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Suretyship-Surety's Defenses

SURETYSHIP — SURETY'S DEFENSES — Plaintiff bank offered defendant Meyers the position of cashier, but he informed the bank that he had had no banking experience and that he doubted his competency to act as cashier; nevertheless he was hired as cashier, and procured defendant surety company to execute a bond guaranteeing that he would "faithfully and honestly" discharge his duties as cashier. More than a year later it was discovered that his account was short about $1700. The trial court, in a suit upon the bond, found that Meyers had not appropriated any of the money to himself, but that the money was apparently lost as a result of his incompetency. *Held*, the surety company is not liable.[1]

The court holds that the guaranty that the principal would act faithfully was a guaranty of his fidelity and not of his competency. Although there is a conflict of authority on this point, it seems that the interpretation of the court in the principal case is a proper one. The Oregon court in considering the provision in a bond for the "faithful discharge of duty"

S. W. (2d) 974, 68 A. L. R. 1239; *Purnell v. Fooks*, 32 Del. 336, 122 Atl. 901; *Diamond Service Station v. Broadway Motor Co.*, 158 Tenn. 258, 12 S. W. (2nd) 705; *Davy v. State*, 130 Okla. 91, 265 Pac. 626, Blackwood Case approved; *John W. Snyder, Inc. v. Aker*, 134 Misc. Rep. 721, 236 N. Y. S. 28.

[7] *Bousquet v. Mack Motor Truck Co.*, 269 Mass. 200, 168 N. E. 800; *D. Q. Service Corp. v. Securities Loan & Discount Co.*, 210 Cal. 327, 292 Pac. 497; *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510.

[8] *John W. Snyder, Inc. v. Aker, supra*, note 6. See *Shaw v. Webb*, 131 Tenn. 173, 174 S. W. 273, 1915D L. R. A. 1141. Deals mainly with garage keepers' lien and in conjunction with it, see *Robinson Bros. Motor Co. v. Knight*, 154 Tenn. 631, 288 S. W. 725.

[9] *Clarke v. Johnson, supra* 7.

[10] *Twin City Motor Co. v. Rouzer Motor Co.*, 197 N. C. 371, 148 S. E. 461.

[11] *A. Meister & Sons Co. v. Harrison*, 56 Cal. App. 679, 206 Pac. 106.

[12] *The White Co. v. Bowen*, 84 Pa. Superior Ct. 484.

[13] *Hallman v. Dotham Foundry & Machine Co.*, 17 Ala. App. 152, 82 So. 642.

[14] 1929 Burns Supplement, 9844, which succeeded 1926 Burns, 9844, same as 1914 Burns Supplement 8294; 1926 Burns 10157; *Partlow-Jenkins Motor Car Co. v. Stratton*, 71 Ind. App. 122, 124 N. E. 470; *Atlas Securities Co. v. Grove*, 79 Ind. App. 144, 137 N. E. 570; *Bowen v. Kokomo Omnibus Co.*, 87 Ind. App. 245, 161 N. E. 298.

[15] *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615.

[1] *Sparta State Bank v. Meyers*, (Sup. Ct.) 177 N. E. 258, superseding the opinion in 165 N. E. 439.

interpreted this phrase to mean honestly and to the best of his ability.[2] The provision for "the faithful performance of his duty" has been held to be a stipulation not for the principal's infallability but for carefulness and honesty.[3] "Well and faithful" is a guaranty of honesty and not ability.[4] The provision "shall faithfully execute his duties", and "will well and faithfully execute his office" bind the surety only for the principal's fidelity and not for his skill.[5] The Appellate Court has held that the condition that the principal should "honestly and faithfully discharge his duties" is a guaranty of good faith only and not competency.[6] The cases construing "honestly" and "faithfully" as including competency have been criticized as changing the liability of the surety who in intelligible terms has indicated that it is not guaranteeing the competency of the principal.[7]

It is difficult to conceive how the bank is in a position to insist that the surety company guaranteed the competency of Meyers when the bank knew him to be incompetent. But assuming that the surety did guarantee his competency, was not the bank under a duty to disclose Meyer's incompetency to the surety? "If a material fact connected with the contract of suretyship, and directly affecting the surety's liability, and which might influence the sureties in entering into a contract, is purposely concealed from the surety in the interest of the creditor, such concealment, tho no inquiry is made by the sureties, amounts to a fraud upon them, and would discharge them from liability."[8] Certainly the competency of the principal would be a material fact within the meaning of the above test, and the court could arrive at the proper result without construing the meaning of the words used in the bond.

R. O. E.

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[2] *State v. Chadwick,* (1882) 10 Ore. 465.

[3] *Hoboken v. Evans,* (1865) 31 N. J. L. 342.

[4] *Union Bank v. Clossy,* (1813) 10 Johns. 269.

[5] *Alexandria v. Corse* (1822), 2 Cranch C. C. 363; *Bank of U. S. v. Brent,* (1826) 2 Cranch C. C. 696.

[6] *Brock v. Clarksburg Bank,* (1926) 85 Ind. App. 390, 154 N. E. 296.

[7] 1 Morse on Banks and Banking, 90.

[8] *Jungk v. Holbrook,* (1897) 15 Utah 198, 49 Pac. 305; *Springfield Engine and Thresher Co. v. Park,* (1891) 3 Ind. App. 173, 29 N. E. 444; *Wilson v. Monticello,* (1882) 85 Ind. 10; *Hier v. Harpster,* (1907) 76 Kans. 1, 90 Pac. 817; *Griswold v. Hayward,* (1891) 141 U. S. 260; *Franklin Bank v. Cooper,* (1853) 15 W. Va. 21; *Railton v. Mathews,* (1884) 10 Cl. & F. 934, 8 Eng. Rep. 993.