

A similar result was reached in construing this statute in 1957 O. A. G., page 90, No. 22.

The act in question is giving additional benefit to one already retired, and the act applies as of the time it becomes effective, but any increase or decrease in social security benefits effective after that time would have no effect.

Applying the foregoing to your illustrated cases, I am of the opinion that the teacher who retired June 1, 1960 without social security benefits, who in October 1960 acquired social security benefits based on teaching service, would have his case considered on the basis of the social security benefits being received at the time the Act becomes operative, July 1, 1961, for the purpose of computing the increased benefits given by the statute in question. Those teachers already retired, or to be hereafter retired, whose social security benefits are deferred for any reason after the time of computation of benefits for payment to them, made under the provisions of the statute in question, would not have any deductions made as to any such social security benefits so deferred.

OFFICIAL OPINION NO. 33

July 21, 1961

Honorable A. Morris Hall
State Senator
716-717 Marion National Bank Bldg.
Marion, Indiana

Dear Senator Hall:

This is in reply to your recent letter requesting an Official Opinion on the following subject:

“Section 9-1036 of Burns and following sections provide for the apprehension of a principal by his surety. The annotated cases under these sections are clear that such surrender may be made, and the surety discharged, prior to judgment against such surety. Nowhere can we find any decisions, and we believe there are none, deciding the question of whether the power to apprehend and surrender the principal continues after

OPINION 33

judgment is entered but before said judgment is paid. *Another way of putting the question would be whether the surety can be discharged by surrendering the principal after judgment has been entered against said surety but before it is paid.*" (Our emphasis)

In addition to your specific question, there is another question which is raised by implication, namely, whether the surety may lawfully apprehend his principal after judgment upon a recognizance forfeited but before payment.

The statutes to which you refer are the Acts of 1905, Ch. 169, as found in Burns' (1956 Repl.), Sections 9-1036 to 9-1043, which (omitting Section 9-1042) read as follows:

9-1036. "When a surety on any recognizance desires to surrender his principal, he may procure a copy of the recognizance from the clerk, by virtue of which such *surety*, or any person authorized by him, *may take the principal* in any county within the state." (Our emphasis)

9-1037. "*Any surety, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal* in open court, or to the sheriff, and upon payment of such costs as the court may adjudge to be paid by him, may thereupon be discharged from any further liability upon the recognizance." (Our emphasis)

9-1038. "Such surety must deliver a certified copy of the recognizance to the sheriff, with the principal; and the sheriff must accept the surrender of the principal, and acknowledge it in writing."

9-1039. "Any defendant, so surrendered, may give other surety, or remain in custody until discharged by due course of law."

9-1040. "If, without sufficient excuse, the defendant neglects 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 the recognizance, or money de-*

posited in lieu thereof, as the case may be, *is thereupon forfeited.*" (Our emphasis)

9-1041. "At any time after forfeiture and at any time before judgment upon the recognizance, the surety may pay the amount named in the bond to the clerk of the court, who shall give him a receipt therefor."

9-1043. "*Any judgment upon a recognizance forfeited by the principal is collectible upon execution, unless remitted by the governor, although such principal is afterward arrested on the original charge.*" (Our emphasis)

The power of our Governor to remit forfeitures is granted by the Indiana Constitution, Art. 5, Sec. 17, which reads, in part, as follows:

"* * * He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and also the names of all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted:
* * *"

The above constitutional provision was implemented by 1 R. S. 1852, Ch. 40, as found in Burns' (1956 Repl.), Section 9-2501, thus:

"All applicants to the governor for the remission of fines and forfeitures shall forward to him, with their application, the opinion of the propriety of so doing, of a majority of the following officers in the county where the fine was assessed, or forfeiture occurred, viz.: The clerk of the circuit court, auditor, sheriff, county treasurer, and such officers as shall from time to time have the care and custody of the common school fund within the county."

Ewbanks Indiana Criminal Law (Symmes Edition), Section 233, page 134, reads as follows:

OPINION 33

“Any judgment upon a recognizance forfeited by the principal is collectible upon execution, unless remitted by the Governor, although such principal is afterward arrested on the original charge. The conviction and punishment of the principal after the entry of judgment on the bail bond does not release the sureties, though his rearrest by the authorities of the same county for the same offense for which the recognizance was given, after forfeiture but before the entry of judgment, will discharge the sureties.”

See also :

Butler v. State (1884), 97 Ind. 373;

State v. Dunning (1857), 9 Ind. 20;

Weaver *et al.* v. State (1914), 56 Ind. App. 394, 105 N. E. 517;

1932 O. A. G., page 302;

1937 O. A. G., page 298.

The annotation in 3 A. L. R. at page 189 cites *Lorance v. State* (1849), 1 Ind. 359, and *State ex rel. Smith v. Smith* (1917), 65 Ind. App. 471, 117 N. E. 553, along with cases from many other jurisdictions to support its conclusion that:

“The general rule seems to be that bail may surrender the principal, and thereby exonerate themselves, at any time before the entry of final judgment in a proceeding to enforce their liability.”

There was a common law right of the surety on a bail to take their principal “at any time, day or night, Sunday or weekday, in any house or place, in any county, state or territory, with whatever assistance is required, and by breaking open doors if necessary.”

Turner v. Wilson (1875), 49 Ind. 581, 587.

1 R. S. 1852, Ch. 61, as found in *Burns'* (1956 Repl.), Section 1-101, provides that the common law of England which is of a general nature (and not inconsistent with the Constitution of the United States, the Constitution of the State of

Indiana, statutes of the General Assembly of the State of Indiana and laws enacted by Congress) shall be law governing this state.

There have been a succession of statutes enacted by our General Assembly in harmony with the common law right of a surety to apprehend and surrender his principal in his own discharge, at least one of which was not considered to be exclusive of the common law.

See: Clark v. State (1890), 125 Ind. 1, 9, 24 N. E. 744.

In Cook v. Harper, Clerk (1921), 78 Ind. App. 267, 269, 135 N. E. 349, decided when the Acts of 1905, Ch. 169 as found in Burns' 9-1036 to 9-1043, *supra*, was in effect, the Court there said:

"It is well settled that where the manner in which the accused may be surrendered and the surety on a recognizance exonerated is fixed by statute, *the mode of arrest and surrender provided by statute is not cumulative, but is exclusive of the common law remedy*, and if the surety desires to surrender his principal there should be substantial compliance with the statute * * *." (Our emphasis)

By our law, as stated in Burns' 9-1037, *supra*, final judgment upon the forfeiture terminates the right of a surety to be discharged upon surrender of his principal.

In Henry v. United States (1923), 288 Fed. 843, 32 A. L. R. 257, the United States Circuit Court of Appeals [Seventh Circuit] construed a federal statute permitting remission of the penalty of a forfeited bail bond when there has been no willful default of the party and it is still possible to try him on the charge, holding that there can be no relief where the principal, being the only party contemplated by the statute, willfully absconds even though the surety, at large expense, rearrests him and returns him to the jurisdiction of the court. It was further held there that, where a special statute permits a remission after the forfeiture of bail, the case must come strictly within the statute.

OPINION 33

It is therefore my opinion that the answer to your stated question is that the surety cannot be discharged by surrendering the principal after judgment has been entered on a forfeited recognizance, before payment, but that by application to the Governor he may obtain remittance of the forfeiture.

In consideration of your implied question as to the power of a surety to apprehend his principal after judgment, there is no statutory authority for the same; however, such power appears to be indistinguishable from the power of arrest. Any such arrest, not being by a peace officer, would have to meet the requirements of a citizen's arrest under the common law.

In *Searches, Seizures and Immunities*, Varon, Vol. 1, page 74, it is said:

“It has been well established that a private individual has a common law right to make an arrest. However, not being vested with the governmental authority, such private citizen can make only such arrest of a person who commits a crime in his presence or who has reasonable cause to believe that a felony has been committed by the accused. * * *”

The leading Indiana case on the right of private individuals to arrest is *Doering v. State* (1874), 49 Ind. 56, in which it is said:

“In *Holley v. Mix*, 3 Wend. 350, the court held: ‘If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal though an officer would be justified if he acted upon information from another which he had reason to rely on.’ (page 59)

* * *

“The law applicable to arrests by a private person is stated with great precision and clearness by TILGHMAN, C. J., in *Wakely v. Hart*, 6 Binn. 316, where, after quoting a provision of the state constitution and

commenting thereon, it is said: 'But it is nowhere said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and pursued with or without a warrant, he may be arrested by any person. *And even when there is only probable cause of suspicion, a private person may without warrant at his peril make an arrest.* I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution.'” (Our emphasis) (page 60)

The common law right of a citizen to arrest a felon was reiterated in *Burns v. State* (1922), 192 Ind. 427, 136 N. E. 857.

The Uniform Extradition Act, the same being the Acts of 1935, Ch. 49, as found in *Burns'* (1956 Repl.), Section 9-432, substantially recites the common law right of a private citizen to arrest upon reasonable belief that a felony has been committed by saying:

“The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one [1] year; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for arrest as in the last section; and thereafter his answer shall be heard as if he had been arrested on warrant.” (Our emphasis)

While procedural requirements of *Burns'* 9-432, *supra*, are only applicable to the arrest in Indiana of fugitives charged with crime in the courts of another state, recognition by the Legislature enacting such statute of a charge of crime filed in

OPINION 34

a court of another state as basis for a citizen's arrest of a fugitive would infer that a felony charge filed in a court of this state is sufficient probable cause of suspicion to make a legal citizen's arrest at common law.

In conclusion, it is my opinion that after judgment on a forfeiture, the surety has the same common law right as any private citizen to make an arrest of one who he has probable cause to suspect has committed a felony; however, he is also subject to the same liability for illegal arrest. Nevertheless, it would seem that one who had been a surety on a recognizance bond would have reasonable cause to believe that a felony had been, in fact, committed, and that he would be in less danger of liability for false imprisonment than other less-informed citizens.

Since it is my opinion, in answer to your express question, that the right of a surety to be discharged from liability on his bond by surrender of his principal terminated with judgment upon the forfeiture, the chances of remission of the forfeiture upon surrender after judgment are within the discretion of the Governor under the Constitution of Indiana, Art. 5, Sec. 17, when presented to him pursuant to the procedure provided by statute.

OFFICIAL OPINION NO. 34

July 26, 1961

Mr. Robert J. DuComb, Commissioner
Indiana Securities Commission
Office of the Secretary of State
201 State House
Indianapolis, Indiana

Dear Mr. DuComb:

This is in response to your letter of June 13, 1961, in which you requested an Official Opinion clarifying the effect of Ch. 79 and Ch. 333 of the Acts of 1961. The questions as stated in your letter are as follows:

“Query 1: Does Chapter 79 of the Act of the Indiana General Assembly requiring the licensing of secu-