

Suretyship: Defenses of Surety: Estoppel

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there is unlawful picketing the courts will enjoin it to prevent irreparable injury to property and property rights. However, in so doing, they will frequently have to make fine distinctions between peaceful persuasion and annoyance, moral coercion and intimidation. *Truax v. Corrigan*, supra.

The Wisconsin legislature tries to make this distinction between lawful and unlawful picketing and in 1931 legalized peaceful picketing. Thus section 268.20, (1), (e), Wis. Stats., provides that "Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, *without intimidation or coercion*, (italics writer's) or by any other method not involving fraud, violence, *breach of the peace*, (italics writer's) or threat thereof" shall be legal. Subsection (2) of the same section provides that "No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts." (i.e., peaceful patrolling and picketing, etc.). It is hardly necessary to point out how much room for judicial discretion remains, and necessarily so.

There has been in the past a blind abuse of the injunction power by the courts, resulting in greater class hatred, and in more contemptuous disrespect for justice than ever before. Statutes such as the above and the Federal Statute passed in 1921 limiting the courts somewhat in their power to grant injunctions in trade disputes, combined with a more liberal public opinion and a more socially minded judiciary than has existed in the past, are leading to a more impartial adjudication of labor disputes.

CAROLINE AGGER,
ERNEST O. EISENBERG.

SURETYSHIP—DEFENSES OF SURETY—ESTOPPEL.—By the terms of a trust agreement the creditors of a construction company agreed to be paid pro rata from the proceeds of a proposed mortgage and to furnish materials needed for the completion of a building on land owned by the company. The plaintiff, a creditor, executed the agreement only because the defendant, a trustee, guaranteed, individually, to pay the balance of its account remaining unpaid after the distribution of the balance of the proceeds of said mortgage. The materials were furnished and the work of completion started. The mortgagee of the proposed mortgage could not advance the funds. The trustees, without knowledge or consent of the plaintiff, negotiated in place of the proposed mortgage another mortgage of larger denomination. The proceeds of this mortgage were insufficient to meet the necessary disbursements and the creditors received nothing. The plaintiff sued on the guaranty. Motions for nonsuit and directed verdicts by both parties were refused. The jury returned a verdict for the plaintiff covering its full account. From the judgment the defendant appeals on grounds of improper submission to the jury. *Held*, that the case was properly submitted to the jury. Judgment affirmed. *Mosaic Tile Co. v. Jones*, (N.J. App., 1933) 168 Atl. 629.

The defendant for one defense contended that the placing of a new and larger mortgage released his obligation on the guaranty. A variation from the terms of the original contract is different from an alteration. An alteration of a material character releases the guarantor because the contract is destroyed. A variation from the terms of the contract gives the surety an equitable defense.

To avail the surety, the variation must be injurious to him. Arnold, Suretyship and Guaranty (1927) § 115; Arant on Suretyship (1931) § 67. The foregoing theory was applied where the owner failed to insure as called for in the principal contract and no fire occurred. *Schreiber et. al. v. Worm*, 164 Ind. 7, 72 N.E. 852 (1904); *Hohn v. Shideler*, 164 Ind. 242, 72 N.E. 575 (1904); criticized in 18 Har. Law Rev. 626 (1905). Contra, *Watts v. Shuttleworth*, 5 H.&N. 235, 157 Eng. Repr. 1171 (1861). It was also applied where the owner made additions to a building contrary to the contract but paid the expense from his own pocket. The surety was held not to be injured and was not discharged. *Prescott National Bank v. Head*, 11 Ariz. 213, 90 Pac. 328, 21 Ann. Cas. 990 (1907); see 21 Har. Law Rev. 63 (1907). But where a creditor shipped goods on an f.o.b. shipping point basis instead of prepaid as called for in the contract, *Chandler Lumber Co. v. Radke*, 136 Wis. 495, 118 N.W. 185, 22 L.R.A. (N.S.) 713 (1908), or advanced more than the 80 per cent of the wholesale price at greater than the 6 per cent interest, provided for in the original contract, *Commercial National Bank of Washington v. London & Lancashire Indemnity Co. of America*, 10 F. (2d) 641, 56 App. D.C. 76 (1925), the surety was discharged. The Wisconsin Court said that the surety had a right to define exactly the conditions upon which he shall be responsible and unless the variation appear to be wholly immaterial and without prejudice to the surety's rights, he will be released. *Chandler Lumber Co. v. Radke*, supra; for an expression of a similar thought see, *Fond du Lac Harrow Co. v. Bowles*, 54 Wis. 425, 11 N.W. 795 (1882); *Stephens v. Elver*, 101 Wis. 392, 77 N.W. 737 (1898). As a matter of policy it seems unwise to rely upon the immateriality talk of the Wisconsin Court unless it is the only defense available. The better rule seems to be that if the variation is not obviously immaterial, the surety is discharged. The Court of Appeals of the District of Columbia based its decision on the general statement that the contract of suretyship should be strictly construed, and since the transaction did not come within the scope of the bond, the surety was not bound to answer; and it is not material whether or not the surety would suffer any actual disadvantage because of the variance. *Commercial National Bank of Washington v. London & Lancashire Indemnity Co. of America*, supra.

It is apparent that the courts are confused and can no longer rely on a broad rule of law based on the classification suggested by the textbook writers. The rapid growth of complex commercial dealings has outstripped the rules of law. Justice Cardozo, in commenting upon the rule releasing the surety for an extension of time, remarked, "Such rules are survivals of the days when commercial dealings were simpler, when surety companies were unknown, when sureties were commonly generous friends whose confidence had been abused, and when the main effort of the courts seems to have been to find some plausible excuse for letting them out of their engagements. * * * I think we may well ask ourselves whether the courts are not under a duty to go farther, and place this branch of the law upon a basis more consistent with the realities of business experience and moralities of life." Cardozo, *The Nature of the Judicial Process*, (1921) pp. 152-155. The key to the problem is not whether the surety has been harmed. The question before the courts is a problem of construction of the surety's contract. The construction is based on the intention of the parties as expressed and as reasonably implied by the present-day business relationships, and dealings, and requirements for credit transactions. Each case should be independently construed in the light of its individual problem, reflected against present-day, good business usage.

The court in the instant case placed a reasonable construction on the surety contract. But in refusing the defendant's contention, no longer of importance in view of the construction given the contract, by holding that he was estopped to assert such a defense, the court erred; for the reasoning imputed strength to the defense when in reality there was none; and the doctrine of estoppel was applied without considering the defendant's dual capacity.

GERRIT D. FOSTER.

TRUST RECEIPTS—CONDITIONAL SALES CONTRACTS—ESTOPPEL.—Defendant, a finance corporation, in dealing with A, an automobile dealer, received from the manufacturer bills of sale. Defendant would then forward the bill of lading, together with a sight draft for 10 per cent of the purchase price, a note for the remainder and a trust receipt to a bank in A's community. The A company then would pay the draft and execute the note and trust receipt, and upon paying freight take possession of the cars. The trust receipts contained the usual provisions as to holding in trust, etc., A further agreeing not to sell, incur, or otherwise dispose of the cars until all the payments were completed. Plaintiff company was engaged in buying chattel mortgages and conditional sales agreements. A represented to plaintiff that a car had been sold to one X, on a conditional sales agreement and offered plaintiff the contract. Plaintiff investigated the credit of X, found it satisfactory, bought the contract and recorded it. This conduct was pursued a second and third time with Y and Z, as supposed buyers. In fact X, Y, and Z never purchased the cars, their names being inserted on the respective contracts by A. The automobiles never left the possession of A, and were taken into possession of the defendant upon default of A on the notes in September, 1931. Action by plaintiff to recover the cars. Judgment for plaintiff, and motion for new trial denied; appeal. *Held*, judgment reversed. No one can transfer better title than he has. Plaintiff is not a bona fide purchaser. The rule of estoppel applies only if the party asserting it can show that he was in fact misled to his prejudice. Plaintiff had no knowledge with reference to the cars. *Iowa Guarantee Mortgage Corporation v. General Motors Acceptance Corporation*, (S. Dak., 1933) 250 N.W. 669.

Trust receipts have been interpreted by the courts as conditional sales, *New Haven Wire Company Cases*, 57 Conn. 352, 18 Atl. 266 (1899); *Mershan v. Moors*, 76 Wis. 502, 45 N.W. 95 (1890); as chattel mortgages, in Kentucky, *In re Draughn & Steele Motor Co.*, 49 F. (2d) 636 (E. D. Ky., 1931); in New Jersey, *Karkuff v. Mutual Securities Corp. et al.*, 108 N.J. Eq. 128, 148 Atl. 159 (1928); and in Texas, *Commercial Credit Co. v. Schlegel-Storseth Motor Co. et al.*, 23 S.W. (2d) 702 (Tex. Comm. of App., 1930); and as a bailment, in Pennsylvania, *Brown Bros. v. Billington*, 163 Pa. 76, 29 Atl. 904 (1894); in Nebraska, *General Motors Acceptance Corp. v. Hupfer*, 113 Neb. 228, 202 N.W. 627 (1925); and in California, *Commercial Credit Co. v. Peak*, 195 Cal. 27, 231 Pac. 340 (1924). Thus it is seen that the courts are as yet undecided as to its inherent nature, and the variance in the holdings has been to give or deny protection. *In the matter of L. E. Lee, Bankrupt*, 6 Am. Bankruptcy Rep. (N.S.) 437 (Ref. W. D. Wis., 1923).

It is in the nature of a pledge transaction, with delivery to the pledgor for a temporary purpose, *In re Smith-Flynn Commission Co.*, 292 Fed. 465 (C.C.A. 8th, 1923). The bona fide purchaser from the holder of the cars has always been protected by the court under situations similar to the instant case, *Glass v. Continental Guaranty Co.*, 81 Fla. 687, 88 So. 876, 25 A.L.R. 312 (1921); *Indiana*