Statutory Protection of Sureties and Cosureties

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STATUTORY PROTECTION OF SURETIES AND COSURETIES

Where $D$ is indebted to $C$ and the obligation is past-due and $S$ has bound himself as surety for $D$ and fears the insolvency or disappearance of $D$, what legal responsibility may $S$ impose upon $C$ to proceed immediately against $D$? At common law $S$ could only protect himself against $C$ and $D$ by a bill *quia timet* in equity to compel $D$ to pay and $C$ to collect the debt." As against $D$, $S$ also had the right of exoneration and reimbursement. The equitable remedy, however, was found too cumbersome to be effective and consequently at an early date sureties demanded statutory protection. Thus in 1794, Virginia adopted the statute giving $S$ a remedy at law. The statute provided:

"that when any person or persons shall hereafter become bound as security or securities . . . for the payment of money or tobacco, and shall apprehend that his or their principal debtor is or are likely to become insolvent . . . . it shall and may be lawful for such security . . . . to require by notice in writing to his or their creditors, forthwith to put the bond, bill or note, . . . . in suit; and unless the creditor or creditors . . . . shall in a reasonable time commence an action . . . . the creditor or creditors . . . . shall thereby forfeit the right . . . . to demand and receive . . . . the amount of the money or tobacco which may be due by such bond, bill or note."

In the general revision of the Virginia Code of 1849 the phrase "any person bound by any contract" was substituted for the phrase "any person . . . . bound as security". In substantially

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2 See, 3 Minor's Inst. *supra* n. 1 at 188.


4 Cited from Wright's Adm'r v. Stockton, *supra* n. 1, at 154, n. 1.

5 Va. Code (1849) c. 146, § 4. "The surety or grantor, or endorser, (or his personal representative) of any person bound by any contract, may, if a right of action has accrued thereon, require the creditor, or his personal representative, by notice in writing, forthwith to institute suit thereon; and if he be bound in a bond with collateral condition, or for the performance of some collateral undertaking, he shall also specify in such requisition the breach of the condition or undertaking for which he requires suit to be brought."
in this form the statute has remained. Eighteen states have adopted similar provisions, three states provide the same remedy by judicial decision, and five states have a special type of statute requiring the creditor to pursue any remedy which he has against the principal debtor which is not accorded to the surety directly. *Quaere,* do these statutes supplement the common law remedies or do they supersede them?  

The statute in its original form gave a remedy to the surety in case the creditor did not "put the bond, bill or note, . . . in suit" upon notification by the surety that the surety feared for the solvency or suability of the principal. The revision of 1849 permits the surety to give notice to the creditor "if a right of action has accrued" and thereupon the creditor must "institute suit against every part to such contract." *Quaere,* does the elimination of the requirement of insolvency or threatened absence of the principal debtor in the revision of 1849 extend the application of the statute to cases in which the surety fears for the solvency of the surety? This question was before the West Virginia Court of Appeals in the case of *State v. Citizens' National*

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1. VA. CODE (Michie, 1930) § 5774. The provision is similar in West Virginia. See, W. VA. REV. CODE (1931) c. 45, art. 1, § 1.  
2. ALA. CODE (1926) § 9555; ARIZ. REV. CODE (1928) § 3050; STAT. OF ARK. (Crawford, 1921) §§ 8287-8289; GA. ANN. CODE (1926) § 3546; ILL. REV. STAT. (1929) c. 132, § 1; IND. ANN. STAT. (Burns, 1926) §§ 1258, 1269; IOWA CODE (1927) §§ 9457, 9458; KY. STAT. (Carroll, 1930) § 4608; MISS. CODE (1920) § 2957; MO. REV. STAT. (1919) §§ 12687-12692; N. C. CODE (1927) §§ 3967, 3968; OHIO GEN. CODE (Page, 1926) §§ 12191-12193; TENN. ANN. CODE (Shannon, 1918) §§ 3517-3520; COMPLETE TEX. STAT. (1928) §§ 6244, 6248; CODE OF VA. (1930) § 5774, 5775; WASH. COMP. STAT. (Remington, 1922) c. 9, §§ 974, 975; W. VA. REV. CODE (1931) c. 45, Art. 1, §§ 1, 2; WYO. COMP. STAT. ANN. (1920) §§ 6233-6265.  
3. *Pain v. Packard & Minson, 13 Johns. (N. Y.) 174 (1815); Lickenthaler v. Thompson, 13 S. & R. (Pa.) 157 (1825); Martin v. Skehan, 2 Colo. 614 (1875).* See also *The Doctrine of Pain v. Packard* (1928) 37 YALE L. J. 971, n. 9; L. R. A. 1918C 10; AMES, CASES ON THE LAW OF SURETYSHIP 221; CAMPBELL, CASES ON SURETYSHIP 514. N. B. This doctrine was developed after the enunciation of the Virginia statute of 1794.  
4. CAL. CIV. CODE (Deering, 1928) §§ 2840, 2845; MONT. REV. CODE (Chouteau, 1921) §§ 2801, 2803; N. D. COMP. LAWS ANN. (1913) §§ 6681, 6683; OKLA. REV. LAWS (1921) §§ 5153, 5155; COMP. LAWS OF S. D. (1920) §§ 1504, 1506, 1507.  
5. ALA. CODE (Michie, 1928) § 9545, "The remedies given sureties and cosureties in this chapter are not exclusive of other remedies conferred by statute or existing at common law, but are cumulative and additional."  
6. CALIF. STAT. (1928) §§ 2043, 2044; MONT. REV. CODE (Chouteau, 1921) §§ 2801, 2803; N. D. COMP. LAWS ANN. (1913) §§ 6681, 6683; OKLA. REV. LAWS (1921) §§ 5153, 5155; COMP. LAWS OF S. D. (1920) §§ 1504, 1506, 1507.  
7. "Supra n. 3.  
8. "Supra n. 5.  
9. "Supra n. 5."
Bank of Philippi. In this case a creditor demanded payment on a bond and served notice on the principal and sureties that a motion for judgment would be made. Learning that the motion would not be made on the specified day, three of the sureties notified the creditor that if the suit was not brought and any of the other sureties became insolvent they would not be bound. A year elapsed and suit was again instituted. The sureties pleaded, and the lower court sustained, the notice under the statute which provided that if such suit was not instituted against every party to the contract the creditor would forfeit his rights against surety and his cosureties. The court reversed the circuit, holding that the statute was not intended to give protection to one surety against another.

The interpretation of a statute is justified only in case the statute is ambiguous. But ambiguity in law, as in everything, is a matter of subjective relativity. If the revision of 1849 is ambiguous, it is because the statute is in derogation of the common law, or because of the existence of the statute of 1794, or because of the revisor’s failure to explain the cause of the change. Contemporaneous statutes and judicial decisions treat statutes extending remedies to sureties as supplemental to, rather than in derogation of, the common law. If this is so the “rule” of strict construction of statutes in derogation of the common law does not apply, and thus there is no need for a restrictive interpretation.

Does the existence of the statute of 1794 compel a strict construction? Apparently not. If the statute had first been adopted in its revised form it would be difficult to restrict it to the “surety-debtor” relation in the face of its general language applying to “every party to such contract”. Mechanically, it is possible to argue for a restrictive interpretation on the grounds of ambiguity arising either from the existence of the prior statute or from the silence of the revisors in changing the statute.

171 S. E. 810 (W. Va. 1933).

The requirements of the statute as to notice were satisfied. See, W. VA. REV. CODE (1931) c. 45, art. 1, § 1.

See, W. VA. REV. CODE (1951) c. 45, art. 1, § 2.


Supra n. 10.

As to the task of interpreting the silence of the 1849 revisors, the age-old discussion of the interpretation to be attached to the silence of the legislators, see GENY, MÉTHODE D’INTERPRETATION, II, No. 172 (2d ed. 1919) p. 162, (— the law being silent, the difficulty is to be resolved by means of free
If the existence of the prior statute is restrictive, it must be on the theory that the *ejusdem generis* rule applies as well to phraseology in successive enactments as it does to general and particular phraseology in a single enactment.20 This application of the rule, however, seems contrary to the purpose of the statutory amendment. In the normal *ejusdem generis* situation the meaning is uncertain because of the impossibility of generality and particularity existing contemporaneously. But an amendment may seek either (1) to clarify and simplify language without changing its substance; or (2) to change the effect of the prior enactment.

In the instant case it is not clear so far as reference to the parties to the transaction are concerned whether the revisors intended a change in the substance of the law or not. Thus no "genuine interpretation" is possible.21 A "spurious interpretation" will resolve the question.22 It is said that spurious interpretation exists when the legislators did not have before them the specific problem which now confronts the court. The process, in such a case, will be "not so much the searching for the intention of the legislators as it is the administration of the legislators' rule by the court, according to a semi-intuitive sense of justice which will make the abstract rule amenable to the juristic needs of the community."23 So in the principal case the court must eventually decide, no matter how it wishes to mask its decision, whether it wishes to protect the creditor or the surety against the solvency or disappearance of cosureties.24

20 The *ejusdem generis* doctrine is a rule of construction only and is not controlling in all cases. Mason v. United States, 280 U. S. 545, 43 S. Ct. 200 (1923); Gauley Coal Land Co. v. Koontz, 77 W. Va. 583, 87 S. E. 930 (1916). Even within the same statute general and special matter will not be construed together unless such is strong legislative intention.

21 "The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed. Its object is to enable others to derive from the language used 'the same idea which the author intended to convey.'" Found, *Spurious Interpretation* (1907) 7 Col. L. Rev. 379, 382.

22 "... the object of spurious interpretation is to make, unmake, or remake, not merely to discover (the intention of the law-maker)." Elder, *Statutory Interpretation* (1932) 7 Tul. L. Rev. 128, n. 14.


24 The presence of so many confused, contradictory, and meaningless
The statute, however, is subject to another interpretation; an interpretation which makes it so distinctively different from the statute of 1794 that the prior existence of that statute and the silence of the revisors can create no ambiguity. The statute of 1794 granted a remedy to sureties only in case of the threatened insolvency or disappearance of the principal debtor. The revision of 1849, however, removed any requirements concerning the solvency or suability of any party to the contract and extended a new protection which arose upon the single contingency that the obligation was overdue. Consequently, to argue by analogy from the insolvency of the principal obligor that the revision of 1849 was not intended to reach situations arising from the insolvency of parties secondarily liable is erroneous, for by the new statute the solvency of the principal debtor is as unimportant as is the solvency of the cosurety. The revision of 1849 is in fact a new enactment and not a clarification of the existing statute. The interpretation of the court which limits it to the scope of the prior enactment creates more difficulties than it cures. By this interpretation many new problems are created. For example, will the court read into the statute the requirements of the prior enactment that before the surety can be protected from overdue obligations he must prove the threatened insolvency or disappearance of the principal debtor?

Problems like these will continue to multiply and judicial decisions will hamper the orderly growth of the law until such time as common law courts are willing to treat the problem of statutory interpretation according to modern code technique.

—Frederick W. Ford.

"theories" and "methods" of interpretation creates a turbid atmosphere which is not conducive to clear thinking. Clarity would manifestly be secured by singleness and avowed method. If we must select one, it is hard to see how we can avoid selecting that method which is the commonest in practice, if the least announced. The statute — the *les lata* — creates limits on both sides of strictness and liberality. Within them, any decision to interpret strictly might with advantage be consciously rendered on the basis of its probable consequences. Radin, *Statutory Interpretation* (1929) 43 Harv. L. Rev. 863. For a plea for the legislative intent, see Landis, *A Note on "Statutory Interpretation"* (1929) 43 Harv. L. Rev. 886.

25 *Supra* n. 5.

*Alabama* copied the Virginia statute of 1794. See *Clay's Digest*, 532; *Shahan v. Hampton*, 8 Ala. 492, 495 (1846). After the Virginia revision of 1849, *Alabama* also revised their statute. They specifically included the cosurety situation, and it is arguable that they did so believing that they were following the Virginia practice. *Alabama Code* (1852) § 2647. See Savage's *Adm'r v. Carleton*, 33 Ala. 443, 445 (1859). See also *Ala. Code* (Michie, 1928) § 9555.