NOTES

Guaranty and Suretyship in Pennsylvania—An Attempt at Clarification

It has often been said that the concept of suretyship is one of the oldest of recognized legal relations.[1] In the days of simple barter and sale transactions, there was little confusion as to the rights and liabilities of this third party obligor, but with the developing complexities of modern commercial dealings, suretyship law has become greatly obscured by a confusion of terms and a corresponding inconsistency in the declaration of rights and liabilities.[2] Courts have varied in their use of the terms surety, guarantor, endorser and indemnitor, at times treating them as synonymous and on other occasions placing different meanings upon them. As a result, consequences have sometimes been attributed to each without regard to the separate factual situations.[3] Despite the various attempts on the part of commentators, courts, and text writers to formulate definitions of the various terms,[4] no satisfactory definitive solution has been found. That definition of terms is not a satisfactory solution of the problem is evidenced by the confusion among the various writers,[5] and by the seeming impossibility of framing definitions specific enough to deal with the hodge-podge of wording in loosely drawn contracts. The most satisfactory of the broad definitions adopted by courts and writers alike is that where the liability of the accommodating party is intended to be unconditional and co-extensive with that of the principal debtor, a suretyship relation arises, while where the liability is conditioned upon notice or proof of uncollectability against the principal debtor the relation is one of guaranty.[6] This latter type of party is most commonly known as a guarantor of collection.[7] However, even these categories are meaningless unless each is connected with a different set of consequences. The consequences attributed by the Pennsylvania courts to the above general categories will be discussed in a subsequent section of this Note.[8] It would seem unnecessary to use any established category since liability imposed by the terms of the contract is factually either unconditional or subject to the conditions imposed by the contract itself. But, such an ideal solution of the problem is also impossible because of the traditional and frequent usage of the terms surety and guarantor by both the courts

1. Lloyd, *The Surety* (1918) 66 U. OF PA. L. REV. 40; Arnold, *Primary and Secondary Obligations* (1925) 74 U. OF PA. L. REV. 36; Radin, *Guaranty and Suretyship* (1929) 17 CALIF. L. REV. 605.

2. ARANT, SURETYSHIP AND GUARANTY (1931) 13.

3. *Id.* at 20.

4. ARANT, *op. cit. supra* note 2, at 14; Radin, *supra* note 1, at 23; Cormack and McCarroll, *Suretyship and Guaranty* (1937) 10 So. CALIF. L. REV. 371; Arnold, *supra* note 1, at 41.

5. *Ibid.*

6. ARANT, *op. cit. supra* note 2, at 20.

7. *Id.* at 8. The usual conditions to liability of a guarantor of collection are (1) notice of default on the part of the principal obligor, and (2) proof of due diligence and uncollectibility as against the principal obligor. The Pennsylvania cases do not seem to be much concerned with the first of these conditions.

8. *Infra* p. 470.

and the parties to the contract. Thus, the most useful guides in this field of confusion are the above two definitions, and the extent to which the parties insert conditions in the contract will determine to what extent the relation will be treated as one of guaranty rather than of suretyship.

In 1913, the Pennsylvania legislature attempted to place a limitation on the broad definition set out above. It declared that "every written agreement . . . made by one person to answer for the default of another shall subject such person to the liabilities of suretyship, and shall confer upon him the rights incident thereto, unless such agreement shall contain in substance the words: 'This is not intended to be a contract of suretyship' . . .".[9] While the statute does not define any terms, it does imply the existence of at least two categories, guaranty and suretyship. It seems reasonable to assume, then, that the legislature intended to continue the use of the pre-existing categories created by the courts before the passage of the Act. The present discussion, therefore, first will be directed at an inquiry into conditions antedating the Act of 1913 in an effort to discern any settled rules of law and consistency or inconsistency in the use of terms; and thereafter, an examination of the cases following the Act will be made in order to determine the extent to which the former classifications have been abandoned and new definitions adopted.

Historical Development

The development of a definite distinction between the terms "guarantor" and "surety" had its beginning almost concurrently in the English Common Law and in America.[10] Although the earliest recorded case purporting to set up a distinction was decided in a Massachusetts court,[11] the Pennsylvania court soon followed suit. The use of the word "guarantor" in Pennsylvania is first found in 1822 in the case of *Gibbs v. Cannon*[12] which held that while lack of notice of default could be asserted as a defense by an endorser, such defense was not available to the "guarantor". Five years later, in *Rudy v. Wolf*,[13] the Court, while not using the term "guarantor", points out the difference between an absolute and a conditional engagement. In that case, it was decided that while an absolute engagement imposes a duty on the third party obligor to pay the debt at once if the principal debtor defaults, a conditional engagement subjects the third party obligor to a lesser duty, i. e., to pay the money on the insolvency of the principal debtor provided the creditor has used ordinary diligence[14] for collection. The theory of this case was adopted by the same court in 1831[15] and the conditional engagement was called a guaranty. Since that time, refinement and definition of this general theory, that a surety must pay if the debtor *does not* and a guarantor only if the debtor *cannot*, has constituted the bulk of the case law on the subject of suretyship and guaranty in

9. Pa. Stat. Ann. (Purdon, 1930) tit. 8, § 1.

10. Lloyd, *loc. cit. supra* note 1. But see Radin, *supra* note 1, at 618, to the effect that the distinction had its origin in Pennsylvania.

11. Hunt v. Adams, 6 Mass. 519 (1810). It is questionable whether this case really made a distinction.

12. 9 S. & R. 198 (Pa. 1822).

13. 16 S. & R. 79 (Pa. 1827).

14. Although the consequences of lack of ordinary diligence will be subsequently discussed, it might be well to point out here that it means an effort to collect against the principal debtor within a reasonable time after the debt becomes due. See *infra* p. 470.

15. Johnston v. Chapman, 3 P. & W. 18 (Pa. 1831).

Pennsylvania until 1913[16] when the legislature attempted to prescribe a general classification.[17]

Definition Prior to the Act of 1913

Since it was early apparent that the courts would give no conclusive effect to the words "guarantor" or "surety", as used in the obligation,[18] it was necessary to develop rules to determine whether the engagement was absolute or conditional. In some cases the distinction made little or no difference,[19] but in cases where the third party obligor set up the defense of lack of due diligence or lack of notice on the part of the creditor plaintiff, the distinction was essential.[20] Thus, the great body of the Pennsylvania case law on the subject is concerned with the establishment of the following tests for determining whether the obligation is one of guaranty or of surety.

(1) *The Wording of the Obligation*

The starting point in the field of definition of terms was the specific wording of the obligation itself,[21] its aim being to give as much effect as possible to the expressed intention of the parties.[22] At first, the courts decided whether or not certain words and combinations of words indicated an absolute or conditional liability, and, after a few years, such terms as "security for fulfillment",[23] "I will see the within paid",[24] "I will be responsible for",[25] and guaranty of payment "when due",[26] or "according to its terms" [27] became recognized as conclusive of absolute liability. And, by 1883, the court had adopted a policy of reviewing the specific obligations in the cases and attempting to determine why certain words were held to connote an absolute and some a conditional liability.[28] This led to the establishment of the most important and most interesting test developed by the courts, namely, the definiteness of the terms of the obligation.

(2) *The Definiteness of the Terms of the Obligation*

The rule generally stated by the courts in the early decisions was that if the terms of the obligation are made definite either by the main engagement or by the specific engagement of the third party obligor, the liability is absolute (surety). Otherwise, the liability is conditional (guaranty).[29] This doctrine was first promulgated in a Philadelphia District Court case in

16. Brown v. Brooks, 25 Pa. 210 (1855); Reigart v. White, 52 Pa. 438 (1866); Kramph's Ex'rs v. Hatz's Ex'rs, 52 Pa. 525 (1866); Bartholomay Brewery Co. v. Thomaier, 2 Pa. Super. 345 (1896); Supplee v. Herrmann, 16 Pa. Super. 45 (1901).

17. Pa. Stat. Ann. (Purdon, 1930) tit. 8, § 1.

18. Riddle v. Thompson, 104 Pa. 330 (1883). But see Johnston v. Chapman, 3 P. & W. 18 (Pa. 1831) indicating that the term "guarantee" has great effect.

19. Arant, *op. cit. supra* note 2, at 14.

20. *Supra* note 16.

21. Reigart v. White, 52 Pa. 438 (1866); Gardiner v. Lloyd, 110 Pa. 278, 2 Atl. 562 (1885).

22. Marberger v. Pott, 16 Pa. 9 (1851).

23. *Ibid.*

24. Ashton v. Bayard, 71 Pa. 139 (1872).

25. Amsbaugh v. Gearhart, 11 Pa. 482 (1849).

26. Supplee v. Herrmann, 16 Pa. Super. 45 (1901).

27. Campbell v. Baker, 46 Pa. 243 (1863).

28. Roberts v. Riddle, 79 Pa. 468 (1875).

29. Campbell v. Baker, 46 Pa. 243 (1863); Zahm v. First Nat'l Bank of Lancaster, 103 Pa. 576 (1883); McBeth v. Newlin, 15 W. N. C. 129 (Pa. 1884). This definition is open to question as a test because an engagement may be definite in terms, yet subject to specific conditions.

1836 [30] and later confirmed in 1863 by the Pennsylvania Supreme Court in the leading case of *Campbell v. Baker*.[31] In that case, however, absolute liability was designated not as a suretyship obligation but as an obligation of special guaranty, while the term for conditional liability was general guaranty. Even though this language occasionally recurs in the cases, it is now well settled that the term special guarantor and surety are one and the same thing, the effect of both being that the creditor does not have to proceed first against the principal debtor.[32] However, an examination of the factual situations in the early cases and the rule as stated in later cases [33] reveals that the rule is more specific than the above general statement. In all of the cases in which the general rule, i. e., as to absolute and conditional engagements, has been advanced, the definiteness of the time of default of the accommodating party's obligation has determined the absoluteness of the engagement. If the time is fixed in the writing signed by the accommodating party, it is clear that the obligation of the accommodating party becomes absolute at that time and the engagement is one of suretyship.[34] If the time of default is not fixed by the collateral writing and the principal contract is also indefinite as to the due date, the engagement is clearly one of guaranty.[35] Most litigation on this subject, however, concerns those cases in which the time of default is fixed in the principal obligation but not in the obligation of the accommodating party. The question then arises as to whether the wording of the collateral obligation shows an intent to become bound immediately on the default of the principal obligation. In construing the language of the various obligations, the courts have held that when the time of default of the main obligation is fixed, a collateral promise to pay the "within note when due",[36] a guarantee of punctual [37] or prompt [38] payment, or payment of "the within bond according to its terms" [39] constitutes a showing of sufficient definiteness to make the obligation one of suretyship. However, even though the time of default is fixed in the principal obligation, such promises as "I guarantee the payment of the within note for value received" [40] and "I hereby guaranty payment of the within note without protest" [41] have been held to create only a guaranty relation. Apparently, when the principal obligation is a demand note,[42] the showing of intent in the

30. Cochran v. Dawson, 1 Miles 276 (Pa. D. C. 1863). See also Grand Life Ins. Co. v. Finley, 1 Phila. 70 (Pa. 1850).

31. 46 Pa. 243 (1863).

32. Hartley Silk Mfg. Co. v. Berg, 48 Pa. Super. 419 (1911).

33. Campbell v. Baker, 46 Pa. 243 (1863); Homewood Peoples Bank v. Hastings, 263 Pa. 260, 106 Atl. 308 (1919); Butler Savings & Trust Co. v. Phillips, 79 Pa. Super. 318 (1922).

34. Riddle v. Thompson, 104 Pa. 330 (1883) ("guarantee" of payment in "one year after date").

35. Columbia Baking Co. v. Schissler, 35 Pa. Super. 621 (1908).

36. Campbell v. Baker, 46 Pa. 243 (1863). See also Hartley Silk Mfg. Co. v. Berg, 48 Pa. Super. 419 (1911) ("I will guarantee payment thereof should (*X*) not pay when due").

37. Drake v. Philadelphia & R. R. R. Co., 21 W. N. C. 122 (Pa. 1888).

38. Iron City Nat'l Bank v. Rafferty, 207 Pa. 238, 56 Atl. 445 (1903); McBeth v. Newlin, 15 W. N. C. 129 (Pa. 1884).

39. Roberts v. Riddle, 79 Pa. 468 (1875).

40. Mizner v. Spier, 96 Pa. 533 (1880). See also Iset v. Hoge, 2 Watts 128 (Pa. 1833) (guaranty of payment of the "above note").

41. Zahm v. First Nat'l Bank of Lancaster, 103 Pa. 576 (1883).

42. When a note is negotiable, there is some doubt in the early cases as to whether the common law principles of suretyship and guaranty or the law of negotiable instruments is controlling. A strong opinion in Snevily v. Eckel, 1 W. & S. 203 (Pa. 1841) holds that the former applies. A subsequent dictum, however, in Dunning v. Heller,

collateral writing does not have to be as specific as for a time obligation.[43] It has also been held that an obligation definite as to time will not be rendered indefinite by a clause which permits extensions of the obligation without the consent of or notice to the accommodating party.[44] Thus, the courts seem to like the test of definiteness. However, they purport to use it as synonymous with or as a refinement of the absolute and conditional test. This cannot be accurate because it overlooks the fact that a contract can be definite as to time and still be subject to conditions. The only virtue of the test of definiteness lies in the fact that it is comparatively easy to apply, but it is very questionable that it will in the majority of cases give true effect to the intent of the parties which in the last analysis is the real basis for making a distinction. Also, close situations will still arise as in *Butler Savings and Trust Co. v. Phillips*[45] which was one of the last cases to be decided by the Superior Court before the Act.[46] In that case, certain shareholders of a land company "guaranteed" a bond and mortgage, held by the land company, to the plaintiff bank. The terms of the bond and mortgage were definite and the amount for which each shareholder was to be liable was fixed by the agreement. The court held, however, that since the time when the promisor was to assume liability was indefinite, the contract was one of guaranty and the bank must first exhaust its remedy against the principal debtor. Probably, if it had been a demand note or if the words "when due" had been inserted after the "guaranty", the liability would have been construed to be one of surety.[47]

Out of this test of definiteness, the following special classifications have been developed:

(a) *Guaranties of future credit.* This group of cases especially is concerned with the question of notice of the acceptance of an offer to guarantee contracts which are to be completed from time to time in the future. In these cases, although the terms of the obligation are usually fixed, the promise itself is conditional in that it is a promise to be responsible for obligations to accrue in the future. The courts early placed these cases in a separate category and have been very strict in requiring notice of acceptance to be proved.[48] Notice is required even in those cases where the promise of "guaranty" has been given at the precedent request of the creditor or debtor.[49] Although the general language in these cases indicates that the

---

103 Pa. 269, 272 (1883) indicates that the latter controls. See Note (1924) 72 U. OF PA. L. REV. 296, 299. Recent cases on the subject apparently disregard the N. I. L. and apply the Act of 1913. Rochester Bank v. Fry, 294 Pa. 425, 144 Atl. 416 (1928); Bloomfield Trust Co. v. Trojanowski, 298 Pa. 61, 147 Atl. 847 (1929); Brock's Assigned Estate No. 2, 312 Pa. 18, 166 Atl. 782 (1933).

43. A demand note endorsed "I hereby guarantee payment of the within note and waive demand, protest and notice of protest on the same", was held to create a surety obligation in Homewood Peoples Bank v. Hastings, 263 Pa. 260, 106 Atl. 308 (1919) while a time note with substantially the same endorsement was held to create only a guaranty relation in Zahm v. First Nat'l Bank of Lancaster, 103 Pa. 576 (1883). Apparently *contra* to the *Zahm* case is Shaffstall v. McDaniel, 152 Pa. 598, 25 Atl. 576 (1893) where an endorsement of a time note "I guarantee the within note's payment" was held to be a surety obligation.

44. Westinghouse Elec. & Mfg. Co. v. Wilson, 63 Pa. Super. 294 (1916).

45. 79 Pa. Super. 318 (1922).

46. The transactions occurred in 1911. *Id.* at 319.

47. Campbell v. Baker, 46 Pa. 243 (1863); Homewood Peoples Bank v. Hastings, 263 Pa. 260, 106 Atl. 308 (1919).

48. Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205 (1900).

49. Kay v. Allen, 9 Pa. 320 (1848); Coe and Richmond v. Buehler, 110 Pa. 366, 5 Atl. 20 (1885).

liability of the so-called "guarantor" is conditional and that notice of acceptance is required, there is no square holding as to whether or not lack of due diligence on the part of the creditor would defeat a claim under an otherwise validly accepted contract. It is indicated, however, that there being a conditional or contingent obligation, the ordinary consequences of a "guaranty" obligation would apply.[50]

(b) *Endorsement of a lease.* This second sub-classification differs only slightly from the ordinary guaranty of future credit, but has been subjected to a much higher degree of liability.[51] The ordinary form of the endorsement, an agreement to be responsible for the true and faithful performance of the "within lease", was first held to impose only the conditional liability of guaranty and lack of due diligence was a defense.[52] However, in *Allen v. Hubert,*[53] decided in 1865, the court held an agreement to become "security" for the faithful performance of a lease to impose an absolute liability. Such a view is consistent with the earlier construction of the word "security".[54] Yet, in later cases construing the ordinary form of endorsement, *Allen v. Hubert* has been followed and generally the liability of suretyship is imposed without regard to the wording of the obligation.[55]

(3) *Consequences of the Distinction*

Up to this point, the discussion has been confined to a consideration of the tests used to differentiate between contracts of suretyship and those of guaranty. Only incidentally have the differing consequences of applying one or the other of the standard labels been mentioned. However, in order to show the reason for making the distinction and in order to compare the cases subsequent to the Act of 1913, it is necessary to determine the consequences of the two relations prior to the Act. The first and most important distinction is the requirement of due diligence in the guaranty relation. In other words, it has been generally held that a surety's liability arises immediately on the default of the principal debtor since the surety's engagement is absolute, while, on the other hand, the liability of a guarantor arises only after the creditor has exhausted his remedies against the principal debtor or has shown that such procedure would be fruitless.[56] The question of due diligence is one of fact for the jury and is usually proved by the showing of insolvency of the principal debtor and the exercise of a reasonable effort by the guarantee to prosecute his claim promptly.[57]

Next important of the distinctions is the requirement of notice of acceptance of the offer of guaranty. This requirement is important in

50. Gardiner v. Lloyd, 110 Pa. 278, 2 Atl. 562 (1885).

51. There seems to be no real distinction between a guaranty of future credit and an endorsement of a lease except that the latter is more formal and thus apparently more definite.

52. Gilbert v. Henck, 30 Pa. 205 (1858). This case was later overruled by Reigart v. White, 52 Pa. 438 (1866) and still later cited with approval by a lower court in Bickel v. Auner, 9 Phila. 499 (Pa. 1872).

53. 49 Pa. 259 (1865).

54. Marberger v. Pott, 16 Pa. 9 (1851).

55. Korn v. Hohl, 80 Pa. 333 (1876); Haynes v. Synnott, 160 Pa. 180, 28 Atl. 832 (1894); Supplee v. Herrmann, 16 Pa. Super. 45 (1901); Dreutlein v. Young, 45 Phila. C. C. 624 (Pa. 1917).

56. Johnston v. Chapman, 3 P. & W. 18 (Pa. 1831).

57. Hoffman v. Bechtel, 52 Pa. 190 (1866); National B. & L. v. Lichtenwalner, 100 Pa. 100 (1883) (Return of nulla bona to a fi. fa. is prima facie evidence of due diligence but not conclusive. Creditor is not obliged to pursue every claim his debtor may have especially where such claim is contingent and uncertain.).

Pennsylvania only in cases concerning guaranties of future credit since in cases where the guaranty is of an immediate obligation, the courts consider the guaranty as accepted when given.[58] The reasons usually asserted for requiring notice are that the ordinary rules of contract law must apply and the continuing offer of guaranty is not valid until accepted and notice given, and also, that the liability of the guarantor being only contingent, he is held less strictly accountable and should not be held liable if he has not received notice fixing the extent of his liability.[59]

A third distinction concerns the time of the running of the Statute of Limitations. Since the surety's obligation is considered as absolute and coexistent with that of the principal debtor, the statute is said to run from the maturity date of the note. The guarantor's obligation, on the other hand, being contingent, does not ripen into an actionable liability until the guarantee has exhausted his remedy against the principal debtor. Thus, the statute does not begin to run against the guarantor until after a reasonable time for the exercise of due diligence.[60]

The development in the commercial world of professional surety companies who, for a consideration, become third party obligors, was recognized by the courts as a distinct problem as early as 1910,[61] and the distinction between compensated and gratuitous accommodating parties is now firmly established in the Pennsylvania cases.[62] It is generally held that the rule of *strictissimi juris* is applied to gratuitous but not to compensated "sureties". This means that in many instances, acts of a creditor which might possibly be detrimental to the accommodating party will discharge the latter if gratuitous but if compensated there will be no discharge in the absence of proof of prejudice resulting therefrom.[63]

In summary then, it seems that there are only two types of accommodating parties recognized in the common law of Pennsylvania: a surety and a guarantor of collection. The surety's liability is absolute and ripens with that of the principal debtor while the guarantor of collection is liable only after the guarantee has proceeded with due diligence against the principal debtor.

The Act of 1913 and Its Effect

Although before the Act, the courts had pigeon-holed the law of suretyship into various standardized categories, the problem of definition in many cases was still confused by the wording of the instruments and many inconsistencies developed. The legislature, in attempting to standardize the definition and eliminate the existing confusion, passed the Act of 1913, which, apparently unwittingly, codified a doctrine enunciated in the early case of *Craddock v. Armor*.[64] This case held that "absence of apt words to indicate a contingent responsibility showed that the parties intended to be jointly bound" and the third party obligor was termed an immediate party and not a guarantor. The Act, however, instead of ending the confusion of terms, seems to have set up a new series of problems: (1)

58. Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205 (1900).
59. See Ross v. Leberman, 298 Pa. 574, 148 Atl. 858 (1930); Sullivan Smythefield Co. v. Welsh, 91 Pa. Super. 413 (1927). See also Sullivan, *Suretyship Law in Pennsylvania* (1930) 5 Temp. L. Q. 66.
60. Homewood Peoples Bank v. Hastings, 263 Pa. 260, 106 Atl. 308 (1919).
61. Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623 (1910).
62. Phillips v. American Liability & Surety Co., 309 Pa. 1, 162 Atl. 435 (1932).
63. *Ibid.*
64. 10 Watts 258 (Pa. 1840).

What are the consequences of suretyship under the Act? (2) How much is required to negative the presumption of suretyship? (3) Is the Act conclusive? The remainder of this discussion will be devoted to a consideration of these problems in an attempt to determine whether they have been satisfactorily answered by the courts.

(1) *The Consequences of Suretyship Under the Act of 1913*

It is natural that, inasmuch as the cases before the Act had set up various liabilities arising from calling the obligation one of suretyship, those consequences should be attributed to all cases after the Act which by the terms of the Act must be designated as imposing a suretyship relation. Thus, it is found that the decisions uniformly hold that the creditor need not prove due diligence or the insolvency of the principal debtor,[65] nor need he first proceed against the collateral.[66] But, as to the question of requiring notice of the acceptance of a guaranty of future credit which under the Act might have to be called a surety transaction, great confusion remains. The closest case decided since the Act is the Superior Court case of *Sullivan Smythefield Co. v. Welsh* [67] in which the obligation was as follows: "The purchases of (the debtor) from you this week I will personally guarantee.". The court held this to constitute a suretyship relation under the Act and that it was unnecessary to decide the question of notice of acceptance. However, there is some language to the effect that the reasons for requiring such notice still exist.[68] The law as to the commencement of the running of the Statute of Limitations is unchanged and once the relation is found to be a surety obligation under the Act, the Statute is applied as before.[69]

(2) *Negativing the Presumption of Suretyship*

The Act declares that the obligation shall be construed to be one of suretyship unless it "shall contain in substance the words: 'This is not intended to be a contract of suretyship'." [70] However, the cases give little indication of an attempt to set up a guaranty or less than surety obligation by compliance with the terms of the Act. The only case directly in point is *Waber's Estate,*[71] in which the obligation was signed by *X* as builder and owner and by *Y* and *Z* as "guarantors only". The court held that this was not sufficient compliance with the Act and thus, *Y* and *Z* were sureties. Apparently, a literal compliance with the wording of the Act is necessary.

(3) *Conclusiveness of the Act*

Although there is no specific language in the cases as to the conclusiveness of the Act, it is interesting to note that there are very few cases which are based solely on the authority of the Act.[72] In fact, in most of the cases, the court first reviews the common law decisions setting up distinctions between guaranty and suretyship, and then, after making its determination,

65. Miners State Bank v. Auksztokalnis, 283 Pa. 18, 128 Atl. 726 (1925); Brock's Assigned Estate No. 1, 312 Pa. 7, 166 Atl. 778 (1933).
66. Homewood Peoples Bank v. Cull, 72 Pitts. L. J. 986 (Pa. 1924).
67. 91 Pa. Super. 413 (1927).
68. *Id.* at 417.
69. Rochester Bank v. Fry, 294 Pa. 425, 144 Atl. 416 (1928).
70. PA. STAT. ANN. (Purdon, 1930) tit. 8, § 1.
71. 20 Pa. D. & C. 490 (1933), *aff'd*, 317 Pa. 497, 177 Atl. 51 (1935).
72. Thommen v. Aldine Trust Co., 302 Pa. 409, 153 Atl. 750 (1931); Halpern v. Axelrod, 120 Pa. Super. 352, 183 Atl. 94 (1936); Smith v. Strickler, 123 Pa. Super. 181, 186 Atl. 369 (1936).

cites the Act.[73] In none of these cases, however, has the common law decision been found to be at variance with the holding under the Act.

There are three Supreme Court cases in which the Act has not been cited and the distinction between guaranty and suretyship made on common law grounds. The first of these cases was decided in 1926.[74] It involved a writing on the back of a demand note and the wording of the obligation was as follows: "guarantee the payment of the (within note) at maturity, waiving protest, demand, notice and all defenses arising out of lack of diligence in enforcing payment.". The court decided that this being an agreement to pay at maturity was a contract of surety.

More surprising and of much greater significance is the case of *League Island Building and Loan Association v. Doyle,*[75] decided in 1936. In that case, the Supreme Court not only did not cite the Act of 1913 but decided that the relationship was one of guaranty and lack of due diligence was a defense. The obligation was worded: if the creditor "should at any time suffer any loss by reason of (the) loan (the obligor will) hold (himself) responsible for the same.".[76] The effect of the Act of 1913 was the main point of contention in the brief of the accommodating party. It was there argued that "the statute cannot change the nature of a contract. If our contract is one of guaranty, that is to say, conditional guaranty, this statute cannot make it one of absolute guaranty, because it is fundamental that the parties can make any contract they see fit." [77] The brief then cited *Purdy v. Massey* [78] for the proposition that the covenants in a bond should be construed to mean what the parties intended. The court in its opinion in the *League Island* case, deciding that the contract was one of guaranty, did not mention the Act of 1913 or the contention of the "guarantor" as to its effect. It did, however, cite with approval *Purdy v. Massey,* arguing in part that "The words used in the contract . . . leave no one in doubt as to what the parties intended. There was no definite date set when the liability was to accrue except that it was to accrue when the (guarantee) should 'suffer any loss by reason of (the) loan'." [79] The implications of this case are great. It seems to indicate that if the contract is one of "guaranty" judged by the test of definiteness, the Act of 1913 does not apply. Perhaps it means that an agreement to be responsible for any loss is not an agreement to answer for the default of another.[80] But, all this can be nothing more than conjecture because of the vague language of the opinion. However, it is very evident that the Act of 1913 can in no sense be said to be conclusive and the common law tests are still of great importance in affixing a label to the relationship.

In a case decided in 1938, *Putnam v. Pittsburg Ry.*,[81] the obligation involved was "a guaranty" of the prompt payment of the principal and

73. Brock's Assigned Estate No. 1, 312 Pa. 7, 166 Atl. 778 (1933); Cohen v. Bank of Phila., 102 Pa. Super. 279, 156 Atl. 631 (1930).

74. Lincoln Bank v. Gem City Wholesale Co., 286 Pa. 421, 133 Atl. 554 (1926).

75. 323 Pa. 287, 185 Atl. 636 (1936).

76. *Id.* at 288, 637.

77. Brief of Appellee, Jan. Term, 1935, No. 466, at p. 6.

78. 306 Pa. 288, 159 Atl. 545 (1932).

79. 323 Pa. 287, 290, 185 Atl. 636, 638.

80. See Roberts Trust Estate, 316 Pa. 545, 175 Atl. 869 (1934) where the following agreement was involved: *X* deposited money with *Y* Bank as trustee, *Y* Bank agreeing to invest and reinvest and on demand of *X* to pay back the *res* in cash. The Supreme Court held this not to be a suretyship obligation because it was the bank's own obligation and not an agreement to answer for the default of another.

81. 330 Pa. 210, 199 Atl. 211 (1938).

interest of bonds as they "shall become due and payable". Again, the court neglected to cite the Act and held that the obligation *may* be one of surety notwithstanding the use of the word "guaranty".[82]

CONCLUSION

It is evident from the above discussion that the Act of 1913 has not eliminated the confusion in the surety and guaranty cases in Pennsylvania. Further, it is questionable that it has helped the problem of definition. With the tendency in the more recent cases to cite the Act merely in passing or to totally disregard it, there remains some question as to how conclusive this legislative prescription may be. The statute has at most merely carried forth the categories used prior to its enactment. The same confusion and the same problems continue to exist. The statute does attempt to lay down a test which is reasonably explicit and based on the wording of the contract. Thus, one would expect that in all of the cases arising since the statute the courts would address themselves to the following statutory mandate:

> ". . . every written agreement . . . made by one person to answer for the default of another shall subject such person to the liabilities of suretyship, and shall confer upon him the rights incident thereto, unless such agreement shall contain *in substance* the words: 'This is not intended to be a contract of suretyship' . . ." [83]

This test has not been applied as effectively as it might be and the *League Island* case strongly indicates that in some cases it will not be applied at all. The statute could be made more effective by defining the terms "surety" and "guarantor" and by expressing the consequences arising therefrom. Until that is done and until the problem of application created by the *League Island* case is clarified, the law of suretyship in Pennsylvania will remain in a state of confusion even greater than that existing prior to the enactment of the statute.

R. H. S.

---

82. There are a number of cases in which the distinction is not important where the courts still use "guarantee" language. See, General Motors Acceptance Corp. v. Foley, 311 Pa. 477, 166 Atl. 909 (1933) (use of "ejusdem generis" rule to determine the extent of liability under the contract); Globe Indemnity Co. v. McCullom, 313 Pa. 135, 169 Atl. 76 (1933); Talcott v. Levy, 123 Pa. Super. 94, 186 Atl. 251 (1936) (question of cancellation); Quinto v. Stein, 123 Pa. Super. 109, 186 Atl. 280 (1936) (release); *In re* Rittenhouse Hotel, 31 Pa. D. & C. 533 (1938).

There is also a group of cases involving the distinction between surety and indemnity against loss, the latter being sometimes loosely referred to as a guaranty. The consequences of each relation differ only as to the amount of damages awarded, the damages for the breach of an indemnity against loss being merely compensation for the loss while the damages for a breach of the surety relation are measured by the cost of completion. These cases are restricted to professional sureties on construction contracts. See Purdy v. Massey, 306 Pa. 288, 159 Atl. 545 (1932).

83. PA. STAT. ANN. (Purdon, 1930) tit. 8, § 1 (italics supplied).