Volume 49 | Issue 1 Article 13

December 1942

Principal and Surety--Discharge of Surety--Notices to Sue Principal--Sufficiency of Notice

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likewise barred the "last clear chance" doctrine as a possible ground of recovery. The court holds, however, that "An implied licensee upon the tracks of a railroad company who plainly exceeds the purpose for which the license has been allowed by the owner becomes a trespasser."[9] The rule that a licensee who exceeds his license becomes a trespasser is well settled.[10] However, this seems to be the first time the West Virginia court has applied it to facts such as appear in the present case. Other courts have made a similar application of the rule, the Texas court saying: "If the public had a license to use the tracks as a highway, no license can be inferred to use the tracks for sleeping purposes."[11]

D. V. B.

PRINCIPAL AND SURETY — DISCHARGE OF SURETY — NOTICE TO SUE PRINCIPAL — SUFFICIENCY OF NOTICE. — *S* signed, as surety, a note held by *C*. A statute provided that after a cause of action had accrued, "The surety . . . may . . . require the creditor . . . by notice in writing, forthwith to institute suit",[1] and if the creditor does not institute suit within a reasonable time after notice, the surety shall be released.[2] *S* sent C the following notice: ". . . this is to notify you *to collect* his note on which I am endorser . . ."[3] Five years later, *C* brought suit on the note, and *S* claimed release under the statute. *Held*, one judge dissenting, that the notice was insufficient under the statute. *Williams v. Zimmerman*.[4]

Several courts have held a notice "to collect" sufficient under this type of statute,[5] but the majority opinion discounted these holdings as based either on special urgency expressed in the notice, or on the special working of the statute itself. At the other ex-

[9] Syllabus by the court.
[10] Cornett's Adm'r v. Louisville & N. R. R., 181 Ky. 132, 203 S. W. 1054 (1918); Lyons' Adm'r v. Illinois Central R. R., 22 Ky. L. R. 1032, 59 S. W. 507 (1900); Smith v. International & G. N. R., 34 Tex. Civ. App. 209, 78 S. W. 556 (1904).
[11] *Ibid.*

[1] W. VA. CODE (Michie, 1937) c. 45, art. 1, § 1.
[2] *Id.* at § 2.
[3] Williams v. Zimmerman, 20 S. E. (2d) 785, 786 (W. Va. 1942). Italics ours.
[4] 20 S. E. (2d) 785 (W. Va. 1942).
[5] Franklin v. Franklin, 71 Ind. 573 (1880); Iliff v. Weymouth, 40 Ohio St. 101 (1883); Strickler v. Burkholder, 47 Pa. 476 (1864); Sullivan v. Dwyer, 42 S. W. 355 (Tex. Civ. App. 1897). *Cf.* Benge's Adm'r v. Eversole, 156 Ky. 131, 160 S. W. 911 (1913) and Baker v. Whittaker, 177 Ky. 197, 197 S. W. 644 (1917).

treme, it has been held that a notice "to sue" was not sufficient, because it omitted the requirement "forthwith".[6] The weight of authority is in accord with the view of the instant case, that notice "to collect" is not substantial compliance with the statute.[7] The supreme court of Virginia has held that a notice by a surety to take whatever steps are necessary to get his name off the obligation was not sufficient under an identical statute.[8] In a leading case on the point, it was said that "the notice must contain the following essentials, to wit: (1) It must be peremptory. It must 'require' the (2) 'Commencement of an action'; (3) 'Forthwith'; (4) It must be unconditional, and (5) It must not be misleading, but should be easily understood."[9] The notice in the instant case lacked urgency, was not a peremptory demand, and did not directly require the commencement of an action.

The trial court, in a written opinion,[10] adopted a strict construction of the statute, while the supreme court of appeals acknowledged itself committed to a liberal interpretation of the statute, and yet both agreed that only substantial compliance with the terms of the statute was required by the law of the state. The dissenting judge was of the opinion that under the liberal interpretation, the notice in the instant case was substantial compliance. The rationale of the decisions which are in accord with the West Virginia court on this point is that before this statute was passed, the only relief of a surety from an indolent creditor was by a bill *quia timet*,[11] and that since the statute provides a way by which the surety may be released from a valid contract obligation, and the creditor be made to forfeit his rights against the surety, it is not unreasonable to require

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[6] McMillin v. Deardorff, 18 Ind. App. 428, 48 N. E. 233 (1897).

[7] Darby v. Berney National Bank, 97 Ala. 643, 11 So. 881 (1892); Frye v. Eisenbiess, 56 Ind. App. 123, 104 N. E. 995 (1914); Hunt v. Purdy, 82 N. Y. 486 (1880); 30 A. L. R. 1292.

[8] Edmonson v. Potts' Adm'r, 111 Va. 79, 68 S. E. 254 (1910). The tenor of the notice required is, "an explicit and peremptory demand", Naylor v. Anderson, 178 S. W. 620 (Tex. Civ. App. 1915); "a positive direction to sue", Bowling v. Chambers, 20 Colo. App. 113, 122, 77 Pac. 16 (1904); "must show a clear, unequivocal and distinct demand", Edmonson v. Potts' Adm'r, 111 Va. 79, 82, 68 S. E. 254 (1910).

[9] Frye v. Eisenbiess, 56 Ind. App. 123, 126, 104 N. E. 995 (1914), quoting from Haskell v. Beers, 16 Ohio Dec. 368, 371 (1906).

[10] Williams v. Zimmerman, Record, p. 19.

[11] In Pain v. Packard, 13 Johns. 174 (N. Y. 1816), without the aid of a statute, a surety was released when the creditor did not sue the principal after notice by the creditor. This result was criticized as a common law result in ARANT, SURETYSHIP & GUARANTY (1931) 316.

strict compliance with the statute.[12] The surety must leave no possible doubt in the mind of the creditor that he is standing on his statutory right, and that unless suit is commenced within a reasonable time, he will claim release under the statute.[13] The notice is so simple that even a layman could easily comply therewith and there is no reason why the statute should not be strictly followed.

This is not a case in which abstract justice is either for or against the decision, but, as is often true in the field of commercial law, the certainty of a rule is its principal virtue. By this holding the rule is made certain and the scope of possible future litigation greatly limited. It is now settled in this state that a notice "to collect" is not sufficient. The safe thing to do when drafting such a notice, as usually is true, is to follow the exact wording of the statute: "I require you forthwith to institute suit."

D. C. H.

STATES — CONSTITUTIONAL LIMITATIONS — LOAN OF CREDIT. — Mandamus to compel the county court of Webster county to transfer from the general county fund to the general relief fund the balance of the amount included in the budget for general relief. The county court, in compliance with the general welfare law had represented to the state tax commissioner that it would provide a separate item for general relief in its budget, to be not less than fifteen percent of the total amount which the county court might levy for current expenses as authorized by law. This sum was to supplement the funds spent by the state in the county for general relief. The county court contended that the public welfare law[1] violated that section of the state constitution which provides that "The credit of the State shall not be granted to, or in aid of any county, city, township, corporation, or person; nor shall the State ever assume or become responsible for the debts or liabilities of any county, city, township, corporation or person."[2] *Held,* that this was not a loan of credit within the meaning of the constitution, but was only county participation in a state function.[3]

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[12] McMillin v. Deardoff, 18 Ind. App. 428, 429, 48 N. E. 233 (1897); Maier v. Canavan, 57 How. Pr. 504, 507 (N. Y. 1879); Edmonson v. Potts' Adm'r, 111 Va. 79, 82, 86 S. E. 254 (1910).

[13] Denick v. Hubbard, 27 Hun 347, 351 (N. Y. 1882).

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[1] W. VA. CODE (Michie, 1937) c. 9, art. 10, as amended by W. Va. Acts 1941, c. 74.

[2] W. VA. CONST. art, X, § 6.

[3] Kenny v. County Court of Webster County, 21 S. E. (2d) 385 (W. Va. 1942).