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Discharge of Surety by Failsure of Creditor to Sue Principal After Notice from Surety

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Notes

DISCHARGE OF SURETY BY FAILURE OF CREDITOR TO SUE PRINCIPAL AFTER NOTICE FROM SURETY—In most jurisdictions the rule is that a creditor not only owes no duty of active vigilance to collect from the principal but neither can such a duty be imposed upon him by a notice from the surety to sue the principal. The surety is required to pay the obligation and collect from the principal.[1] In many states, however, statutes have been passed giving the surety the right to require the creditor to bring suit against the principal, and releasing the surety upon the failure of the creditor to comply with a notice to sue the principal. No such statute exists in Pennsylvania because the courts early established this rule upon equitable grounds and the only legislation on the subject is confined to a provision that the notice given by the surety must be in writing and signed by the surety giving the notice.[2]

The existence of the rule in Pennsylvania is an interesting illustration of the expedients to which its courts resorted in their effort to enforce equitable rights in common law actions, due to the nonexistence of a court of chancery in Pennsylvania when the law on this subject was in the making.

The earliest judicial statement in support of the doctrine was in *Eddowes v. Niell*,[3] in which it was said: "It is true, however, that the gross negligence of a creditor, even of the obligee in a bond, may operate to discharge a surety; as where the obligee is requested by the surety to proceed against the principal, in order to save the debt; if he neglects or refuses to do so, the surety, both in law and equity, will be exonerated."

This was quoted and followed in *Cope v. Smith's Exrs.*[4], in which Chief Justice Tilghman says: "Although the surety is positively bound for payment of the whole debt, and there is no distinction in the bond between principal and surety, yet it would be against good conscience for the obligee to refuse to bring suit against the principal, though requested to do so by the surety, who was apprehensive

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[1]21 R. C. L. 1124 and 1036; 32 Cyc. 99; L. R. A. 1918 C. 11.

[2]Act of May 14, 1874, P. L. 157, 4 Purdon 4520.

[3]4 Dall. 133, (1793).

[4]8 S. & R. 110, (1822).

that the debt might fall upon him by delay. * * * An equitable defense may be supported on a request in pais, provided it be proved clearly and beyond all doubt, and provided the request be positive, and accompanied with a declaration that unless it be complied with the surety will be considered as discharged."

In this leading case reference is made to the fact that chancery would compel a creditor to sue the principal debtor and that unless a demand in pais were held to be sufficient in Pennsylvania, the equity of the surety would be sacrificed, there being no court of equity in Pennsylvania. The added suggestion that it would be best to put such requests to sue in writing remained unnoticed by the legislature for over fifty years.

In *Gardner v. Ferree*,[5] the notice to sue was given by the widow of a deceased surety and it was held that the right to give such a notice passed to the surety's executor. But it was observed by Judge Gibson that if the principal is shown to have been insolvent when the notice was given, failure to sue does not work a discharge of the surety, as he is not hurt. It also appeared that the creditor offered to permit suit on the bond in his name and it was declared that this was a sufficient performance of the creditor's duty in these cases.

In *Erie Bank v. Gibson*,[6] Judge Rogers observed that the merit of the requirement that a request to sue be accompanied by an explicit declaration that, if suit be not brought, the surety will consider himself discharged, lies in the fact that the creditor is thus put on his guard and it is reasonable that he should then at his peril neglect or refuse to comply with the surety's request, particularly since he may merely offer to permit the surety to bring the suit in the creditor's name. "The rule is explicit, and of course easily understood, and is eminently calculated to prevent surprise."

Where the creditor is the holder of other obligations which might be referred to by the notice to sue, the notice is insufficient if it does not clearly show the instrument upon which suit is requested.[7] A notice given before the

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[5]15 S. & R. 28, (1826).

[6]1 Watts 143, (1832). See also Greenawalt v. Kreider, 3 Pa. 264, (1846) and First Nat. Bk. of Hanover v. Delone, 254 Pa. 409, 421, (1916).

[7]Wolleshlare v. Searles, 45 Pa. 45, (1863); Hellen v. Crawford, 44 Pa. 105, (1862).

instrument becomes due may be safely disregarded.[8] The reason given is that such a notice is a substitute for a bill in equity and a bill could not be filed until the debt was due and unpaid. The contrary rule would require a creditor "to keep a separate book for entering such notices."

In *Conrad v. Foy*,[9] Justice Agnew insisted that the creditor must be able to act at once upon the request and repeated Tilghman's suggestion that "in justice the notice ought to be in writing and in the most explicit terms. But prior decisions have not required this, and we cannot legislate such a rule into existence."

In *Strickler v. Burkholder*,[10] it was held that a notice "to collect" is unequivocal. "Notice to collect is notice to sue, if suit be necessary for collection." This decision was evidently in the mind of the legislature when the Act of May 14, 1874, P. L. 157,[11] was enacted for the language of the statute is:

> "The surety or sureties in any instrument in writing for the forbearance or payment of money at any future time, shall not be discharged from their liability upon the same, by reason of notice from the surety or sureties, to the creditor or creditors, *to collect* the amount thereof from the principal in said instruments, unless such notice shall be in writing and signed by the party giving the same."

The same case holds that there is no burden on the surety to show that the money could have been collected from the principal. The presumption is that the money could have been made. But the creditor may prove the contrary, if he can.

Though the Pennsylvania rule giving effect to a notice to collect was founded upon the absence of equity powers in our courts and though at the date of the last mentioned decision equity powers had been conferred over a variety of subjects, it was held that, admitting that the rule opens a door for mischief and that it sometimes works injustice, it had been too long established and adhered to, to be abolished by judicial decision.

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[8]Fidler v. Hershey, 90 Pa. 363, (1879). See Kemmerer v. Yoder, 1 Woodw. 41, (1862) contra, where the notice was given immediately before the note became due.

[9]68 Pa. 381, (1871).

[10]47 Pa. 476, (1864)-an appeal from Cumberland County, Judge Graham affirmed.

[11]4 Purdon 4520; 3 Purdon 3660.

In *Wetzel v. Sponsler's Exrx.*,[12] Chief Justice Black laid down five rules governing cases of this type. 1. A general agent of the surety may give the notice to sue without special authority to do so. This is his duty in a proper case. 2. The notice may be given to an agent or attorney of the creditor, in whose hands the creditor has left the obligation for collection. 3. The notice need not be accompanied by a tender of expenses or a stipulation to pay them or an offer to take the obligation and bring suit, "unless the creditor at the time of the notice expressly puts his refusal to sue on the ground of the trouble and expense, and offers to proceed if that objection be removed." 4. If the principal debtor's financial condition becomes impaired after the notice, the surety is discharged. 5. The creditor must sue immediately and must press his suit with diligence and do everything which a prudent man would do to save himself.

The last mentioned case is followed in *Stark v. Fuller*,[13] in which Judge Woodward observes: "A guarantor or surety is entitled to reasonable protection. He has a right to expect that the creditor will not wantonly lose or destroy his claim against the principal debtor with a view of falling back upon the liability of the guarantor. If the request of the surety be accompanied with explicit declaration, that if suit be not brought he will consider himself discharged, a surety or guarantor will be discharged."

That the "explicit declaration" is an essential part of an effective notice has been reiterated in many cases.[14]

Whether the right of a surety to discharge his obligation by notice to the creditor is to be determined by the lex fori or by the lex loci contractus or by the law of the place of performance turns upon whether the rule relates to the remedy or to the nature of the obligation assumed by the surety. In *Tenant v. Tenant*,[15] it was held to go to the very root of the surety's obligation and to render the surety's obligation one of a conditional character.

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[12]18 Pa. 460, (1852)-another appeal from Cumberland County, Judge Watts affirmed. Followed in Thomas v. Mann, 28 Pa. 520, (1857) as to notice to counsel.

[13]42 Pa. 320, (1862).

[14]First National Bank of Hanover v. Delone, 254 Pa. 409, 421, (1916) and cases therein cited. And see 30 A. L. R. 1285 for elaborate note as to purport of notice.

[15]110 Pa. 478, 485, (1885).