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The Contract of the Corporate Surety

be extracted. The first point of emphasis is to note clearly and decisively that, in America at least, the inherent rights of control and custody of children are firmly fixed in the home, and in the natural parents. In the absence of abnormal circumstances within the domestic circle the State has only a limited right to intervene in matters pertaining to the child's moral, educational, physical and religious upbringing. When complications intervene and the breakdown of the home is involved, the approach by the State to this regrettable situation is with the objective of protecting the best interests of the child. The salvaging of human values is essentially a matter of compromise with the eye of the court directed to the welfare of the unfortunate children. No magic formula exists. Institutional care,[114] and paternalism of the State may be imperative in these emergencies but no law or statute can completely rectify the irreparable harm and work a satisfactory solution. Perhaps the parting proposal might be that the cure is not to be found in the law but in a removal of the social and economic shortcomings which have made the children the innocent victims of their elders' folly.

THE CONTRACT OF THE CORPORATE SURETY.[1]—Not until the last quarter of the nineteenth century did corporate enterprise in this country grasp the potentialities inherent in the practise of "going bond."[2] One of the oldest of

114. There is a definite trend to place a dependent child in a foster home rather than in an institution. This is because institutional life is necessarily surrounded with artificial atmosphere which is inferior to the natural contacts which home life provides. WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION. SECTION IV (1930) 134; HALL, SOCIAL WORK YEAR BOOK (1935) 164; MANGOLD, PROBLEMS OF CHILD WELFARE (1930) 499. "Institutional care for the most part has produced uninspired individuals poorly adjusted for the outside world." WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION. SECTION IV (1930) 134.

1. Bifold in meaning, the term "suretyship" is more generally employed in its broad sense by the courts to include all promises to answer for the debt of another regardless of the form of the undertaking. BOUVIER, LAW DICTIONARY (Student's ed. 1928) 1152; ARANT, SURETYSHIP (1931) § 5. Because the law applicable to the term is usually the same when the term is used either in respect to primary obligations, which are also known as those of strict suretyship, or to those collateral or accessorial in nature, more often called guaranties, courts have little reason to be hyper-technical in the choice of these words. *Ibid.* 2 WILLISTON, CONTRACTS (1920) § 1211. Where, however, distinction is thought necessary for clarity, courts do not hesitate to use the terms "guaranty" and "suretyship" in their restricted sense. Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914 (1904); Young v. Merle & Heaney Mfg. Co., 184 Ind. 403, 110 N. E. 669 (1915); Clymer v. Terry, 50 Tex. Civ. App. 300, 109 S. W. 1129 (1908); Ricketson v. Lizotte, 90 Vt. 386, 98 Atl. 801 (1916).

2. According to Morgan, *The History and Economics of Suretyship* (1927) 12 CORN. L. Q. 153, 487, the first company to be chartered in America was the Fidelity Insurance Co. in 1865. 34 BANKERS' MAGAZINE 423, fixes the organization of the first corporate surety in 1866, while according to Arnold, *The Compensated Surety* (1926) 26 COL. L. REV. 171, the first incorporation of this type of business did not occur until 1875 although attempts to organize were begun as early as 1853 in this country and 1720 in England.

legal relationships,[3] suretyship had accumulated a body of long established rules and principles a majority of which remain substantially impregnable to this day. But with the entry of corporate organization into the field a marked deviation from the well-grooved path over which this branch of the law had theretofore progressed became increasingly apparent.[4] Whether the decisions form the basis of a trend wholly irreconcilable with past developments or merely represent the adaptability of legal principles to the exigencies of social growth is debatable. Certain it is, however, that principles have been established, applicable only to the corporate surety, which a half century ago "would have startled the legal profession."[5]

It is unfortunate that the theory underlying so important a change in the law has been only imperfectly expressed by the courts. But to impute its development to the vagaries of the judicial process while perhaps conducive to brevity is not conducive to clarity. One fact cannot be disputed: the self-protective and precise method of the corporate surety is rapidly displacing the informal procedure characteristic of the individual or accommodation surety.[6] This circumstance at once suggests a possible basis for the changes alleged to have occurred.

The Doctrine of Strictissimi Juris

The function of the individual surety was that of an accommodation party. In the eyes of the law, if not always in fact, he received nothing for his undertaking which was presumably based on friendship or family tie.[7] He made little effort to protect his interests. He did not prepare the con-

3. Morgan, *supra note* 2, at 153, gives evidences of this type of contract *circa* 2750 B. C. A discussion of the change wrought in the law of suretyship since the time of ancient Rome will be found in Loyd, *The Surety* (1917) 66 U. OF PA. L. REV. 40.

4. In Tebbets v. Mercantile Credit Guaranty Co., 73 Fed. 95 (C. C. A. 2d, 1896) it was said that contracts of guaranty against loss by sales on credit were not to be construed in favor of the surety, citing for the proposition two cases involving insurance law: Wallace v. German-American Ins. Co., 41 Fed. 742 (C. C. Iowa 1882) (fire insurance) and Wadsworth v. Jewelers' & Tradesmen's Co., 132 N. Y. 540, 29 N. E. 1104 (1892) (life insurance). Since that time the rule of *strictissimi juris* has been applied almost solely to the individual surety.

5. Tackett v. United States Fidelity & Guaranty Co., 112 Kan. 500, 512, 212 Pac. 357, 362 (1923).

6. Because of the nature of the corporate surety's business which holds itself out publicly to those in need of its services the idea quickly took root and the surety company has to a large measure almost wholly displaced the individual surety. Many of the existing companies were established between 1880 and 1900. About 25 of these organizations conduct the national surety and fidelity business. In addition there are a number of local companies. Arnold, *loc. cit. supra* note 2. The spurt in the general corporate growth occurred approximately during the same period. PATTERSON, THE WORLD'S ECONOMIC DILEMMA (1930) 72, 286.

7. The courts presume that the contract of the individual surety is gratuitous and motivated by friendship. Loyd, *supra* note 3, at 65. See also the quotation cited note 13, *infra*. But it has been said that the rule of *strictissimi juris* would not be applied to the individual surety where he receives "a premium paid or other consideration." *In re* Oeflein's Estate, 209 Wis. 386, 394, 245 N. W. 109, 112 (1932).

tract; often he did not even read it; rarely did he understand its full scope and legal significance.[8] Under these circumstances the courts felt constrained to apply the doctrine of *strictissimi juris*,[9] entitling the surety to invoke the most tenuous technicalities in order to secure release from the obligations of his contract.[10] It is to be noted, however, that while some courts applied the doctrine of *strictissimi juris* to all contracts of suretyship,[11] substantial authority developed the view that where the words used were explicit and free from ambiguity, the rules of construction applicable to a simple contract should prevail in determining the intention of the parties without any preconception in favor of the surety.[12] Only where that intent was not ascertainable from the fair import of the words employed was resort to be had to the doctrine of *strictissimi juris* in order to enable the surety to assert his right to have all doubtful expressions of intent resolved in his favor.[13] Not-

8. STEARNS, SURETYSHIP (3d ed. 1922) § 234 suggests that if the individual surety undertook to fortify himself with the same care evinced by the corporate surety the resulting liability of both would be the same. *Cf.* Hargreave v. Smee, 6 Bing. 224, 130 Eng. Reprints 1274 (C. P. 1829); Belloni v. Freeborn, 63 N. Y. 383 (1875).

9. "A surety is everywhere in law a favored debtor. He is moreover a necessity in many of the most important business transactions of life, both public and private, and the policy of the law is that he should be favored more than any other debtors, since he is or may be to a certain extent, powerless to protect himself." State v. Churchill, 48 Ark. 426, 442, 3 S. W. 352, 359 (1887).

10. So broad has been the application of this doctrine that unless the contract with the individual surety is performed literally, he is released from further liability. This is true even though the noncompliance redounds to the surety's benefit. Bangs v. Strong, 7 Hill 250 (N. Y. 1843); see Grant v. Smith, 46 N. Y. 93, 97 (1871). It has been held that a mere executory agreement to change the precise nature of the obligation rather than actual performance of the proposed change will release the surety. O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409 (1898). The general rule has been applied with utmost strictness in cases involving building contracts. United States v. Freel, 92 Fed. 299 (C. C. N. Y. 1899); Woodruff v. Shultz, 155 Mich. 11, 118 N. W. 579 (1908); Note (1910) 16 ANN. CAS. 347.

11. Nicholson v. Paget, 1 Cromp. & Mees. 48, 149 Eng. Reprints 309 (Ex. 1832); see 1 BRANDT, THE LAW OF SURETYSHIP AND GUARANTY (3d ed. 1905) § 103.

12. ARANT, *op. cit. supra* note 1, § 39. No exceptional meaning may be placed upon the words in order to invoke *strictissimi juris*. Bell v. Bruen, 42 U. S. 169 (1843); Los Angeles v. Hoppenyan's, Inc., 8 Cal. App. (2d) 138, 47 P. (2d) 293 (1935) (implication imposing burden not clearly inferable from the language is not to be indulged in); People v. Southern Surety Co., 76 Colo. 141, 230 Pac. 397 (1924) (where only one reasonable interpretation there is nothing to be construed); Lewis v. Dwight, 10 Conn. 95 (1834) (strained construction not permissible); Gates v. McKee, 13 N. Y. 232 (1855) (technical interpretation not permitted to defeat the intent of the parties); see SPENCER, THE GENERAL LAW OF SURETIES (2d ed. 1913) § 90.

13. The doctrine of *strictissimi juris* is a rule of application and not one of construction, *e.g.*, its operation is withheld until the terms of the contract have been ascertained. Covey v. Schiesswohl, 50 Colo. 68, 114 Pac. 292 (1911); Shaver v. Kappellas, 83 Ind. App. 338, 146 N. E. 858 (1925); Richardson v. Steuben County, 226 N. Y. 13, 122 N. E. 449 (1919).

"This rule was sometimes justified upon the ground that their contract is a favor to the parties in the sense that it is founded upon a consideration moving not to themselves, but to the principals in the contract for which they become sponsors. Although, in

withstanding the rejection by the exponents of the latter view of the rule that the surety had some preëmptive right to the protection of the law upon which he could rely even when the purport of his agreement was distinct and unequivocal, a certain degree of solicitude and concern flavors the attitude of both schools of thought.

The most casual inspection of the decisions involving corporate sureties will disclose a judicial approach of an entirely different character. Almost without exception the contract is said to be construed *against* the corporate surety in marked contrast to the treatment afforded the individual surety.[14] Closely associated with this disinclination of the courts to accord the corporate surety the privileges enjoyed by its rapidly disappearing competitor is the inescapable fact that the corporation is engaging in a business for pecuniary gain.[15] Conceding that the personal surety was in many instances induced to act by a monetary consideration,[16] his undertaking arose incidentally rather

many cases, this was a violent deduction from the facts, the rule remained that however greatly the surety may have profited, as he did often profit, by the transaction, he might, by the form of his contract alone, place himself in the cherishing arms of the law." Southern Real Estate & Financial Co. v. Bankers' Surety Co., 184 S. W. 1030, 1033 (Mo. 1916).

14. Mechanics' Savings Bank & Trust Co. v. Guarantee Co., 68 Fed. 459 (C. C. Tenn. 1895); National Surety Co. v. Lincoln County, 238 Fed. 705 (C. C. A. 9th, 1917); Moore v. Maryland Casualty Co., 12 F. Supp. 90 (D. C. Mass. 1935); National Surety Co. v. Rochester Bridge Co., 83 Ind. App. 195, 146 N. E. 415 (1925); Fidelity & Deposit Co. v. John Gill & Sons Co., 270 S. W. 700 (Mo. 1924); Bryant v. American Bonding Co., 77 Ohio St. 90, 82 N. E. 960 (1907); Building Contractors' Ltd. Mut. Liability Ins. Co. v. Southern Surety Co., 185 Wis. 83, 200 N. W. 770 (1924). *Contra:* Southern Real Estate & Financial Co. v. Bankers' Surety Co., 184 S. W. 1030 (Mo. 1916). See also STEARNS, *op. cit. supra* note 8, § 233. But it is interesting to note that in one jurisdiction the doctrine of *strictissimi juris* is applied alike to the individual and the corporate surety because no plausible ground for any distinction can be found. Lonergan v. San Antonio Loan & Trust Co., 101 Tex. 63, 104 S. W. 1061 (1907).

15. It is difficult to determine whether the trend of modern decisions involving the corporate surety is dependent upon the compensation element or the fact that it is engaged in a business designed solely for the purpose of "going surety." The importance of compensation is stressed in National Surety Co. v. Lincoln County, 238 Fed. 705 (C. C. A. 9th, 1917); Community Bldg. Co. v. Maryland Casualty Co., 8 F. (2d) 678 (C. C. A. 9th, 1926); National Surety Co. v. Rochester Bridge Co., 83 Ind. App. 195, 146 N. E. 415 (1925); Maryland Casualty Co. v. Eagle River Union Free High School, 188 Wis. 520, 205 N. W. 926 (1925). But in Bench Canal Draining Dist. v. Maryland Casualty Co., 278 Fed. 67, 80 (C. C. A. 8th, 1921) it was said that the "enforcement of the express terms of the contract of suretyship cannot be made to depend upon whether the surety is compensated or not. It cannot be one contract when the surety is compensated, and another contract when the surety is not compensated." The importance of the business motive is brought out in Supreme Council Catholic Knights of America v. Fidelity & Casualty Co., 63 Fed. 48 (C. C. A. 6th, 1894); Atlantic Trust & Deposit Co. v. Laurinburg, 163 Fed. 690 (C. C. A. 4th, 1908); New Haven v. Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517 (1906). But it has been said that "the principles of law defining the rights of the parties to a suretyship contract must of necessity be the same, whether the surety is a private person or an incorporated company. . . ." STEARNS, *op. cit. supra* note 8, § 233.

16. See the quotation cited note 13, *supra*. Moreover, some courts have emphasized

than systematically and as part of a business enterprise. Parties were not solicited; the element of engaging in an organized business was entirely absent from the transaction. In the face of this vast dissimilarity in purpose and incentive, it is not surprising that the courts were loathe to accept the spirit and enforce the letter of the law which had evolved prior to this commercial development.[17] But while a commendable uniformity characterized the determination of the judiciary to evade the doctrines of the bygone period, a lesser degree of accord prevailed in discharging the responsibility of establishing new principles in their stead.[18]

The Nature of the Consideration

Considerable attention has been directed to the element of a deliberate and calculated compensation.[19] The transaction which had theretofore been conducted in a casual and irregular fashion was now enveloped in an atmosphere of detail, system and efficiency.[20] In effect, the corporate surety was holding itself out to the business world as an agency for the accomplishment of a needed service.[21] It was clear that the corporate surety was not submitting

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the importance of beneficial consideration moving to the individual surety by declaring such a transaction to be outside the operation of the statute of frauds. Thus a distinction in the nature of the consideration was clearly recognized long before the advent of the corporate surety. See Arnold, *The Main Purpose Rule and the Statute of Frauds* (1924) 10 CORN. L. Q. 28.

17. In Arnold, *supra* note 2, at 172, the author states that it is not surprising that difficulties were encountered in "grafting" corporation suretyship upon the law previously applied to the individual surety.

18. See note 15, *supra*.

19. Many of the decisions which have been rendered against the corporate surety are founded either solely or in part upon the "premium" factor. Atlantic Trust & Deposit Co. v. Laurinburg, 163 Fed. 690 (C. C. A. 4th, 1908); Topeka v. Federal Union Surety Co., 213 Fed. 958 (C. C. A. 8th, 1914); Community Bldg. Co. v. Maryland Casualty Co., 8 F. (2d) 678 (C. C. A. 9th, 1926); United States Fidelity & Guaranty Co. v. Poetker, 180 Ind. 255, 102 N. E. 372 (1913); Fidelity & Deposit Co. v. John Gill & Sons, 270 S. W. 700 (Mo. 1924); State Agriculture & Mechanical Soc. v. Taylor, 104 S. C. 167, 88 S. E. 372 (1916); Building Contractors' Ltd. Mut. Liability Ins. Co. v. Southern Surety Co., 185 Wis. 83, 200 N. W. 770 (1924). This distinction was criticised in Barton v. Title Guaranty & Surety Co., 192 Mo. App. 561, 565, 183 S. W. 694, 695 (1916), because it does not distinguish between different classes of sureties who are in business for a profit.

Contra: Bench Draining Dist. v. Maryland Casualty Co., 278 Fed. 67 (C. C. A. 8th, 1921).

20. Where the details of the contract are not prescribed by law, as often they are in judicial and official bonds, the corporate surety usually requires an application in which both the principal and obligee join in representations which are made conditions of the bond. Moreover provisions against concealment affecting the risk are generally required of the obligee in addition to other precautions which are taken. STEARNS, *loc. cit. supra* note 8.

21. It has been said that there are as many as 500 different types of bonds which have been designed by the corporate surety, more than 300 of which are in common use today. One author classifies them as follows: (1) fidelity bonds which were first written in 1865, (2) bonds for executors, administrators and other fiduciaries first used about

to the dictates of friendly courtesy or family conscience but was catering to a definite demand created by the growing complexity of our economic and governmental pattern.[22] These facts inevitably exerted an influence upon the nature of the consideration.[23] While the ostensible consideration moving to the surety is the payment of a stipulated premium, similar to the periodic payments which support a contract of insurance, the analogy is by no means perfect. A default in payment in the latter case creates a failure of consideration and justifies cancellation.[24] It has been suggested, however, that in suretyship, when the premium is payable by the principal, his default does not, in the absence of statute, relieve the surety of liability to the obligee.[25] This holding attributes to the obligee's reliance upon the existence of the bond a legal significance akin to that of consideration.[26] However, such a hypothesis

1879, (3) bonds in court proceedings in use by 1881, (4) contract bonds first employed in 1887, (5) license and permit bonds in 1890, and (6) public official bonds which were first permitted by federal law in 1894. The states rapidly followed the federal practice in opening this last field to the corporate surety. Morgan, *supra* note 2, at 492.

22. Not only have the services of the corporate surety become indispensable in modern business but the use of particular types of undertakings in governmental administration have become a virtual necessity of public life. Among the many official and judicial bonds are those "insuring" various public officers against losses of public moneys and against actions beyond the scope of their jurisdiction and in the latter group are bonds for staying execution, bonds necessary in procuring provisional remedies, bail bonds, bonds of guardians, committees and others. The marked advantage of the corporate surety in this field is emphasized by the provision frequently encountered in statutes making a corporate surety the equivalent of two individual sureties. See for example N. Y. CIV. PRAC. ACT. (1895) § 156.

23. While the nature of the compensation of the corporate surety is almost invariably a money premium it was not generally true that the consideration for the individual surety's promise was based solely on friendship or family tie. In the realm of the commercial guaranty wherein the principal obtained credit upon the "name" of a third party, friendship or family tie was infrequently an inducing cause. Lee v. Lee, 67 Ala. 406 (1880) (directors became sureties on guardian's bond for his promise to place funds in their bank); Judd v. Martin, 97 Ind. 173 (1884) (surety's consideration was chattel mortgage); Rouss v. Creglow, 103 Iowa 60, 72 N. W. 429 (1897) (defendant was surety on debt arising from sale of goods to firm of which he was a member); Alter v. Hornor, 33 La. Ann. 243 (1881) (defendant guaranteed mortgage for stipulated fee to be derived upon foreclosure). Because of the presumption that the surety's undertaking was gratuitous the facts of many of the cases do not disclose the benefits derived by the surety from his undertaking.

24. The consideration for the insurance contract is generally the premium. 1 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 771. And as a rule in the absence of provision, the payment of the premium in advance is necessary for completion of the contract. *Id.* at 683.

25. STEARNS, *op. cit. supra* note 8, § 236. Nelson v. American Surety Co., 77 Minn. 402, 80 N. W. 300 (1899) *semble;* see *In re* Thurber's Estate, 162 N. Y. 244, 251, 56 N. E. 631, 633 (1900). But it is to be noted that in the absence of a stipulated provision in the contract, the failure of the *insured* to pay premiums upon an insurance policy releases the company from its obligation. 1 COOLEY, *op cit. supra* note 24, at 683.

26. It is suggested in STEARNS, *op. cit. supra* note 8, § 236, that on the basis of this theory the premium might be considered as merely an inducement persuading the surety to contract, thus relegating the matter of compensation to a subordinate status.

obscures the vital fact that in reality the corporate surety assumes its obligation in consideration for the premium and the premium only. The true purpose behind the rule takes cognizance of the needs of modern business which, to an ever increasing extent, must rely upon the bonding industry.[27]

The Contract as One of Insurance

The analogy between the contract of the corporate surety and the ordinary contract of insurance was first advanced in the federal courts in 1894.[28] Its reception was immediate and enthusiastic,[29] and the insurance theory, which offered a seemingly simple solution to many complex problems,[30] was "settled" law four years later.[31] The absence of any transition period in the formulation of this theory, such as generally precedes the adoption of a novel doctrine, is perhaps explained by the fact that the growth of the corporate surety was greatest at this time.[32] Thus the various jurisdictions were compelled to seek

27. This is emphasized by the fact that in general a valid contract of suretyship cannot without statutory provision be rescinded without the consent of all the parties interested. Commonwealth v. American Bonding Co., 245 Pa. 535, 91 Atl. 938 (1914); Richter v. Leiby's Estate, 101 Wis. 434, 77 N. W. 745 (1898). Furthermore, where legislation provides for the release of such contracts, the statutes must be strictly complied with. Clark v. American Surety Co., 171 Ill. 235, 49 N. E. 481 (1897); Bookhart v. Younglove, 207 Iowa 800, 218 N. W. 533 (1928); Taylor v. Taylor, 66 W. Va. 238, 66 S. E. 690 (1910).

28. See Supreme Council Catholic Knights of America v. Fidelity & Casualty Co., 68 Fed. 48, 58 (C. C. A. 6th, 1894). The court there mentioned the profit motive of the surety and held the contract one of indemnity.

29. United States Fidelity & Guaranty Co. v. Reifler, 239 U. S. 17 (1915) (held an indemnity agreement); Mechanics' Savings Bank & Trust Co. v. Guaranty Co., 68 Fed. 459 (C. C. Tenn. 1895) (analogous to insurance); Tebbets v. Mercantile Credit Guarantee Co., 73 Fed. 95 (C. C. A. 6th, 1896) ("credit insurance" is in all essential particulars insurance); National Surety Co. v. Rochester Bridge Co., 83 Ind. App. 195, 146 N. E. 415 (1925) (bond to guarantee performance of building contract); Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 115 Ky. 863, 75 S. W. 197 (1903) (defendant not only an insurer but a surety); Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co., 142 Minn. 428, 172 N. W. 693 (1919) (fidelity bond); Note (1921) 12 A. L. R. 382; RICHARDS, INSURANCE (4th ed. 1932) § 476; VANCE, INSURANCE (2d ed. 1930) §§ 276, 277. But STEARNS, *op. cit. supra* note 8, § 235, discerns not even a fair analogy between the contract of insurance and these suretyship agreements.

30. This doctrine was adapted to suretyship law because it enabled the courts to reach a result desired when dealing with the corporate surety and because the manner of operation of both the insurance and the surety companies was so similar in many respects that the analogy seemed quite feasible.

31. See Jackson v. Fidelity & Casualty Co., 75 Fed. 358, 365 (C. C. A. 5th, 1896).

32. The concentration of corporate suretyship in a relatively few number of companies is a distinguishing characteristic of the industry in this country. From 1883 to 1898, at least 25 new companies were formed. But before that period had expired the pronounced monopolistic tendencies ever present in the field had reduced the total in operation by 11. Today about 35 surety companies are engaged in a nation-wide business. Morgan, *supra* note 2, at 494. Many of the present day sureties were organized between 1880 and 1900. Arnold, *loc. cit. supra* note 2.

an immediate *ratio decidendi* which would dispose of the increasing litigation accompanying this expansion.[33]

It may be conceded that many types of contract executed by the corporate surety cannot fairly be regarded as promises to answer for the debt, default or miscarriage of another.[34] This is well illustrated by the title guarantee undertaking in which the legal liability of the surety is almost identical with that of an insurer. But while the margin of distinction between the title guaranty undertaking and a policy of insurance is indeed slim,[35] the analogy is less evident with respect to the usual type of engagement which the corporate surety undertakes. The argument that insurance involves a bipartite agreement while suretyship is tripartite in nature, may or may not withstand criticism as a conceptualistic refinement.[36] More cogent are the several contentions: (1) that insurance is a contract of indemnity rather than a promise to guarantee conduct of a third party; (2) that, moreover, it is addressed to an impersonal, involuntary act and not to the choice or determination of the individual ultimately responsible,[37] and (3) that the policy need never be based upon an underlying obligation.[38]

As a practical matter the corporate surety conducts its business along the same lines as does the insurance company. The same theory of probabilities based on empirical formulae is employed although the preciseness of insurers has as yet not been attained.[39] The surety, like the insurance company, spreads the risk among the many principals covered, for it is ultimately by the premiums collected that a fund is established to provide for administrative costs and probable matured risks.[40] The tendency to identify suretyship with in-

33. For a list of the states adhering to this view see Note (1921) 12 A. L. R. 382. In Texas the compensated surety has, like the private surety, the advantage of the doctrine of *strictissimi juris*. Hess & Skinner Engineering Co. v. Turney, 110 Tex. 148, 216 S. W. 621 (1919).

34. For a list of the types of undertakings in which the corporate surety engages see note 21, *supra*.

35. "The insurance contract, in its general form strikingly analogous to the contract of suretyship, becomes almost identified with it in the form of guaranty insurance." VANCE, *loc. cit. supra* note 29. See SPENCER, *op. cit. supra* note 12, § 7.

36. See Morgan, *supra* note 2, at 497, where the author indicates that he observes no basic difference between the two types of contract.

37. STEARNS, *op. cit. supra* note 8, § 236.

38. Arnold, *supra* note 2, at 178. Since the insurance contract is one of indemnity, the indemnitee may sue immediately upon the happening of the loss and where a provision creates immediate liability of the surety company, the contract may be likened to that of insurance. 1 BRANDT, *op. cit. supra* note 11, § 5.

39. As early as 1840 it was said that the use of experience tables could be applied as accurately to fidelity insurance as to any of the common subjects of insurance. Morgan, *supra* note 2, at 164. That this has proven untrue in respect to credit insurance can be seen from the statistics given in SHENKMAN, INSURANCE AGAINST CREDIT RISKS (1935) at 120. Similarly no semblance of accuracy in prediction for the general fidelity and suretyship business could be found in a random survey made of the years 1929 and 1935 where there was an 8.5% difference between the ratio of losses and claims to premiums. BEST'S INSURANCE RECEIPTS (1930) 1025; *id.*, (1934) at 744.

40. 2 COOLEY, *op. cit. supra* note 24, at 988; 1 *id.* at 15 *et seq.*

surance has been so consistent that today the hybrid terms, "guaranty insurance," "fidelity insurance," "credit insurance" and others of similar import are words commonly used in describing these undertakings. While the corporate surety continues to invoke the formality of traditional terminology in an attempt to govern its contracts by the law of suretyship, judicial realism denominates them insurance contracts on the conditions specified in the instrument.[41]

It is significant to note that the interpretation of the contract as one of insurance evades the stringent requirements of the statute of frauds[42] thereby rendering the surety's oral agreements enforcible though literally they import a promise to answer for the debt, default or miscarriage of another. However, the applicability of the statute of frauds has not been presented to the courts with the same frequency as in the period during which the individual surety prevailed, by virtue of the fact that the modern surety exercises the meticulous care common to all corporate management in embodying its obligations in writing.

The Doctrine of Fortius Contra Proferentem

The principle that a contract is to be strictly construed against the party who drafts it invades many branches of the law.[43] As in the application of *strictissimi juris,* such construction is not permissible when the intention of

41. The fact that the agreement is in the form of a bond and not a policy is predicated upon long existent custom and not regarded as indicative of the type of undertaking. Guarantee Co. v. Mechanics' Savings Bank & Trust Co., 80 Fed. 766 (C. C. A. 6th, 1896), *rev'd on other grounds,* 173 U. S. 582 (1899); VANCE, *loc. cit. supra* note 29.

42. 1 COOLEY, *op. cit. supra* note 24, at 552. The confusion as to whether a given promise is within the statute of frauds is very largely due to an attempt to classify solely as promises of indemnity, promises to "indemnify" for the debt, default or miscarriage of another. 1 WILLISTON, CONTRACTS (2d ed. 1936) § 482. *Cf.* Meyer v. Building & Realty Service Co., Inc., 196 N. E. 250 (Ind. 1935) where it was questioned whether a contract of a corporate surety came within the purview of a statute invalidating provisions of insurance policies which limit the time of filing claims to less than three years. It was held that such a contract was not intended to be included.

The contract was held to be one of suretyship rather than indemnity in Union Indemnity Co. v. Vetter, 40 F. (2d) 606 (C. C. A. 5th, 1930); Maine Lumber Co., Ltd. v. Maryland Casualty Co., 216 App. Div. 35, 214 N. Y. Supp. 621 (1st Dep't 1926); Montgomery County v. Ambler-Davis Co., 302 Pa. 333, 153 Atl. 621 (1931).

43. Although the principle is most frequently applied to contracts of insurance it is recognized in other branches of the law as well. Texas & Pac. Ry. Co. v. Reiss, 183 U. S. 621 (1902) (contract of carrier represented by bill of lading construed against carrier); Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391 (1901) (builder's contract to repair); Delogny's Heirs v. Mercer, 43 La. Ann. 205, 8 So. 903 (1891) (contract of sale). It has been applied in insurance contracts in McMaster v. New York Life Ins. Co., 183 U. S. 25 (1901); Cottingham v. National Mut. Church Ins. Co., 290 Ill. 26, 124 N. E. 822 (1919); Koshland v. Columbia Ins. Co., 237 Mass. 467, 130 N. E. 41 (1921); Ira S. Bushey & Sons v. American Ins. Co., 237 N. Y. 24, 142 N. E. 340 (1923); French v. Fidelity & Casualty Co., 135 Wis. 259, 115 N. W. 869 (1908). Occasionally it has been invoked in contracts of the individual surety: Hargreave v. Smee, 6 Bing. 224, 130 Eng. Reprints 1274 (C. P. 1829); Rose v. Ramm, 254 Mich. 259, 237 N. W. 60 (1931); Belloni v. Freeborn, 63 N. Y. 383 (1875).

the parties is clear.[44] The rule obtains only when it has been determined that an ambiguity exists, in which event the meaning of the language is concluded most strongly against the party who prepares the instrument.[45] It is submitted that the application of this doctrine offers the most desirable approach to the construction of suretyship contracts. In those cases where *strictissimi juris* embarrasses the judiciary by leading to a result diametrically opposed to that desired, *fortius contra proferentem* offers a sound legal theory directed to the adequate protection of business needs.[46] Moreover, it effectively achieves a continuity of principle and method, and appropriately disposes of a notion that the current judicial attitude towards the corporate surety is either drastic or unwarranted. It is not at all improbable that the insurance theory is itself merely an argumentative device for applying this very same rule, in view of the strictness with which ambiguities in a policy are construed against the insurer.

Conclusion

Prescinding from the soundness of the various theories which have been advanced, it is apparent that a definite public policy permeates their application. The courts have perceived and accepted the practical necessity which balances the interests of business against the legalistic and highly technical rights of the surety, and rejects any narrow interpretation which will lead to the latter's undue protection.[47] Basically, the object of obtaining a bond is

44. The rule may not be used to refine away terms which sufficiently express the intention of the parties. Guaranty Co. v. Mechanics' Savings Bank & Trust Co., 183 U. S. 402 (1902).

45. This doctrine is applicable to the contract of the surety whether compensated or gratuitous, corporate or individual, as well as to contracts in general. See note 43, *supra*. In the field of the corporate surety, similarly, the principle requires that contracts be interpreted in accordance with the meanings of its terms as used and understood in a plain and popular sense. New Amsterdam Casualty Co. v. Central Nat. Fire Ins. Co., 4 F. (2d) 203 (C. C. A. 8th, 1925). Guaranty Co. of N. America v. Mechanics' Savings Bank & Trust Co., 183 U. S. 402 (1902); People v. Southern Surety Co., 76 Colo. 141, 230 Pac. 397 (1924); Fidelity & Deposit Co. of Md. v. Mason, 145 Va. 138, 133 S. E. 793 (1926).

46. With the application of this principle the presumptions that the individual surety generally acts carelessly and without legal advice are rendered irrelevant. ARANT, *op. cit. supra* note 1, § 39; STEARNS, *op. cit. supra* note 8, §§ 234, 236. Similarly the prudence and business judgment of the corporate surety in fixing the limits of its obligations are subordinated to the simple process of documentary construction.

In Atlantic Trust & Deposit Co. v. Laurinburg, 163 Fed. 690 (C. C. A. 4th, 1908) the court would not permit the corporate surety to plead the technical faults of the instruments which it had drawn because of the "superior means and facilities" which were open to it. The presumption in Champion Ice Mfg. & Cold Storage Co. v. American Bonding Co., 115 Ky. 863, 75 S. W. 197 (1903) was that the bond in dispute was prepared by one of the company's skilled attorneys. But where it was not apparent that the company drew the contract (the stipulations being directed against the surety) the company was permitted to stand equally with the obligee on the matter of construction. Southern Real Estate & Financial Co. v. Bankers' Surety Co., 184 S. W. 1030 (Mo. 1916).

47. As a result of this view the corporate surety will not be absolved from liability because of technical deviations from the contract by the obligee. The general rule is that

to preclude against the possibility of loss to the obligee through some act of the principal. This purpose, inherent in the transaction, is subverted and circumvented if recognition is to be accorded defenses of the proverbial loophole character.[48] While the tendency to pierce the veil of technicalities interposed by the surety concededly entails a drain upon the funds of the corporation, the extraordinary care used by the surety in defining the extent of its liability operates at once to establish a limit beyond which the courts cannot go without completely disregarding the intention of the parties.[49]

The diversity in concept which results from the comparison of the status of the corporate surety with that of the individual surety[50] has been attributed in part "to a reluctance to admit that the rule of *strictissimi juris* has little justification in modern law."[51] It has been seen that the use of the term "insurance" should create no magical alteration in the characteristics of the corporate surety's contract. Equally unsatisfactory is the distinction based merely upon the factor of compensation. The most comprehensive justification appears to lie in the fact that the corporate surety is the creator of the instrument and as such is bound by the use of ambiguous language. It is paradoxical that the vigor of public policy underlying the whole subject should have obscured rather than clarified this logical basis for judicial action, recognized in the law, applicable to the problem and effective to attain a result essential to the needs of modern business.

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the company must prove injury and it will be relieved only to that extent. Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 N. W. 431 (1908); Brown v. Title Guaranty & Surety Co., 232 Pa. 337, 81 Atl. 410 (1911); Ohio County v. Clemens, 85 W. Va. 11, 100 S. E. 680 (1919).

48. To adapt the narrow view applicable to individual sureties to contracts of the corporate surety would tend to endanger the administration of public and private business. Guarantee Co. v. Mechanics' Savings Bank & Trust Co., 80 Fed. 766 (C. C. A. 6th, 1896), *rev'd on other grounds*, 173 U. S. 582 (1899). The confidence placed in the corporate surety, which is less subject to the hazard of insolvency than is the private surety, is evidenced by the statutes of many states providing that the undertaking of the corporate surety shall be equivalent to that of two individuals, *e.g.*, N. Y. Civ. Prac. Act. (1895) § 156. The corporate surety, moreover, prosecutes criminal defaulters relentlessly nor does it deviate because of sentiment or sympathy. Vance, *loc. cit. supra* note 29.

49. In interpreting contracts of the corporate surety the courts have always had an eye to the intention of the parties regardless of what reasoning was used to support this view. Union Central Life Ins. Co. v. United States Fidelity & Guaranty Co., 99 Md. 423, 58 Atl. 437 (1904); Board of Education v. United States Fidelity & Guaranty Co., 155 Mo. App. 109, 134 S. W. 18 (1911).

50. Loyd, *loc. cit. supra* note 3.

51. *Id.*, at 67.