PROC. § 594; OKLA. STAT. ANN. tit. 22, § 1108 (1951).

23 See, *e.g.*, State v. Scott, 371 P.2d 704 (Okla. 1962).

24 State v. Scott, *supra* note 23, at 707. People v. Continental Cas. Co., 301 N.Y. 79, 92 N.E.2d 898, 901-02 (1950). The contrary view, however, seems prevalent today. *E.g.*, Smaldone v. United States, 211 F.2d 161 (10th Cir. 1959); Dudley v. United States, 242 F.2d 656 (5th Cir. 1957); Bryan v. State, 156 So. 2d 885 (Fla. App. 1963). *Accord,* State v. Seaton, 170 Neb. 687, 103 N.W.2d 833 (1960).

be operative only upon a clear demonstration of facts which would tend to exonerate an otherwise willful default.[25]

A few jurisdictions have attempted to limit further the exercise of the trial court's discretion to specifically enumerated instances by a rather concise categorization of the legal defenses and excuses under which a forfeiture can be set aside. Remission under this classification will generally not depend on the court's discretionary determination as to whether the principal or surety have shown reasonable grounds for exoneration, but rather upon their meticulous compliance with the conditions set forth in the statute. The Texas statute set out earlier in Part I is a prime example of this class of legislation.[26] While the efficacy of any "pigeon hole" classification may at times be seriously questioned, the results obtained under the Texas provision appear to be just.[27]

Similarly, a few other states have used this comprehensive scheme of conditions, exemplified by the Texas statute, as conditions precedent to a *right* of remission. The granting of remission in this context has been relegated beyond the immediate discretion of the trial court under so-called "mandatory remission" statutes.[28] While the extent of remission still remains a matter of discretion, the fact of remission itself has become a right and not merely a privilege upon compliance with the statute. Other seemingly detrimental or prejudicial factors surrounding the default will probably be reflected in the extent of remission granted. Idealistically, however, these statutes seem to represent a welcome trend in the law of bail, since they significantly diminish the conception of an unintentional default as an essential element in remission and emphasize the position of the bail surety and bondsmen who as a rule ultimately bear the brunt of a forfeiture. Realistically, the latter can no longer act as "substitute jailors" to effectively restrain a principal who intends to default.

The 1963 amended California Criminal Code exemplifies this departure from discretion, and its consequential change of emphasis:

> But if at any time within 90 days after such entry [of forfeiture] in the minutes, the defendant and his bail appear, and satisfactorily excuse the defendant's neglect or show to the satisfaction of the court that the absence of the defendant was not with the connivance of the bail, the court *shall* direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just. If within said 90 days after such entry in the minutes, it be made to appear to the satisfaction of the court that the defendant is dead or is physically unable, by reason of illness or insanity, or by reason of detention by civil or military authorities, to appear in court at any time during said 90 days, and that the absence of the defendant was not with the connivance of the bail, the court *shall* direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.[29]

Analogous to the "mandatory remission" statutes is the recent judicial interpretation placed on FED. R. CRIM. P. 46(f)(2),(4) by the Seventh Circuit Court of Appeals. The specific language of this rule confides remission to the discretion — the "sound and reasonable" discretion — of the district court, which may set aside or remit a forfeiture on its own terms if "justice does not require the enforcement of the forfeiture."[30] Judge Castle, speaking for a unanimous court in *United States*

25 The factor of the defendant's willful default still permeates the thinking of many recent court decisions in determining the question of remission. See, *e.g.*, Central Cas. Co. v. State, 233 Ark. 602, 346 S.W.2d 193 (1961); Allegheny Mut. Cas. Co. v. State, 234 Md. 278, 199 A.2d 201, 204 (1964); State v. Arrington, 131 S.E.2d 382, 386-87 (W.Va. 1963).

26 TEX. CODE CRIM. PROC. ANN. *supra* note 13; WIS. STAT. ANN. § 264.24 (1957).

27 See Prescott v. State, 363 S.W.2d 937 (Tex. Crim. App. 1963).

28 See, *e.g.*, CAL. PEN. CODE § 1305; FLA. STAT. ANN. §§ 903.26, 903.28 (Supp. 1964); ILL. ANN. STAT. ch. 16, § 37(f) (Smith-Hurd Supp. 1964); LA. REV. STAT. §§ 15:107, 15:109 (Supp. 1964). Other states have made remission mandatory under a more limited set of circumstances. IND. ANN. STAT. § 9-3733 (Supp. 1964); KY. REV. STAT. ANN. § 425.090 (1963).

29 CAL. PEN. CODE § 1305. (Emphasis added.)

30 FED. R. CRIM. P. 46(f)(2),(4) *supra* note 12.

v. D'Argento[31] seems to have extended the liberality of FED. R. CRIM. P. 46(f)(2), (4) beyond the expectations of its drafters.[32] The court took the position that a remission of forfeiture is mandatory in all cases where justice does not specifically require the forfeiture.[33] The "requirements of justice" are the guidelines of the court, and "it is only where justice requires enforcement that discretion can operate to determine the degree or extent of enforcement and what, if any, conditions are to be imposed."[34] Adoption of the Federal Rule, however, has remained sporadic throughout the states with only a few jurisdictions espousing it in its entirety.[35]

III. Exoneration from Forfeiture — Legal Defenses and Excuses

A. *At Common Law*

At common law the standard of remission centered around the absence of a willful default by the principal.[36] The principal's intention to evade justice or even his unexplained absence from court when his appearance was required generally precluded any form of relief to him and his surety irrespective of other mitigating circumstances.[37] The undertaking of a bail bond or other form of recognizance proved a rough proposition for the unwary surety, who in effect assumed a strict liability for his principal's prompt appearance in court. The surety was literally a substitute jailer.

Thus without a satisfactory excuse for his principal's nonappearance, the surety's liability as obligor on the bail bond would immediately accrue; yet the surety at common law was seriously restricted in the explanations he could offer in defense of his bond. The common law courts confined his defenses to those which would render performance of the bond conditions virtually impossible, and narrowly construed these to three, an act of God, an act of the obligee, and an act of the law.[38] If the surety failed to fit his explanation of the accused's default into one of these "pigeon holes," the default was deemed willful and relief was accordingly denied.[39] The surety's good faith, diligence, and expense incurred in attempting to apprehend the defaulting principal, the latter's subsequent surrender, or even

31 339 F.2d 925 (7th Cir. 1964).

32 The Advisory Committee on the Federal Rules of Criminal Procedure had amended former 18 U.S.C. § 601 to increase substantially the discretion of the district court in the area of remission. The former statute gave the district court the power of remission only in cases where the defendant's default was other than willful, and where, despite the default, a trial of the case could still be effectuated.

33 United States v. D'Argento, 339 F.2d 925, 928 (7th Cir. 1964).

34 *Ibid.*

35 *E.g.*, DEL. SUPER. CT. (CRIM.) R. 46(f)(2),(4) (1953); NEB. REV. STAT. §§ 29-1107, 29-1109 (1956).

36 See cases cited in note 24 *supra.*

37 A surety's inability to explain adequately or excuse his failure to deliver the principal in court at the required time was tantamount to a strict judgment of forfeiture under the common law system. See, *e.g.*, State v. Douglas, 91 W. Va. 338, 112 S.E. 584, 587 (1922).

The North Carolina Supreme Court in State v. Schenck, 138 N.C. 560, 49 S.E. 917, 917-18 (1904) aptly states the role of the common law surety:

> At common law, when bail was given and the principal relieved from the custody of the law, he was regarded, not as freed entirely, but as transferred to the friendly custody of his bail. They had a dominion over him, and it was their right at any time to arrest and surrender him again to the custody of the law, in discharge of their obligation. They were sometimes said to be his jailers, and to have him always upon the string, which they may pull when they please in order to surrender him in their own discharge.

For a modern analysis of the common law position, see State v. Scott, 371 P.2 704 (Okla. 1962).

38 Some courts have added a fourth defense, an "act of the public enemy." Cases turning on these three defenses are legion. *E.g.*, United Bonding Ins. Co. v. State *ex rel.* Patrick, 382 P.2d 146 (Okla. 1963). Some jurisdictions have codified all or part of these common law defenses directly by statute. *E.g.*, ILL. ANN. STAT. ch. 16, § 37(f) (Smith-Hurd Supp. 1964); MASS. ANN. LAWS ch. 276, § 70 (1956); TEX. CODE CRIM. PROC. art. 436 (1954).

39 See Note, 8 WYO. L.J. 151, 152 (1953).

the lack of appreciable prejudice or injury to the state as a result of the willful default were all unavailing in the majority of the common law courts.[40] Absent a statutory scheme whereby the surety could invoke the trial court's discretion in favor of at least a partial remission, the surety's liability became an accomplished fact upon an unexcused, willful default.

B. *Some Inroads on the Common Law*

In the light of the statutory innovations of our present era, the prevalence of the strict common law forfeiture has waned to a "somewhat relaxed but still firm doctrine."[41] Apart from the statutory grants of discretion, however, the majority of jurisdictions have still adhered to the trio of common law defenses as a basis for exoneration of either the defendant or surety, though without the same severity of interpretation formerly attributable to them.

Act of God

At common law, an "act of God" comprehended every unforeseeable misfortune beyond the realm of human control which would render the performance of the bond conditions virtually impossible.[42] The inherent concept of a willful default is again apparent, for the defense precluded every conceivable voluntary response of the principal. Today, however, the courts do not require as a *sine qua non* strict impossibility of performance, but seem to be content with "reasonable impossibility,"[43] that is, such a force of nature as will render compliance with the bond sufficiently hazardous to human life to warrant the breach. Mere difficulty in complying with the bond terms, however, will not alone operate to relieve the surety. The mere assertion, for example, that the principal was "sick" will not of itself exonerate the surety from liability unless the surety can demonstrate to the court in support of his affidavit the extent of the principal's illness and the correlative fact of his inability to appear as a result of such illness.[44] In construing the "act of God" defense the modern courts seem to require as their condition precedent some empirical data or demonstrative evidence clearly showing the causal relationship between the principal's illness or insanity and his failure to make a timely appearance.[45] This proposition was well expounded in *People v. Wilcox*,[46] where the California Supreme Court hesitated to act upon the surety's petition for exoneration from liability, since the court record contained no documentary evidence of the defendant's continuing illness or his consequential inability to appear in court. The Court relieved the surety solely on the basis of its own medical examiner's report and the affidavits of defendant's attending physician.[47] Similarly the death of the principal prior to the date of appearance will also

40 See, *e.g.*, State v. Scott, 371 P.2d 704, 707 (Okla. 1962).
41 People v. Peerless Ins. Co., 253 N.Y.S.2d 91, 98 (App. Div. 1964).
42 State v. Johnson, 23 Conn. Sup. 318, 182 A.2d 632, 633 (1962). Death, serious illness, or insanity of the principal are the commonly pleaded defenses under this category.
43 See Ramer v. State *ex rel.* Ward, 302 P.2d 139, 140 (Okla. 1956).
44 See, *e.g.*, Turner v. Commonwealth, 338 S.W.2d 213, 214 (Ky. 1960).
45 Hood v. State, 234 Ark. 901, 356 S.W.2d 28 (1962) (defendant's insanity no defense to a forfeiture where he voluntarily entered a mental hospital and was released to his attorney prior to appearance date); Turner v. Commonwealth, 338 S.W.2d 213, 215 (Ky. 1960) (principal's illness a defense where five days before his date of appearance, his doctor recommended immediate hospitalization for a coronary occlusion); Ramer v. State *ex rel.* Ward, 302 P.2d 139 (Okla. 1956) (defendant's insanity no excuse in absence of evidence showing that it was reasonably impossible to secure his appearance in court). *Cf.* Hood v. State, 231 Ark. 772, 332 S.W.2d 488 (1960) (insanity a defense to surety even though principal voluntarily admitted himself to a mental hospital, where surety had no knowledge of defendant's action and defendant was later adjudged insane).
46 2 Cal. Rptr. 754 (1960).
47 *Id.* at 756.

exonerate the surety by an "act of God,"[48] though some jurisdictions disallow the defense if death is by suicide.[49]

Act of Obligee and Act of Law

Under the orthodox common law conception, the "act of law" which would absolve the liability of the defendant and his surety had to be one operative within the territorial confines of the bonding state.[50] Similarly an act of the state as obligee on the bail bond, which would excuse the default, also had to emanate from the state of the original undertaking, and could not be invoked when officials of the asylum state detained the defendant beyond his appearance date.[51] As a result, the lawful, but untimely, incarceration or confinement of the principal beyond the limits of the bonding state on a totally new criminal charge in no way relieved the surety of his responsibility for the default. Analogous to the "act of God" defense, the emphasis was once more on the willful character of the principal's default. The common law courts in this regard distinguished between an act of the law proper and the voluntary act of the defendant-obligor in exposing himself to the control of the criminal laws in another jurisdiction.[52] The latter course afforded no relief apart from statutory provision.

Considering the principal-surety relationship today, its elements of impersonality and financial dominance, together with the large quantity of defendants under the "supervision" of the bondsman or surety, the common law notion of a surety as substitute jailor no longer seems realistic or feasible. While the surety may still have technical custody of the accused, he can no longer exhibit the personal supervision and diligence characteristic of the common law attitude.[53] Conversely, it would seem that an "act of the law" preventing compliance with the bond terms should no longer be made to depend solely on artificial distinctions between the "act of law" of the demanding state or of the asylum state. Such distinctions ultimately rest on the willfulness of the defendant's default and not on the diligence of the surety in reapprehending the principal.[54] The latter would seem to be the only workable criterion in view of the surety's inability to adequately defend against

48 See, *e.g.*, Western Surety Co. v. People, 120 Colo. 338, 208 P.2d 1164 (1949).

49 United States v. Kehrt, 128 F. Supp. 38 (3d Div. Alaska 1955).

50 Public Service Mut. Ins. Co. v. State, 135 So. 2d 777 (Fla. App. 1961).

51 The bond relationship between the defendant, his surety, and the state was said to contain an implied contract that the state and its officials would do nothing to interfere with the surety's custody of the principal. State v. Liakas, 165 Neb. 503, 86 N.W.2d 373 (1957) (surety excused when Governor of state granted extradition of defendant on bail to foreign jurisdiction). See also United States v. Vendetti, 33 F. Supp. 34 (D. Mass. 1940). The defense "act of the obligee" has also been extended by some jurisdictions to the situation where the asylum state has failed to give reasonable assistance to the surety in attempting to extradite a defaulting principal. *E.g.*, State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927, 930 (1947); State v. Reed, 127 Wash. 166, 219 P. 833 (1923).

52 See, *e.g.*, State v. Pelley, 222 N.C. 684, 24 S.E.2d 635, 638 (1943); United Bonding Ins. Co. v. State *ex rel.* Patrick, 382 P.2d 146 (Okla. 1963). An "act of law" exonerated the surety where defendant's nonappearance was due to his confinement in another jurisdiction as a result of a revocation of a previously suspended federal charge in this other jurisdiction on grounds pertaining solely to the state offense.

53 For a general discussion of the surety's plight in tracking down the bailed principal, see Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031, 1065-67 (1954).

54 An example will perhaps clarify this point. Consider two defendants, both freed on bail by state X. If the Governor of state X honors the extradition request of the Governor of state Y and reapprehends and surrenders the first defendant to state Y, who then tries, convicts, and sentences him to prison in state Y for a criminal offense committed in that state while on bail, there is no doubt that this is an "act of law" or "act of obligee" which exonerates the surety. But if the second defendant haplessly wanders across the state line into state Y and is seized by the authorities of state Y, the surety has no such defense in his behalf. To make a distinction between the act of the obligee on the one hand and the act of the defendant on the other proves rather academic, since the ultimate result of confinement in state Y is the same in both cases irrespective of what the surety has done.

the risk of default. Yet the majority of jurisdictions have tenaciously held to this dubious distinction between an "act of law" proper and an act of the obligor which exposes himself to the law of another jurisdiction, and consequently have often denied relief where the principal is held by other state or federal authorities.[55]

A few jurisdictions, however, have capitulated to the more realistic approach, and have exonerated a surety and his principal where the latter's default is due to his confinement under the laws of a foreign jurisdiction. This exoneration, however, seems to be conditional upon the surety's diligence in the first instance in informing the court of the principal's confinement, and, secondly, upon his securing at his own cost the principal's presence in court following his release from the foreign jurisdiction.[56] Presumably, the obligations of the bail bond would be suspended during this interval period, but would again be subject to forfeiture for the surety's untimely delay in returning the principal at the date of release.[57] The workability of such a system was adequately demonstrated by the Washington Supreme Court in *State v. Heslin*.[58] In this case the surety, upon acquiring knowledge of the defendant's imprisonment in another state, immediately informed the court of that fact and petitioned for a continuance of the trial until the principal could appear. The surety further requested the Court to continue the bail bond until that time, and offered to deposit in court collateral which would be sufficient to defray all the costs of returning the principal. The Court accepted the surety's proposals as a sufficient excuse to set aside the bail bond forfeiture, and reversed the trial court's decision as an abuse of discretion for its failure to do so.[59]

The *Heslin* decision would thus seem to characterize a desirable trend in the law and the more functional approach to the situation of foreign confinement. The New York court in *People v. Peerless Ins. Co.*[60] aptly stated the illogical approach of the old common law view:

> It should suffice that a surety guarantee the defendant's appearance whenever possible unless barred by law; it should not also be obliged to guarantee his good behavior or his good fortune in avoiding other confinement. Certainly, the precedents are neither so clear nor so modern as to dictate a contrary view. But, of course, the right to remission should await, except again, in extraordinary circumstances, the surrender of the bailed defendant.[61]

An "act of law" similarly comprehends the involuntary induction of the principal into the armed forces of the United States, and consequently such an induction, depending on the circumstances of the case, may be deemed a valid defense against forfeiture in both the federal and state courts during the duration of the service.[62] Yet analogous to his burden with regard to the other common law defenses, the surety must still appropriately establish a causal relation between the fact of military service and the principal's failure to make his court appearance date. If the surety fails to demonstrate that the defendant was in active military

55 See, *e.g.*, Corn v. State, 168 So. 2d 304 (Miss. 1964); Burd v. Commonwealth, 335 S.W.2d 945 (Okla. 1960); State v. Arrington, 131 S.E.2d 382 (W.Va. 1963). *Contra,* United Bonding Co. v. State *ex rel.* Patrick, 382 P.2d 146 (Okla. 1963).

56 *E.g.*, People v. Rolley, 35 Cal. Rptr. 803 (Cal. App. 1963); State v. Heslin, 63 Wash.2d 957, 389 P.2d 892, 895 (1964); *Cf.* United States v. Craft, 162 F. Supp. 578 (S.D. W.Va. 1958).

57 The cases have not specifically touched upon this point, but it may be implied since both the *Heslin* and *Rolley* cases, *supra* note 56, place strong emphasis on the ultimate return of the principal.

58 63 Wash.2d 957, 389 P.2d 892 (1964).

59 *Id.* at 895.

60 253 N.Y.S.2d 91 (App.Div. 1964).

61 *Id.* at 103.

62 *E.g.*, Carolina Cas. Ins. Co. v. United States, 237 F.2d 451 (7th Cir. 1956); People v. Wojick, 35 Cal. Rptr. 680 (Cal. App. 1963); People v. Walling, 195 Cal. App. 2d 640, 16 Cal. Rptr. 70 (1961). In specific response to the problem of forfeiture, Congress enacted the Soldier's and Sailor's Relief Act of 1940, § 103(1-3), as amended, 50 U.S.C.A. App. § 513(1-3), which prohibits enforcement of a bail bond by either state or federal courts against a principal inducted into the armed forces.

service and that this factor prevented his compliance with the conditions of the bail bond, relief will accordingly be denied.[63] Above and beyond the fact of active military service, the surety may also be required factually to prove to the court his unsuccessful efforts in attempting to secure the principal's presence in court.[64]

IV. Remission of Forfeiture — Mitigating and Extenuating Factors

In the absence of some exonerating defense which will excuse or set aside an otherwise absolute forfeiture, the principal and his surety must invoke the sound discretion of the trial court within some statutory scheme designed to alleviate the harshness of an unexcused forfeiture.[65] The majority of modern courts with their statutory power have been reluctant to impose upon the surety the full penalty of a forfeiture where the defendant's default, even though willful, has not crippled the orderly processes of criminal administration, and where he has been brought to trial within a reasonable time and without undue burden on the prosecution's case as a result of the default.[66]

The courts have evolved a series of factors which are relevant to a decision to grant a partial or even a total remission, depending on the statutory scheme present in the jurisdiction. A compilation of these factors bearing on mitigation, not necessarily in their order of importance, is set out below. This list, while not intended to be exclusive, is fairly representative of the trends in the various jurisdictions.

1) Expense or prejudice accruing to the prosecution and state as a result of the defendant's default.

2) The good faith and diligence of the surety, exerted in reapprehending the defendant upon default, and the expense to which he has been put as a result of reapprehension.

3) The cause, purpose, and length of the defendant's absence at the time of appearance.

4) The timeliness of the defendant's return to the custody of the proper authorities.

5) Lack of willfulness in the principal's default.

6) Stage of proceedings at which the defendant absconded from custody.

7) Whether the purpose of the bail bond has been substantially accomplished in spite of the default.

8) The voluntary surrender of the defendant within a reasonable time.

9) Degree of diligence exerted by the surety in attempting to prevent the principal's default.

10) Contribution of the surety, either by negligent or by willful act, to the principal's default.

11) Validity of the forfeiture process initiated following a default. Each case will necessarily depend on an evaluation of its own set of facts by the respective jurisdictions. Similarly, statutes which define remission in terms of the trial court's discretion have been liberally construed in favor of remission in order to provide the surety with an incentive to procure the arrest of a defaulting principal or face the bleak prospect of an ultimate forfeiture.[67]

Without the reward of a remission conceivably within his grasp, the surety would have little or no reason to pursue the defendant, and surrender him back into

63 People v. Wojick, *supra* note 62 at 681.

64 People v. Walling, 195 Cal. App. 2d 640, 16 Cal. Rptr. 70, 73 (1961).

65 Part IV assumes the existence of an unexcused forfeiture and deals with it in the light of various criteria which have commended themselves to the courts as factors in granting either partial or total remission.

66 See, *e.g.*, Allegheny Mut. Cas. Co. v. State, 234 Md. 278, 199 A.2d 201 (1964).

67 See Allegheny Mut. Cas. Co. v. State, *supra* note 66, at 203-04; People v. Rolley, 35 Cal. Rptr. 803 (Cal. App. 1963).

the custody of the demanding jurisdiction — a consequence which would tend to demote rather than promote the administration of criminal justice. The judiciary's predisposition towards the ultimate apprehension of the principal, and its minimal interest in securing a financial windfall to the state, has been aptly characterized as early as 1813 by the United States Supreme Court. In a significant decision, *United States v. Feeley*,[68] Chief Justice Marshall correlated with precision the function of a bail bond with the penalty of forfeiture:

> The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as is within his power, by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done.[69]

In spite of court leniency, however, remission remains the exception and not the rule after a declaration of forfeiture.[70] Foremost among the factors calling for remission is the absence of serious expense or prejudice towards the interests of the state as a result of the principal's default.[71] In *State v. Seaton*,[72] for instance, the Nebraska Supreme Court overturned a lower court decision which refused to remit any portion of a $7500 forfeiture as an abuse of discretion. The basis of the Court's ruling was that the sole expense occasioned to the state by the default was merely the issuance of subpoenas for defendant's appearance and that the prosecution's case against him was in no manner weakened by the short delay in trial. While this element of lack of prejudice or expense to the state, standing alone, may not in all instances warrant a partial remission to a surety, its significance in the eyes of the courts is well attested by the various "surrender and cost" statutes which require the courts to measure a principal's or surety's recovery, if recovery be permitted, in proportion to the state expenses accruing from the default.[73] The surety, however, must maintain the burden of proof and show affirmatively the lack of expenses or prejudice on the part of the state.[74] Expenses incurred by the state in seeking to locate and return the principal to custody, witness and jury fees, loss of proof to the prosecution are all requisite items of the surety's burden. Absent a "surrender and cost" statute which would provide otherwise, however, the surety's loss in each instance is not necessarily limited to the extent of state or government expense, since the amount of the penal bond, standing unremitted, constitutes liquidated damages to the state as a concomitant of the default.[75]

A modern correlative to the absence of prejudice or expense to the state is the degree of diligence and expenses expended by the surety in attempting to locate the absconding defendant. While the extent of remission may not be mathematically commensurate with the surety's efforts, this factor weighs heavily in the courts of most jurisdictions as the line of demarcation between a forfeiture

68 25 Fed. Cas. 1055 (No. 15082) (C.C. D. Va. 1813).
69 *Id.* at 1057.
70 People v. Peerless Ins. Co., 253 N.Y.S.2d 91, 106 (App. Div. 1964).
71 See, *e.g.*, Larson v. United States, 296 F.2d 167 (8th Cir. 1961) (remission denied since Government suffered injury and delay as a result of the default); United States v. Ciena, 195 F. Supp. 511 (S.D.N.Y. 1961) (remission denied where expense of the Government occasioned by the default approximated the amount of the bail bond); Allegheny Mut. Cas. Co. v. State, 234 Md. 278, 199 A.2d 201 (1964) (remission granted — no evidence of prejudice to the state); Shetsky v. Hennepin County, 239 Minn. 463, 60 N.W.2d 40 (1953) (remission denied where public authorities incurred a heavy expense in apprehending the principal).
72 170 Neb. 687, 103 N.W.2d 833 (1960).
73 See statutes cited in note 18 *supra*.
74 *E.g.*, Carolina Cas. Co. v. United States, 283 F.2d 248 (5th Cir. 1960) (surety's petition for partial remission denied where no factual data was presented as to the cost incurred by the United States in ultimately apprehending the principal).
75 United States v. D'Argento, 227 F. Supp. 596, 603 (N.D. Ill. 1964).

and remission.[76] A typical example is the decision of *McCrosky v. State*[77] where the surety, upon his principal's failure to appear in court at the requisite date, immediately engaged a private detective and sent him from Arkansas to Chicago in an attempt to locate the defendant. Two days later, having spent over $912 in his search, the surety produced his principal at the trial. After receiving evidence of these facts, the court granted a remission of the entire bond over and above the expenses incurred by the county as a result of the delay.

Diligence of search, however, without concrete results has not commended itself to the majority of courts who tend to apply a different set of standards than when the principal is ultimately produced.[78] Thus in *United Beneficial Fire Ins. Co. of Omaha v. United States*,[79] in spite of the surety's diligent efforts, including telephone calls, personal trips and rewards, the Court refused to decree remission in the absence of proof showing that the principal was located as a result of these efforts or that the surety offered to pay the expenses of extradition when the principal was ultimately located in Mexico by the Government.

The significance of the surety's diligence in returning the absconding principal, as an element in the granting of remission, may be attributable, at least in part, to the surety's or bondsman's extra-territorial power of extradition. Under the present law the surety need not comply with the formal extradition procedures of either the asylum or the demanding state, but has the right to seize his principal anywhere within the jurisdictional limits of the United States.[80] Upon presentation of the "bail piece" — the documentary evidence of the bail relationship — to a court of record within the asylum state, the surety can then extradite the defendant without fear of violating the sovereignty of the asylum state or incurring a false imprisonment charge by the principal.[81] With such a power, the surety and bondsman often have a greater opportunity than the bonding state itself to seize the defaulting principal and surrender him in hope of mitigating the penalty. Thus the courts have weighed the exercise of this extradition power in their ultimate determination of a remission.

The requirement of diligence in search as a condition precedent to remission may also be related in part to the current prevalence of cross-indemnification contracts and pledges of security between the principal and surety, since some jurisdictions have interpreted these as an influencing factor in the surety's laxity to secure the surrender of the principal.[82] The theory behind this position seems to be that the surety's direct financial interest in preventing the escape of the defendant is proportionately diminished to the extent that the former is indemnified by the latter's pledge of collateral to back up the bond. The problem of such contracts minimizing or substantially diminishing the surety's interest in producing his principal seems especially acute today in view of their prevalence and undisputable legality.[83]

76 See, *e.g.*, State v. Hinojosa, 364 Mo. 1039, 271 S.W.2d 522 (1954); People v. Peerless Ins. Co., 253 N.Y.S.2d 91, 106 (App. Div. 1964); Ray v. State, 350 S.W.2d 653 (Tex. Crim. App. 1961); State v. O'Day, 36 Wash.2d 146, 216 P.2d 732 (1950). *Contra,* United States v. Davis, 202 F.2d 621 (7th Cir. 1953), *cert. denied,* Ferguson v. United States, 345 U.S. 998 (1953).

77 235 Ark. 629, 361 S.W.2d 266 (1962).

78 People v. Fiannaca, 306 N.Y. 513, 119 N.E.2d 363 (1954).

79 306 F.2d 325 (9th Cir. 1962).

80 United States v. Trunko, 189 F. Supp. 559 (E.D. Ark. 1960); Golla v. State, 50 Del. 497, 135 A.2d 137 (1957).

81 Note, *Bailbondsmen and the Fugitive Accused — The Need for Formal Removal Procedures,* 73 YALE L.J. 1098, 1100-03 (1964).

82 See Note, *Indemnification Contracts in the Law of Bail,* 35 VA. L. REV. 496, 502 (1949).

83 Indemnification contracts until the turn of the twentieth century were declared void as against public policy, but today are universally upheld. See Note, *Indemnification Contracts in the Law of Bail, supra* note 82, at 502-03. In England, on the other hand, they are still considered void as against public policy and subject to the criminal conspiracy doctrine. Egan, *Bail in Criminal Law,* CRIM. L. REV. (Eng.) 705, 709 (1959).

Diligence and lack of prejudice without timeliness of surrender, however, will generally not afford relief to the surety.[84] Understandably the degree of prejudice and expense to the state will also vary proportionately to the length of the defendant's absence from custody. The element of timeliness, however, must be measured by whether the purpose intended to be achieved by the bond has been substantially accomplished irrespective of the delay.[85] Yet many courts in exercising their discretion have presumed such non-accomplishment and have denied remission where the principal has not been surrendered within a reasonable or statutory period following default. An obvious example is the Minnesota case of *Shetsky v. Hennepin County.*[86] Here the Minnesota Supreme Court rejected the surety's petition to set aside or remit the forfeiture upon the principal's reapprehension where the evidence clearly indicated both a willful default and an 18 month interval between the dates of default and surrender.

V. Conclusion

Despite the sporadic advances of the "mandatory remission" statutes, typified by the California Code, the discretion of the court remains the focal point of remission in the vast majority of the American jurisdictions. The exercise of this discretion, however, has assumed a completely new context, well evidenced by the developing trends in recent case law, for a court's discretion must operate both within the ambit of various statutory provisions and within its own self-imposed limitations. The latter element would seem to merit the greater attention today. The courts have consistently refused to exercise their discretion without a positive demonstration by the principal or surety of certain requisite facts, or which absence of prejudice to the state, diligence of the surety in surrendering the principal, and timeliness of return are but a few examples. This shift in emphasis, from the defendant to the surety or bondsman, seems appropriate and desirable, for it is they who in the ultimate instance must either bear the hardships of a final forfeiture or reap the benefits of a remission.

James E. Hakes

84 See, *e.g.*, Carolina Cas. Ins. Co. v. United States, 283 F.2d 248 (5th Cir. 1960) (remission denied under the liberal federal provision where principal was not reapprehended until 2½ years after default); Shetsky v. Hennepin County, 239 Minn. 463, 60 N.W.2d 40 (1953) (lapse of 18 months until appearance of principal, among other factors, precluded remission). See also Central Cas. Co. v. State, 233 Ark. 602, 346 S.W.2d 193 (1961) (remission granted less costs where principal's default was the result of a plane delay and he appeared only seven hours late on the day of trial).

85 *E.g.*, Dudley v. United States, 242 F.2d 656 (5th Cir. 1957).

86 239 Minn. 463, 60 N.W.2d 40 (1953).