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William O. Morris

INTRODUCTION

The rules of law applicable to suretyship transactions are drawn from many broad areas of the law. To fully understand and comprehend the problems associated with a suretyship transaction one must have a working knowledge of the laws relating to contracts, negotiable instruments, property, pleading and practice and certain equitable doctrines.

The importance of suretyship law to practitioners in West Virginia is attested to by over one hundred and fifty cases in which the Supreme Court of Appeals of West Virginia has resolved disputes resulting from suretyship transactions. Excluded from this number of cases are the multitude of cases involving the application of the Statute of Frauds to certain transactions on which one was claimed to be a surety.

It is the purpose of this article to examine the major decisions of the Supreme Court of Appeals of West Virginia during the first century of statehood in which problems of suretyship law were resolved. Consideration will also be given to the provisions of chapter 45 of the West Virginia Code which contains nearly all the statutory law of the state with reference to suretyship law.

DEFINITION OF A SURETY

A surety may be defined as a person who being liable to pay a debt or perform an obligation is entitled, if he be required to perform, to be indemnified by some other person who ought to have himself performed before the surety is compelled to do so. The relation is fixed entirely by the arrangement and equities between the debtors or obligors and may or may not be known to the creditor.

SURETY AS CO-OBLIGOR

A court of law regards the surety as a co-obligor with his principal, and in the absence of any statutory restriction, the

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creditor has the same rights against the surety that he has against the principal debtor.\(^2\)

**Parol Evidence to Show Suretyship Relation**

The courts of West Virginia have permitted evidence to be introduced into proceedings to prove the relationship of principal and surety on written contracts both sealed\(^3\) and unsealed.\(^4\)

In *Creig v. Henrick*\(^5\) parol evidence was allowed to show the relation of principal and surety on a bond signed by three persons followed by their seal. One of the obligors on the bond, who was in fact a surety and who gave notice to the creditor to bring suit on the bond but subsequently consented to the dismissal of the action, remained bound on the obligation without the showing of a new promise on his part.

**To Whom Obligation of a Surety Extends**

No person can maintain an action on a bond guaranteeing the performance of a private contract except the obligee, his assignee or personal representative.\(^6\) A private bond does not protect strangers to the bond as does a bond of a public official.\(^7\) If a bond is payable to a corporation, only the corporation may maintain an action thereon. Shareholders of the corporation have no legal interest in the bond.\(^8\)

Where a bond did not name the bank as the creditor, yet, having evidently been executed to secure the bank against its cashier's default, the court construed the contract according to the real intention of the parties and permitted the bank in its corporate capacity to maintain a suit on the bond.\(^9\)

In *Lawhead v. Doddridge County Bank*,\(^10\) the court applied the doctrine descriptio personae in determining to whom the surety's liability on a bond extended. The bond in question named

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\(^3\) Parsons v. Harold, 46 W. Va. 122, 32 S.E. 1002 (1899).

\(^4\) Creig v. Hendrick, 5 W. Va. 140 (1872).

\(^5\) *Id.* at 141.


\(^7\) *Id.* at 437, 85 S.E. at 640.

\(^8\) *Id.* at 437, 85 S.E. at 640.

\(^9\) Clark v. Nickell, 73 W. Va. 69, 79 S.E. 1020 (1913).

\(^10\) 119 W. Va. 467, 194 S.E. 79 (1937).
as creditor "C. E. Lawhead, receiver." The court held the word receiver following the creditor's name was unimportant, as it merely identified the person—descriptio personae. The surety was held liable for personal deposits made by Lawhead.

SURETYSHIP BY OPERATION OF LAW

The opinion in the case of Burlew v. Smith11 contains a satisfactory discussion of the respective rights of parties when land had been sold subject to encumbrances and the vendee assumed an indebtedness as part of the purchase price. In this case one Patton conveyed to Smith a parcel of land subject to a vendor's lien to secure the payment of the purchase price. Smith conveyed the land to Bowers who assumed the obligation to pay the balance of the purchase price to Smith. Bowers then sold the land to Garner, Bowers agreeing to pay the purchase price and to discharge all liens on the property. There was a default in payment of the purchase price to Patton. Burlew, plaintiff in this litigation, was the administrator of the estate of Patton, the original vendor in this series of transactions. Garner and Smith filed cross answers praying for a decree that Bowers pay the indebtedness.

Bowers' express covenant to pay all incumbrances on the land gave Garner a right to compel her to pay the Patton estate to Garner's relief. Bowers' assumption of the Smith notes gave Smith a like equitable right. In equity, both were quasi sureties of Bowers. Each, being treated as sureties, could have maintained a bill in equity to require Bowers to exonerate them. This may be accomplished by the use of a cross bill.

"[W]hen it is expressly or impliedly agreed that the incumbrance shall be deducted from the consideration, or paid by the purchaser, the vendor stands in the position of a surety, and is entitled to exoneration at the expense of the land." It is therefore the duty of the purchaser of encumbered land who assues or agrees to pay off the indebtedness of the vendor, as where the land stands as collateral, to protect the land from sale under the trust deeds; and the fact that he does not do so, but permits it to be sold under said deeds, does not exonerate such party from the payment of the purchase money.12

RELATIONSHIP OF PARTIES ON DISSOLUTION OF PARTNERSHIPS

The question of whether two partners who were jointly liable for an indebtedness to a creditor can change that relationship to one of principal and surety so as to affect their relation with the partnership creditor and their attaching responsibilities was answered in *Barnes v. Boyers*.*

Boyers and Harden, doing business under the name of Boyers and Harden, executed a partnership note payable to Barnes. After executing the note the partnership was dissolved, and it was agreed between Boyers and Harden that Harden would pay the note. At maturity of the note Boyers gave notice to Barnes to proceed against Harden to collect the note. Harden was alleged to be solvent at that time, but had since become insolvent. Boyers defended in part on the basis that he had been discharged from liability by the creditor's failure to proceed against Harden whom he claimed as between them was the principal debtor.

The court in finding for the plaintiff concluded that it is not in the power of joint debtors to change their relations to a common creditor without his consent, and that the plea did not allege that the plaintiff was ever consulted or consented to any such arrangement. According to the court, the creditor had a right to ignore the notice served upon him to forthwith institute action against the partner who had agreed with the outgoing partner to pay the partnership indebtedness.

The court noted the case of *Johnson v. Young* which had been cited in support of the contrary view, but stated that the court went no further in the syllabus than to decide that where one of two partners purchased the interest of the other in the partnership property and assumed and agreed to pay the partnership debt, that as to such debts the former became in equity the principal debtor, and the latter the surety.

The court in the *Barnes* case quoted from *Parsons, Partnership* 428 (3d. ed.):

No dissolution of any kind affects the rights of third parties who have had dealings with the partnership without their consent. This is a universal rule, without any exception whatever . . . . Such an agreement is so far binding on the partners

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13 *34 W. Va. 303, 12 S.E. 708 (1890).*
14 *Supra, note 1.*
that, if either of the others is obliged to pay a debt thus assumed by a partner, the partner paying may have his action for the money against the partner who undertook to pay; but, so far as the creditors are concerned, all the partners remain just as responsible for all the creditors after such an agreement as they were before.\textsuperscript{15}

The court noted that it was aware that notwithstanding the unanimity of the textbooks upon this subject, some very respectable decisions are to be found, both in England and the United States, which hold otherwise and decide that, where the retiring partner has brought to the notice of a creditor the fact that when on dissolution of the partnership one member received all the assets and had agreed to pay the partnership debts, such creditor is bound to recognize the newly created relationship of principal and surety. If the creditor is requested by the retiring partner to collect his claims from the partner who had agreed to pay the partnership debts and the creditor refuses or neglects so to do, if at the time of the request the principal was solvent and able to pay, even though he thereafter becomes insolvent, the retiring partner is discharged.\textsuperscript{16}

When on the dissolution of a co-partnership one partner purchases the interest of his co-partners and agrees to pay all the partnership liabilities, the partner thus retiring may still be held liable by the creditors, but if he is compelled to pay he is entitled to indemnity from the other partner and is therefore as to such other partner a surety merely upon the partnership obligation.

\textbf{CONSTRUCTION OF CONTRACT}

In determining the liability of a surety on his contract reference may be had to the language used in the contract as well as to the attending circumstances. In this regard the Supreme Court of Appeals of West Virginia in \textit{Waldron v. Tarney Collieries Co.}\textsuperscript{17} stated:

The courts should so far as possible put itself [sic] in the place of the parties when their minds met upon the terms of

\textsuperscript{15} \textit{Supra}, note 13, at 308.

\textsuperscript{16} See also Colgrove v. Tallman, 67 N. Y. 95 (1876), where the court held that where one of two co-partners purchased the interest of the other in the partnership property and assumed and agreed to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and a firm creditor who has notice of the agreement is bound to observe it.

\textsuperscript{17} 101 W. Va. 596, 133 S.E. 318 (1926).
the agreement, and then from a consideration of the writing itself, or its purpose and of the circumstances which conditioned its making, and endeavor to ascertain what they intended to do, upon what sense and meaning of the terms they used their minds actually met . . . . The intention of the parties when manifest, must control and be enforced without regard to inapt expressions and technical rules of interpretation.

Generally the same rules of construction and interpretation are used by the courts with reference to suretyship contracts as in case of other types of contracts. Although it has been said that the contract of a compensated surety should be construed most favorably for the creditor's benefit, a surety should have the right to stand on the very terms of his contract and not be held responsible beyond the clear and absolute terms of his undertaking. Presumptions and equities should not be indulged in to enlarge or in any degree change the surety's obligation from that stated in his contract. Clearly an uncompensated surety should not be held beyond the strict terms of the necessary intendment of his obligation.

The laws under which bonds are executed are read into them for the purpose of determining the liability of the surety. The parties to suretyship arrangements may incorporate by reference other documents or contracts into a suretyship agreement as in the case of other types of contracts.

A gratuitous surety, that is, one who became a surety without having received value for his undertaking, his obligation being supported by the same consideration that supports the principal debtor's obligation, has always been a favorite of the law. He is not bound beyond the strict terms of the engagement, and his

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10 Id. at 599, 133 S.E. at 319.
19 Id. at 599, 133 S.E. at 319; Schreiber & Sons Co. v. Miller Supply Co., 77 W. Va. 236, 87 S.E. 335 (1915); Wait v. Homestead Bldg. Ass'n, supra note 6.
25 Board of Commrs v. Clemens, 85 W. Va. 11, 100 S.E. 880 (1919).
liability cannot be extended by implication or construction beyond the true meaning expressed by the contract.26 Such surety has the right to insist on standing on the letter of the contract.27 He may plant himself upon the technical objection of non haec in foedera veni—this is not my contract.28

A compensated surety, one who received value for becoming a surety, such as a surety company, has never been looked upon with favor by the West Virginia court with respect to such surety's liability.29 In some cases a compensated surety has been treated almost like an insurance company with respect to its liability on a written contract.30 The contracts of compensated surety companies are usually expressed in terms selected by the surety companies or their lawyers, and therefore terms used should be construed most strongly against the company and in favor of the obligee named in the contract.31

The doctrine or rule of strictissimi juris, strict adherence, applies for the benefit of a gratuitous surety once the meaning of the contract has been determined.32 A compensated surety does not have the benefit of this doctrine.33 The rule of strictissimi juris is not a rule of construction.34 It operates only after the meaning of the contract has been ascertained.35

The doctrine of descriptio personae as a rule of construction applies to suretyship contracts. A bond which ran to "C. E. Lawhead, receiver" was held to protect personal deposits made by Lawhead. The words following the name merely identified the person.36

The Supreme Court of Appeals of West Virginia held it was proper to permit a corporation to maintain a suit on a bond even though the bond did not name the corporation as the creditor

26 Waldron v. Tarney Collieries Co., supra note 17.
27 Lawhead v. Doddridge County Bank, supra note 22; Glenn v. Morgan, supra note 21.
30 Board of Comm'r's v. Clemens, supra note 25.
31 Id. at 14, 100 S.E. at 681.
32 Koblegard Co. v. Maxwell, 127 W. Va. 630, 34 S.E.2d 116 (1945); Board of Comm'r's v. Clemens, supra note 25.
33 Board of Comm'r's v. Clemens, supra note 25.
36 Lawhead v. Doddridge County Bank, supra note 22.
where it was shown that the real intent and purpose of the bond was to protect the corporation.  

A depositor bond is usually held to be a continuing obligation. That is, the sureties on such bond continue to be liable for so long as the principal continues to receive deposits of the obligee unless the surety takes steps to terminate the continuing offer of guaranty with respect to subsequent deposits.  

**CREDITOR'S DUTY TO VOLUNTEER INFORMATION TO PROSPECTIVE SURETY**

It is recognized that throughout the United States there is a lack of uniformity on the right of one about to become a surety to rely upon the silence of the creditor as a representation of the trustworthiness of the principal obligor. Judge Green in *Warren v. Branch* disapproved the broad doctrine of Lord Campbell in *Raulton v. Matthews* and adopted the moderate view making it the duty of the creditor to warn the surety of the unworthiness of the principal, only when the dealings are such as fairly to lead a reasonable man to believe fraud must have been used in procurement of the suretyship.

In *Wait v. Homestead Bldg. Ass'n* the facts disclose that the creditor may have had grounds for fear or suspicion, but did not have actual knowledge of any fact casting reproach upon the honor of the principal-treasurer of the corporation-creditor. The court observed:

> Having no knowledge of any fraud on his part against their association, the directors could not consistently assume or suspect any fraud in his transactions with those who became, or were about to become his sureties. . . . Mere constructive notice of default is not enough to impose duty to a surety. Actual knowledge is required.

The directors of the corporation-creditor are not required to make an investigation to the end that they might advise the surety.

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38 Lawhead v. Doddridge County Bank, *supra* note 22.
39 15 W. Va. 21 (1879).
40 10 Cl. & F. 934 (H.L. 1844).
41 *Supra*, note 6.
42 *Id.* at 448, 449, 85 S.E. at 644, 645.
43 *Id.* at 449, 85 S.E. at 645.
The Supreme Court of Appeals of West Virginia has cited with apparent approval the Georgia case of *Fidelity & Cas. Co. v. Gate City Nat'l Bank*44 with respect to any duty on the part of the creditor to inform a surety of misconduct on the part of the principal debtor. In the Georgia case, the contract in issue provided that the creditor-bank was to notify the surety of any loss of more than a prescribed amount. The court said:

Only after knowledge had actually come to the Bank that he was, or had become, otherwise, was it under any duty to the company; and then, it was required to immediately notify the company of what it had ascertained . . . . The 'knowledge' referred to meant actual knowledge.45

The highest court in West Virginia has noted that the United States Supreme Court has denied any duty on the part of an employee to exercise diligence to ascertain whether an employer defaulted or did any act indicative of untrustworthiness, to the extent that the sureties may be protected, and repudiated the view that the doctrine of constructive notice applies to the subject.46

What is meant by "immediate notice" when the creditor by the terms of the contract agreed to give "immediate notice" upon discovering a default by the principal has been considered by the West Virginia Supreme Court of Appeals. The court said that "immediate notice" does not require literal interpretation. "As soon as reasonably practical under the circumstances," "without unreasonable and unnecessary delay," "within a reasonable time," or "with reasonable diligence" are considered equivalent terms.47

Perhaps the fullest consideration of the obligation of the creditor to volunteer information to the surety is found in the old case of *Warren v. Branch*48 where the court said:

What misrepresentations or failures to disclose facts and circumstances by a creditor will release a security from his obligation to pay a debt? When with the knowledge and assent of the creditor, there is a misrepresentation with regard to a material fact, which, had it been known, might reasonably

46 Id. at 447, 85 S.E. at 644.
48 15 W. Va. 21 (1879).
have prevented the security from entering into his contract of suretyship, such contract will not be binding on the surety, though such misrepresentation was not made with a fraudulent purpose.49

Unless the surety makes an inquiry of the creditor, the creditor is under no duty to disclose facts to the surety which are in no manner connected with the transaction which is the subject of the suretyship, even though such facts would likely influence the surety to enter into, or decline to enter into the particular contract.50 For example, a creditor is under no duty to volunteer information to one about to become a surety that the principal debtor is a gambler. Such fact not being connected with the proposed transaction, the creditor would be under no duty to volunteer a disclosure of this fact to the surety.

A creditor who knows that the principal debtor is insolvent need not inform the surety of this fact when no inquiry is made of him with respect to this matter. The Supreme Court of Appeals of West Virginia said by the way of dicta:

"It is a material fact connected with the contract of suretyship, which might influence the surety in entering into the contract, if fraudulently concealed with a view to benefit the creditor, such concealment, though no inquiry has been made by the surety, would vitiate the contract of suretyship and discharge the surety.51"

Where there is a secret agreement between the creditor and the principal that the whole or substantial part of the money borrowed is to be applied to a pre-existing debt due the creditor, and this fact is not disclosed to the surety, the creditor believing that if the surety had such knowledge the surety would not sign the bond, such concealment, considered with the motive involved, would amount to fraud on the surety and would vitiate his contract. On the other hand, if the creditor had no reason to believe that the surety would not sign such a bond if he knew of the facts, the failure to communicate this fact would not be fraudulent, and the surety would be liable on the contract, assuming of course that the surety had made no inquiry with respect to the matter.52

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49 Id. at 26-27.
50 Id. at 35.
51 Id. at 35.
52 Id. at 35.
Where a bond is given for a cashier which binds the surety for all defalcations of the cashier, both past and future, the creditor would be guilty of fraud upon the surety if the fact that the creditor was already in default at the time of surety's undertaking was not disclosed to the surety, even though no inquiry was made. This is true even though there was no direct dealing between the creditor and the surety as where the cashier-principal debtor sought out the surety to sign the bond.53

Generally speaking, if the principal, in procuring one to become his surety committed a fraud upon the surety, either in suppressing or misstating facts, and the creditor had no knowledge and gave no assent to the fraud, the surety would nevertheless be liable to the creditor.54

In instances where the principal debtor practiced fraud upon one to induce that person to become a surety either by suppressing material facts, or by misstating facts and dealings such as to fairly lead the creditor, if a reasonable man, to believe that the principal must have been guilty of fraud in order to induce the surety to enter into the contract, the creditor is bound to inquire of the surety how his execution of the contract had in fact been procured. The creditor's failure to make such inquiry, if fraud had in fact been practiced by the principal on the surety, entitled the surety to avoid liability because of the fraud even though no fraud was traced to the creditor.55 As the court said:

If he has abstained from inquiry in such a case, because he sees the result of the inquiry would probably be shown that the transaction, in which he was engaging, was tainted with fraud, his want of knowledge of the fraud would in such a case afford no excuse.56

APPLICABILITY OF SURETYSHIP LAW TO NEGOTIABLE INSTRUMENTS

Careful consideration should be given to the laws to be applied in determining the rights and liabilities of those who have loaned their credit to another as evidenced by a negotiable instrument. The issue is whether the courts should apply negotiable instruments laws or rules of suretyship law in determining the rights and liabilities of one who is a surety on a negotiable instrument.

53 Id. at 35.
54 Id. at 36.
55 Id. at 36.
56 Id. at 36.
When one, other than the owner of a negotiable instrument, places his signature on a negotiable instrument for the purpose of adding his credit to the obligation of another, such party becomes in the broad sense a surety, whether he placed his name on the instrument as co-maker or endorser.

In a case decided after the adoption of the Uniform Negotiable Instrument Act, but prior to the adoption of the Uniform Commercial Code, the Supreme Court of Appeals of West Virginia resolved that it had not been the intent of the West Virginia legislature when it enacted the Uniform Negotiable Instruments Law to take from the operation of the Negotiable Instruments Law the entire body of laws relating to suretyship transactions. The court said: "... [I]n our opinion [the statute] evidence [sic] a clear legislative intent to make the relation of principal and surety as it existed at common law applicable to negotiable instruments."56

Prior to its repeal by the adoption of the Uniform Commercial Code, section 2, article 8, chapter 46 of the West Virginia Code (Michie 1961) provided for the discharge of negotiable instruments. Subsection (d) thereof provided: "This section does not include the rules governing the discharge of a surety or a party secondarily liable because of such secondary liability." The court felt obliged to disapprove a portion of its opinion in the previous case of Marshall County Bank v. Fonner.57 In the Marshall County Bank case there was no qualification to the signatures of the alleged accommodation makers. It did appear that the plaintiff knew that two of the parties had signed the instrument as accommodation makers. In the later case the court said: "We disapprove such parts of that opinion as would indicate that the law of suretyship where the relation of principal and surety is shown under proper evidence does not apply to negotiable instruments."58 As to whether such surety should be discharged in toto or pro tanto should be resolved according to the applicable principles of suretyship law.

Section 3-415 of the Uniform Commercial Code entitled "Contract of Accommodation Party" sets forth the law to be applied

57 Koblegard Co. v. Maxwell, supra note 32.
58 Id. at 638, 34 S.E. at 120.
59 113 W. Va. 451, 168 S.E. 375 (1933).
60 Koblegard Co. v. Maxwell, supra note 32, at 639, 34 S.E.2d at 120.
in determining the rights and liabilities of accommodation parties to negotiable instruments under the Uniform Commercial Code as now in effect in West Virginia. By this section of the Code it would seem that every person who places his name on a negotiable instrument, whether as an endorser or as co-maker, for the purpose of lending his name to another party is an accommodation party, whether the person so lending his name was or was not compensated for so doing.

Under sub-section (3) of section 3-415 of the Uniform Commercial Code the fact that one whose signature appears on a negotiable instrument was in fact a surety-accommodation party may not be shown against a holder in due course of the instrument who purchased the instrument without knowledge of the accommodation character of the signature. That is, parol evidence may not be introduced by the accommodation party against a holder in due course who purchased without knowledge of the accommodation character of a party to show the suretyship relation in order that he might benefit by any discharge dependent on his character as such. A surety co-maker on a negotiable instrument may prove any defense against a party not a holder in due course, or against a holder in due course who had knowledge of the accommodation character of the signature at the time of purchase, which he might have asserted against the party had the instrument been non-negotiable. For example, he might have shown that a binding extension of time for payment had been granted to the principal debtor without his consent. In which case under the rules applicable to suretyship law the surety would have a defense to any claim by the creditor, assuming the surety had not consented to the extension.

An accommodation endorser, as any other unqualified endorser, is only liable as an endorser after the instrument has been properly presented, dishonored and proper notice of dishonor given. It should be noted in passing that under the Uniform Commercial Code an accommodation endorser is only liable on his contract of endorsement and is not liable as a warrantor.

As to whether the surety should be discharged either in toto or pro tanto, the court resolved that this issue should be determined by the application of the law of suretyship.
The doctrine of the case of Pain v. Packard is in force in West Virginia by virtue of a statute which may be traced to a Virginia statute enacted in 1794, twenty years before the decision by the New York court in the case of Pain v. Packard.

The court in the Packard case was called upon to determine whether the creditor continued to have a cause of action against the surety after having failed to proceed against the principal debtor in accordance with the surety's request. The court found for the surety and denied the creditor's claim against the surety.

The West Virginia Code ch. 45, art. 1, § 1 (Michie 1961) confers on the surety the right to demand that the creditor proceed against the principal debtor or lose his rights against the surety. The statute is designed to afford protection to the surety when a creditor is careless in failing to recover from the principal debtor; otherwise the creditor might delay his effort to recover until the insolvency of the principal debtor which would place the surety in the position of having to bear the ultimate loss. In the absence of a statute, and except for a few states, the only remedy available to the surety at maturity of the debt, and prior to payment of the debt, is by the equity bill quia timet. That is, the surety at maturity of the debt, may file a bill in equity to obtain a decree against the principal debtor ordering the principal debtor to pay the creditor the sum due in order to save the surety harmless. The statute affords the surety additional protection by authorizing him to require the creditor to sue every party to the contract who is a resident of the state and not insolvent or lose his rights against all sureties on the contract.

As the object of the statute is to provide a practical working device by which the ordinary citizen-surety may avail himself in a summary way of the relief offered to him by the expensive and circuitous procedure of a bill quia timet, the Supreme Court of Appeals of West Virginia has expressed the view that courts should

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65 Id. at 464, 20 S.E.2d at 787; Neal v. Buffington, 42 W. Va. 327, 26 S.E. 172 (1896); Knight v. Charter, 22 W. Va. 422 (1883); Mattingly v. Sutton, 19 W. Va. 19 (1881).
not require of a surety the use of precise and technical exactness in giving notice to the creditor that would be required in pleadings and like instruments. Substantial conformity is all that appears to be required.67

The statute clearly requires that the notice from the surety to the creditor to forthwith to institute suit be in writing. It has been held that a notice which provided in part “this is to notify you to collect”68 was not equivalent to the statutory requirement for the surety to notify the creditor to “forthwith to institute suit.”69 However, the demand to “sue at once” satisfies the requirement of the statute. The notice served upon the attorney for the holder of the note in question was held to be an insufficient demand by the surety.70

A creditor, in order to preserve his rights against a surety, in the absence of statute, is not bound to active diligence in trying to collect an obligation from the principal debtor.71 If the creditor merely remains passive his rights are not impaired.72

The Code provision adopting into law the doctrine of Pain v. Packard ante-dates the adoption of the Uniform Negotiable Instruments Act73 and the Uniform Commercial Code and is not impliedly repealed by either of these acts with respect to rights of any indorser-surety on a negotiable instrument.

On at least three occasions the Supreme Court of Appeals of West Virginia has been called upon to determine whether the burden of proof is upon the surety to show as part of his defense, when sued by the creditor, that the principal debtor was solvent and a resident of the state or whether the creditor has the burden, as part of his case, of proving when he sued the surety, after having received the demand to forthwith institute suit that the creditor was a non-resident or insolvent at the time the demand was made and for a reasonable time thereafter.74

67 Williams v. Zimmerman, supra note 64; McDonald v. Stewart, 110 W. Va. 280, 158 S.E. 177 (1931).
68 Williams v. Zimmerman, supra note 64.
69 Williams v. Zimmerman, supra note 64.
71 First Nat'l Bank v. Kittle, supra note 63.
72 Renick v. Ludington, 14 W. Va. 267 (1878).
73 W. Va. Code ch. 46, art. 8, § 2 (Michie 1961). “This section does not include the rules governing the discharge of a surety . . . .”
74 McDonald v. Stewart, 110 W. Va. 280, 158 S.E. 177 (1931); Barnes v. Boyers, 34 W. Va. 303, 12 S.E. 708 (1890); Gililan v. Ludington, 6 W. Va. 128 (1878).
The earliest case in which the court considered this question was the case of *Gillilan v. Ludington* where the court held that the burden was upon the creditor to show why the surety should not be released. The court stated:

The plea before us sets out that the defendant, the surety, has done what the 1st section of the statute required him to do, and all that it required him to do; it omits to state, beyond reciting the fact that the plaintiff had failed to institute suit in a reasonable time, and the legal consequence which followed, the further particulars connected with the suit, as mentioned in the second section. But these matters are made by statute the duty of the creditor and are supposed to be particularly within his own knowledge . . . . These are matters more likely to be known to him than to the surety; and if on receiving the notice he has complied with these requirements of the statute, he can readily reply then by way of avoidance to the plea.

Some years after the decision in the *Gillilan* case the Supreme Court of Appeals of West Virginia in *Barnes v. Boyers,* by the way of dicta, recognized that the plea of the surety under sections one and two should aver the solvency of the principal at the time suit should have been instituted and that he then resided in the state.

Finally, in *McDonald v. Stewart* the Supreme Court of Appeals of West Virginia reversed the position it had taken in the *Gillilan* case. The court stated:

If the principal debtor is not solvent and resident within the state, the surety has no right to require the creditor to sue. In such situation the complaining surety must rely upon contribution among the sureties for partial relief from the burden of the debt, when that burden shall have been discharged.

In arriving at its conclusion the court found an analogy between a bill quia timet and the statute. If the surety had sued out a bill quia timet, the surety would have had the burden of making his case. As the statute was designed to make unnecessary the

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75 *Supra*, note 74.
76 *Id.* at 284, 158 S.E. at 179; see also *Barnes v. Boyers*, supra note 74.
77 *Supra*, note 74.
78 *Id.* at 284, 158 S.E. at 179; see also *Barnes v. Boyers*, supra note 74.
79 *McDonald v. Stewart*, supra note 74, at 286, 158 S.E. at 177.
use of a bill quia timet, the burden of proving the solvency and residency of the debtor remains on the surety. The court summarized its position by stating:

Therefore, a surety or endorser who undertakes to avail himself of the provisions of Code 45-1-1 and 2, and seeks to set up such matters as a defense to an action against him by the creditor, must aver his special plea and prove not only that he gave the notice prescribed by the statute and that the creditor failed to sue within a reasonable time, but also that at the time of the giving of the notice and for a reasonable time thereafter, the principal, was solvent and resident within the state.

The court found for the plaintiff-creditor because the endorser-surety failed to prove the solvency of the principal debtor.


JOINDER OF PARTIES

In one of the most lengthy, if not the most lengthy, opinions delivered by the Supreme Court of Appeals of West Virginia involving the laws of suretyship the court was concerned with the proper joinder of parties. The court could cite no authority which required the creditor of joint judgment debtors separately owning real estate on which the judgment constituted a lien to prosecute a single judgment lien suit against the lands of both or all the debtors or separate suits contemporaneously against them for enforcement of the lien. With respect to authorities cited by the appellant the court said:

They say all of the co-debtors must be made parties to a suit to enforce the lien against the land of one of them, because they are parties to the judgment, liable for it and have right to insist upon its proper rank and priority in the adjustment of the liens. Shenandoah etc. Bank v. Bates, 20 W. Va. 210; Norris Coldwell & Co. v. Bean, 17 W. Va. 655; Neely v. Jones, 16 W. Va. 625; Jackson v. Hull, 21 W. Va. 601. None of them intimate necessity of bringing co-debtors' land into the suit.

The court continued by stating:

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80 McDonald v. Stewart, supra note 74, at 288, 158 S.E. at 180.
81 Shields v. Reynolds, 9 W. Va. 483 (1876).
83 Id. at 314, 101 S.E. at 480.
The lien and the land on which it subsists constitutes the basis of the cause of action. The creditor is not necessarily concerned about the equities between his debtors. He is entitled to his money and cannot be rightfully subjected to undue delay, trouble or expense by their equities. They have their own remedies therefor [sic]. The situation is not the same as that of right to a mere personal decree against parties jointly liable in equity. Nor is it the same as the case in which the joint debtors or principal and surety and their respective properties happen, by some means, to be all in court and subject to its jurisdiction at the same time, in the same or different suits, and their rights so far ascertained that the equities can be enforced between the debtor without substantial detriment to the creditor.  

A surety may proceed against the principal debtor to compel him to pay by way of exoneration and if he gets all the parties and all the property into the court at the same time, he may have his equities awarded to him by a proper decree.

In a suit in which the issue of joinder parties was raised, the facts disclosed that one McNeer, the cashier of the Bank of Union, executed a bond which named as obligees the president and four directors of the bank with three of these directors as his sureties. The principal and the surety died before suit. The bill did not name their personal representatives. The court stated that equity had jurisdiction to enforce payment of a lost instrument. Resort to equity is frequently, though not always, permitted to establish and enforce payment of a lost instrument. The subsequent production of a lost obligation will not operate to defeat jurisdiction, when once properly assumed. However, the West Virginia court has stated that all the surviving obligors, and the representatives of those who are dead, should be named as parties to the suit, unless their absence be excused by reason of insolvency or other substantial cause. As

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54 Ibid.
55 First Nat'l Bank v. McGraw, supra note 82.
57 Clark v. Nickell, supra note 86.
58 Clark v. Nickell, supra note 86.
59 Lyttle v. Cozad, supra note 86.
authority for this proposition, the court in quoting from White v. Kennedy90 said:

‘In a creditor’s bill against the administrator and heirs of a decedent to enforce the collection of a debt secured to the plaintiff by the joint and several obligation of the decedent and another obligor, such obligor is a necessary party to such bill, although he may be a non-resident,’ because he has a right to appear and make defense to such bill, and the administrator and heirs of such decedent have the right to require him to make a party to the suit, [sic] so that in case he should appear his liability for such debt may be ascertained and determined between him and such-decedent.91

The court stated in summarizing its position that:

[I]t is necessary to name as parties all persons living, and the personal representatives of those who are dead, whose interests are to be affected by the final determination of the cause, to the end that all matters may be adjusted and complete justice done in one suit. Otherwise, if a liability is fixed as to one or more and not all of the several obligors, those required to discharge and who do discharge the liability are obliged to seek by other litigation contribution from those jointly liable with them. And the fact that some are dead, does not in equity, excuse failure to join the personal representative with those still living, although at law such joinder is not allowed. Where a creditor applies to a court of equity for its aid in the collection of his debt against sureties, the simple allegation of the death of the principal debtor or a co-surety and his insolvency will not excuse the omission to make his representative a party to the bill, unless it appears that no part of the debt would be made out of his estate .... The principal if living, and his estate thereafter, by the very nature of the undertaking, assumes the chief burden of payment. While a judgment obtained in an action at law against all the obligors when sued jointly, as they may be, is enforceable against any one of them, it enures to the benefit of the one so discharging the obligation, who may enforce it by any proper process or proceeding against the principal or

90 23 W. Va. 221 (1883).
91 Clark v. Nickell, supra note 86, at 75, 29 S.E. at 1023.
his estate, or ratably against the co-sureties. If at the date of the action or during its pendency the principal or any surety dies, separate actions against the survivors and the personal representatives of the deceased obligors may proceed to final judgment in both. But in equity, by reason of its flexible rules and procedure, all may with propriety be joined in the same suit, and should be joined, unless completely insolvent at the time; and to excuse the omission even for this cause, there must be averment and proof of insolvency, unless admitted by defendants.\textsuperscript{92}

The court reversed the lower court and held that the demurrer should have been sustained.

The issue of joining a surety and principal debtor and guarantor and principal debtor in the same court was considered in \textit{Shore v. Lawrence}.\textsuperscript{93} The facts in this case disclosed that the defendant had agreed that in case of failure of the tenant to pay the rental in accordance with the terms of a rental agreement the defendant would pay the same. The defendant was not a party to the lease; his agreement to pay was collateral and conditional. That is, his agreement was to pay in case the lessee did not. The court said this made the defendant a guarantor and not a surety. As the contracts of the defendant and the lessee were separate and distinct and not joint, the court held that they could not be joined as defendants, in respect to the liability imposed in the lease.

A surety on executing a bond, becomes responsible for the fidelity of the principal. Such a bond is not a collateral engagement dependent on some contingency or condition different from the engagement of the principal. They are joint obligors with the same conditions underwritten.\textsuperscript{94}

\textbf{Lack of Capacity of Principal Debtor to Contract}

Generally speaking a valid contract with the principal debtor is essential to the validity of a contract of suretyship. This is true in situations prohibited by law or where the obligation of the principal debtor was induced by the fraud practiced by the creditor on the principal debtor.\textsuperscript{95}

\textsuperscript{92} \textit{Ibid.}
\textsuperscript{93} 68 W. Va. 220, 69 S.E. 791 (1910).
\textsuperscript{95} \textit{Boyard v. Boyard}, 79 W. Va. 554, 91 S.E. 529 (1917).
However, the incapacity of the principal debtor to contract does not have the effect of invalidating the contract of the surety on such principal’s contract. The insanity of the principal debtor at the time of entering into the agreement does not relieve the surety of liability on the contract.

In Burner v. Nutter the court by way of dicta indicated that a surety who pledged his credit to the fulfillment of a contract of a person under some disability to contract, such an in infant or other person non sui juris, is liable, notwithstanding the principal’s disability, except obligations procured by fraud.

**AMOUNT OF DAMAGES ON PERFORMANCE BOND**

With respect to the amount of damages which recipient of a performance bond may recover from a surety on the bond, the Supreme Court of Appeals of West Virginia has held that the creditor on the bond should be limited in his recovery to the profit he would have made on the contract provided the principal obligor had carried out his agreement to the letter. The court recognized that in special, undefined cases departure from the strictness of this rule might be permitted.

**PUBLIC OFFICIALS’ BONDS**

The purpose of bonds for public officials is to guarantee the good conduct of the officers in general. Such bonds are payable to the state. Any person injured by the wrongful act of the public officer in the performance of the officer’s official duty may sue on the bond in the name of the state.

It seems to be very generally held that an official bond containing only the usual conditions requiring the faithful performance of the duties of the office, and an accounting for moneys coming into the hands of the officer, does not cover penalties, forfeitures and other emerecements super-imposed upon the officer over and above the damages resulting from his wrong, unless especially so provided by statute.

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96 Id. at 558, 91 S.E. at 530.
98 Id. at 258, 87 S.E. at 360.
100 Lammon v. Feusier, 111 U.S. 17 (1884); Wait v. Homestead Bldg. Ass’n, supra note 94.
This is evidenced by fact that the legislature deemed it necessary to enact into law the provisions of West Virginia Code ch. 38, art. 8, § 8 (Michie 1961), which confer on the complaining party a cause of action against both the officer and the surety.

**Statutory Penalty**

In a case involving a statutory penalty the court was concerned with a claim against a constable and his surety on the constable's official bond. The plaintiff sought to recover the sum of $5.00 for each day that the plaintiff's exempted wages remained unreleased from execution as provided in West Virginia Code ch. 38, art. 8, § 8 (Michie 1961). The statute expressly provides that recovery may be had against either the principal or the surety.

The court recognized that one's action to recover a statutory penalty, unless otherwise provided for by statute, is non-assignable. If the party having the cause of action cannot by contract make an assignment of the cause of action then it will not survive his death.

As the cause of action is non-assignable and would not survive the plaintiff's death, the plaintiff's cause of action would be barred by the one year statute of limitations under subparagraph (c) of West Virginia Code and is not governed by the ten year statute of limitations applicable to actions on official bonds. The court in the Richards case held the one year statute of limitations applied to the action against both the constable and his surety.

**Surety on Bail Bond**

The rights of a surety on a recognizance was in issue in Carr v. Davis. Carr, a surety on a recognizance, took from a felon and others a bond to indemnify Carr against loss on the recogniz-

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102 State ex rel. Sabatino v. Richards, supra note 101.
103 Id. at 707, 34 S.E.2d at 273; see also Western Mortgage & Guar. Co. v. Gray 215 Cal. 191, 8 P.2d 1016 (1932); Wilson v. Shrader, 73 W. Va. 105, 79 S.E. 1083 (1913).
104 "Every personal action for which no limitation is otherwise prescribed shall be brought: . . . (c) within one year after the right to bring the same shall have accrued if it be for any other matter of such nature that in case a party died, it could not have been brought at common law by or against his personal representative." W. Va. Code ch. 55, art. 2, § 12 (Michie 1961).
105 64 W. Va. 522, 63 S.E. 326 (1908).
The court stated that it seems settled that when a bail pays a recognizance the law does not imply a promise by the accused to reimburse the bail. According to the court, it is also settled "that though a criminal recognizance is a lien for the state on land, yet the bail surety cannot be substituted to the lien, and this for like reasons against raising an implied promise or repayment to the bail." There appear to be no cases holding that a contract by a third party to indemnify a surety upon a recognizance is illegal. The court refused to adopt the position that a person accused of a crime could not enter into a valid express contract to indemnify his surety against loss on a recognizance.

**Extension of Time**

In West Virginia, as in many other states, the effect of a binding extension of the due date entered into between the principal debtor and the creditor depends on whether the surety is a gratuitous or a compensated surety.

It is settled that mere indulgence granted to the principal debtor by the creditor will not release the surety of liability. When the creditor is indulgent and merely neglects to enforce payment, and if the principal debtor becomes insolvent, the surety for that reason alone cannot complain for the indulgence by the creditor was likewise shown the surety.

If without the consent of the gratuitous surety the creditor makes an obligatory agreement with the principal debtor by which the time of payment is extended to him so as to tie the hands of the creditor from proceeding in the interval to enforce the original contract, the remedies of the surety against the principal are for the same period suspended which exposes the surety to a hazard and risk of loss not contemplated by his undertaking. While in *Knight v. Charter* the court found no binding extension had been granted, it did recognize that if there had been a binding extension, the extension would have been enough to absolve the surety of liability without inquiring into the question of whether the surety suffered any loss by the extension.

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107 Id. at 524, 63 S.E. at 327.
108 Id. at 522, 63 S.E. at 326.
109 Id. at 522, 63 S.E. at 326.
111 Board of Comm'rs v. Clemens, 85 W. Va. 11, 100 S.E. 680 (1919).
112 Knight v. Charter, 22 W. Va. 422 (1883).
113 Id. at 429.
A surety company which has received value for being a surety is not released from liability because of a binding extension of time granted by the creditor to the principal debtor unless: (1) the extension exceeds the time limited in the bonds for bringing an action thereon or (2) the surety company thereby is made to suffer a material harm. In this case the question is raised as to whether the surety company should be released in toto or only to the extent of any damages which the surety company suffered as a result of the extension. The Supreme Court of Appeals of West Virginia considered this matter in McKenzie v. Wiley, and indicated that in some instances the discharge of the surety would be in toto while in others it would be pro tanto. While the court did not specify under what circumstances the discharge would be in toto or pro tanto, perhaps the court would apply one rule in case of a compensated surety and the other in case of a gratuitous surety.

In order for an extension of time to constitute a binding extension the extension must be a contractual extension. That is, the extension of time granted to the principal debtor by the creditor must have been for a definite period and supported by valuable consideration. The paying of interest already due is not sufficient to satisfy the requirement of consideration to amount to a contractual extension because the principal debtor did nothing that he was not already obligated to do. The actual advance payment of usurious interest by the principal debtor to the creditor, where the whole interest so paid cannot be recovered, is sufficient consideration for an agreement to extend the time of payment and to release the surety. The payment of interest in advance for a definite period implies a contract to extend the due date for payment for that period and such extension amounts to contractual extension of the due date.

The right of a surety to be discharged because of the creditor having entered into a contractual extension of time with the principal debtor is a personal privilege which the surety may waive,

114 Board of Comm’rs v. Clemens, supra note 111.
115 27 W. Va. 658 (1886).
117 Knight v. Charter, supra note 112.
118 Glenn v. Morgan, supra note 110.
119 Id. at 469, 470.
and if the surety does so, with full knowledge of the facts by renewing his promise to be bound after his discharge, the surety may be estopped from afterwards availing himself of such discharge. For this to occur the promise to remain bound must be clear and explicit, such as will show that he intended to waive his privilege and to remain bound notwithstanding his right to be discharged.\textsuperscript{120} It is equally clear that a surety upon learning that an extension of time has been granted to the principal debtor by the creditor is not estopped to assert his release by virtue of the extension of time by the fact that he did not express his objection to the extension upon learning of the extension.\textsuperscript{121}

An attorney at law, in the absence of express authority given him by the creditor, has no authority to extend the due date for payment. The unauthorized extension of the due date granted by the creditor's attorney, not being a binding extension of time, does not release the surety of liability.\textsuperscript{122}

It is recognized that under early West Virginia decisions binding extensions of time granted to the principal debtor on a bond did not release the surety at law but only in equity.\textsuperscript{123} Today there is no reason to make such a distinction.

\textbf{RENEWAL NOTES}

Consideration will now be given to the issue of whether the acceptance by the creditor of a renewal note which is not signed by the party who was surety on the original note relieves such surety of liability.

"There are decisions to the effect, that if commercial paper, as a bill or negotiable note, payable at a future time be taken for an existing debt, the law implies from this transaction an agreement to wait till the bill or note matures," before the creditor seeks to collect, and such transaction will therefore discharge the sureties from liability if the sureties did not consent to such an arrangement.\textsuperscript{124}

\textit{[T]here are many cases in which it . . . [has been] held that the taking of . . . [a] bill or note is only prima facie evidence that it was taken as collateral payment, and therefore that existing right of action on the original debt was suspended,}

\textsuperscript{120} Id. at 471.
\textsuperscript{121} Id. at 471, 472.
\textsuperscript{122} Board of Comm'rs v. Clemens, supra note 111.
\textsuperscript{123} Glenn v. Morgan, supra note 110; Sayre v. King, 17 W. Va. 562 (1880).
\textsuperscript{124} Sayre v. King, supra note 123, at 573.
and that it may be proven, that it was not so taken, but was taken as collateral security in which case the right of action on the original debt will not be suspended, and the surety on the original obligation will remain liable.\footnote{125}

The idea that the giving of a bill or note is prima facie conditional payment which operates to suspend the debt has its origin in the commercial law rather than in the common law.\footnote{126} Where a single non-negotiable bill or a bond or mortgage or an assignment of chattels to be delivered at a future date has been taken for an antecedent debt, there should be no legal implications of an agreement to forbear the collection of the antecedent debt; unless such agreement is otherwise proved than by the mere proof of the taking of such single bill or other chose in action not commercial paper, the sureties on the original debt are not discharged.\footnote{127}

Where the creditor receives from the principal debtor his negotiable bill or note for an existing debt, this is prima facie conditional payment of the original debt. However, "it may be shown by direct or circumstantial evidence, that the [negotiable] bill or . . . note was taken as . . . absolute payment or as collateral security . . . ."\footnote{128}

It may be said as general propositions that where a "chose in action, such as a . . . [non]negotiable note . . . a deed of trust or mortgage or an obligation to deliver goods be given by the debtor to his creditor, such chose . . . is prima facie collateral security for the original debt." If the chose in action was received by the creditor as absolute payment of the antecedent debt, it discharges the surety of liability. On the other hand, if the chose in action is "received as conditional payment, and such chose in action is payable at a future time, it amounts to a suspension of the . . . [creditor's right] to sue on his original debt; and if taken," by the creditor without the consent of the surety, the surety is released of liability.\footnote{129} At this juncture one may question whether the surety is no longer liable because the obligation on which he was a surety in fact has been paid or whether he is released because there has been a contractual extension of the due date. This may

\footnote{125 Id. at 575.}  
\footnote{126 Id. at 562.}  
\footnote{127 Id. at 575.}  
\footnote{128 Id. at 574.}  
\footnote{129 Id. at 575.}
be important where the surety in question is a surety company which received value for the undertaking. An examination of the portion of this paper dealing with extension of the due date will disclose that the compensated surety is not released under the same circumstances as voluntary surety. If the chose in action was received by the creditor merely as additional security for the debt, though the chose be payable at a future date, and unless there was an agreement to postpone the right to sue on the original debt, proved either by direct or circumstantial evidence, the taking of the collateral security would not suspend the creditor's right of action on the original debt; therefore, under such circumstances the surety is not released.

In the case of Hess v. Dille, George C. Shafer incumbered his property to secure his debt to Chesney. Subsequently Shafer conveyed the property to M.V.C. Brookover who agreed to pay Shafer's obligation to Chesney, the grantor retaining a vendor's lien as security. By this transaction the grantee, M.V.C. Brookover, became responsible to Chesney for the debt, and the land was specifically and expressly charged with payment resulting in a suretyship relation. Subsequently, M.V.C. Brookover sold the property to M. E. Brookover who assumed the obligation to Chesney and was given credit on the purchase price for the amount due Chesney. At the maturity of Shafer's note M. E. Brookover gave her note to Chesney for the balance due Chesney and obtained from Chesney the Shafer note. The court resolved that by this transaction the parties intended to release M.V.C. Brookover from his liability. The issue to be determined was whether the land remained subject to a lien. The court said:

[It] is well settled both in Virginia and this State, that the giving of a new note for a previous one which had become due, is not to be regarded as an absolute extinguishment or payment of the precedent note or pre-existing debt, unless it was so expressly agreed whether the new note was that of one previously bound or of a stranger . . . . Where the new note is that of a third person, the surrender of the old note will be held to . . . prima facie discharge . . . the old note and . . . [to release the maker of the old note from liability. However,

\[130\] Board of Comm'rs v. Clemens, supra note 111.
\[131\] Hess v. Dille, 23 W. Va. 90 (1883).
\[132\] Ibid.
where] the holder of the old note had a specific lien on land as security for the debt and by an arrangement between the maker of the old and the maker of the new note, the . . . land becomes the property of the latter, who at the same time . . . [assumes the] debt as a part of the consideration for the land, the execution of . . . [the] new note for . . . [the debt does not extinguish the debt unless it is so agreed.]\textsuperscript{133}

It is clear that under the facts of this case the new note was not in fact one of a third party or stranger but was the note of a party already bound for the debt. The court concluded that when M. E. Brookover gave her note to Chesney and received the Shafer note, it operated to release Shafer and M.V.C. Brookover from all personal liability to Chesney but that the property remained subject to the lien.

The surety who does not sign the renewal note has the burden of proving that the renewal was intended to relieve him of liability. "[T]he facts alone of surrender by [the] payee to the maker of the old note at the time of acceptance of the renewal, is not sufficient to show a release of the original obligation."\textsuperscript{134} In Peter v. Beverly\textsuperscript{3} the court said, with respect to whether a note was discharged by the acceptance of a renewal note: "the evidence must certainly be so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties."\textsuperscript{136}

**APPLICATION OF FUNDS IN CREDITOR'S CONTROL**

A misapplication of funds held by the creditor, the surety not assenting, increases the risk on the part of the surety and may result in releasing the surety of liability. The Supreme Court of Appeals of West Virginia said, in Hamilton v. Republic Cas. Co.:\textsuperscript{137} "By the great weight of authority, the failure of the plaintiff to retain ten per cent of the estimate of September 20 would alone be sufficient under all the circumstances to release the surety."\textsuperscript{138} From the language used it would appear the West Virginia court inferred that in such event the surety is released in toto, for the court quoted with approval the following statement:\textsuperscript{139}

\textsuperscript{133} Id. at 96. (Italics omitted).
\textsuperscript{135} 34 U.S. (10. Pet.) 532 (1836).
\textsuperscript{136} Id. at 568.
\textsuperscript{137} 102 W. Va. 32, 135 S.E. 259 (1926).
\textsuperscript{138} Id. at 37, 135 S.E. at 262.
\textsuperscript{139} Id. at 38, 135 S.E. at 262.
The stipulations in a building contract, that the owner will make payments as the work progresses . . . but will retain a certain percentage . . . until the work is completed are . . . covenants for the benefit of the surety, and a violation of these stipulations by premature payments deemed a material alteration of the contract, whereby the surety is released. The rule rests upon two reasons—the one is that such a defense deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor's mind, to induce him to finish the work in accordance with the term of the contract.140

However, in a later case the court said where the creditor fails to apply all moneys and securities of the principal over which he has control for the surety's benefit, the surety is released pro tanto.141

In the case of State v. Smith142 involving a performance bond, the creditor had agreed to withhold ten per cent of the amount due at each installment until the job was completed. The creditor delivered to the principal debtor equipment to aid in performance of the contract with $1,140 and debited the ten per cent retained in this amount. In considering whether the act of the creditor released the surety the Supreme Court of Appeals recognized that such payment by the creditor released the surety only to the extent of the $1,140.143 On this basis the act of the creditor resulted in a pro tanto discharge of the surety.

Where collateral is given the creditor by the principal debtor to secure debts, some of which a surety is liable, the creditor may, except in the case of a special pledge for a particular debt, apply the proceeds of the collateral on the debts on which the surety is not bound.144

Successful Appeal by Less Than All Sureties

Where a judgment is rendered against several sureties and an appeal is prosecuted successfully on grounds of defenses peculiar

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140 Stearns, Suretyship " 76 b (3d ed.).
141 Koblegard Co. v. Maxwell, supra note 116, at 640, 34 S.E.2d at 121.
142 92 W. Va. 12, 114 S.E. 375 (1922).
143 Id. at 17, 114 S.E. at 377.
144 Koblegard Co. v. Maxwell, supra note 116, at 642, 34 S.E.2d at 122.
to them, by one or more, but less than all sureties the non-appealing sureties are relieved of liability pro tanto to the extent that the appeal impaired their right of contribution.\textsuperscript{145}

In the past, courts of equity have enjoined creditors from collecting from non-appealing sureties of greater amount than those sureties were equitably bound to pay.\textsuperscript{146}

**Effect of a Judgment Against Principal Debtor**

The surety on a bond conditioned to pay any judgment that might be recovered against his principal is bound by the judgment when so recovered. The judgment against the principal binds the surety, in the absence of fraud, and determines his liability.\textsuperscript{147} If the surety has obligated himself to pay a judgment or fine that may be imposed on his principal, that judgment or fine is the very thing which he has agreed to pay, and the surety is estopped, in the absence of fraud or collusion, to controvert the judgment recovered against his principal.\textsuperscript{148}

"Where the effect of the undertaking of the surety is that he shall be liable for the result of a suit against his principal, he is conclusively bound by the judgment in such suit, even though he is not a party to it and has no notice of it."

**Surety's Rights Where Principal is Insolvent and the Surety is Indebted to the Principal**

In 1881 the Supreme Court of Appeals of West Virginia in *Mattingly v. Sutton*\textsuperscript{150} stated: "A principal, who is insolvent ... cannot collect a debt, which the surety owes him, without first indemnifying the surety."\textsuperscript{151} An assignee will stand in no better position than his insolvent assignor.\textsuperscript{152}

\textsuperscript{145} Williams v. Carr, 76 W. Va. 139, 85 S.E. 69 (1915).

\textsuperscript{146} Boughner v. Hall, 24 W. Va. 249 (1884).

\textsuperscript{147} State v. Myers, 74 W. Va. 488, 82 S.E. 270 (1914); State v. Abbott, 63 W. Va. 189, 61 S.E. 369 (1907); State v. Nutter, 44 W. Va. 385, 30 S.E. 67 (1898).

\textsuperscript{148} State v. Myers, supra note 147.

\textsuperscript{149} BRANDT, SURETYSHIP & GUARANTY § 802 (3d ed. 1905); quoted with approval in *Town of Point Pleasant v. Greenlee*, 63 W. Va. 207, 213, 60 S.E. 601, 603 (1907).

\textsuperscript{150} 19 W. Va. 19 (1881); Hughes v. McDermitt, 86 W. Va. 86, 102 S.E. 767 (1920); see *Bowling v. Bluefield-Graham Fair Ass'n*, 84 W. Va. 41, 99 S.E. 184 (1919).

\textsuperscript{151} Mattingly v. Sutton, 19 W. Va. 19 (1881).

\textsuperscript{152} Hughes v. McDermitt, *supra* note 150.
Where the insolvency of the principal debtor is shown, the surety may retain any funds which he holds belonging to the principal debtor to indemnify himself against his liability as surety.\footnote{153 Mattingly v. Sutton, supra note 151.}

**SURETY'S RIGHT TO SET ASIDE FRAUDULENT TRANSFER**

The surety may go into equity and have set aside a fraudulent transfer of property by the principal debtor. A surety is as fully protected against fraudulent and voluntary conveyances by the principal debtor as if he held a claim certain and absolute. The law is that the holder of a claim or demand arising out of a pre-existing contract, although it may be contingent, is a creditor whose rights are affected by such conveyance and such contingent creditor may avoid them when the contingency happens upon which the claim depends.\footnote{154 Carr v. Davis, supra note 106.} A surety may likewise have a fraudulent conveyance of a co-surety set aside in equity as an aid to enforcing his right of contribution.\footnote{155 Charter v. Maxwell, 132 W. Va. 282, 52 S.E.2d 753 (1949); Hawker v. Moore, 40 W. Va. 52, 20 S.E. 819 (1894).}

**QUIA TIMET**

If a surety, after the debt has matured, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may by the way of a bill quia timet compel the debtor to discharge the debt or other obligation. That is, before the surety has paid anything he has the right, on principle of quia timet, to sue to compel the principal debtor to pay the debt to his relief.\footnote{156 Carr v. Davis, supra note 106, at 528, 63 S.E. at 326; Neal v. Buffington, 42 W. Va. 327, 329, 26 S.E. 172, 173 (1896); Knight v. Charter, supra note 112, at 428; Mattingly v. Sutton, supra note 151, at 30.}

**SURETY'S RIGHTS WITH RESPECT TO COLLATERAL HELD BY CREDITOR**

The creditor is not required to proceed against collateral of the principal debtor before proceeding against the surety.\footnote{157 Post v. Baily & Co., 68 W. Va. 494, 69 S.E. 910 (1910).} The surety is fully protected with respect to the collateral in that upon payment of the indebtedness by the surety he would be subrogated to the rights of the creditor with respect to the collateral.\footnote{158 Id. at 496, 69 S.E. at 911.}
Some states have enacted laws which require the creditor who, "holds other security of the principal, to exhaust it before going on the property of the surety; or, in case . . . [the creditor] has obtained judgment and execution against both principal and surety, to . . . [require satisfaction] first out of the property of the principal" debtor. Such a policy has not been enacted into law in West Virginia; the surety is still primarily liable, as he was at common law. The West Virginia courts have recognized that where the creditor is seeking to enforce a lien against land of both the principal debtor and surety, "all parties being before the court, equity will sell first the lands of the principal, provided it does not unreasonably delay the creditor in the collection of his debt." This is done to prevent circuity of actions and multiplicity of suits.

The creditor need not proceed against the principal debtor before proceeding against the surety. The creditor may at the same time proceed against the collateral and the sureties.

The courts will not, "at the instance of a surety, stay the hand of a creditor and require him to first resort to his lien on the lands of the principal debtor before enforcing his remedy . . . against the surety."

A creditor who holds securities for an indebtedness is under a duty to the surety to use due care and diligence in the management and collection of the collateral securities. The failure of the creditor to perform his duties with respect to the collateral security will release the surety to the extent of the loss he sustained by the negligence of the creditor with respect to the collateral security to the same extent he would have been released by the positive act of the creditor. This is not to say that the principal debtor also might not be released to the same extent where he was not a party to causing or aiding in causing the loss to the creditor or sureties.

When a creditor obtains a judgment against both the principal debtor and the surety, the surety may assert his equity against the

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159 Id. at 437, 69 S.E. at 912.
160 Ibid.
164 First Nat'l Bank v. Kittle, supra note 163, at 174, 71 S.E. at 110.
principal debtor and obtain a decree that first subjects the principal debtor's land to the satisfaction of the judgment in cases where all parties to the transaction and the land in question are before the court.\textsuperscript{165}

This principle was applied in \textit{First Nat'l Bank v. Kittle}\textsuperscript{166} where the facts disclosed that the principal debtor obtained money from a bank upon (1) an obligation of himself and two sureties and (2) additional security by the way of an assignment of money to become due the principal debtor. Because of the failure of the creditor to give notice of the assignment and to take such other steps as might have been necessary to preserve its right and the rights of the sureties, the same having been lost or surrendered, the sureties were discharged of liability to the extent of the loss suffered by such neglect.

This principle also was recognized in \textit{Colerider v. Central Nat'l Bank}\textsuperscript{167} where the issue was raised as to whether the bank which held the note should have protected the collateral in its care by taking steps to prevent the wrongful removal of timber from property securing the debts. The court resolved the issue by stating: "Generally speaking, the law favors a surety or grantor, and requires reasonable diligence on the part of the holder of collateral to protect the same . . . ."\textsuperscript{168} The surety was held released to the extent the security held by the creditor had been impaired.

One should not lose sight of the fact that the creditor who holds collateral belonging to the principal debtor holds the collateral not only in his own right but also in effect as trustee for the surety.

When the principal debtor has given securities to the surety to indemnify the surety against loss, the surety likewise holds the collateral not only in his own behalf but also in trust for the creditor.\textsuperscript{169} That is, a creditor may claim the benefit of securities given by the principal debtor to indemnify the surety which properly belonged to the principal debtor.\textsuperscript{170} The rule is not applicable

\textsuperscript{165} Post v. Bailey & Co., \textit{supra} note 157.
\textsuperscript{166} \textit{Supra} note 163.
\textsuperscript{167} 128 W. Va. 520, 137 S.E.2d 466 (1946).
\textsuperscript{168} \textit{Colerider v. Central Nat'l Bank, supra} note 163, at 528, 37 S.E.2d at 469.
\textsuperscript{169} Lewis, Hubbard & Co. v. Toney, 76 W. Va. 80, 82, 85 S.E. 30, 31 (1915). By the terms of the deed of trust the sureties were indemnified against having to pay the note; therefore, it was not necessary for them to pay it prior to perfecting their rights against the principal debtors.
\textsuperscript{170} New Martinsville Bank v. Hart, 103 W. Va. 290, 137 S.E. 222 (1927).
where the property given to indemnify the surety belonged to one other than the principal debtor.\textsuperscript{171}

Where the principal debtor executed a deed of trust to realty to indemnify the surety, the creditor was held to be entitled to the benefit of the deed of trust where the principal debtor and surety were both insolvent.\textsuperscript{173}

Where there is a foreclosure of a deed of trust on realty given by the principal debtor to the surety to indemnify the surety against loss, the proceeds should be paid to the creditor and not to the surety. Otherwise, the surety might not pay the creditor, and the principal debtor, still being liable to the creditor, might be required to pay the obligation a second time.\textsuperscript{173}

A judgment creditor who has a number of judgments against a debtor is free to

pursue his remedies by execution and otherwise for the collection of the judgments in which there are no sureties . . . . [I]f property be taken on execution on . . . other judgments and released . . . [this would not] release the sureties in such other judgments, nor work a discharge or satisfaction of the judgments on which they were issued, so as to give priority to such others in favor of the sureties.\textsuperscript{174}

Where a judgment is taken by the creditor against the principal debtor and property of the principal debtor sufficient to pay the judgment is levied against, the release of such property from levy releases the surety.\textsuperscript{175} The aforementioned result obtains whether the release of the lien by substitution of a note for the judgment was intended as payment or satisfaction of the judgment. When a judgment is taken against both the principal debtor and the surety and a levy is made on the principal's property followed by a release of the lien, the surety has the equitable right that the judgment be not used against the surety to maintain a lien against his property.

\textsuperscript{171} W. F. Shawver Sons Co. v. Board of Educ., 117 W. Va. 531, 186 S.E. 307 (1936).
\textsuperscript{172} New Martinsville Bank v. Hart, \textit{supra} note 170; 1 Pomeroy, \textit{Equity Jurisprudence} § 352 (5th ed. 1941).
\textsuperscript{173} Lewis, Hubbard & Co. v. Toney, \textit{supra} note 169, at 81, 85 S.E. at 31.
\textsuperscript{174} George v. Crim, 66 W. Va. 421, 422, 66 S.E. 528, 527 (1909).
\textsuperscript{175} Williams v. Brown, 70 W. Va. 472, 74 S.E. 409 (1912).
Where the creditor prosecutes a claim to judgment against the principal debtor he may, after having placed an execution in the hands of the proper officer and prior to actual levy, recall the same and direct the officer not to levy the same without releasing the surety of liability as no lien has by such action been released.\(^{176}\)

The surety is entitled to expect, not only that the principal shall save him from harm . . . but moreover that the principal shall allow him the benefit of the means of payment which the . . . [principal] has placed in the hands or within the power of the creditor . . . . [A surety may] enforce against his principal all securities which the . . . [principal provided to the] creditor; for the purpose of . . . [making the surety whole] if payment has been made; and it is not in the mouth of the creditor to object in the one case or in the other to the surety's standing precisely in his shoes, on the contrary the creditor, in relation to such sureties may be said with truth to be trustee of the surety, and if he acts unfaithfully, he not only fails in his duty as such, but violates the right of the surety against his principal. If therefore, he releases or perverts, or defeats such securities, he exempts the surety to the extent of the loss thereby sustained.\(^{177}\)

**Application of Payments**

A payment by a debtor of a sum without direction as to which of two or more accounts it is to be applied may be applied by the creditor to whichever account he desires.\(^{178}\) Likewise, where the debtor is indebted to the creditor on more than one account and neither the debtor nor the sureties have directed the creditor with respect to certain credits, the creditor may apply such credit to either of the debts according to his pleasure, unless the creditor was cognizant of the fact that said credit was obtained with money collected by the principal debtor from taxes for which the surety would be liable if the principal debtor did not account to the creditor for them.\(^{179}\)

Once the debtor has designated an application to be made of a payment or, in the absence of such designation, once the creditor

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\(^{176}\) Martin v. Charter, 22 W. Va. 427 (1883).

\(^{177}\) Johnson v. Young, 20 W. Va. 614, 661 (1882).


\(^{179}\) Grafton v. Reed, 34 W. Va. 172, 12 S.E. 767 (1890).
has applied the funds, the application cannot be revoked without the consent of both the debtor and the creditor.¹⁸⁰

"A debt is not necessarily discharged or extinguished by payment by a stranger except where ratified by the debtor."¹⁸¹

SURETY'S RIGHT TO RECOVER INTEREST AND COST OF LITIGATION

A surety who pays the debt of his principal is entitled to interest on the amount paid on behalf of his principal even though part of the sum paid represents interest on the principal obligation. This is true even though the surety was a subrogee of the creditor.¹⁸² The creditor's "recovery against a principal and surety in a bond for the payment of money is not limited to the penalty but may exceed it, so far as necessary to include interest from the time of the breach."¹⁸³

The issue of whether a surety is entitled to recover from the principal the cost of litigation is not as clear. Each case must stand on its own.

[T]he principal is not liable for costs and expenses unnecessarily incurred by the surety in litigation carried on by him in order to get rid of his liability or defeat the efforts of a party seeking to enforce . . . [the claim]. . . . And it is incumbent on the surety, seeking to recover from his principal costs and expenses incurred in litigation to show that the litigation was entered into in good faith and upon reasonable grounds, and was a measure of defense, necessary to the interest of both parties, and was calculated so to result.¹⁸⁴

SUBROGATION

By the doctrine of subrogation one who has the right to pay a debt for which he is liable and which should have been paid by another after payment is entitled to exercise all the remedies which the creditor possessed against the one who by all rights should have paid.¹⁸⁵ The right also is extended to a co-surety who

¹⁸² Cranmer v. McSwords, 26 W. Va. 412 (1885).
¹⁸³ Perry v. Horn, 22 W. Va. 381, 386 (1883).
¹⁸⁴ Cranmer v. McSwords, supra note 182, at 417.
pays the principal debtor's obligation in order to obtain contributions from his co-sureties.\textsuperscript{186}

The early decisions by West Virginia courts held that when payment or release is made, the debt is dead in a court of law but remains alive in equity for the benefit of the surety or co-surety. Similarly, it was held that when a judgment against the principal debtor is paid by the surety the judgment is ended at law, but equity keeps it alive for the benefit of the surety.\textsuperscript{187}

Where an obligation is discharged by one for the benefit of another whose duty it was to pay the same, the law creates an obligation in favor of the one who pays against the party who by all rights should have paid.

A bill based on a claim of subrogation to the rights of another is defective if it fails to allege the relationship of the parties out of which the right of subrogation arose.\textsuperscript{188}

A judgment lien on the principal debtor's property, even after it has been formally released on the record, remains alive in equity for the protection of the surety's rights.\textsuperscript{189} In cases where the equity of the surety is latent the surety does not prevail over the rights of a subsequent bona fide purchaser of property from the principal debtor. A surety who pays a judgment is subrogated to all the rights of the judgment and lien resulting from such judgment for so much of the judgment as was paid by the surety.\textsuperscript{190} The surety is subrogated to all such rights without any assignment of the judgment or liens and may enforce the lien against the principal debtor's property for his own benefit.\textsuperscript{191}

When a surety pays a judgment of his principal debtor to the state, the surety is subrogated to the rights of the state and may enforce the lien of the state for his benefit without making the state a party to the suit.\textsuperscript{192} Logic dictates that the subrogee would be subrogated to any priorities or preferences granted to the state.\textsuperscript{193}

\textsuperscript{186} Gooch v. Gooch, 70 W. Va. 38, 41, 73 S.E. 56, 58 (1911) (dictum).
\textsuperscript{187} Id. at 42, 73 S.E. at 58.
\textsuperscript{188} Haines v. Kuykendall, 120 W. Va. 549, 199 S.E. 449 (1938).
\textsuperscript{189} Gooch v. Gooch, supra note 186, at 42, 73 S.E. at 58.
\textsuperscript{190} Bassett v. Streight, 78 W. Va. 262, 88 S.E. 848 (1916).
\textsuperscript{191} George v. Crim, supra note 174.
\textsuperscript{192} Pickens v. Wood, 57 W. Va. 480, 50 S.E. 818 (1905).
\textsuperscript{193} United States Fid. & Guar. Co. v. Central Trust Co., 95 W. Va. 458, 121 S.E. 430 (1924).
It has been recognized that the creditor's remedies on a note secured by a mortgage or deed of trust may be barred, but that fact does not bar the lien of that mortgage or deed of trust, the note being one thing, the mortgage or deed of trust another; the one dead, the other yet alive. In such a case the creditor can not successfully maintain an action on the note, but may resort to his security for satisfaction. When a surety pays the debt, so far as subrogation is involved the surety steps into the shoes of the creditor, and so long as the creditor's right against the principal debtor would not be barred neither will the right of the surety against the principal debtor be barred, for the surety is subrogated to all the positions and rights the creditor would have had he remained the creditor.  

The surety is not subrogated to the right of the creditor until the creditor has been fully satisfied. The surety cannot compel the creditor to assign or cede or in any way detract from his securities until the creditor has been fully satisfied.

It has been said that a surety may not make a profit at the expense of his principal when the surety discharges the debt for a consideration of a lesser value than the debt for which it was taken. In Matthews v. Hall the court noted that,

[If the surety discharges the debt of his principal, in whole or in part for any sum less than the full amount he so discharges, he can, in the absence of an express contract, recover from his principal only the amount actually paid by him . . . . [The surety should] not be allowed to speculate out of his principal . . . . He occupies in that regard the same position as an agent . . . . It is . . . . [the duty of the surety] to make the best terms he can for his principal . . . . [If the surety] pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can recover from the principal . . . . the amount actually paid by him and not the amount extinguished by the payment.

Where two persons purchase property, with the understanding between them that each will pay an equal part of the purchase price and they execute a joint note for the purchase price, they

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194 Gooch v. Gooch, supra note 186, at 42, 73 S.E. at 58.
196 21 W. Va. 510 (1883).
are sureties for each other to take the extent of one-half the joint obligation. The suretyship relation which is apparent on such facts results in an equitable lien in favor of the party who pays more than his share of the debt upon the interest of the other to secure the excess. However, if one sells his interest in the property to a bona fide purchaser without notice of the equity of the other party, the purchaser's rights prevail over any rights of the surety.

Where an obligation of the principal and surety is secured by a mortgage on the principal's property and the record discloses satisfaction of the mortgage without disclosing by whom payment was made, the purchaser, without notice to the contrary, may properly assume the debt was paid by the principal debtor. However, if the purchaser knows or the record discloses that the debt was paid by one who was in fact surety for the principal debtor, such purchaser does not acquire unencumbered title to the property for the surety would, as the result of his payment of the indebtedness, be subrogated to the security interest in the property to protect his right to reimbursement from the principal debtor. Any release by the creditor of the lien would under these circumstances be in violation of the surety's rights and would be invalid as against one other than a bona fide purchaser of the property.

Where the record discloses that if payment had been made by a certain person he would be entitled to subrogation, a purchaser is not required to look beyond the record to determine whether payment was in fact made by such person.

In Perkins v. Hall a party became a surety by co-signing a negotiable note; the surety paid the note. The effect of this payment upon his rights against the principal was in issue. At the time of the decision the Uniform Negotiable Instruments Law, not the Uniform Commercial Code, was in force in West Virginia. As a preliminary to consideration of the Perkins case it is noted that under the Negotiable Instruments Law an endorser on a negotiable instrument is secondarily liable, while a co-maker is

198 Id. at 353, 90 S.E. at 876.
199 Ibid.
200 Ibid.
201 Id. at 354, 90 S.E. at 876.
primarily liable. By the terms of the Negotiable Instruments Law payment by a person secondarily liable did not discharge the instrument. Formerly, the West Virginia Code provided: "The person 'primarily' liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same ...." Under the Negotiable Instruments Law did payment by a surety who was a co-signer of a negotiable instrument discharge the instrument? The Supreme Court of Appeals of West Virginia in answering this question in the affirmative said: "We think it has always been the law that the payment of a negotiable instrument, at or after maturity, by the makers thereof, or any of them, extinguishes the note, and nothing in the negotiable instrument law weakens that proposition." If the instrument be discharged the surety can not base his action against the principal debtor on the instrument but would have to base his action against the principal debtor on some other theory.

The fact set forth in the Perkins case disclose that Perkins, J. Hall and L. Hall were all primarily liable on the note. The court said the surety, who was primarily liable on the note, having paid the note, could not maintain an action on the note as it had been discharged by payment.

The court speaking through Judge Ford, quoted from Judge Snyder's opinion in Conrad v. Buck, saying:

It is well settled, that where a surety pays a debt of his principal, which is evidenced by bond, the surety is not substituted to the rights of the creditor so far as to make him a bond creditor. The payment completely discharges and destroys the bond and leaves the surety to his remedy on his account for money paid for the use of his principal. The only contract available to the surety after such discharge of the bond, is an implied promise that the debtor will repay him the amount so paid for his use ....

A careful reading of the Conrad case will disclose that this statement was dicta and was used in an analogy to a case which was concerned with the dissolution of a partnership.

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204 Perkins v. Hall, supra note 202, at 715, 17 S.E.2d at 800.
205 21 W. Va. 396, 410 (1883) (dictum).
206 Perkins v. Hall, supra note 202, at 715, 17 S.E.2d at 800.
As additional justification for its decision in the *Perkins* case, the Supreme Court of Appeals of West Virginia alluded to a Virginia case\(^\text{207}\) in which it was held that when a surety pays a note, he "can not take an assignment thereof to himself so as to enforce the note as such against his principal, but would have to rely on the implied undertaking of his principal to indemnify him."\(^\text{208}\)

The West Virginia court was referring to the West Virginia Code\(^\text{209}\) under which a surety, guarantor or endorser, who pays a judgment in whole or in part awarded on account of such liability, may, by motion in the court in which the judgment was rendered, obtain a judgment against any person against whom such right of action exists for the amount so paid with interest stated. The statute merely provides a remedy in addition to that which might be involved under the equitable powers of the court providing for contribution or subrogation.

Section 3-601 of the *Uniform Commercial Code*\(^\text{210}\) speaks of discharge of "any party" rather than discharge of "the instrument" as did Section 119 of the *Uniform Negotiable Instrument Act*\(^\text{211}\). Subsection (1) of Section 3-601 of the Code provides: "The extent of the discharge of any party from liability on an instrument is governed by the sections on (a) payment or satisfaction (Section 3-603) . . . or (b) . . ." etc.\(^\text{212}\) Subsection (2) of Section 3-603 of the Code provides: "Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (Section 3-201) . . . ."\(^\text{213}\) When one refers to Subsection (1) of Section 3-201 of the Code, he will note that "transfer of an instrument vest [*sic*] in the transferee such rights as the transferor has therein . . . ." Is it not possible in reading these three sections of the Code together to conclude that under the Code a surety who is a co-maker may sue the principal debtor on the instrument which the surety who is a co-maker has paid? If so, what is the limit of the recovery by the surety who

\(^{207}\) Grizzle v. Fletcher, 127 Va. 663, 105 S.E. 457 (1920).

\(^{208}\) Id. at 664, 105 S.E. at 458.

\(^{209}\) ch. 45, art. 1, § 4 (Michie 1961).


\(^{212}\) W. VA. CODE ch. 46, art. 3, § 603 (2) (Michie Supp. 1965).

\(^{213}\) W. VA. CODE ch. 46, art. 3, § 201 (Michie Supp. 1965).
is a co-maker in the event the surety discharged the instrument by the way of a compromise settlement for less than its face amount? Had the creditor so desired might he have recovered from the principal debtor the face amount of the instrument? Unless section 4 of article 1 of chapter 45 of the West Virginia Code has been impliedly repealed by the adoption of the Commercial Code, which does not seem to be the case, the surety is limited to recovering the amount it cost him to discharge his obligation on the instrument. The applicable portion of section 4 provides that where the surety pays, he shall

be substituted to and become the owner of all of the rights and remedies of the creditor for the enforcement and collection of the amount or amounts so paid . . . . The provisions of this section are cumulative, and are intended to protect the rights of any person secondarily liable to the extent to which he has satisfied the obligation of the person primarily liable . . . .

From the content of this section it appears that the words "secondary" and "primary" are used to designate a "surety" or "principal" irrespective of whether the surety signed as co-maker or endorser.

It is reasonable to conclude that under the provisions of the Code the surety who has discharged his obligation to the creditor may maintain an action on the negotiable instrument against the principal debtor as the creditor might have done, but the surety would be limited in his recovery to the amount it cost him to discharge the obligation.

[The] . . . payment of a judgment by one of the judgment debtors extinguishes the judgment law . . . [A] creditor could not sell the judgment to one of the judgment debtors so as to keep it alive at law, although the equitable remedy of subrogation to the rights of the creditors in favor of a surety, or for contribution, was not . . . affected.\(^{214}\)

The facts in *Hughes v. McElwee*\(^ {215}\) disclose that the administrator of an estate recovered a judgment in covenant against


\(^{215}\) *Supra* note 181.
Hughes and McElwee. M. Hughes, not a party to the action, borrowed from McElwee the sum to pay the judgment which had been rendered against her son and McElwee. The court found that M. Hughes intended to pay the debt; therefore, the judgment was extinguished as to her son, the principal obligor. The obligation of the surety was automatically extinguished because the surety was liable only so long as the debt of the principal was not extinguished.

INDEMNIFICATION

The statement of facts in *National Surety Co. v. Conley* disclosed that the National Surety Company was surety on Conley's bond. Conley had agreed to indemnify the surety company against loss, including counsel fees, which the surety company might incur as the result of its undertaking. One McGinnis, a deputy sheriff appointed by Conley, executed his bond to Conley with the National Surety Company as his surety. The surety company sought to recover from Conley the expense it incurred as the result of a wrongful act committed by Deputy Sheriff McGinnis.

The court in affirming the decision of the lower court against the surety company said: "Had this litigation been confined alone to the bond of the sheriff his liability for counsel fees would have been plain . . . ." The deputy's bond provided that the sheriff was to be "saved harmless" by reason of the deputy's appointment.

CONTRIBUTION

The rights between co-sureties grow out of the implied understanding that each co-surety will pay his share of the common indebtedness and not from the note evidencing their obligation to the creditor.

The right of one surety to seek contribution from a co-surety was originally a matter of equitable cognizance. For many years the right of one surety to seek contributions from co-sureties also has been recognized as a legal right enforceable in the law courts.

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217 Id. at 592, 152 S.E. at 5.
The right of a surety to recover contribution from a co-surety in the law courts is limited to an aliquot part of the debt. At law this amount is determined by dividing the whole number of co-sureties, both solvent and insolvent, into the amount of the debt paid. In Selvey's Ex'r v. Armstrong's Adm'r, the personal representative of a deceased judgment debtor, the deceased having been surety on another's obligation, was permitted to recover from the estate of his co-surety by the way of contribution.

In a court of equity the surety who has paid the principal debtor's debt is entitled to contribution from his solvent co-sureties based pro rata on the number of solvent co-sureties. While the West Virginia court did not consider the matter, decisions in other states indicate that the equitable doctrine in relation to contributions also excludes from consideration solvent and insolvent co-sureties who are non-residents and not amenable to service of process.

A surety who seeks contribution from a co-surety is entitled to recover interest on the amount to which he is entitled by the way of contribution from the date of payment by the surety seeking contribution.

Where the principal debtor was insolvent and one of two co-sureties paid the credit in full, the one who paid was entitled to contribution from his co-surety, and in order to protect and to enforce his right of contribution the court set aside a fraudulent deed made by his co-surety. Other creditors of the defendant co-surety had no right to complain. The debt had in truth not been paid, because it was not paid by the one ultimately bound. Rather, it was paid by another, who became the co-surety's creditor in due course of law.

A surety who has paid his principal debtor's debt, or more than his equitable part thereof, is subrogated to all the rights and remedies of the creditor against a co-surety in order to enforce

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219 Pickens v. Wood, supra note 192, at 490, 50 S.E. at 822; Weimer v. Talbot, supra note 218, at 262, 49 S.E. at 374; Dent v. Wait's Adm'r, 9 W. Va. 41, 45 (1876).
221 Weimer v. Talbot, supra note 218, at 262, 49 S.E. at 374; Dent v. Wait's Adm'r, supra note 219, at 45.
his right to insist that his co-surety pay a share of the indebtedness. Such right is an equitable demand for money which may be assigned and enforced by the assignee.\(^\text{224}\)

**Modification of Contract**

A modification of a contract on which there is a gratuitous surety without the surety's consent discharges the surety in toto. The modification must result from a binding agreement between the creditor and the principal.\(^\text{225}\)

Where a contract authorizes additions, deductions or changes in the work to be done as may be necessary and makes a fair allowance or deduction on account thereof, the surety on the contract is not discharged by modification of the contract, in accordance with its terms.\(^\text{226}\) Where the surety did not reserve the right to determine the price of any changes in the work or materials to be furnished under the terms of the contract, the surety had entrusted the determination of this matter to the principal debtor.\(^\text{227}\)

The Supreme Court of Appeals of West Virginia by way of dicta has said that powers and responsibilities of a public officer may be enlarged or diminished by legislation without affecting the liability of a surety on the public officer's bond. In such cases the surety is deemed by law to have entered into the contract with knowledge that the public officer's obligations are subject to change by the legislature. The surety has no right to object to changes in the duties of his principal debtor to which he has previously consented.\(^\text{228}\)

The Supreme Court of Appeals of West Virginia has stated that a surety of an officer of a private corporation is presumed to know that the shareholders and board of directors of the corporation may enlarge or diminish the scope of an agent or officer. Such a surety obligates himself for the care, skill, diligence and honesty of the principal in the bond respecting the duties imposed on the agent or officer of the corporation at the time of the execu-

\(^{224}\) Weimer v. Talbot, *supra* note 219, at 261, 49 S.E. at 373.
\(^{226}\) State v. Smith, 92 W. Va. 12, 18, 114 S.E. 375, 377 (1922).
tion of the bond and also for such duties as subsequently may be
developed upon him in the exercise of corporate powers.\textsuperscript{229}

It is well settled that if the contract between the owner and
the contractor permits alterations to be made in the work to
be done, or if the bond itself permits the alterations the surety
will not be discharged by reason of a material alteration made
without his express consent, where such alteration is one con-
templated by the terms of the stipulation permitting altera-
tions.\textsuperscript{230}

Where the bond of an officer or agent of a corporation binds
him in only a general way to "well and truly perform the duties
of the said office during his term . . ." the surety on that bond
is liable not only for defaults in the exercise of authority which
the principal had at the time the bond was executed but also for
defaults in the exercise of authority subsequently granted. This
applies not only to authorized acts but also to unauthorized, ratified
acts.\textsuperscript{231} In holding a surety liable for the defaults of an agent-
officer of a corporation, the agent-officer's authority having been
modified after the suretyship relation was created, the Supreme
Court of Appeals of West Virginia said:

The limits of his [principal-employee] potential authority
were those of the corporation itself, respecting matters per-
taining to the treasurer's functions, such as the receipt and
custody of its funds. Rules governing the liability of sureties
in bonds collateral to clearly defined and limited contracts,
undertaking to do specific acts . . . are . . . not applicable.\textsuperscript{232}

\textbf{CREDITOR ESTOPPED TO DENY NOTE UNPAID}

Where the creditor states that a note has been paid, when in
fact it has not, the surety may well be misled thereby to his detri-
ment in that he might fail to take certain steps. In such a case
the surety may plead an estoppel in pais as a defense even though
the statement was a mistake, and there was no fraud practiced.\textsuperscript{233}

\textsuperscript{229}Id. at 441, 85 S.E. at 642.
\textsuperscript{230}21 R.C.L. 1012, which is cited with approval in State v. Hudson Pav-
\textsuperscript{231}Wait v. Homestead Bldg. Ass'n, supra note 228, at 440, 85 S.E. at 641.
\textsuperscript{232}Ibid.
\textsuperscript{233}Citizens Trust & Guar. Co. v. Coff, 81 W. Va. 366, 370, 94 S.E. 756,
757 (1917); Poling v. Maddox, 41 W. Va. 779, 785, 24 S.E. 999, 1001 (1896);
Bates v. Swiger, 40 W. Va. 420, 21 S.E. 874 (1895); see also 1 BRANDT,
SURETYSHIP & GUARANTY § 245 (3d ed. 1905).
The surety should be discharged only where he can show that the principal debtor was solvent at the time the surety was led to believe that the indebtedness to the creditor had been paid. Otherwise, the surety would be unable to show that he had relied on the creditor’s statement to his detriment.234 The creditors may likewise mislead the surety through a third party, as where he gave a receipt to the principal debtor showing the principal debtor had settled with him which was in turn shown to the surety by the principal debtor.235

Usury

Where the plea of usury is not available to the principal debtor, it will not be available to the surety.236 A note was signed in Ohio calling for interest at the rate of eight per cent per annum, which was lawful under the Ohio law. It was signed by the surety in Virginia where the maximum lawful rate was six per cent per annum. At the time the surety signed the note the Virginia law of usury rendered the contract void. The court found the agreement to be an Ohio contract, valid under the usury laws of that state, and denied to the surety the defense of usury under the Virginia laws. If the principal cannot attack the validity of the contract the surety may not.

The court cited with approval the New York case of Rosa v. Butterfield.237 A New York statute denied a corporation the right to set up the defense of usury; therefore, notes of a railroad company were not usurious and could be enforced against the company and the guarantors. The New York court said: “This is equivalent to saying, as the corporation could not set up the defense of usury, neither could the surety of said corporation set up such a defense.”238

Duress

There appears to be only one reported case in West Virginia where duress practiced on the principal debtor was successfully

234 Citizens Trust & Guar. Co. v. Goff, supra note 233, at 373, 94 S.E. at 758 (dictum).
236 Pugh v. Cameron’s Adm’r, 11 W. Va. 523 (1877).
237 33 N.Y. 665 (1865).
238 Pugh v. Cameron’s Adm’r, supra note 236, at 531.
asserted by a surety. In the case of Bank of Clinchburg v. Carter, the accommodation indorser on a note was sued. The facts disclosed that the payee had threatened the principal debtor with criminal prosecution for having engaged in certain improper activities. The note was still in the hands of the payee.

The Supreme Court of Appeals of West Virginia adopted the view that duress practiced by the holder upon the principal obligor, the maker of the note, may be asserted as a defense by the surety who was ignorant of the duress at the time he became a surety. This view is favored by a majority of jurisdictions.

In an earlier case the court had found that it was not duress to threaten one with arrest unless threat was made with an improper purpose. The court held that it was not an improper purpose where the wife had threatened her husband with prosecution for non-support.

**SET-OFF**

As a general proposition the law courts will not permit the set-off of a joint liability against an individual liability nor the set-off of an individual claim against a joint obligation. However, a separate demand may be set-off against joint and several claims.

In Johnson's Ex'r v. Johnson's Heirs, the court held that a surety of an insolvent estate may set-off a debt owed by the estate for which he is liable as a surety. This case is of unusual interest because the degree of the insolvency of the estate had not at the time of this litigation been determined. The court held that when the amount the surety may have to pay is not known, the surety has the right to protection from the creditor. In such a case the surety is liable to the creditor only for the unpaid portion of the debt after the creditor has received his pro rata share of the estate.

In the law courts a surety has been denied the right to set-off against the creditor a claim which the principal debtor has against the creditor. The set-off in this case has been said to be purely equitable.

229 101 W. Va. 669, 133 S.E. 370 (1926).
242 83 W. Va. 593, 98 S.E. 812 (1919); see also Beard v. Beard, 25 W. Va. 486 (1885).
Where one is indebted to an insolvent creditor and is also surety for that insolvent party's debt, one may enjoin the collection of his indebtedness until he has been indemnified against his liability as a surety. This is in effect creating an equitable set-off of an obligation which may not as yet be due against a matured claim of an insolvent creditor. Similarly, where the surety discharges his liability as surety to such creditor he may set-off, in equity, such payment against his indebtedness to such creditor. An assignee of such creditor will stand in no better position than the insolvent assignor.

When an action of debt is brought against a surety alone on a joint and several penal bond, conditioned that the principal as an agent would faithfully pay over certain moneys to his employee, the court expressed the view that the surety could "neither offset nor recoup a debt due to the principal by the plaintiff for services as such agent . . . when receiving such money." The court in reaching its conclusion contrasted the case of Baltimore & Ohio R.R. v. Jameson. The court recognized that in the Jameson case it had held that a set-off for services rendered by the principal was allowed. The court said:

But this by no means establishes that the surety, when sued alone on a joint and several obligation, can plead as a set-off any demand due from the plaintiff to a person not a party to the suit, even though that person stands in the relation of principal to the defendant as a surety.

It is elementary that when two parties execute a joint and several obligation to a third person, as where one is a principal debtor and the other a surety, the creditor may at his option treat it as a joint obligation of the principal debtor and the surety and sue them both, or he may treat it as a several obligation and sue only one of them. In the latter instance and in the absence of a statute, the surety is precluded from asserting any defense which belongs only to the principal debtor who has not been joined.

243 Hughes v. McDermitt, 86 W. Va. 86, 102 S.E. 767 (1920).
244 Ibid.
246 13 W. Va. 833 (1878).
248 Ibid.
CONCLUSION

Notwithstanding the decisions rendered by the Supreme Court of Appeals of West Virginia in the multitude of cases involving principles of suretyship law, many problems in this area of the law remain unresolved. In view of the adoption of the Uniform Commercial Code in which many problems relating to commercial transactions of other types have been anticipated and resolved, it would be desirable for the Legislature of West Virginia to re-examine the antiquated statutes relating to suretyship law with the idea of enacting a comprehensive suretyship code. Such code would fill the present voids in the law and would codify the law which has developed in this area by decisions of the courts.