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Walter E. Treanor
Indiana University School of Law

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THE RATIONALE OF CORPORATE AND NON-CORPORATE SURETYSHIP DECISIONS

WALTER E. TREANOR*

I

One of the world's greatest philanthropies has been passing away during the last fifty years, and with noticeably accelerated rapidity during the last quarter of a century. A venerable institution, "a favorite of the law," the private accommodation surety is being crowded out by the competition of the compensated corporate surety. But this steady elimination of the private surety has aroused little protest, since the private surety has been quite willing to step aside, and business men and others who demand personal security have accepted the corporate surety company as a necessary result of the enormous security demands of our modern credit system. Modern business enterprises demand the flexibility of personal security and the financial dependability of real security, and the corporate surety company with its great fluid assets meets this demand.¹

* See biographical note, p. 140.

¹ "Larger enterprises call for greater alliances of adventurers and specialization in the calculation of hazards; security is obtained through association; the premium payer is now the ultimate surety. As the knowledge acquired through these operations becomes more scientific and their management increasingly efficient, group indemnity on a more extended scale may be anticipated. The same tendency is reflected in other branches of the law." 66 U. P. L. R. 40, 67.

"No matter how strong a company might be financially, it would be highly impracticable, if not suicidal, for it to risk a huge loss on a single proposition, or even on a series of propositions relating to the same subject. To avoid such a situation and to diminish the possibility of facing what
The change from the factual basis of private suretyship to that of present corporate suretyship is in many respects comparable to the change from the situation in which neighbors depended upon one another for errands to the nearby towns, to the present shipper-carrier situation; or the change from the small private partnership to the modern corporation. It would be strange, indeed, if the rules of law which have gradually grown up on the basis of relatively simple and unchanging facts should exactly meet the needs of a situation involving vastly different understandings and expectations, even though the general situation and the relation of the parties are essentially unchanged.

When farmer A, as a favor to farmer B, tells him to throw a plowpoint into his (A's) wagon, and drives away to town and leaves the point at the village blacksmith's shop, there is an undertaking to carry; but it does not require any acute analysis to conclude that the respective attitudes, understandings and expectations of A and B in respect to the transaction are far different from those of A and B, if B is a shipper and A a railroad carrier. Elementally considered, A and the railroad are both carriers, yet no one would now urge that the same rights, duties and liabilities ought to attach to the two situations, even if A should undertake to deliver the point in consideration of B's promise to carry something to town for him. Likewise, there would seem to be sufficient basis for a distinction between the degree and extent of liability of one who, as a favor to a relative, friend or business associate, becomes a surety, as a purely incidental venture, with no investigation of the nature and extent of the principal obligation, and the liability of the corporate surety company which makes a thorough investigation, understands the hazards, undertakes the relation as a purely business venture and anticipates payment of losses as a normal feature of the undertaking. This distinction as to liability ought to exist even though the elemental factors of the two situations are the same.

The purpose of this paper is to make a critical examination both of the changes in facts and changes in rules, with the hope of determining the nature and extent of the modifications of suretyship doctrines; also to consider whether these modifications are justified by changes incident to the conduct of suretyship—might be a catastrophe—in other words to insure the insurance ceded—resort must be had to some sort of re-insurance." Live Articles on Suretyship, vol. 1, p. 48.
ship as a business; and to what extent, or in what sense corporate suretyship is properly designated as "insurance."

II. THE CONTRACT OF THE SURETY. INTERPRETATION AND CONSTRUCTION.

(A) The Non-Corporate Surety.

Preliminary to the discussion of the rules of interpretation and construction of the non-corporate surety's contract, I offer the following resumé of the facts which the courts have stressed as the basis of their traditional favorite-of-the-law attitude toward the surety.

1. The surety is not beneficially interested in the principal obligation and normally receives no direct compensation from either the principal or the secured. Regularly the consideration for the surety's promise is found in the secured's entering into a legal relation with the principal.

2. The surety takes no part in the writing of the principal contract and if there is a separate security instrument to be signed by the surety it is invariably prepared by the secured, or in conformity to his express instructions.

3. The surety's undertaking is not a part of his regular business, and ordinarily he is not in a position to check up on the transactions involved in the performance of the principal's obligation. Consequently the surety must trust to the good faith of the other parties.

4. If the surety is required to pay, the payment comes from his personal assets and is entirely disconnected from the avails of the principal's transactions with the secured.

5. There is seldom direct negotiations between the prospective surety and the secured, the preliminary matters usually being settled between the secured and the principal. From the standpoint of the surety the emphasis is not so much on making the secured safe, as on obtaining a benefit for the principal, or on avoiding some pressing disadvantage. For example, the principal wants credit, or a position, or doesn't want to be sued; or he is required to furnish bond in a judicial proceeding, or for the purpose of qualifying for an official position. The burden is on the principal "to get a surety."

6. As between the surety and the principal it is the duty of the principal to discharge the obligation to the secured and the secured accepts the promise of the surety with knowledge of this fact.
That the above facts should have legal significance, and generally in the direction of safeguarding the interests of the surety, was inevitable, in view of the utter impossibility of separating them from the understanding and reasonable expectations of the parties to the suretyship relation. Yet these facts do not in any sense call for or justify any rules having for their object a penalizing of the party secured. Least of all, do they suggest any justifiable basis for the invention of arbitrary and special rules of interpretation and construction for the purpose of concealing the extent of the assumed liability of the surety, as understood and intended by the parties. It is the purpose and function of interpretation and construction of contracts to determine the intention of the parties, but when the parties disagree as to their intentions it becomes obvious that the actual individual, conscious intention of either party ceases to be legally important.\(^2\)

In practice we have consistently acted upon the implication of Justice Brian's remark,\(^3\) and have contented ourselves with the discovery of the legal intention of the parties as the basis for determining the legal meaning of the contract. But our problem is the same, whether we are seeking the "intent of the parties" in the contract of a principal plus the agreement of a surety, or in an ordinary contract of sale and purchase.

Is interpretation to be distinguished from construction? It has been insisted that "interpretation is the art of finding out the true sense of any form of words: that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey;" and that "construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text."\(^4\) But Professor Williston thinks any such distinction is devoid of legal consequences for the law of contracts. In his words: "The only inquiry which is generally pertinent is the meaning of the language used when judged by the standard adopted by the law. If this standard permits enforcement of "conclusions which are

\(^2\) "A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by the mere force of the law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." Hotchkiss v. National City Bank (1911), 200 Fed. 287, 293, aff'd (1913), 231 U. S. 50.

\(^3\) "The thought of man shall not be tried, for the Devil himself knoweth not the thought of man." Y. B. 7 Ed. IV, f. 2, pl. 2.

\(^4\) Lieber Hermeneutics, Hammond's ed. 11, 44.

in the spirit though not within the letter of the text,' such conclusions have the same importance as conclusions which are in the letter of the text. If the standard does not permit enforcement of conclusions which are not expressed in words, such conclusions are of no legal significance whatever."5 However, Professor Williston refers to one rule of construction which he thinks may properly be distinguished from rules of interpretation. His comment is as follows:

"But when it is said that contracts which affect the public are to be construed most favorably to the public interest, it is obvious that the court is no longer applying a standard of interpretation that is, it is not seeking the intention of the parties. It is attaching a meaning to the contract for another reason than the primary one which is ordinarily controlling. This is true, too, when it is said guarantees are construed in favor of the guarantor. A rule of this latter sort may be called a rule of construction rather than interpretation. . . . A rule of construction as thus understood then is one which in case of ambiguity gives a special meaning to language for reasons other than the normal meaning of the words or the actual or apparent intention of the parties; but such a rule of construction, like a rule of interpretation, concerns itself with the legal meaning of the contract, not with its legal effect after that meaning has been discovered."6

The rule just referred to can be properly applied as a rule of construction only in case the primary standards of interpretation leave the meaning of the contract ambiguous. For if the ordinary rules of interpretation disclose a clear meaning for the writing, then "a rule of law that forbids effect being given to that meaning is a part of the substantive law of contracts which comes into play after interpretation and construction have finished their work."7 Professor Williston differentiates this "rule of construction" from the rule that language will be taken most strongly against the party using it, and suggests that this latter rule is one of interpretation, "since it should be anticipated that the person addressed will understand ambiguous language in the sense most favorable to himself, and his reasonable understanding should furnish the standard."8

We are constantly reminded by the courts that the contract of the surety is "strictissimi juris" and that the surety is "a favorite of the law," and these magic words, when spoken at the psychological moment by a judicial Houdini, have often dissolved the seemingly indissoluble bonds with which some luckless surety had been tied hand and foot by an importunate debtor and a very human, but not necessarily dishonest, creditor. How have

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6 Ibid., p. 1161.
7 Ibid.
8 Ibid.
the courts given effect to the doctrine of "strictissimi juris" and the attitude that the surety is "a favorite of the law?" How far have they entered into the formulation of the substantive rules respecting the rights, duties and liabilities of the party secured, the principal and surety; and to what extent have they modified general rules of interpretation and construction of contracts?

The courts have frequently insisted that "for the purpose of ascertaining the meaning of the language which the surety has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments." And it has been said: "The contract of a voluntary surety is to be construed by the same rules as all other contracts, and the language used is to be given its ordinary meaning with a view to carry out the intention of the parties as expressed in the instrument executed by them. There should be no strained construction in order to release or hold the sureties." Courts have declared that "strictissimi juris" has nothing to do with interpretation or construction of a surety's contract but refers to a surety's right to stand upon the strict terms of his obligation.

In an effort to show how far the above excerpts are reflected in the actual decisions of cases I shall make a somewhat detailed examination of typical cases. For convenience I include the following summary of certain rules of interpretation as given by Professor Williston.

(1) Primary Rules:

Ordinary meaning given to words; technical words given technical meaning, but circumstances may show different intention; every part construed if possible, so as to give effect to its general purpose; circumstances always to be shown,—not limited to case of ambiguous writing.

(2) Secondary Rules:

(a) The courts will, if possible, give effect to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one that leaves a portion of the writing useless or inexplicable; and if this cannot be done, a construction which gives effect to the main apparent purpose of the contract will be favored.

(b) Constructions which make contracts lawful will be preferred to ones which make it unlawful; a construction which makes the contract fair and reasonable will be preferred to one which leads to harsh and unreasonable results—therefore constructions which would lead to forfeiture will not be favored.

11a McMullen v. United States (1909), 167 Fed. 460.
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(c) Language will be construed most strongly against party using it.
(d) "A contract binding a surety, it has been held, should if possible be construed in his favor. But there seems little propriety in such a rule and it is opposed to a number of decisions."

The last rule mentioned is, as indicated, a special rule of construction applied to promises of sureties, and to the extent that it is applied there is a departure from the rules generally applied to contracts.

The rule that the circumstances should always be shown and given their proper effect in determining the intent of the surety has not received full consideration by all the courts. The court ought to be put as nearly as possible in the position the parties were in when the contract was made; and this can be accomplished only by the court's having all the circumstances revealed. However, the legitimate value of proof of the circumstances under which and the purposes for which the surety's contract has been made is lost if the court, in a more-favorable-to-the-surety frame of mind, first decides what the words of promise of the surety reasonably mean, and then, assuming this to be the meaning of the words, examines the circumstances to see if this meaning must be revised. In a close case, a court which proceeds in the manner suggested will almost surely fail to reach the same result as one that considers the circumstances under which the promise has been made as an independent, but co-ordinate, source of the intention of the surety.

An interesting example of the tendency referred to is found in the case of Birdsall v. Heacock. The language of the surety was as follows: "Please send my son the lumber he asks for and it will be all right." The son presented the writing to the plain-

11b "Defendants rely upon the general maxim that upon a bond of indemnity or guaranty the liability of the surety is strictissimi juris. Such is the statement often found in the books. This does not, however, mean that rules of construction of such a contract are different from those applicable to written contracts generally. What is meant by the maxim is that, when the meaning of a contract of indemnity or guaranty has once been judicially determined under the rules of reasonable construction applicable to all written contracts, then the liability of the surety under his contract, as thus interpreted or construed, is not to be extended beyond its strict meaning." Covey v. Schiesswohl (1911), 50 Col. 68, 114 Pac. 292.

12 "There is another rule, partly of evidence and partly of construction, which applies to this class of contracts as well as to all others, and that is, that in order to arrive at the intention of the parties, the circumstances under which and the purposes for which, the contract was made may be proved, and must be kept in view in its construction." Crist v. Burlingame (1862), 62 Barb. 351.

18 (1877) 32 Ohio State 177.
tiff, made a small purchase and continued to make purchases from time to time. The first charge was for $226 and there were credits in excess of this sum. The plaintiff was in the wholesale lumber business and the son was embarking in the retail lumber business. In addition to the above facts the complaint alleged "that he (the principal) expected to carry on said business through several seasons, all of which was known to the said E. H. Potter, (the creditor) and the said Edwin Heacock, (the guarantor) and in order to give him, said T. C. Heacock, such credit from the said firm, as he might desire in his said business, the said Edwin Heacock executed said letter of guaranty and delivered it to his son," etc. A demurrer was sustained on the ground that the complaint showed that only one transaction was covered by the offer of guaranty, and that it also showed that the change for this transaction had been paid.

It is interesting to note the court's verbal attitude, which is stated to be as follows:

"There can be no good reason why a guarantor, who procures a credit to be given which would otherwise have been refused, should not be held liable to the full extent warranted by the terms of the guaranty. As an additional rule, we think it well settled that all contracts, in which the terms are in any respect equivocal should be read in the light of the circumstances under which they were entered into."

What would be the "full extent warranted by the terms of the guaranty?" One could reasonably rely on the terms of the offer to cover sales to a reasonable amount for a reasonable time. The court says: "There is no express limit to the quantity of lumber to be furnished. This is left to depend solely on the pleasure of the purchaser. But it may well admit of doubt whether it contemplates more than a single purchase. Its language is in the present tense. And it might therefore be held that this language embraces only such lumber as the guarantor's son should ask for, upon the presentation of the guaranty. And as it contains no express reference to future transactions, such we think, should be its construction, if read without regard to the circumstances under which it was written, or acted upon." No doubt the court is correct when it says that the language might be taken to cover only one transaction; certainly the language is consistent with such an intention. But if the intention were pushed "to the full extent warranted by the terms," it could easily include transactions for a reasonable period of time. Then, in determining what may be fairly inferred from the language, it should be noted that the "guaranty" is after all at the most merely an offer to a series of unilateral contracts of guaranty, subject to being revoked at the pleasure of the offerer as to
future transactions. If the defendant's words alone, are relied upon, we may well agree with the court that the writing "does not clearly import more than this" (i.e. one transaction). But it seems equally clear that the writing does not clearly import only one transaction. If the plaintiff relied upon the writing alone he would eventually lose his case, but for the reason that he would fail to establish his claim to payment for a series of transactions by a preponderance of the evidence. Granting that the writing leaves it doubtful whether one or more than one transaction was intended to be covered, a demurrer should be sustained to the complaint, if the court adopts the rule that doubts should be resolved against the guarantor.

After considering the circumstances the court comes to the following conclusion:

"But looking to all the circumstances stated in the petition, we think they are not sufficient to give the guaranty relied on a more extended meaning than its terms would ordinarily import. It is averred that the guarantor knew that his son was about engaging in the lumber business which he expected to carry on for several seasons, but the writing contains no reference to that fact; and it is not averred that the son expected or intended to make a series of purchases of lumber from the plaintiff, and that this fact was known to the father."

It will be noted that the court turns to the circumstances with the idea already fixed that the words of the writing "would ordinarily import" one transaction. It is submitted that the court should consider the language of the writing in the "light of the circumstances" under which it was used, for the purpose of deciding whether the defendant intended to include only one transaction, or a series of transactions, in his offer, and that the court should not first decide what equivocal language "ordinarily imports" and then put upon the "circumstances" the burden, so to speak, of overcoming what is, in effect, a presumptive intention created by the court. The court points out that while the allegation is made that the son was about to engage in the lumber business for several seasons and that the guarantor knew this, still "the writing contains no reference to that fact." Obviously, if the circumstances are to be used as a source of light on the words of the writing, the weight of the circumstances should not depend on the circumstances being referred to in the writing. Then the court remarks that "it is not averred that the son expected or intended to make a series of purchases of lumber from the plaintiff, and that this fact was known to the father." It is difficult to follow the court in this conclusion. The complaint specifically alleges that the son intended to carry on his business through several seasons; that this was known to the prospective guarantor and creditor; and that in order to give
him such credit with the plaintiff as he might desire in "his said business," the defendant "executed said letter of guaranty," etc. Evidently the court did not get much light from the circumstances. The real reason is revealed by the following quotation which the court approves: "Such an instrument should be confined to the immediate transaction, UNLESS THE LANGUAGE OF THE PROMISE is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits."

The Michigan case of Gard v. Stevens\(^\text{14}\) is regularly cited as upholding the doctrine of strictissimi juris. The letter of guaranty read: "If you will let the bearer have what leather he wants and charge the same to myself, I will see that you have your pay in a reasonable length of time." There was balance due from a series of transactions and the creditor sued the writer of the above as surety. Apparently the facts showed that the principal debtor had paid a sum in excess of the amount involved in the first transaction. There was judgment for the plaintiff below and on appeal this was reversed on the ground that the writing covered only one transaction. The report of the case does not show that the plaintiff either alleged or offered to prove any special extrinsic circumstances to show the intent of the parties, and one might support the decision on the ground that the plaintiff failed to establish his claim by preponderance of the evidence. But the statements of the court reveal the same attitude as that of the Ohio court. The court made the following statements:

"Every person is supposed to have some regard to his own interest; and it is not reasonable to presume that any man of ordinary prudence would become surety for another without limitation of time or amount, unless he has done so in express terms, or by clear implication."

"We think it is limited to a single purchase or transaction. We must hold this, or that it is unlimited both as to time and amount."

The court sets up a straw man and knocks it down with a reductio ad absurdum. The letter from the prospective guarantor does not bind him for any time or for any amount, as it is merely an offer directed to a series of unilateral contracts and can be revoked at any moment as respects future credits. It would seem that the addressee, in both the Ohio case and this case, would have acted reasonably in assuming that the communication was intended to induce him to credit the principal for reasonable amounts and for a reasonable time, unless otherwise notified. In both of the above cases the words in the offers of guaranty

\(^{14}\) (1864) 12 Mich. 292.
were the words of the defendants, but neither court considers the possibility of applying the rule that ambiguous language should be taken most strongly against the one using it. In both cases the courts took that interpretation which would put the minimum liability on the surety, and in effect said that an offer of guaranty expressed in general terms and without limitation as to the time and amount must have an express provision that it is not intended to be limited to the least possible liability under its terms, in order to be interpreted to cover more than the minimum liability. It is true, as the Michigan court points out, that no one should be presumed to have bound himself as surety for an unlimited time and amount in the absence of express stipulations to that effect; but it does not follow that even a surety should not be presumed to intend the reasonable implications of his own words, which in the writings referred to, would be that the writers intended and expected the creditors to furnish a reasonable amount of goods for a reasonable period of time, unless the offer should be sooner withdrawn. It hardly can be said that these offers were interpreted "as any other contract," and especially so since the words were the words of the guarantors and, according to the accepted canons of interpretation, should have been constructed most strongly against the parties using them. How far the courts have failed to adopt ordinary rules of interpretation is indicated by a statement quoted with approval in Birdsall v. Heacock, as follows: "The tendency of decision in this country has, accordingly, been against construing guaranties as continuing, unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt."15

The case of State v. Medary16 reveals the disinclination of the courts to give effect to the intention of the parties, in fact to defeat the purpose of the instrument by an artificially technical interpretation of words. The General Assembly of Ohio created a Board of Public Works and designated five persons as members. The statute creating the board provided that each member should take an oath of office, and that the Board should designate from its membership not to exceed four "acting commissioners" who before receiving any moneys of the state should give bond in the sum of $30,000. The members of the board who did not act as commissioners were not required to give bond. P, a member of the board, was designated as an acting commissioner and before entering upon his duties as commissioner, executed his bond with the defendant Medary as one of his sureties. The

15 2 American Leading Cases, p. 141.
16 (1848) 17 Ohio Reports 565.
bond recited that the principal had been appointed a member of the board of public works and its condition was that he should faithfully discharge the duties of his said office, and account for all moneys intrusted to him as such officer, according to law. The principal failed to account for funds received as acting commissioner and suit was instituted on the bond. The defense was that the bond covered only the official acts of the principal as a member of the board of works and not his acts as a member of the "acting commissioners." In reply it was urged that there was actually only one office, that as acting commissioner the principal was performing special functions of a board member, that since the statute required the bond only in case a board member acted as commissioner the surety must be charged with notice that the obligation assumed was for acts of commissioner. It was also pointed out that outside of his duties as commissioner the principal did not, and could not receive any moneys of the state, and urged that it would be absurd to suppose that the parties intended to have a bond executed for one's acts in a capacity in which he received no moneys, and in respect to which capacity no bond was required; and all the more absurd in view of the fact that the bond recited the condition that the principal should account for all moneys received as such officer. The Supreme Court, in affirming judgment for the defendant, said:

"But it may be said, in this instance, if the bond do not embrace the latter (acts as commissioner) it embraces nothing; and that the officer who took it failed in intelligence. The reply to all this is, that the bond speaks for itself, and the law is that it shall so speak: and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail. It is not like a grant, where everything is construed most strongly against the grantor, and where the intent governs, and will be sought after from the object, or extrinsic facts, to give such construction to words as to carry into effect the intention of the parties." (Italics mine.)

The understanding of the parties was unquestionably that a bond was to be executed to cover the duties for the faithful performance of which the law required a bond to be given; furthermore, the court did not believe that the parties intended that a bond with a penalty of $30,000 should be executed conditioned upon the proper accounting for moneys in a position which involved the receipt of no moneys. But the court frankly says that this situation calls for no consideration of intent, and that the "object or extrinsic facts" can have no relevancy; "if the
words will not make them liable nothing can.” The fact that the surety’s obligation was in the form of a bond did not require the adoption of any such technical interpretation of words, for, in the words of Marshall, “there are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties.”17 There is no place in this court’s attitude toward the surety for general rules of interpretation; for example, construing every part of a contract so as to give effect to its general purpose; or preferring a construction which makes the contract fair and reasonable, etc. Of course the court expressly rejects the rule that allows the circumstances to throw light on the intention. After reading this case one is tempted to paraphrase the rule given by Professor Williston18 into “a contract binding a surety, it has been held, should, even if impossible, be construed in his favor.”

Two early New York cases, Rogers v. Warren19 and Whitney & Schuyler v. Groot20 are frequently cited in the “one transaction” decisions. In the former the surety sent the following writing to the prospective creditor: “If E. W. and D. W. B., our sons, wish to take goods of you on our credit, we are willing to lend our names as security for any amount which they may wish.” This was delivered about May 3, 1804, and the principals bought goods on credit from time to time, for all of which they paid. In December, 1805, they took another parcel of goods, for which they gave their note. This suit was for a balance of $267.94 due on the note. The reviewing court does not say that the writing covered only one transaction, but does say it would be unjust and unreasonable to extend it to an indefinite credit for an indefinite time, and adds: “The plaintiff did not probably understand it so; for after goods had been at several times taken upon credit and paid for, they took a note for the last parcel, which was above a year and a half after the first transaction.” Even if the plaintiff relied upon the offer of the defendants and extended credit upon the faith of it, one can easily agree with the court’s view that the creditor was not relying on the offer of guaranty when he accepted a note for the last purchase. At any rate it is reasonable to feel that the plaintiff did not, by a preponderance of the evidence, establish either (1) that he accepted the offer of the defendants in respect even to the first transaction, or (2) that he was relying on it when he furnished the

17 Cooke v. Graham’s Adm’r. (1805), 3 Cranch 235; 2 Law Ed. 420.
18 Supra, p. 7.
19 (1811) 8 Johns. 119.
20 (1840) 24 Wend. 81.
goods for which the note was given, in view of the lapse of time since the offer was made and the fact that he did not extend credit in the ordinary business sense.

The words used in Whitney & Schuyler v. Groot are quite vague and there is no showing of extrinsic facts to throw light upon the meaning. The offer was as follows: "We consider Mr. J. L. Van Eps good for all he may want of you (. . . .) and we will indemnify the same." The words of the court suggest the phrase "strictissimi juris": "Upon general principles a strict interpretation should be applied in favor of a surety. I cannot say the credit was to be extended beyond the first parcel of goods. 'All he may want of you,' does not necessarily extend beyond this—it may fairly intend all he may want at the time." The court seems to be applying the rule of construction referred to by Professor Williston,—"a contract binding a surety . . . . should if possible be construed in his favor."

The words of Marshall in Russell v. Clark's Executors et al.\(^{21}\) are quoted as authority for the rule that all ambiguous words should be resolved in favor of the surety. However, in that case the question was not the extent of a surety's obligation, but whether there had been even an offer to become a surety. From that point of view the words of the court do not seem too strong when it says "the law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt." The absence of any benefit to an alleged surety as a basis for an implication of a promise to become liable for the obligation of another justifies the requirement that there be more than words of general commendation, or recommendation in respect to a prospective debtor in order to hold the one using the words as a surety. That was in substance what Marshall said.\(^{22}\)

Many surety obligations which have been before the courts have appeared in the form of a bond and despite the general relaxation of the old strict construction rules which were formerly applied to specialties the courts have occasionally applied them to surety bonds. A good illustration of this is found in National

\(^{21}\) (1812) 7 Cranch 69, 90.

\(^{22}\) This is clear from the following remark: "In their letter of the 20th Clark and Nightingale indicate no intention to take any responsibility on themselves, but say that Mr. Russell may be assured Robert Murray & Co. will comply with their engagements. In their letter of the 21st they speak of the letter of the preceding day as a letter of recommendation, and add 'we have now to request that you will render them every assistance in your power."
The sureties bound themselves by executing a bond for the faithful performance of the duties of the principal. The recital clause of the bond set out that the obligee had appointed the principal as "book-keeper" and that the principal had accepted the same. But the bond recited that it was conditioned on the principal's faithfully fulfilling and discharging "the duties committed to and the trusts reposed in him as such book-keeper and shall also faithfully fulfill and discharge the duties of any other office, trust or employment relating to the business of the said association which may be assigned to him, or which he shall undertake," etc.

Subsequently the principal was appointed teller, and while acting as teller he embezzled a sum of money. In a suit on the bond the sureties were held not liable. In affirming the judgment of the trial court the reviewing court stated the rule as follows: "The recital in such bonds, undertaking to express the precise intent of the parties, controls the condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key." The court can not be said to be adopting a special rule in favor of the surety as it only applied a rule which has been generally applied to the construction of bonds.

The above cases are typical of a large number of cases which indicate that the doctrine of *strictissimi juris* and the favorite-of-the-law attitude of courts have entered into the interpretation and construction of the contract of the surety, as distinguished from the determination of the substantive rights, duties and liabilities of the parties. The cases analyzed in detail as well as cases cited, not only disregard the more general rules of interpretation but also ignore the rather definite rule, regularly applied in construing contracts, that ambiguities of language are to be resolved against the user of the language. In many of the cases the individual "words and symbols" are not ambiguous,

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23 (1882) 90 N. Y. 116, 121.
24 Accord: *Bennett v. Draper* (1893), 139 N. Y. 266.
25 "In truth the recital is the proper key to the meaning of the condition." Wightman, J., in *London Assurance Co. v. Bold*, 6 Ad. & El. (N. S.) 514.

In *Hassell v. Long*, 2 M. & S., 363, Lord Ellenborough said that the words of the recital of a bond afforded the best ground for gathering the meaning of the parties.

In *Pearsall v. Summersett*, 4 Taunt. 593, it was said that "the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate."
and yet the writing as a whole may be considered ambiguous. This is especially true in the cases involving the question of continuing or non-continuing guaranties. The uncertainty is in respect to the application of the contract as a whole to its subject matter, that is, is the subject matter of the guaranty one transaction or a series of transactions? In the case of State v. Medary the question was whether the obligation of the surety as a whole was for the faithful performance of the principal in his capacity as a member of the board of works as distinguished from the performance of his functions as an "acting commissioner." In this situation the cases considered have unquestionably favored the surety and have limited the obligation to that subject matter which placed the least, or no, liability on the surety. It seems that the results reached in these cases are consistent with the special rule of construction referred to by Professor Williston. And, in his words, "such a rule of construction, like a rule of interpretation, concerns itself with the legal meaning of the contract, not with its legal effect after that meaning has been discovered." 

In contrast with the preceding cases there is a line of decisions that has consistently interpreted and construed surety agreements by the same rules as other contracts are construed. An early Federal decision adopts an attitude on the question of interpretation and construction which might well have been seized upon by the courts in the corporate surety cases as authority for their "changed attitude." The following excerpts are self-explanatory:

"Indeed if the language be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor, for it does not lie in the mouth of the guarantor to say that he may without peril scatter ambiguous words, by which the other party is misled to his injury."

"We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purpose to which it is applied."

In Lee v. Dick the court said "a guaranty is a mercantile instrument and to be construed according to what is fairly to be

26 Supra, p. 7, (d).
27 Supra, p. 5.
28 Laurence v. McCalmot et al. (1844), 2 How. 426, 449, 450.
29 (1836), 10 Peters 482, 498.
THE RATIONALE OF SURETYSHIP DECISIONS

presumed to have been the understanding of the parties, without any strict technical nicety.”

In Bell et al. v. Bruen occur the following expressions which develop more fully the Supreme Court’s views on interpretation and construction of “letters of guarantee.”

“Bonds, etc., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid in their construction. And if there be sureties bound by them, and if the meaning is doubtful, the construction is restricted, and made most favorable to the sureties. Such is the result of the authorities cited for the defendant.

On the other hand letters of guarantee are usually written by merchants rarely with caution, and scarcely ever with precision; they refer in most cases, as in the present, to various circumstances and extensive commercial dealings in the briefest and most casual manner, without any regard to form, leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances and facts accompanying the transaction; without referring to which, they could rarely be properly understood by merchants or by courts of justice. The attempt, therefore, to bring them to a standard of construction founded on principles, neither known nor regarded by the writers, could not do otherwise than produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagements to the same rules of interpretation applicable to bonds and similar precise contracts.”

The court properly points out the unsoundness of applying the same rules of interpretation to informal promises of sureties that had been applied to bonds and “similar precise contracts.” At another point the court remarks that “we think the court should adopt the construction which under all the circumstances of the case ascribes the most reasonable, probable and natural conduct to the parties.”

30 (1843) 1 How. 169, 182, 186.

31 The following excerpts from Douglass et al. v. Reynolds et al. (1833), 7 Peters 113, 121, 122, are of the same general purport.

“Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification or liberal construction beyond the fair import of its terms.”

“That the language fairly admits of, if it does not absolutely require this construction, cannot be doubted. If it does so it is but common justice that it should receive this construction in favor of innocent parties who have made acceptances and indorsements and advances upon the faith of it, according to the rule already stated, that the words shall be taken as strongly against the party using them as the sense will admit.”

“It is rare that in any case of guarantee the language of the instrument is such as to make the decision upon one an exact authority for that of another. The whole words and clauses are to be construed together, and
These early Federal decisions emphasize three things:

(1) The interpretation should seek the general object for which the instrument was designed; the sense which "best comports with the general scope and intent of the whole."

(2) That the strict construction rules of specialties should not be applied to these informal and inartificial writings.

(3) That the party secured should be favored in the interpretation of ambiguous language used by the guarantor.

With the exception of the statement of Marshall in *Russell v. Clark's Executors* there is no support in these cases for the proposition that a surety should be favored by any rules either of interpretation of the language of the writing or of construction of the contract as a whole.

Several New York cases have carefully considered the doctrine of *strictissimi juris* in its relation to the liability of sureties and are quite helpful and instructive. In *Gates v. McKee* the court was passing on the construction of the following: "Sir: I will be responsible for what stock M. E. McKee has or may want hereafter to the amount of $500. (signed) Chauncey McKee." The principal owed the creditor $60.44 for stock at date of the instrument, and prior to a subsequent date the principal bought and received $1,045.65 worth of goods. In the meantime he paid the $60.44 and in addition made various payments aggregating $525.65, leaving a balance due of $520.00—later reduced to $408.89. Plaintiff sued defendant for this sum on the guaranty, the defense was that "to the amount of $500.00" was meant as a limit on the amount of purchases, and did not define the principal's ultimate debt for which the defendant would be liable.

The court said the offer of guarantee contemplated a continuous business and a standing credit to the amount of $500. The court might have taken the position that it could not say that the parties did not intend that the guaranty was to be limited to the first $500 worth of goods purchased. That would be a possible, though not reasonable interpretation of the words; indeed, not unreasonable if the court had been sufficiently imbued with a favorite-of-the-law attitude and believed that ambiguous words should be taken most strongly against the creditor.

But the court declared that the weight of authority "in this class of cases" was in favor "of construing guarantees by rules that sense is to be given to each which best comports with the general scope and intent of the whole."

"We cannot admit, therefore, as has been contended at the bar, that the courts have inclined to vary the rule of construction of instruments of this nature and to hold them to be *strictissimi juris* as to their interpretation."

32 (1855) 13 N. Y. 232.
at least as favorable to the creditor as those which the courts apply to other written contracts, irrespective of the consideration that the guarantor is a surety. The court added: "There is a sense undoubtedly, in which these obligations are to be strictly construed; and it is this: That the surety is not to be held beyond the very precise stipulations of his contract. He is not liable on an implied engagement where a party contracting for his own interest might be, and he has a right to insist upon the exact performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party."

What does the court mean by the remark "that the surety is not to be held beyond the very precise stipulations of his contract?" If we interpret or construe the agreement of the surety to cover liability for acts A and B of the principal, and not to include liability for act C, our interpreting or construing of the contract is at an end. To say that we have construed the promise of the surety by the same rules as any other promise is construed, and have come to the conclusion that his promise includes liability for acts A and B, and then to say that the surety may stand on the letter of his promise and not have it extended by implication to cover act C, means nothing if C is not reasonably within the limits of the meaning of the promise, and if act C is reasonably implied, then the surety's agreement has not been construed the same as other agreements. Unquestionably the court is referring to considerations that become significant in the determination of liability on the basis of the legal meaning of the contract as judicially construed and applied to the acts of the parties performed thereunder.

Perhaps the following will make my meaning clearer. Suppose A has done some work for B under an agreement. After the work is completed B claims that A has departed from the stipulations of the contract and refuses to make payment. In the subsequent suit by A to recover from B, A may insist that his performance satisfies the requirements of the contract, as properly construed; or, conceding that he has varied from the strict, literal terms of the contract, A may still contend that his performance has so nearly complied with the provisions of the contract that B should be required to perform. The question is simply and effectively settled if the court decides that the terms of the contract authorize the method of performance adopted by
A. Or there is no difficulty if it is found that the performance is so materially different from the performance called for by the contract as to be no performance. But it is not so simple if it appears that there has been a departure, and yet, that B has received, or can receive, substantially what he has contracted for, and that the situation is such that A will suffer a loss approximately equal to the value of his performance, unless B is obliged to make payment. The law might be that B could stand on "the precise stipulations of his contract" to the result of being discharged from any liability to A; or it might be that he should be held to pay the contract price less whatever sum would properly compensate him for the loss occasioned by A's breach of his agreement. If, in Gates v. McKee, the court meant that either of the last two results should be reached by allowing the surety to stand on the "precise stipulations of his contract," then the court was not thinking of construction of the promise of the surety, but of substantive rights and defenses of the surety.

In Page v. Kreky the defendant had executed a written statement to the effect that if the plaintiff would ship skins to T, from time to time, T would not convert then; but would "well and faithfully tan them, and, if he does not buy them and pay you for them within time agreed upon between you, I agree that he shall deliver them at R. M. & Co., New York City, N. Y."

The plaintiff shipped goods to T under six different contracts, each of which provided that in case T did not buy and pay for the skins they were to be delivered to M. & G., "another party at another place." T failed to pay or deliver and the defendant was sued as guarantor. The trial court instructed that the change from "R. M. & Co." to "M. & G." was not material. The reviewing court said:

"It seems to me that where a party intending to enter into a contract with another, prior to its execution, secures from another a guaranty of the performance of such contemplated contract, in which the terms upon which the surety is to be bound are specified, and the contract when drawn, does not correspond to the terms of the guaranty, the surety will be discharged from liability for default in the contract as made. In such a case the obligation of the principal is different from that for which the surety became bound. The question seems to have been disposed of in the court below on the ground that the change was not material. But the answer is that the defendant's obligation is strictissimi juris, and he is discharged by any alteration of the contract, to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury."
The Rationale of Suretyship Decisions

On the facts of this case it is clear that the court is not bothered by any question of interpretation or construction, but is simply dealing with the question whether, under the doctrine of *strictissimi juris*, a surety has an absolute defense if the principal and the party secured vary the terms of the principal obligation. There is no mental legerdemain by which "deliver to A at 325 X Street" can be construed to mean "deliver to B at 450 Y Street." We may insist that it could not possibly make any difference to the surety whether the goods were delivered to A or B, but we cannot say that there is not a variation. It was obvious in the instant case that the surety was not injured in the slightest by the change in the person to whom and the place to which the skins were to be shipped, since the principal did not ship them to either address. So the court's application of the doctrine of *strictissimi juris* in this case comes to this: Given the meaning of the surety's obligation, the surety may stand on its strict letter, in the sense that he is discharged by any change in the terms of the principal obligation; that is, *strictissimi juris* is not a rule of interpretation or construction, but connotes the substantive right of the surety to be discharged from his obligation by even the slightest variation of the principal contract by the principal and the party secured.34

That the New York courts are carefully distinguishing the doctrine of *strictissimi juris* from interpretation and construction is further evidenced by the case of *U. S. Rubber Company v. Silverstein*.35 The writing before the court was the following: "Dear Sir, Inclosed find check for the three above bills. Please do not send my statements and my son's statements together. Send him his and me mine. They do business for themselves and therefore send them separate statements, but I am good for what they buy. Yours truly, B. Silverstein." The defendant had two sons, Louis and Moses, and the statements referred to were those of Louis. Both sons had been doing business with the plaintiff, and after receipt of the above letter the plaintiff sold on credit to both sons. The defendant denied any liability for amount due from Moses, claiming that the "they" and "them" were grammatical mistakes. The court said that the writing was ambiguous and that it was proper to take into consideration the surrounding circumstances. The following excerpts reveal the court's position:

34 It seems to the writer that *Page v. Krecky* should turn on the failure of the plaintiff to accept the defendant's offer.
"In interpreting the guaranty the jury were permitted to take into account the fact that it had been prepared by the defendant, that it was his own language, and that when an ambiguity exists under those circumstances, the doubt is to be resolved against the guarantor rather than the guarantee. This is a reasonable rule of construction supported by ample authorities. If the use of the plural "they" was a mere grammatical error on defendant's part, the plaintiff should not be made to suffer therefor, and if he intended merely to guarantee the account of his son Louis, his fault in not being more specific should not work to the injury of the plaintiff."

"The intention of the parties is the test to be applied, but where the intent is ambiguous, it is to be determined from the surrounding circumstances, balancing the doubts in favor of the guarantee."

The same considerations are involved in the case of Richardson v. County of Steuben. This was an action to recover moneys claimed to have been paid by the plaintiff under mistake of fact on account of an alleged liability as surety on a bond conditioned on the repayment by the "George W. Hallock Bank" of moneys deposited therein by the county treasurer. Recovery had been allowed by the trial court and the Appellate Division had affirmed the judgment on the theory that when the undertaking was executed the bank was a copartnership, and that before the deposit of the moneys for which the surety had responded on the default of the bank, the membership of the copartnership had changed; and that this change had had the effect of releasing him, and he had paid without knowledge of the change in the membership. The bank in question had done business under the name of "The George W. Hallock Bank" for over sixty years. The founder had died and his widow and son had continued to conduct the bank as co-partners under the same name and without any changes in the method of doing business. There had been a change in membership just before the plaintiff executed the bond and another change afterwards. Neither the plaintiff nor the county treasurer knew whether the bank was an incorporated bank, a private bank or an individual bank, and neither of them knew or had any information as to what persons owned or were interested in the bank, and neither of them made any inquiry on that subject.

The court's opinion included the following comments:

"If in the decision of this question we were confined to a consideration of the naked written words of the undertaking we should find it a close one. However we are not thus confined but have very illuminating circumstances casting their light upon the intent of the parties and the interpretation of their contract.

The rule that the liability of a surety is to be strictly construed is so often reiterated with a very general sense of its true meaning that we perhaps may profitably recall just what its application is to such a case as this. It does not mean that in interpreting the undertaking of a surety we are to be governed by different fundamental rules than those which are applicable to the construction of another contract. And least of all does it permit us to cast aside the principle applicable to all contracts, that in their interpretation we are to seek for the true intent of the parties who executed them. After that intent has been discovered and the meaning of the contract determined, it is of course true that the liability of a surety is to be strictly and rigidly limited by the scope and meaning of the instrument which he has executed."

The court, after calling attention to the fact that the bank had existed in the community as an "institution", adds:

"... apparently his (the surety's) mind visualized the facts that it had been a permanent institution receiving and paying back deposits all this long time, and he was not interested in the question whether it was a corporation, an individual bank or a private bank, for interest would have begetten inquiry and of inquiry there was none. There stood before him an organization of some kind taking the external form of a bank, which for this long time had met its obligations, and he would guarantee that it would continue to do so for a few years without even inquiring what the form of the organization behind it was. There was entirely absent any circumstance or suggestion of suretyship for a co-partnership and to be limited by its unchanged membership."

When viewed in the light of the above circumstances, the language of the undertaking disclosed, in the opinion of the court, "an intent to guarantee the actions of the bank rather than of the co-partnership which at the moment happened to own it."

With discriminating exactness the court speaks of the "rule that the liability of a surety is to be strictly construed" as distinguished from a rule that the contract of a surety is to be strictly construed, and the same distinction is emphasized by the statement that "it is of course true that the liability of a surety is to be strictly and rigidly limited by the scope and meaning of the instrument which he has executed."

It is evident from the cases already considered that two fairly well defined attitudes have been taken by the courts. One line of decisions has reached results which are explicable only on the assumption that the courts have not applied the ordinary rules of interpretation and construction of contracts. Sometimes they have reversed the rule that one's ambiguous words are to be taken most strongly against him. In other cases where there does not appear to be any specific ambiguities of language, but where there is some uncertainty as to the general scope of the
surety's obligation, the courts have given the surety the benefit of the uncertainty. This has often involved reducing the contract to a nullity, as, for example, in the case of *State v. Medary*,\(^{37}\) and is contrary to the general rule that contracts, grants, etc., should be construed so as to have effect rather than fail. Also the cases have disregarded the rule that circumstances should be shown in order to get at the intention of the parties and to apply the contract to its proper subject matter; or when circumstances have been allowed to be shown they have not been given their legitimate effect. In short, the courts have given effect to the doctrine of *strictissimi juris* and the favorite-of-the-law attitude through interpretation and construction.

On the other hand the second line of decisions represents an application of the usual rules of interpretation and construction to the agreements of sureties. They take ambiguous words most strongly against the surety, if they are the words of the surety, and there is no suggestion of some indefinite favoritism which turns the close case to the advantage of the surety. Further, these cases clearly recognize that the doctrine of *strictissimi juris* is not a rule of interpretation and construction, but has to do with the legal consequences of the conduct of the parties as measured by the contract after the scope of its legal meaning has been determined. These cases seem to me to be sound and to have done a service in putting the doctrine of *strictissimi juris* and the favorite-of-the-law attitude where they belong—i.e., in the sphere of substantive rights, duties and liabilities of the parties to the suretyship relation. The absence of any beneficial interest for the gratuitous surety in the principal obligation involves the practical impossibility of implying a promise to become bound as a surety,\(^{38}\) but, granting the existence of a promise, there would seem to be no basis for a distinction between the meaning of the words of this promise when used by A as a gratuitous surety and the meaning of the same words when used by him as a principal obligor. But there is a just and rational connection between the facts of a gratuitous suretyship relation and the rules requiring scrupulous conduct on the part of both principal and creditor in so far as their conduct may tend to shift to the surety an ultimate loss which both creditor and principal know should in good conscience be borne by the principal. Therein is the proper sphere for the functioning of the doctrine.

\(^{37}\) *Supra*, p. 13.

\(^{38}\) See *Marshall v. Clark's Executors*, *supra*, p. 16 and note 22.
of strictissimi juris and of the traditional favoritism of the law for the surety.\(^{39}\)

(To Be Continued.)

\(^{39}\) (a) In Viner's Abridgment vol. 20, pp. 104, 105, under “Surety” is found the following: “(E) Surety favored, how; to enable him to recover his debt.” Then follows a collection of examples to show how the surety was favored in enforcing his claim against the principal for reimbursement.

(b) “(1) The contract of a surety is to be construed as any other contract—that is to say according to the intent of the parties—and the rules for its construction are not to be confused with the rule that sureties are favorites of the law and have the right to stand upon the strict terms of their obligations.

(2) It being determined what is the meaning of the contract, the sureties are entitled to stand upon the very terms of their undertaking,” *McMullen et al. v. United States*, 167 Fed. 460, 462.

(c) “He (a surety) has a right to stand upon the very terms of his contract and if he does not assent to any variation of it, and variation is made, it is fatal.” *Story in Miller v. Stewart*, 9 Wheat. 680, 701.

(d) “The question whether slight variations of risk shall discharge a surety from liability under the contract is often confused with questions of the interpretation of his promise, but should be considered separately.” *Williston on Contracts*, vol. 11, sec. 625, p. 1209.