

CRIMINAL LAW - Bond of person in military service
is subject to forfeiture.

September 17, 1942

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Hon. J. Ben Searcy
Attorney at Law
Eminence, Missouri

Dear Sir:

We are in receipt of your request for an opinion,
under date of September 12th, 1942, which reads as
follows:

"My office desires an opinion relative to a criminal bond.

"Chilton Culbertson was inducted into the United States Army on or about August 1st and was granted a ten day leave. While on said leave he was arrested under a charge of grand larceny and incarcerated in jail. A Preliminary hearing was held and the defendant bound over to Circuit Court. He was arrested after he had been inducted into the Army.

"The question is: If a bond is made for the defendant and he reports to the proper officials of the United States Army and is accepted, would his bond be subject to be forfeited in so long as he is in the Army?"

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I am presuming that in your request, where you state "fortified", you mean "forfeited."

Section 3962 R. S. Missouri, 1939, reads as follows:

"When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Section 3973 R. S. Missouri, 1939, 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 after-

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ward arrested on the original charge, unless remitted by the court for cause shown."

The above two sections are part of the criminal procedure of the State of Missouri, and is a part of a criminal case, and not a civil case. It will be noticed in Section 3973, supra, that the legislature directed the court as follows:

" * * * must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, * * * * * ."

This section is mandatory and it is the duty of the court to forfeit the bond when the defendant fails to appear for trial or judgment.

The section further directs the court that after the recognizance is forfeited, it shall be proceeded upon by scire facias to final judgment and execution thereon.

The scire facias is not a part of the criminal case, and has been held to be largely of a civil nature in this State. It was so held in the case of State v. Stevens, 134 Mo. App. 115, l. c. 118, where the court said:

" * * * It was said by the Supreme Court in a case cited infra, that though a proceeding on a scire facias

taken in a criminal cause is a mere continuance of an existing proceeding to enforce the collection of a confessed debt, it partakes of the nature of a civil action under the code and will be governed by the same rules. (State v. Morgan, 124 Mo. loc. cit. 475.)
* * * * *

It was also held in the case of The State v. Morgan, 124 Mo. 467, l. c. 474, where the court said:

"Nor do we think the validity or invalidity of the indictment in the principal case, can be inquired into in this proceeding. The purpose of the recognizance was to secure the appearance of the principal therein named according to its terms and conditions which in no way depended upon the validity of the indictment under which he had been convicted, conceding as contended for by the counsel for defendants that the demurrer filed by them to the scire facias went to the whole record. An examination of the authorities cited by him in his brief (State v. Randolph, 22 Mo. 474; State v. Potts, 60 Mo. 368; State v. Poston, 63 Mo. 521; State v. Rogers, 36 Mo. 138; State v. Ferguson, 50 Mo. 470; State v. Heed, 62 Mo. 559) will show that not one of them goes so far as to hold that the sufficiency of an indictment can be inquired into in a proceeding on a scire facias,

after it has been passed upon and held to be sufficient by a court of last resort.

"Moreover, after the demurrer to the scire facias was overruled defendants answered over and while the proceeding on a scire facias in a case of this kind is a mere continuance of an existing proceeding to enforce the collection of a debt confessed, it partakes largely of the nature of a civil proceeding under our code, and should be governed by the same rules of proceeding, and as defendants answered to the scire facias after their demurrer was overruled they should be held to have waived the demurrer." (Underlining, except that of the words "scire facias", and cases cited, ours.)

Under Section 3873, supra, there is no question but that under the facts in your request the bond of the defendant, if he does not appear according to the terms of the recognizance, must be forfeited. This seems to be the only question upon which you request our opinion, but we are also setting out authorities to the effect that a judgment cannot be had against the defendant or his sureties while he is a member of the United States Army.

Section 520, Article II, Par. (1), Page 115, of the Soldiers' and Sailors' Civil Relief Act of 1940 (New) Act of 1940, Title 50, U. S. C. A., App., reads as follows:

"In any action or proceeding commenced in any court, if there shall be a default of any appearance by the

defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act."

Section 523, of the same Act, Page 117, reads as follows:

"In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service -

"(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and

"(b) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in this Act. Oct. 17, 1940, c. 888, Sec. 203, 54 Stat. 1181."

Section 513 of said Act reads as follows: (Page 115).

"(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such

stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

"(2) When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, endorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered."

Section 525, of the same Act, Page 118, reads as follows:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

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All of the above sections of the U. S. C. A. pertain to the procedure on the Scire Facias but does not have any bearing on the forfeiture of the criminal bond.

CONCLUSION

It is, therefore, the opinion of this department, that if a criminal bond is made by a defendant, and he reports to the proper officials of the United States Army, and is accepted, his bond would be subject to forfeiture, if he does not appear in court under the terms of the recognizance.

Respectfully submitted

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APPROVED:

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