

1986

H.C. Heninger and Doris W. Heninger v. Ninth  
Circuit Court, State of Utah, Washington County,  
St. George Department, and Robert F. Owens,  
Circuit Judge : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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HENINGER, :  
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Plaintiffs-Respondents, :  
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vs. :  
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NINTH CIRCUIT COURT, State of :  
Utah, Washington County, :  
St. George Department, and : Case No. 20976  
ROBERT F. OWENS, Circuit Judge, :  
 : Category No. 13b  
Defendants-Appellants. :

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BRIEF OF APPELLANT

**UTAH SUPREME COURT  
BRIEF**

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**FILED**

APR 22 1986

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Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are put before this Court:

1) Was Respondent's appropriate remedy direct appeal to the district court from the circuit court's forfeiture ruling and did their failure to raise that appeal constitute a waiver?

2) Did the district court act improperly and without authority by granting an extraordinary writ?

3) Did the district court lack constitutional authority when it exercised supervisory authority over the Ninth Circuit Court?

4) Does Judge Owens have the authority and discretion to supervise bondsmen in the Ninth Circuit Court and was the revocation of Respondent's bonding privileges proper?

5) Did the district court improperly interpret the language of Utah Code Ann. § 77-20-7 (1953, as amended) regarding the effective term of bonds in the state of Utah?

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 : Category No. 13b  
Defendants-Appellants. :

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STATEMENT OF THE CASE

Respondents are bondsmen who petitioned the Fifth Judicial District Court, Washington County, for an extraordinary writ asking the District Court to exercise supervisory power over Appellants and claiming that the Ninth Circuit Court acted without authority in forfeiting certain bonds and revoking the bonding privileges of the bondsmen in that court. The District Court granted the writ and issued a summary judgment order holding that revocation of bonding privileges is prohibited without notice and hearing, and that imposition of sentence exonerates the liability of bail bondsmen by operation of law. Consequently, the Ninth Circuit Court objected to the District Court's ruling and filed this appeal.

STATEMENT OF FACTS

Appellant Robert F. Owens (hereinafter "Judge Owens") presides as judge in the Ninth Circuit Court, Washington County

(R. 107). Respondents are bondsmen (hereinafter "bondsmen") who, prior to the initiation of this action in the Fifth District Court, Washington County, were qualified by Judge Owens to write bonds in the Ninth Circuit Court (R. 107). In January, 1984, Judge Owens and the bondsmen entered into an agreement whereby the bondsmen would be authorized to file undertakings of bail in the Ninth Circuit Court, Washington County, upon the condition that the bonds would continue after sentencing and throughout probation (R. 107). The language of the individual bonds provides that the terms would continue through execution of sentence (R. 61, 107).

The bondsmen, pursuant to the agreement and authorization by Judge Owens, filed undertakings of bail in the Ninth Circuit Court in behalf of four criminal defendants: Samuel Benally, Geoffrey C. Greening, Jonathon S. Marshall, and Dennis B. Ashcroft (R. 19, 32-39). All four cases for which bonds were taken involve charges of driving under the influence of alcohol (R. 20, 22, 23, 62-63). In each case, the defendant in the Ninth Circuit Court failed to make himself subject to the Ninth Circuit Court's jurisdiction for the purposes of executing sentences imposed by that court in that they failed to abide by the terms of probation, failed to appear at the Washington County Jail, and/or failed to pay fines assessed as part of the circuit court's sentence (R. 20, 22, 63). Bond forfeiture hearings were held in the Ninth Circuit Court on May 6, 1985, and July 9, 1985, at which times the bondsmen requested exoneration of the undertakings (R. 24). Exoneration was denied by the Ninth

Circuit Court and the bonds were forfeited (R. 24). The bondsmen did not appeal from the forfeiture hearings.

On May 28, 1985, the bondsmen commenced an action in the Fifth Judicial District Court, Washington County, seeking an extraordinary writ and order requesting that the District Court exercise supervisory authority over the Ninth Circuit Court (R. 1, 18, 27-28). The bondsmen further requested the District Court specify the duties and obligations of the bondsmen in the Ninth Circuit Court (R. 27-28).

In a letter to the Washington County Sheriff dated May 29, 1985, Judge Owens exercised his discretionary powers and authority over bondsmen in his court by rescinding authorization previously given to accept bailbonds from the bondsmen. Judge Owens withdrew the bondsmen's authority on the grounds that it was clear by the bondsmen's actions that they no longer intended to comply with the provisions of law, the specific language of each undertaking, and the agreement with the Ninth Circuit Court concerning the term of the bonds (R. 61, 107).

On September 22, 1985, Judge Burns, Fifth Judicial District Court, exercised supervisory authority over the Ninth Circuit Court by signing a summary judgment order (R. 118-19). This order provided (1) that revocation of the bondsmen's bonding privileges is prohibited unless afforded prior notice and hearing, and (2) that imposition of sentence relieves the obligation of the bondsmen and exonerates the undertaking of bail by operation of law (R. 118-119). The summary judgment was objected to by the Judge Owens in a pleading filed in the District Court on September 24, 1985 (R. 101-105).

### SUMMARY OF ARGUMENTS

Bondsmen's appropriate remedy was to appeal the Ninth Circuit Court's forfeiture rulings directly to the District Court and their failure to raise that appeal constitutes a waiver. The Ninth Circuit Court had jurisdiction over the bondsmen and the subject matter at the time the District Court improperly granted an extraordinary writ. The Ninth Circuit Court and Judge Owens acted well within proper jurisdiction and bondsmen had an appropriate remedy of direct appeal from the Ninth Circuit Court's forfeiture rulings to the District Court. Therefore, the District Court acted without jurisdiction in granting an extraordinary writ.

Further, the District Court lacked constitutional authority when it exercised supervisory authority over the Ninth Circuit Court, thereby acting without requisite jurisdiction.

Moreover, Judge Owens had authority and discretion to supervise bondsmen in his jurisdiction. Because of bondsmen's failure to comply with the terms of the undertakings and the agreement with the Ninth Circuit Court, Judge Owens properly exercised his discretion when he revoked bondsmen's privileges to file undertakings of bail in the Ninth Circuit Court.

inally, the District Court's ruling that an undertaking of bail is exonerated when sentence is imposed is contradicted by the language of Utah Code Annotated § 77-20-7 (1953, as amended) and of the bonds which requires liability to extend through execution of the sentence imposed.

## ARGUMENT

### POINT I

BONDSMEN'S APPROPRIATE REMEDY WAS TO APPEAL THE NINTH CIRCUIT COURT'S FORFEITURE RULINGS DIRECTLY TO THE DISTRICT COURT AND THEIR FAILURE TO RAISE THAT APPEAL CONSTITUTES A WAIVER.

Appeal procedures from the circuit court to the district court are provided for by law. The Utah Constitution grants the district courts appellate jurisdiction as provided by statute. The Utah Constitution, Article VIII, § 5 (effective July 1, 1985) provides:

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Utah Code Ann. § 78-3-4, of the District Court Act (1953, as amended), grants appellate jurisdiction from inferior courts to the district court and § 78-3-5 provides for appeals to the district courts from final judgments of the circuit courts.

An appeal lies from judgments from forfeited bonds obtained pursuant to the Bail Forfeiture Procedure Act, § 77-2a-1, et. seq. (1983). There have been no reported decisions by this Court construing the provisions of that Act. However, an 1884 Utah case held that appeal is not available from a bail forfeiture order. People v. Tremayne, 3 Utah 331, 3 P. 85

(1884). Although Tremayne has not been expressly overruled, the holding is without merit in light of recent statutory revisions and many well-reasoned cases from other jurisdictions which allow appeals from bail forfeiture rulings. Cases with substantially similar provisions finding that orders dealing with the forfeiture of bail are appealable include: People v. Wilcox, 53 Cal.2d 651, 2 Cal. Reprtr. 754, 349 P.2d 522 (1960); Smaldon v. United States, 211 F.2d 161 (10th Cir. 1954); United States v. Cardina Casualty Ins. Co., 236 F.2d 451 (7th Cir. 1956); State v. Cotton, (La., 1926) 172 La. 295, 110 So.480 (1926); State v. Wright, 51 Wash.2d 606, 320 P.2d 646 (1958); and State v. O'Day, 36 Wash.2d 146, 216 P.2d 732 (1950).

Moreover, this Court has entertained an appeal from a circuit court bail forfeiture order which had been appealed to the district court. Walton v. Circuit Court, No. 16281 (Utah 1979) (See Appendix A). Appealability of a bond forfeiture order was not an issue, but the case was successfully appealed to the district court and the district court order was appealed to the Utah Supreme Court. This Court did not mention Tremayne in its decision. Consequently, bond forfeiture orders appear to be appealable in Utah, notwithstanding Tremayne.

Bondsmen initiated the Petition for an Extraordinary Writ below before all of the forfeiture provisions in the Bond Forfeiture Procedure Act could be exhausted, therefore the Petition was untimely at best. The first bond forfeiture hearing was held on May 6, 1985, the Petition for Extraordinary Writ was initiated May 28, 1985, and the second bond forfeiture hearing

was scheduled for July 9, 1985. The bondsmen preemptively commenced the action below seeking relief from the Ninth Circuit Court's actions even before the second bond hearing was scheduled and complained of an anticipated result prior to any action on the remaining two undertakings. The bondsmen have not appealed orders from either bond forfeiture hearing. Bondsmen should have availed themselves of the proper judicial remedies and procedures pursuant to the Bail Forfeiture Procedures Act and filed a timely appeal. A failure to do so constituted a waiver and does not warrant relief from the District Court in the form of an Extraordinary Writ. Anderson v. Baker, 5 Utah 2d 33, 296 P.2d 283 (1956).

#### POINT II

THE DISTRICT COURT ACTED IMPROPERLY AND WITHOUT AUTHORITY IN GRANTING BONDSMEN'S PETITION FOR AN EXTRAORDINARY WRIT.

Pursuant to the Constitution of Utah, Article VIII § 5 (effective July 1, 1985), district courts have the power to issue all extraordinary writs. However, that power is limited to situations in which no other remedy is available and substantial injustice would otherwise occur.

It is a well established principle that an extraordinary writ is not a proceeding for general review. Commercial Security Bank v. Phillips, 655 P.2d 678 (Utah, 1982); Anderson v. Baker, 5 Utah 2d 33, 296 P.2d 283 (1956); Olsen v. District Court, 106 Utah 220, 147 P.2d 471 (1944); Robinson v. City Court for City of Ogden, 112 Utah 36, 105 P.2d 256 (1947); Chesney v. District Court of Salt Lake County, 108 P.2d 514

(Utah, 1941). Rule 65B(a), Utah Rules of Civil Procedure (hereinafter "URCP"), provides in pertinent part, "where no other plain, speedy, adequate remedy exists, relief may be obtained by appropriate action under these rules . . . ." [Emphasis added]. Pleadings seeking relief by way of extraordinary writ pursuant to Rule 65B, URCP, must specifically designate jurisdictional excess or abuse of discretion claimed and are subject to being dismissed if they merely set forth conclusions. Angell v. Sixth Judicial District Ct., 656 P.2d 405 (Utah, 1982); Lee v. Provo City Civil Service Commission, 582 P.2d 485 (Utah, 1978).

This Court has held that if the lower court is proceeding without jurisdiction, but it appears that there is an adequate remedy, a writ should generally not issue. Allen v. Lindbeck, 97 Utah 471, 93 P.2d 920 (1939). Also if there is no want or excess of jurisdiction and an adequate remedy exists, a writ should never issue. Olsen v. District Court, *supra*. Furthermore, this Court has held that if there was an adequate remedy of appeal from a lower court that has jurisdiction over the parties and the subject matter, and the party permits it to lapse, he does so at his peril and an extraordinary writ should not lie. Anderson v. Baker, 5 Utah 2d 33, 296 P.2d 283 (1956).

Applying the above principles to the instant case, if the Ninth Circuit Court has jurisdiction over bondsmen and the subject matter, and if appeal to the district court was an adequate remedy, the writ was improperly issued. Therefore, since the Ninth Circuit Court has jurisdiction over bondsmen and bond forfeitures, and an appeal from a bond forfeiture is

available, then an extraordinary writ should not lie and the District Court acted improperly and without authority in granting the bondsmen's extraordinary writ.

### POINT III

THE DISTRICT COURT LACKED CONSTITUTIONAL AUTHORITY WHEN IT EXERCISED SUPERVISORY AUTHORITY OVER THE NINTH CIRCUIT COURT.

The District Court apparently issued the extraordinary writ under what was perceived as supervisory authority over the Ninth Circuit Court. However, a recent amendment to the Constitution of Utah has removed all supervisory power district courts previously had over circuit courts. Article VIII, § 5 of the Constitution of Utah, effective July, 1985, states as follows:

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

The prior Constitutional provision, Article VIII, § 7, granting jurisdiction to the district court provided:

The district court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The district courts or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and other

writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions. [Emphasis added.]

The former provision of the Constitution granted the district court supervisory control over inferior courts. The new Constitutional provision conspicuously omitts the language dealing with the district court's supervisory powers over inferior courts, i.e. circuit courts. When the new constitutional provision took effect, this provision specifically removed any prior supervisory authority the district court had over the circuit court under the repealed provisions.

The District Court has no statutory authority to supervise circuit courts. Section 78-3-4 of the District Court Act, enacted in 1943 and amended in 1983, provides:

The district court shall have original jurisdiction in all matters civil and criminal, not excepted in the Constitution and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The district courts, or any judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions . . . . [Emphasis added.]

This provision was enacted pursuant to the authority specified in Article VIII, § 7 of the prior Constitutional article and grants to the district court supervisory authority over inferior courts, in conformity with the prior constitutional provision. However, with the adoption of the new Judicial article, that portion of

§ 78-3-4 granting the district court supervisory authority over inferior courts is inconsistent with the new Article VIII, § 5.

As a general principle, a statute existing at the adoption of a constitution or constitutional amendment cannot be upheld if it is opposed to the plain terms of the Constitution. In such a case, the statute may be regarded as repealed by the constitutional provision by implication. United States v. Mack, 295 U.S. 480, 79 L.Ed. 1559, 55 S.Ct. 813 (1935); Massey v. United States, 291 U.S. 608, 78 L.Ed. 1019, 54 S.Ct. 532 (1934); United States v. Chambers, 291 U.S. 217, 78 L.Ed. 763, 54 S.Ct. 434 (1934); National Prohibition Case, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1920); Veterans' Welfare Board v. Riley, 189 Cal. 159, 208 P. 678 (1922); Jelm v. Jelm, 155 Ohio 226, 98 NE2d 401 (1951).

The final test in determining whether a statute is repealed by implication by a constitutional provision is: Does the Legislature have the present right to enact statutes substantially like the statute in question under the new constitutional provision? Monaghan v. Lewis, 5 Penn. 218, 59 A 948 (Delaware 1905). In applying the test to the instant case, the Legislature had the right to enact a statute substantially like § 78-3-4, except for the supervisory language. The Legislature does not have the right to enact a statute which would grant to the district courts supervisory powers over inferior courts. Further, if the authority of the legislature to enact a particular statute is derived solely from a particular constitutional provision, a repeal of such provision operates as

a repeal of the statute. United States v. Constantine, 296 U.S. 287, 80 L.Ed. 233, 56 S.Ct. 223 (1935). United States v. Chambers, supra. The powers given the district court by constitutional provision cannot be enlarged or abridged by the legislature. Robinson v. Durand, 36 Utah 93, 104 P. 760 (1908). Therefore, a repeal of the constitutional provisions dealing with the district courts supervisory authority over inferior courts operates as a repeal of those provisions of § 78-3-4 granting supervisory powers of the district court over inferior courts.

Section 4 of Senate Joint Resolution No. 1, Laws 1984 (2d S.S.), providing for the repeal and reenactment of Article VIII, states in part:

Existing statutes and rules on the effective date [July 1, 1985] of this amendment [Article VIII], not inconsistent with it, shall continue in force and effect until repealed or changed by statute.

This savings clause inserted by the Legislature provides that all statutes in force and not inconsistent with the new constitutional provision shall continue until amended or repealed by the Legislature. However, by this enactment, the Legislature recognized that inconsistent statutes cannot continue in force and are therefore repealed by implication. Therefore, those provisions of § 78-3-4 granting such supervisory powers to the district court cannot be saved and are of no effect.

In the case before the Court, the District Court acted without constitutional authority when it attempted to exercise such supervisory powers over Appellants. The district court is limited to those powers granted it by the Constitution. S.L.C.

v. Christensen Co., 34 Utah 38, 95 P. 523 (1939); Wadsworth v. Santaquin City, 83 Utah 321, 28 P.2d 161 (1933); National Tunnel & Mines Co. v. Industrial Commission, 99 Utah 39, 102 P.2d 508 (1940). Consequently, the district court improperly exercised supervisory power over the circuit court.

#### POINT IV

JUDGE OWENS HAS AUTHORITY AND DISCRETION TO SUPERVISE BONDSMEN IN THE NINTH CIRCUIT COURT AND THE REVOCATION OF BONDSMEN'S BONDING PRIVILEGES WAS PROPER.

By constitutional grant of authority in Article VIII, § 5, Constitution of Utah, the Legislature enacted the Circuit Court Act of 1977, Utah Code Ann., § 78-4-1 et. seq. (1953, as amended), and created a circuit court system. The purposes of the Circuit Court Act are enumerated in § 78-4-2, as follows:

The purpose of this act is to create a statewide court of record of limited jurisdiction to provide full-time professional judicial service to every county in the state on a regular basis organized and administered in like manner to the district courts of the state. To this end this act shall be liberally construed and applied. [Emphasis added.]

The circuit courts are courts of limited jurisdiction, but § 78-4-18 provides that circuit judges have the same powers with respect to matters within their jurisdiction as may be exercised by district court judges. The circuit courts are supervised by the Supreme Court and the Judicial Council, as are all Utah courts. Article VIII, §§ 4 and 12, Constitution of Utah (effective July 1, 1985).

The Legislature has granted to circuit court judges the jurisdiction and powers of a magistrate, including the release on

bail of persons charged with criminal offenses. Section 77-20-5. Further, section 77-20-4 provides that bail may be posted in cash or a written undertaking with or without sureties, subject to the discretion of the magistrate. It is in the exercising of such discretion that a magistrate has the authority to determine from whom and under what minimal conditions a written undertaking, or bond, can be accepted. In addition, minimal qualifications of sureties on written undertakings are specified as follows in § 77-20-5:

Qualifications of sureties--Justification--Requirements of undertaking. (1) The sureties on written undertakings shall be real or personal property holders within the state and shall collectively have a net worth of at least twice the amount of the undertaking, exclusive of property exempt from execution.

(2) Each surety shall justify by affidavit upon the undertaking and each may be further examined upon oath by the magistrate or by the prosecuting attorney in the presence of a magistrate, in respect to his property and net worth.

(3) The undertaking shall, in addition to other requirements, provide that each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the undertaking may be served, and that his liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

No other procedure for the approval of bondsmen is specified by the Utah Legislature. The Legislature has granted circuit court judges, when acting as magistrates, broad discretionary powers over sureties to written undertakings. The entire field of the regulation of bondsmen has not been preempted by legislative action. This Court has imposed no additional standards.

Further, circuit courts have certain common law inherent judicial powers in addition to those specifically prescribed by the Legislature. As a common law inherent judicial power, courts have the authority to authorize and control bondsmen in their jurisdiction. Taylor v. Waddy, (Tenn., 1960) 334 SW2d 733. The Supreme Court of Tennessee in Taylor v. Waddey, in construing the Release from Custody and Bail Reform Act, T.C.A., § 40-12-1 et. seq., held that statutes concerning the regulation of bail bondsmen and their qualifications are directory only and do not cover the whole field of what is necessary for a bondsmen before he is allowed to make bonds in various cases and that such statutes do not take away inherent right of the court to properly administer its affairs. The Court reasoned that a court with general judicial powers has certain inherent judicial powers and rights to see that the courts over which they preside, in the absence of any statute on the subject, are conducted in an honest and upright manner by those who are officers of the court or who are dealing with the court. 334 S.W.2d 733, 736.

The relevant Tennessee statute is an extensive statutory system for dealing with bail and bondsmen based on public policy considerations aimed at controlling certain questionable practices. In Utah, the bonding statutes are directory only and do not cover the entire field of regulation of bondsmen, particularly in light of the limited control the Legislature has exercised over the courts in this area. The statutes do not interfere with judge's inherent powers such as

the administration of court affairs, which includes the approval and revocation of bonding authority.

The acceptance and approval of bonds is a judicial function of the court. Summit Fidelity & Surety Co. v. Nimitz, 158 Neb. 762, 64 N.W.2d 803 (1954) Authority to authorize, supervise, and control bondsmen lies with the magistrate having jurisdiction over the person arrested. Furthermore, there are no Utah cases which grant that supervisory authority to anyone other than the magistrate and no Utah cases have held that bondsmen are granted a license to write bonds.

In the instant case, the bondsmen were granted the privilege to issue ritten undertakings in the Ninth Circuit Court. Judge Owens has the authority and discretion, pursuant to §§ 77-20-4, 77-20-5, and common law inherent judicial powers, to authorize and control bondsmen. That privilege to issue bonds continues at the discretion of the court. There is no authority in Utah for the suggestion that the privilege, once granted by a magistrate, continues indefinitely. The bondsmen have in no way been granted a life estate to write bonds in the Ninth Circuit Court. The discretion is with the magistrate, Judge Owens, as to how long that privilege may continue and that discretion may be exercised on a case by case basis. Sections 77-20-4 and 77-20-5.

Further, if the surety company should conduct his business in a manner as to lose the confidence of the court or a judge thereof, the court or judge by exercising the court's inherent powers could refuse to accept bonds of any named surety. Concord Casualty & Surety Co. v. United States, 69 F.2d 78, 81

(2nd Cir. 1934). The court's judicial act of approval of a bond is not mandatory under § 77-20-4, supra, but the statute calls for the exercise of judicial discretion.

A general rule exists that when judicial discretion is appropriate, considerable weight should be given to the determination of the trial court. Barber v. Calder, 522 P.2d 700, 702 (Utah 1974). This is true because the trial judge is in the best position to determine what the interests of justice require in safeguarding the rights and interests of all parties concerned due to his close involvement with the parties, the witnesses, and the total circumstances of the case. Id.

In the context of regulating bail bondsmen in his court, Judge Owens is in the best position to determine what justice requires in safeguarding the interests of the accused, the court, and the bondsmen. Therefore, great deference should be given each judge in regulating bondsmen at the circuit court level. See also, Gilbreath v. Ferguson, where the Tennessee Supreme Court stated, "Of course, the judge has full authority to determine who shall and who shall not qualify as bondsmen in his own court." 260 S.W.2d 276, 278 (Tenn. 1953).

Moreover, the bondsmen have no recognized property right to act as bondsmen before the Ninth Circuit Court. When bondsmen's privilege to issue bonds was revoked because Judge Owens no longer had confidence that the underwritings secured by bondsmen would continue in execution of sentence as provided in § 77-20-7 and the specific terms of the individual undertakings, the bondsmen were deprived of no recognized property right in

Utah. Judge Owens properly exercised his discretionary, inherent authority to authorize or not authorize a bondsman pursuant to current law. The privilege to act as bondsman in the Ninth Circuit Court is conditioned upon the understanding that the term of each bond would continue in execution of any sentence.

Section 77-20-7. As long as the bondsmen are willing to comply with the terms of the agreement, the provisions of the statute, and the specific language of the written undertakings, and are qualified to act as bondsmen pursuant to law, there would have been no action taken by Judge Owens to alter the privilege which had been granted them to issue bonds in the Ninth Circuit Court.

In jurisdictions where a license has been granted by an administrative body to act as bondsmen, revocation of that license without notice and hearing would probably violate due process of law. However, in Utah, no license is granted to bondsmen, bondsmen are not controlled in any way by any administrative agency or body, and the authority to accept sureties on written undertakings is within the sole discretion of a magistrate. Sections 58-1-11 through -20. Therefore, the due process argument is without merit.

In other jurisdictions courts have recognized a due process right to notice and hearing prior to revocation of a bail bondsmen's license. See, i.e. In Re Carter, 192 F.2d 15 (D.C. Cir. 1951); Weaver v. Dostert, 300 S.E.2d 102 (W.Va. 1983). However, the circumstances of these cases differ significantly from the instant case. Carter dealt with congressional legislation which removed part of inherent authority of the D.C.

district courts to regulate bondsmen in their jurisdiction. The legislation granted bondsmen in D.C. courts licenses, a property right, for a limited term. Weaver involved a statute, W.Va. Code § 51-10-8 (1959), which was substantially similar to D.C. Code § 23-602 cited in Carter. The Supreme Court of Appeals of West Virginia found that authority to act as a bondsmen sufficiently resembles a license and therefore must be treated as a license for purposes of procedural requirement attendant upon its termination. 300 S.E.2d at 103. Once finding that bondsmen are granted a license, the Weaver court followed Carter without discussion. Moreover, Weaver has not been followed in any other jurisdiction.

Significantly, there is no grant of a license and no grant of a property right to bondsmen in Utah. At most bondsmen have a privilege to issue undertakings and the magistrate has the discretion to accept bonds issued by bondsmen. Bondsmen are not authorized to issue bonds for any specific period of time. The period of time a bondsmen may issue bonds may be on a case by case approval of undertakings by a magistrate. The Legislature has not taken the Utah courts their common law authority to regulate bondsmen in their jurisdiction. Section 77-20-5 has merely specified minimal qualifications requirements for sureties. The Legislature, in its wisdom has determined that magistrates shall continue to have and to exercise broad discretionary powers in this area. It can be presumed that if the Legislature intended that bondsmen be licensed, they would have enacted appropriate licensing provisions.

A strong dissent to the majority opinion in Carter was written by Judge Prettymann, in which Judge's Stephens and Proctor joined. 192 F.2d 15, 17-29. The minority argued persuasively that the Federal Circuit Court of Appeals has no jurisdiction to review orders of the U.S. District Court upon original applications for authority to write bonds or upon applications for renewal, except where there is an abuse of discretion by the Court below. The dissent argues that Congress left to the trial courts the making of rules under statute, that the authority to accept a bondsmen is within the discretion of the trial courts, and that that authority must not be disturbed unless there is found an abuse of that discretion. 192 F.2d 15, 17-29.

Judge Prettyman argues that the writing of bail bonds is not a right and that the customary elements of due process of law are not required for valid denial of the privilege and states as follows:

The writing of bail bonds for pay is not an ordinary vocation the right to pursue which is a basic right and as to which the police power of the state is sharply limited. In the first place, the admission to bail is part of the operation of the trial courts. It is the placing of an accused in the custody of persons selected by him who become, so to speak, his friendly jailers. It is the substitution of one custodian for another. The surety upon the bail has power to arrest the accused. The granting of bail is governed by the Federal Rules of Criminal Procedure. It is performed by a commissioner, judge or justice. Thus going bail is not an ordinary and independent vocation but is an integral part of the operation of the judicial system. In the second place, the bail bond is a contract with the Government. According to the

doctrine of Perkins v. Lukens Steel Co., no person has a "right" to do business with the Government by contract. That doctrine is peculiarly applicable to bail contracts, because, from the very nature of the transaction, the qualification of a surety to appear upon even one bond is in large measure within judicial discretion.  
192 F.2d 15, 18-19.  
[Emphasis added.]

Judge Prettyman concluded:

All the foregoing characteristics of bail bonds combine to indicate that there is no basic "right" to enter into them, as surety, with the Government. Due process of law applies to a deprivation only. If a person is not engaged in a business and has no enforceable right to enter upon it, he is not deprived of a right if he is denied the privilege. Since there is no right to write bail bonds for pay, my view is that the customary elements of due process of law are not required for valid denial of the privilege.  
192 F.2d 15, 19.  
[Emphasis added.]

The Tennessee Supreme Court in Taylor v. Waddey, supra, analyzed the Carter decision and refused to go as far as the Federal Circuit Court of Appeals. The Taylor court adopted Judge Prettyman's argument from the dissent and determined that the courts have inherent powers above and beyond the directions provided in the bail statutes. 334 SW2d 733, 737. Taylor also stated that so long as the bondsman complies with the statutes and meets a fair and rasonable standard in the conduct of his business before the courts then there is no one who is going to prevent him from practicing his profession therein. Under those circumstances there is no violation of the due process of the law because due process applies only to a deprivation. 334 SW2d 733, 737. Therefore, the notice and hearing which it is insisted

Judge Owens allegedly failed to provide for could in any event be only such notice and hearing as would afford due process when it is contemplated that some constitutional right is claimed to be invaded.

In this case there is no deprivation of due process. For there to have been a violation of due process, there must have been a deprivation of a property right. The bondsmen have no property right to issue bonds in the Ninth Circuit Court. Bondsmen have no license to act as bondsmen. The term of the underwritings to be issued by bonds in the Ninth Circuit Court was provided for by law, by terms of the bond, and by agreement and was a condition upon which the privilege to write bonds was predicated. Bondsmen, by their own actions clearly indicated that they no longer intended to be bound by the terms of the agreement, the terms of the bonding statute, and the specific terms of the written undertakings, thereby rendering themselves unsuitable to issue bonds in the Ninth Circuit Court. The bondsmen were afforded notice and hearing at the forfeiture hearings for the bonds which were forfeited in the circuit court, both before and after this action was commenced. The issue as to the term of undertakings should have been raised below and an appeal taken therefrom.

## POINT V

THE DISTRICT COURT IMPROPERLY INTERPRETED UTAH CODE ANN §§ 77-20-7 AND 77-20-8 WITH RESPECT TO THE EFFECTIVE TERM OF THE UNDERTAKING OF BAIL AND THE LIABILITY OF BONDSMEN.

The term of the undertaking of bail and the liability of bondsmen continue up to and including the surrender of the defendant in execution of any sentence imposed. The District Court erroneously ruled that the undertakings of bail were exonerated by operation of law upon the imposition of sentence by the Ninth Circuit Court and that the bondsmen were accordingly released from liability. However, this ruling misinterprets the language of § 77-20-7(1) (1980) which provides:

The principal and the sureties on the written undertaking are liable thereon during all proceedings and for all appearances required of the defendant up to and including the surrender of the defendant in execution of any sentence imposed irrespective of any contrary provision in the undertaking.  
[Emphasis added].

Section 77-20-8 further provides in pertinent part:

Upon conviction, by plea or trial, the court may order a defendant to be taken into custody or may order bail continued pending imposition of sentence.  
[Emphasis added].

Standing alone, § 77-20-8 may be read to support the District Court's ruling. However, when read in conjunction with § 77-20-7, the District Court improperly interpreted the intent of the statutes. Furthermore, it is necessary to consider that the primary purpose of bail is to ensure the appearance of the defendant at all proceedings required by the court, "up to and including the surrender of the defendant in execution of any

sentence imposed." Utah Code Ann. § 77-20-7 (1980) (emphasis added). Also, the specific language of the bonds provides the same term of the statute.

In Walton v. Circuit Court, No. 16281 (December 12, 1979), this Court held that when defendants were ordered to pay a fine, but no jail sentence was imposed, their bondsman was released from liability. Appendix A. The Court reasoned that the defendants were no longer subject to detention on the charges and judgments against them and that the purpose for the bail bonds had been fulfilled. In the present case, a jail sentence was imposed upon each defendant in addition to a fine and other conditions of probation. Therefore, the defendants remained subject to detention on the charges and the purpose for the bail bonds had not been fulfilled. Consequently, the circuit court properly refused to exonerate the bonds.

Significantly, the Legislature recognized the difference between imposition of a sentence and execution of a sentence. Section 77-20-7(i) provides that sureties are liable for a term up to and including the "execution of any sentence imposed." [Emphasis added]. Other courts have recognized this distinction. Gibson v. State, 655 P.2d 1028 (Okla. 1982); Kriebel v. United States, 10 F.2d 762 (7th Cir. 1926). In Gibson, the Supreme Court of Oklahoma refused to exonerate a bond when the defendant failed to render himself in execution of judgment after sentencing. 655 P.2d at 1030. The court in Kriebel defined "imposition of sentence" as the laying on of sentence or the act of sentencing and "execution" as the act or

process of carrying out in accordance with a plan, purpose or order. 10 F.2d at 764.

Moreover, the general rule is that a bond entered into voluntarily and for a lawful consideration is valid as a contractual obligation if it is not contrary to public policy. Hendrick v. Hartford Accident & Indemnity Co., 154 Kan. 79, 114 P.2d 812 (1941); Day v. Walton, 199 Tenn. 10, 281 S.W.2d 685 (1955).

In the instant case, the bondsmen entered into an agreement, not inconsistent with law, with Judge Owens to write bonds in that court subject to the understanding that term of the undertakings would continue through probation. The language of the statute is entirely consistent with such an agreement. Therefore, because the bondsmen entered into this relationship voluntarily and the agreement does not violate public policy they are bound by their agreement.

For all of the above reasons, this Court should reverse the district court's ruling releasing the bondsmen from liability and find that bail bonds are exonerated at the completion of probation.

#### CONCLUSION

For all of the above reasons, Appellants respectfully request that the Court find that pursuant to Utah law, practice and procedure, that Judge Owens has the authority and discretion to supervise bondsmen in the Ninth Circuit Court and that he acted properly therein. Furthermore, that the bondsmen had an appropriate remedy for direct appeal to the district court and

failure to raise that appeal constituted a waiver. Finally, that the district court improperly and without authority issued an extraordinary writ. Therefore, the district court's ruling should be reversed.

DATED this 17 day of April, 1986.

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Attorney General



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CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing Brief were mailed, postage prepaid, to Gary W. Pendleton, Attorney for Respondent, 50 East 100 South, Suite 101, St. George, Utah 84770, this 22 day of April, 1985.



## APPENDIX

IN THE SUPREME COURT OF THE STATE OF UTAH

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Vincent P. Walton, et al.,  
Plaintiffs and Respondents,

No. 16281

v.

F I L E D  
December 12, 1979

Circuit Court, State of Utah,  
Salt Lake County, Salt Lake City  
Department, and the Honorable  
Maurice D. Jones, Circuit Judge,  
Defendants and Appellants.

Geoffrey J. Butler, Clerk

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PER CURIAM:

Defendants appeal from an adverse summary judgment ordering the exoneration of the undertakings of the bail bonds of four defendants in cases filed in the Salt Lake City Court, now the Circuit Court. Each of the four defendants had been charged in the Salt Lake City Court with a misdemeanor and had been admitted to bail on undertakings complying with the requirements of Section 77-43-13, U.C.A. 1953, furnished by the plaintiff. In the course of the proceedings, each defendant had been convicted or had entered a guilty plea, and had personally appeared in court and been sentenced to pay a fine of \$150.00. Some records pertaining to the cases have been lost. However, the documents available indicate that the sentence was to pay a fine and they do not show that any jail sentence had been imposed as a part of any sentence, nor to enforce payment of any fine. The court gave each defendant 30 days to pay the fine, which period expired without payment. Proceedings were instituted against the bondsman on the theory that the undertaking in the bail bonds required the bondsman to pay any fine imposed if the defendants failed to pay as ordered. All four bonds were ordered to be forfeited. The bondsman sought relief in the District Court, and obtained a judgment ordering, among other things, that the Circuit Court exonerate the undertakings in bail and release the bondsman from liability.

The liability of the bondsman is determined by the terms of the suretyship undertaking. There is no express requirement in the language of the undertaking that imposes liability on the bondsman for payment of any fine. There is a statement "that the defendant will render himself in execution of the judgment." This statement presupposes that the judgment is one that provides for imprisonment or for imprisonment to enforce payment of a fine. A judgment limited to a fine constitutes a lien, upon which an execution may be issued as on a judgment in a civil action.

In the words of Justice Cordoza: "In the discretion of the court the judgment may direct that the defendant shall be imprisoned until the fine is paid. If the direction for imprisonment is omitted, the remedy by execution is exclusive. Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of the sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment." Hill v. United States, 298 U.S. 460, 80 L. Ed. 1283, 56 S. Ct. 760.

When fines only were imposed against the four defendants, they could no longer be subjected to any detention on the charges and judgments against them. The purpose for the bail bonds had been fulfilled, and their bondsman was released from any further liability.

The judgment of the District Court is affirmed. No costs awarded.

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Wilkins, Justice, does not participate herein.