

William & Mary Law Review

Volume 34 (1992-1993)
Issue 4 *Symposium: The Restatement of
Suretyship*

Article 2

May 1993

Symposium Introduction: The Restatement of Suretyship

Geoffrey C. Hazard Jr.

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Commercial Law Commons](#)

Repository Citation

Geoffrey C. Hazard Jr., *Symposium Introduction: The Restatement of Suretyship*, 34 Wm. & Mary L. Rev. 985 (1993), <https://scholarship.law.wm.edu/wmlr/vol34/iss4/2>

Copyright c 1993 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

William and Mary Law Review

VOLUME 34

SUMMER 1993

NUMBER 4

SYMPOSIUM: THE RESTATEMENT OF SURETYSHIP INTRODUCTION

GEOFFREY C. HAZARD, JR.*

It is welcome that the *William and Mary Law Review* has devoted this issue to the subject of suretyship law, and specifically to the *Restatement (Third) of Suretyship* now being formulated by the American Law Institute. It is a correspondingly welcome opportunity to provide an introduction to these presentations.

The background of the emergent *Restatement of Suretyship* is explained in detail in the article by Donald Rapson.¹ As he notes, the subject of suretyship was one element of an earlier product of the ALI's restatement work, the *Restatement of Security*² under the Reportership of Professor John Hanna. Although the work of Professor Hanna was of very high quality, the subject of suretyship remained in obscurity, as did the *Restatement of Security*³. That obscurity has persisted notwithstanding the subject's great practical importance and its technical subtlety. The present *Restatement* project restores the subject to its deserved place.

* Director of the American Law Institute; Sterling Professor of Law, Yale University.

1. Donald J. Rapson, *History and Background of the Restatement of Suretyship*, 34 WM. & MARY L. REV. 989 (1993).

2. RESTATEMENT OF SECURITY (1941).

3. See Rapson, *supra* note 1, at 990 n.6.

As demonstrated by the articles in this Symposium, the law of suretyship is important and interesting in at least three dimensions. One is that of practical application; another is that of the internal coherence of this body of law; and a third is the relationship between suretyship law, as a body of law, and other bodies of private law

The practical applications of suretyship law are addressed in the papers by Messrs. Black, Leo, and Reynolds.⁴ I can attest from perusal of their articles, and as well from their participation in the Advisory Committee for the project, that these practitioners are well informed about the field, appreciative of the practical importance of well-stated law, and thoughtful in their suggestions for clarifying the black-letter formulations. Here, as in their contributions in the Advisory Committee, they demonstrate the intellectual and critical contributions that lawyers can make to the development of the law. These contributions deserve special acknowledgment, in a day when that aspect of being a practitioner is sometimes ignored. In this connection, it is worth noting that the Associate Reporter for the Suretyship project, Daniel Mungall of Philadelphia, has acquired his substantial learning in the field through the medium of law practice rather than academic study.

The internal coherence of suretyship law is addressed by Professors Alces and Beard.⁵ As they recognize, the legal relations in suretyship are the product of contract, in the sense that they result from consensual arrangement. However, to call an arrangement "contractual" only begins the analysis. No contractual arrangement can fully define its own terms; many contracts arise from rudimentary expressions of assent, leaving it to the law to govern the details if dispute arises; and even quite detailed contracts depend upon myriad unspecified presuppositions, such as the law of bankruptcy and the law of business associations. This is what is meant by saying that the law is a "seamless web."

4. See James A. Black, Jr., *Miscellaneous Surety Bonds and the Restatement*, 34 WM. & MARY L. REV. 1195 (1993); T. Scott Leo, *The Construction Contract Surety and Some Suretyship Defenses*, 34 WM. & MARY L. REV. 1225 (1993); Hugh E. Reynolds, Jr. & James Dimos, *Fidelity Bonds and the Restatement*, 34 WM. & MARY L. REV. 1249 (1993).

5. See Peter A. Alces, *Reconsidering Consideration in the Restatement (Third) of Suretyship*, 34 WM. & MARY L. REV. 1053 (1993); D. Benjamin Beard, *Suretyship on the Fringe: Suretyship by Operation of Law and by Analogy*, 34 WM. & MARY L. REV. 1157 (1993).

Nevertheless, in comprehending the web of the law, it is necessary to mark out sectors and examine their internal structure. A restatement involves this kind of demarcation and internal analysis and requires an academic viewpoint in the classic sense, i.e., a conception of the law as a system of concepts. Whereas the practitioner compares the law's lexicon with the real world, an academic analysis compares words and concepts in one part of the law's lexicon with those in other parts of the same lexicon. Professor Alces thus explores the meaning of the contractual concept of "consideration" as applied to a suretyship contract.⁶ Professor Cohen similarly explores whether the concept of "defense" means the same thing when invoked by an obligor as it does when invoked by a surety.⁷

A third dimension of legal analysis compares one area of the law with another, in both practical and conceptual terms. In this Symposium, Professors Boss and McLaughlin make these kinds of comparisons between suretyship and letters of credit, standby and otherwise.⁸ It is familiar that legal evolution results in significant differences in the legal rules governing transactions that are substantially alike from an economic or social viewpoint. A classic anomaly, for example, is that the statute of limitations for an economic injury is typically longer if the wrong is classified as contract than if it is classified as a tort, unless the wrong is classified as trespass to land, in which case a longer statute of limitations applies. Professors Boss and McLaughlin explore similar anomalies in this field of the law. Identifying such anomalies, and seeking to rationalize them, is another fundamental task for the academic analyst, as well as for the judiciary.

A restatement project brings all these perspectives to bear—practice, academic analysis, judicial responsibility. In the hands of skillful Reporters and Advisers, the product is an illuminating integration of practical, textual, and comparative analysis. Observers of the progress of the *Restatement of Suretyship* have thought

6. See Alces, *supra* note 5.

7. Neil B. Cohen, *Striking the Balance: The Evolving Nature of Suretyship Defenses*, 34 WM. & MARY L. REV. 1025 (1993).

8. See Amelia H. Boss, *Suretyship and Letters of Credit: Subrogation Revisited*, 34 WM. & MARY L. REV. 1087 (1993); Gerald T. McLaughlin, *Standby Letters of Credit and Guaranties: An Exercise in Cartography*, 34 WM. & MARY L. REV. 1139 (1993).

that it is achieving a high standard, an assessment that commentaries in this Symposium indicate is correct. The authors of these commentaries have made substantial contributions of like kind.