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Duty of Creditor to Pursue Remedy Against Principal Before Looking to Guarantor

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DUTY OF CREDITOR TO PURSUE REMEDY AGAINST PRINCIPAL BEFORE LOOKING TO GUARANTOR. — Suretyship obligations in general are divided into two groups as to the form of the obligation of the one giving the security. Where the promise of the person giving security is absolute or primary in form, he is called a surety.¹ The surety's obligation is direct and unconditional and is usually the same as the principal obligor's,² though it may be in the form of a separate but absolute undertaking. Suretyship in this form is illustrated by the contract of an accommodation maker of a promissory note, whether obligated alone or as joint maker with the principal obligor, or by the obligation of an accommodation acceptor of a bill of exchange.³

Where the promise of the person giving security is collateral and conditional in form, he is called a guarantor.⁴ The guarantor's obligation is separate and distinct from the principal's obligation,⁵ and is conditioned upon the breach of the principal debtor's obligation.⁶ There may be other conditions to the guarantor's obligation to pay the creditor than the mere default of the principal debtor. Under certain circumstances, additional con-

¹ *Kearnes v. Montgomery*, 4 W. Va. 29, 40; *Welsh v. Ebersole*, 75 Va. 651, 656; *Piedmont, etc. Co. v. Morris*, 86 Va. 941, 944, 11 S. E. 883; see STEARNS, SURETYSHIP, 2 ed. § 6; cases cited in 12 R. C. L. 1057, n. 2.

² *Manson v. Rawlings*, 112 Va. 384, 388, 71 S. E. 564; *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; *Watson v. Beaumont*, 18 Ind. 281, 282; *Central Savings Bank v. Shine*, 48 Mo. 456, 462, 8 Am. Rep. 112; *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175, 8 L. R. A. 380; *Northern State Bank of Grand Forks v. Bellamy*, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149; see cases cited in STEARNS, SURETYSHIP, 2 ed. § 6, note 7a.

³ The fact that the surety's obligation is absolute and therefore not in form to answer for the debt, default or miscarriage of another is the reason why it is not within the fourth section of the Statute of Frauds, (W. Va. Code, c. 98, § 1). *Gibbs v. Blanchard*, 15 Mich. 292; *Casey v. Brabason*, 10 Abb. Prac. 368 (N. Y.); *Olson v. McQueen*, 24 N. D. 212, 139 N. W. 522; *Waldock v. Bank*, 43 Okla. 348, 143 Pac. 53; see STEARNS, SURETYSHIP, 2 ed. § 37. Such obligation, though absolute and primary in form, is suretyship in fact because of the obligation of the principal to save the surety harmless. It is, therefore, secondary as to the principal though primary as to the creditor.

⁴ *Kearnes v. Montgomery*, 4 W. Va. 29, 40; *Shore v. Lawrence*, 68 W. Va. 220, 222, 69 S. E. 791; *Arents v. Commonwealth*, 18 Grat. 750, 769 (Va.); *Welsh v. Ebersole*, 75 Va. 651, 656; *Piedmont, etc. Co. v. Moore*, 86 Va. 941, 944, 11 S. E. 883.

⁵ *Middle States, etc. Co. v. Engle*, 45 W. Va. 588, 593, 31 S. E. 921; *Shore v. Lawrence*, 68 W. Va. 220, 222, 69 S. E. 791; *Piedmont, etc. Co. v. Morris*, 86 Va. 941, 944, 11 S. E. 883. For this reason the creditor may not join the principal obligor and the guarantor as defendants in the same action, though he may generally join the principal and a surety. *Shore v. Lawrence, supra*; *Abbott v. Brown*, 131 Ill. 108, 22 N. E. 813.

⁶ *Welsh v. Ebersole*, 75 Va. 651, 656; see STEARNS, SURETYSHIP, § 6. Because the grantor's obligation is always conditional it would seem misleading to speak of a guaranty of payment as an "absolute" guaranty.

ditions are imposed by law in some jurisdictions. Among such conditions imposed by law are the requirements that the guarantor have notice of sales or advances made to the principal under a continuing guaranty,⁷ or notice of the principal's default where the time of performance is uncertain and peculiarly within the creditor's knowledge.⁸ The basis of these conditions imposed by law is the guarantor's inability to protect himself by self-activity. In West Virginia an additional condition is imposed by the statute requiring the creditor under certain circumstances to sue the principal at the guarantor's written request and making the surety's obligation depend upon compliance.⁹

Other conditions precedent to the guarantor's obligation to pay are usually imposed by the agreement of the parties and therefore depend upon their intention as found by the court from the language of their contract and the circumstances.¹⁰ Chief among such guaranties are cases where the guaranty is of collectability as distinguished from a guaranty of payment. As to guaranties of collectability it is uniformly held that the creditor must pursue his remedies against the principal, if solvent, before he can charge the surety with liability.¹¹

⁷ On this question there is much conflict in the authorities and confusion as to the basis of this defense. Cases holding that such notice is necessary to the completion of the contract are clearly unsupportable. The fact that this defense is generally recognized as affirmative and is usually given only to the extent of the damage suffered shows that it is in substance a condition subsequent and equitable in its nature. It is usually limited to guaranties of future advances or credits of which the guarantor did not have opportunity for knowledge. See a good discussion of this matter in STEARNS, SURETYSHIP, 2 ed. § 66.

⁸ See STEARNS, SURETYSHIP, 2 ed. §§ 90, 91. This defense is generally given only to the extent of the damage suffered by the failure to give notice and is usually limited to cases of continuing guaranties for future advances or guaranties of debts payable on demand.

The above rule does not apply to fidelity bonds where the surety has notice from some source, *Accident Ins. Co. of N. Am. v. Baker*, 34 W. Va. 667, 669, 12 S. E. 834; or where the creditor has only constructive notice. *Wait v. Homestead Bldg. Ass'n.*, 76 W. Va. 431, 434, 85 S. E. 637.

⁹ W. Va. Code, c. 101, §§ 1, 2; Va. Code (1904) §§ 2890, 2891 which are substantially similar in their provisions. The statute permits the person giving security to impose the duty of diligence upon the creditor whether the obligation be that of surety, a guarantor, or an indorser. It is held not to apply in cases of involuntary suretyship. *Barnes v. Boyers*, 34 W. Va. 303, 305, 12 S. E. 708; *McCoy v. Jack*, 47 W. Va. 201, 203, 205, 34 S. E. 991, but this result may be subject to question.

¹⁰ *Loverin & Browne Co. v. Bumgarner*, 59 W. Va. 46, 51, 52 S. E. 1000; *Arents v. Commonwealth*, 18 Grat. 750, 770; see STEARNS, SURETYSHIP, 2 ed. § 62. See *Loverin & Browne Co. v. Bumgarner*, *supra*, for consideration of circumstances in determining intent. It would seem, however, that this was unnecessary because the language of the contract was clear.

¹¹ See cases cited in STEARNS, SURETYSHIP, 2 ed. § 62; also cases in 20 Cyc 1448, n. 88.

By some early cases and in some jurisdictions all guaranties were construed to be guaranties of collectability by holding that the creditor is always bound to pursue his remedy first against the principal debtor in all cases of guaranty¹² as though the guaranty were of collectability, but these cases are now overruled in nearly all jurisdictions and such duty is generally held not to exist unless the guaranty is expressly made one of collectability or the intention to create a duty of diligence by the creditor otherwise made clear.¹³ A recent West Virginia case¹⁴ holds that in the case of a guaranty of payment of a definite amount at a certain time there is no obligation upon the creditor to pursue his remedy first against the principal. In so holding the court follows late West Virginia authority,¹⁵ and almost uniform authority elsewhere,¹⁶ though failing to follow statements found in some earlier West Virginia and Virginia cases.¹⁷ The decision is also undoubtedly correct on principle in holding that the guarantor's liability depends only on the principal's failure to meet the obligation at maturity. A contrary holding would obviously violate the intention of the parties to contracts of guaranty of payment and violate a principle of

¹² *Kearnes v. Montgomery*, 4 W. Va. 29, 40; *Middle States, etc. Co. v. Engle*, 45 W. Va. 588, 593, 31 S. E. 921; *Arents v. Commonwealth*, 18 Grat. 750, 769; *Piedmont, etc. Co. v. Morris*, 86 Va. 941, 944, 11 S. E. 883; *Farron v. Respass*, 33 N. C. 170, 173; *Johnston v. Chapman*, 3 Pen. & W. 18 (Pa.); *Rudy v. Wolf*, 16 Serg. & R. 79 (Pa.); *Hoffman v. Bechtel*, 52 Pa. St. 190; *Benton v. Gibson*, 1 Hill 56, 60 (S. C.); *Wilson & Co. v. Dean*, 21 S. C. 327, 333. In *Welsh v. Ebersole*, 75 Va. 651, 656, the court recognizes the confusion among the cases by saying: "According to some authorities the guarantor contracts to pay if by the exercise of due diligence the debt cannot be made out of the principal."

See *Compton v. Duval*, 3 Call 69 (Va. 1801) holding no duty on creditor to pursue remedy against principal even if notified by the surety to do so, before the passing of the Act of December 23, 1794 (Va. Code 1802, 323) which is the origin of the West Virginia and Virginia acts mentioned in note 9, *supra*.

¹³ *Loverin & Browne Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000; *Pierce v. Merrill*, 128 Cal. 464, 61 Pac. 64, 79 Am. St. Rep. 56; *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; *Fegley v. Jennings*, 44 Fla. 203, 32 So. 873, 103 Am. St. Rep. 142; *Kalmon v. Scarboro*, 11 Ga. App. 547, 75 S. E. 846; *Miller v. Lewiston Nat. Bank*, 18 Idaho 124, 108 Pac. 901; *Ft. Dearborn Nat. Bank v. Miller*, 178 Ill. App. 450; *Crissy v. Interstate L. & T. Co.*, 59 Kan. 561, 53 Pac. 867; *Wood, etc. Co. v. Asher*, 103 Md. 133, 62 Atl. 1023, 115 Am. St. Rep. 343; *Warder, etc. Co. v. Johnson*, 114 Mo. App. 571, 90 S. W. 392; *D. M. Osborne & Co. v. Gullikson*, 64 Minn. 218, 66 N. W. 965; *Huff v. Shife*, 25 Neb. 448, 41 N. W. 289, 13 Am. St. Rep. 397; *Vetter v. Welz & Zerwick*, 143 App. Div. (N. Y.) 121, 127 N. Y. S. 1069; *Voorhees, Miller & Co. v. Porter*, 134 N. C. 591, 47 S. E. 31, 65 L. R. A. 736; *Loverin & Browne Co. v. Travis*, 135 Wis. 322, 115 N. W. 829. *Contra*, *Richie v. Walter*, 166 Pa. 604, 31 Atl. 334.

¹⁴ *Shore v. Lawrence*, 92 S. E. 729 (W. Va. 1917).

¹⁵ *Loverin & Browne Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000.

¹⁶ See cases in note 13, *supra*.

¹⁷ See West Virginia and Virginia cases cited in note 12, *supra*.

suretyship that no affirmative duty should be imposed upon the creditor for the benefit of the surety by law where the surety has power to protect himself. In West Virginia and Virginia the surety is given additional power of self-protection by the statutes previously referred to.¹⁸ Thus, mere laches or delay in suing the principal, where there is no binding agreement extending time or releasing the principal, will not discharge the surety¹⁹ because it is unnecessary for the law to impose such obligation for the surety's protection. For the same reason the law should not impose a duty on a creditor to sue the principal first in the absence of an express agreement.

—H. C. J.

HAS THE WEST VIRGINIA WORKMEN'S COMPENSATION ACT ANY EXTRATERRITORIAL OPERATION?—A recent West Virginia decision¹ raises the question whether the West Virginia Act extends to injuries sustained beyond the state's territorial jurisdiction. The claimant's husband was fatally injured while "shooting" an oil well in the state of Kentucky. His employer had complied with the West Virginia Workmen's Compensation Act; but as there is nothing in the Act expressly extending its operation to injuries sustained in other jurisdictions, whereas § 25 provides² that the Compensation Commissioner shall disburse the compensation fund to certain employes "*which employes shall have received injuries in this state,*" the Commissioner therefore decided that the West Virginia Act has "no extraterritorial effect to cover injuries occurring without the state." The Supreme Court of Appeals, reversing the Commissioner's order, held that the Act, notwithstanding the apparently contrary meaning of § 25, is not confined to "injuries received in this state."

The Supreme Judicial Court of Massachusetts, construing the Massachusetts Act, which in this respect is almost identical with the West Virginia Act, has recently reached a conclusion contrary

¹⁸ See note 9, *supra*.

¹⁹ *Renick v. Ludington*, 14 W. Va. 367, 383; *Knight v. Charter*, 22 W. Va. 422, 427; *First Nat. Bank v. Parsons*, 45 W. Va. 688, 698, 32 S. E. 271; *Norris v. Crummev*, 2 Rand. 323, 334 (Va. 1824); *Udike's Adm'r. v. Lane*, 78 Va. 132 (28 years delay).

¹ *Foughty v. Ott*, 92 S. E. 143 (W. Va. 1917).

² W. Va. Code, c. 15P, § 25.