

6-1-1953

Surety – Effect of Premature Payments on Surety Bond

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Recommended Citation

Michael H. Kramer, *Surety – Effect of Premature Payments on Surety Bond*, 7 U. Miami L. Rev. 590 (1953)
Available at: <https://repository.law.miami.edu/umlr/vol7/iss4/20>

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of unjust enrichment. It is also interesting to note that *In re Taylorcraft Aviation Corporation* is cited as being a case involving a similar mechanics' lien law, reaching substantially the same conclusion as did the Florida Supreme Court. There was, however, no mention of *United States v. Security Trust & Savings Bank*²¹ except as a citation to Section 3672 of the United States Code.

The court, in deciding the principal case, has sought to give the materialman every conceivable advantage because of its philosophical approach to the problems of unjust enrichment and the necessity of the laborer and materialmen being rewarded for their efforts. Nevertheless, we are forced to decide legal questions, not alone according to the dictates of our consciences, but also with great regard for the written laws which have been the cause of the dispute and which should be the guide to its final resolution.

For this reason it is important to recognize that although the court used a substantial number of decisions to support its conclusion, all of these cases were in state and lower federal courts, and every one of them preceded the decision in *United States v. Security Trust & Savings Bank*.²² From the logic which the highest court in the land used in that decision, we may reasonably anticipate that a new trend may have been initiated to give the federal tax lien somewhat greater strength in similar future cases.

Murray D. Shear

SURETY—EFFECT OF PREMATURE PAYMENTS ON SURETY BOND

In a suit for indemnification by the owner (obligee), the contractor's surety pleaded that the owner's premature payments were a material deviation from the contract, and constituted a discharge. The trial court awarded summary judgment to the defendant surety. *Held*, a compensated surety is discharged only when the owner's deviation from the contract results in injury to the surety, and the discharge is limited to the extent of such injury. The fact of the alleged deviation and its extent is a question for the jury and precludes an award of summary judgment. *Gibbs v. Hartford Accident and Indemnity Co.*, 62 So.2d 599 (Fla. 1952).

Prior to the advent of the corporate surety late in the nineteenth century, sureties enjoyed a favored position in the eyes of the law,¹ and the law of suretyship was characterized by the rule of *strictissimi juris*.² But the

20. *In re Taylorcraft Aviation Corp.*, 168 F.2d 808 (6th Cir. 1948).

21. *United States v. Security Trust & Savings Bank*, 340 U.S. 47 (1950).

22. *Ibid.*

1. Note, 15 IOWA L. REV. 470 (1930).

2. *United States v. Freel*, 92 Fed. 299, (C.C. E.D. N.Y. 1899), *aff'd*, 99 Fed. 237

considerations that led to the invocation of that rule are not applicable to the corporate surety,³ and all jurisdictions, with the notable exception of Texas,⁴ now draw distinction between accommodation and compensated sureties.⁵ The judiciary has recognized that a corporate surety is similar to an insurer, and should not be allowed to collect premiums and, by a mere technicality, avoid the risks upon which the premiums are based.⁶ This has led to the development of the general rule that a deviation from the contract must be material in order to discharge a corporate surety.⁷

Most courts determine the "materiality" of such deviations by an inquiry into the results flowing therefrom — if the surety suffers injury or prejudice the deviation is "material" and will release the surety.⁸ A few of these courts have found that the premature payments did, in fact, benefit rather than prejudice the surety, and therefore, did not operate as a release.⁹ The majority, however, consider premature payments necessarily prejudicial to the surety because such payments reduce the incentive of the contractor and destroy the security that the withheld payments were intended to create.¹⁰ Generally, these courts limit the surety's release to the extent of the prepayments.¹¹

Some courts, however, determine the "materiality" of the obligee's deviation by the extent to which it operates to alter the contract. In the

(2d Cir. 1900); *Gato v. Warrington*, 37 Fla. 542, 19 So. 883 (1896); *Lange Co. v. Freeman*, 13 S.W.2d 1092 (Ct. of App., Mo. 1929); *Welch v. Hubschmitt Co.*, 61 N.J. L. 57, 38 Atl. 824 (Sup. Ct. 1897); *Lyons v. Kitchell*, 18 N.M. 82, 134 Pac. 213 (1913).

3. Accommodation sureties usually undertake their obligations poorly informed as to the nature and extent, and sign contracts prepared by the obligee. Corporate sureties, on the other hand, undertake an obligation only after careful investigation, and their attorneys prepare carefully drafted contracts for the signature of the obligee. See *Hill v. American Surety Co. of N. Y.*, 200 U.S. 197, 202 (1906); *Topeka v. Federal Union Surety Co.*, 213 Fed. 958, 962 (8th Cir. 1914); *Rule v. Anderson*, 160 Mo. 347, 358, 142 S.W. 358 (1911).

4. *Lonegan v. Trust Co.*, 101 Tex. 63, 104 S.W. 1061 (1907).

5. See note 1 *supra*; *Guaranty Co. v. Pressed Brick Co.*, 191 U.S. 416 (1903); *Barton v. Title Guaranty & Surety Co.*, 192 Mo. 561, 183 S.W. 694 (1916); *Trustees of Methodist Episcopal Church v. Equitable Surety Co.*, 269 Pa. 411, 112 Atl. 551 (1921).

6. *American Surety Co. v. Pauly*, 170 U.S. 133 (1898); *United States Fidelity & Guaranty Co. v. United States*, 178 Fed. 692 (3d Cir. 1910); *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690 (4th Cir. 1908); *Brown v. Title Guaranty & Surety Co.*, 232 Pa. 337, 81 Atl. 410 (1911).

7. *Pickins County v. National Surety Co.*, 13 F.2d 758 (4th Cir. 1926); *National Surety Co. v. Lincoln County*, 238 Fed. 705 (9th Cir. 1917); *Illinois Surety Co. v. Huber*, 57 Ind. 408, 107 N.E. 298 (1914); *Bross v. McNicholas*, 66 Ore. 42, 133 Pac. 782 (1913); *Brown v. Title Guaranty & Surety Co.*, 232 Pa. 337, 81 Atl. 410 (1911).

8. *Y. M. C. A. v. Fidelity & Guaranty Co.*, 90 Kan. 332, 133 Pac. 894 (1913); *St. John's College v. Aetna Indemnity Co.*, 201 N.Y. 335, 94 N.E. 994 (1911); *Brown v. Title Guaranty & Surety Co.*, 232 Pa. 337, 81 Atl. 410 (1911).

9. *National Surety Co. v. Lincoln County*, 238 Fed. 705 (9th Cir. 1917); *Canton v. Globe Indemnity Co.*, 201 App. Div. 820, 195 N.Y. Supp. 445 (3d Dep't 1922); *Maryland Casualty Co. v. Eagle River School District*, 188 Wis. 520, 205 N.W. 926 (1925).

10. *American Bonding Co. v. United States*, 233 Fed. 364 (3d Cir. 1916); *Fidelity & Deposit Co. v. Agnew*, 152 Fed. 955 (3d Cir. 1907); *Fels & Co. v. Massachusetts Bonding & Ins. Co.*, 48 Pa. Super. 27 (1911).

11. *Globe Indemnity Co. v. Southern Pac. Co.*, 30 F.2d 580 (2d Cir. 1929); *State*

case of premature payments by the obligee to the surety's principal, if such payments are substantial, these courts hold that the contract has been materially altered, and they grant the surety a full release.¹²

The Florida Supreme Court, in this case of first impression, has committed itself to the view espoused by the weight of authority — that a corporate surety will be discharged only by a deviation from the contract which results in injury to the surety, and then only to the extent of such injury. However, by its dicta and the cases cited therein,¹³ it is apparent that the court does not take cognizance of the inherently prejudicial nature of premature payments, *i.e.*, constituting a release of security.¹⁴

In this writer's opinion, the most cogent reasoning supports the proposition that premature payments constitute a release of security. Taking this view, it is unnecessary to inquire, as this court did, into the question of *actual* damage. For corporate sureties, though not deserving of the favoritism accorded their "simon-pure" predecessors, are nonetheless entitled to the benefit of the express provisions in their contracts. If the obligee disposes of security which, under the contract, he is bound to hold for the benefit of the surety, he has certainly damaged that surety — at least, to the extent of the unauthorized payments.

Michael H. Kramer

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION

Appellee sought an injunction against proceedings by the Florida State Board of Architects to revoke his architect's certificate. He claimed immunity from such a proceeding under a statute prohibiting prosecution, penalty or forfeiture against any person who testifies before any court in a case involving violation of the statutes against bribery.¹ *Held*, a proceeding to revoke appellee's certificate amounts to a prosecution to effect a penalty or forfeiture as contemplated by the statute. *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952).

The privilege against self-incrimination arose in American law shortly before the formation of the Union² and is firmly established today by judicial determination.³ Before the adoption of the Constitution five

ex rel Union Indemnity Co. v. Shain, 334 Mo. 153, 66 S.W.2d 102 (1933); Barton v. Title Guaranty & Surety Co., 192 Mo. 561, 183 S.W. 694 (1916); Crouse v. Stanley, 199 N.C. 186, 154 S.E. 40 (1930); St. John's College v. Aetna Indemnity Co., 201 N.Y. 335, 94 N.E. 994 (1911).

12. *Globe Indemnity Co. v. United Ry.*, 272 Fed. 607 (3d Cir. 1921); *First National Bank v. Fidelity & Deposit Co.*, 145 Ala. 335, 40 So. 415 (1906); *Meyer v. Standard Accident and Ins. Co.*, 114 N.J.L. 483, 177 Atl. 255 (1935); *Lyons v. Kitchell*, 18 N.M. 82, 134 Pac. 213 (1913).

13. See note 9 *supra*.

14. See note 10 *supra*.

1. FLA. STAT. § 932.29 (1951).

2. See 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

3. *People v. Newmark*, 312 Ill. 625, 144 N.E. 338 (1924); *People v. Spain*, 307