1937

The Distinction Between Surteyship and the Guaranty in States Having the Field Code Provisions

Joseph M. Cormack
William & Mary Law School

Neil G. McCarroll

Repository Citation
http://scholarship.law.wm.edu/facpubs/1663

Copyright © 1937 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/facpubs
SOUTHERN CALIFORNIA LAW REVIEW

THE DISTINCTION BETWEEN SURETYSHIP AND GUARANTY IN STATES HAVING THE FIELD CODE PROVISIONS

JOSEPH M. CORMACK* AND NEIL G. MC CARROLL**

SECTION TABLE OF CONTENTS PAGE

I. The Statement of the Distinction ...................................................... 371
II. The Code Provisions in General ........................................................ 381
III. The Role of Expressio Unis ............................................................. 383
IV. Effects of the Distinction ............................................................... 388
1. Parol Evidence ..................................................................................... 388
2. Statute of Frauds .................................................................................. 389
3. Knowledge or Consent of Principal .................................................... 389
4. Separate Consideration ........................................................................ 389
5. Statement of Consideration ............................................................... 390
6. Construction ......................................................................................... 390
7. Date of Maturity ................................................................................... 392
8. Compensated Secondary Parties .......................................................... 392
9. Notice of Acceptance .......................................................................... 393
10. Defenses of Principal .......................................................................... 393
11. Alterations .......................................................................................... 394
12. Release of Security .............................................................................. 395
13. Notice of Default .................................................................................. 395
14. Request to Proceed Against Principal ................................................ 396
15. Performance and Tender ..................................................................... 396
16. Limitation of Actions .......................................................................... 397
17. Joinder With Principal ........................................................................ 397
18. Proceeding First Against Security to Creditor from Other Parties ...... 398
19. Attachment .......................................................................................... 401
20. Conclusiveness of Judgments ............................................................... 402
21. Equitable Remedies ............................................................................ 403
22. Negotiable Instruments ....................................................................... 403
23. Summary of Effects ............................................................................ 404
V. Proposed Codificatory Abolition ......................................................... 405

I. The Statement of the Distinction

The provisions of the Field Civil Code1 covering the subjects of surety-

* [Professor of Law, University of Southern California.]
** [Member of the Los Angeles Bar; LL.M., University of Southern California, 1936.]

The authors desire to acknowledge their indebtedness to the following professors of law who have examined the article in proof: Clark Y. Gunderson; Maurice H. Merrill; George E. Osborne; and Max Radin. Full responsibility for all statements is retained by the authors.

1 David Dudley Field and Alex. W. Bradford, The Civil Code of the State of New York, Reported Complete by the Commissioners of the Code (Albany, 1865), §§1534-1572. This code will be cited as Field. Letters of credit are included in the
ship and guaranty are in force in five States: California, Montana, North Dakota and South Dakota and Oklahoma. The codification of the two subjects vitally affects the distinction between them, and the situation in these States merits separate treatment. Other writers have discussed ably the history of the distinction, its origin in the "whimsy of a Massachusetts judge in a decision a century ago," and its nature where not reduced to statutory form. For refreshment of recollection, and to serve as a basis of comparison, the nature of the distinction as developed in the States not having the Field Code provisions should be noted briefly. Professors Radin and Merrill have summarized the various text and judicial statements as follows:

"a. A surety is bound upon the same contract or instrument with the principal.

"A guarantor is bound upon a different contract or instrument from that of the principal.

"b. A surety usually is not discharged either by the creditor's indulgence to the principal or by want of notice of the principal's default.

"A guarantor may be discharged by indulgence to the principal and may be, or is usually, released by want of notice of the principal's default.

"c. Principal and surety, being bound upon the same obligation, may be sued jointly.

"The guarantor, being bound by a separate contract, may not be joined in suit with his principal.

"d. Suretyship is a primary and direct undertaking.

"Guaranty is secondary and collateral.

"e. 'The Statute of Frauds applies to [the surety's] undertaking, whereas it is inapplicable if he is strictly a joint promisor, though he is also a surety.'

chapter entitled Suretyship, being covered by §§1573-1581, but will not be treated in this study, or included in citations of current codes.

In quoting the code, omission of the titles of sections will not be noted. The section titles did not appear in the Field Code, but were introduced in the California Civil Code of 1872, adopting the Field Code provisions. Section titles appear in the other States which now have the Field Code provisions, but are different in each State, and will not be referred to hereafter.

The Field Code was never adopted in New York, although prepared for the legislature of that State.

2 Cal.Civ.Code (1935), §§2787-2854. This code will be cited in the text and footnotes by giving the numbers of the sections, without reference to the code.

3 Mont.Rev.Code (1935), §§8171-8209. This code will be cited as Mont.

4 N.D.Comp.Laws (1913), §§6651-6689. These statutes will be cited as N.D.

5 S.D.Comp.Laws (1929), §§1474-1512. These statutes will be cited as S.D.

6 Okla.Comp.Stats.Ann. (1921), §§5123-5161. These statutes will be cited as Okla.

7 Radin, Guaranty and Suretyship, 17 Cal.L.Rev. 605 (1929), 18 Cal.L.Rev. 21 (1929).


9 Radin, Guaranty and Suretyship, 17 Cal.L.Rev. 605 (1929), 18 Cal.L.Rev. 21 (1929); Merrill, Contribution Between Sureties and Guarantors, 2 Idaho L.Jour. 1 (1932). Consult, generally, Morgan, The History and Economics of Suretyship, 12 Corn.L.Quar. 153, 487 (1927). No detailed examination of the effects of the
"f. The surety undertakes to pay the debt of another.
"The guarantor undertakes to pay if the principal does not or cannot.
"g. The surety promises to do the same thing which the principal undertakes.
"The guarantor promises that if the principal does not perform his agreement, he, the guarantor, will do it for him.
"h. The liability of the surety is immediate and starts with the agreement.
"The liability of the guarantor is contingent, at the inception of the agreement, and first becomes absolute upon the principal's default.
"i. The surety undertakes to pay if the principal does not.
"The guarantor undertakes to pay if the principal cannot.
"j. The surety is an insurer of the debt.
"The guarantor is an insurer of the debtor's solvency.
"k. If consideration moves wholly to the principal, the contract is one of suretyship.
"If consideration is in whole or in part for the benefit of the intercessor, the contract is one of guaranty.
"l. If the contract defines the time when the promiser is to assume liability for the debt, his obligation is one of suretyship.
"If the contract fixes no time at which the promiser is to assume liability for the debt, his obligation is one of guaranty."}

Through a process of elimination and consolidation, Professor Merrill has evolved from the foregoing the following briefer summary of the criteria:

"1. A surety is bound upon the same contract or instrument with the principal.
"A guarantor is bound upon a different contract or instrument.  

"2. The surety undertakes to pay if the principal does not.
"The guarantor undertakes to pay if the principal cannot.

"3. The surety's promise is identical in its terms with that of the principal.
"The guarantor's promise is conditioned upon nonperformance by the principal.

"4. Consideration for the surety's promise moves wholly to the principal.
"Consideration for the guarantor's promise moves wholly or in part to him.

Merrill, Contribution Between Sureties and Guarantors, 2 Idaho L.Jour. 1, 8 (1932). As stated by Professor Merrill, the quotation is largely a condensation of the summary compiled by Professor Radin. Radin, Guaranty and Suretyship, 18 CAL.L.Rev. 21, 24 (1929).

10Merrill, Contribution Between Sureties and Guarantors, 2 Idaho L.Jour. 1, 8 (1932), 2 Okla. State Bar Jour., #12, p.15 (1932). As stated by Professor Merrill, the origin of "guaranty" from the Latin warrantia, Radin, Guaranty and Suretyship, 18 CAL.L.Rev. 605, 605 (1929), logically would indicate that a guaranty forms a part of the same contract.
5. A surety's promise defines the time when he is to assume liability for the debt.

“A guarantor's promise fixes no time at which he is to assume liability for the debt.’’

Under the Field Code provisions, shortly to be set forth, it will be noted that “guaranty” includes suretyship. Insofar as any tendency not to treat the terms as mutually exclusive has been observed elsewhere, it has been in the opposite direction. Field's adoption of “guaranty” as the general term represents a departure by him from his first published draft, in which “suretyship” included “guaranty.” The definition of guaranty, as presented in the final form of the code, follows almost completely the language of the fourth section of the Statute of Frauds, reading as follows:

“A guaranty is a promise to answer for the debt, default, or miscarriage of another person.”

A surety is defined:

“A surety is one who

[a] at the request of another,

[b] and for the purpose of securing to him a benefit,

[c] becomes responsible for the performance by the latter of some act in favor of a third person,

[d] or hypothecates property as security therefor.”

The outstanding departure of these definitions from the condition of the law in the other States is the inclusion of suretyship in guaranty. This change is emphasized further by the code titles. Title XIII is “Guaranty,” and under it are two chapters, “Guaranty in General,” and “Suretyship.”


13Radin, Guaranty and Suretyship, 18 CAL.L.REv. 21, 22 n.7 (1929); Arant on Suretyship (1931), 6.

14§§1360 and 1377 of the first draft read: “A surety is one who becomes liable for the performance by another person of the obligation of such other person, or who assumes an obligation for the benefit of another person and at his request.” A guaranty is a contract of suretyship whereby the surety engages to satisfy the obligation of the principal, if the principal fails to do so himself.” Draft of a Civil Code for the State of New York; Prepared by the Commissioners of the Code, and Submitted to the Judges and Others for Examination Prior to Revision by the Commissioners (Albany, 1862); discussed in Radin, Guaranty and Suretyship, 18 CAL.L.REv. 21, 23 (1929). In the first draft, the titles Suretyship and Guaranty are correspondingly reversed. Discussed in Radin, Guaranty and Suretyship, 18 CAL.L.REv. 21, 23 (1929). In his notes on the final draft, Field said that guaranty “of course includes a contract of suretyship, but every guarantor is not necessarily a surety.” Field and Bradford, The Civil Code of the State of New York (Albany, 1865), §1534 n.; discussed in Radin, Guaranty and Suretyship, 18 CAL.L.REv. 21, 22 (1929).

16The only difference is the omission by Field of “special” before “promise.” Discussed, Radin, Guaranty and Suretyship, 18 CAL.L.REv. 21, 22 (1929).

17Field §1554; Cal. §2787; Mont. §6171; N.D. §6651; Okla. §5123; S.D. §1474.

18Field §1558; Cal. §2831; Mont. §6195; N.D. §6675; Okla. §5147; S.D. §1498. For convenience of discussion the definition has been presented in tabular form, with parentheses inserted.

19In California the title and chapter headings are preserved as in the Field code. In the other States having the Field code provisions the title headings have
SURETYSHIP AND GUARANTY

So far as has been observed, in only one case has a court noted that the terms as used in the code are not mutually exclusive. In discussing the effects of the distinction, the present writers in general will follow the practice of the courts, and employ the terms as though delimited from each other. Before proceeding to consider the effects, it is felt that a detailed examination of the various aspects and implications of the code definitions is necessary.

As it is desired that this be done thoroughly, the reader's indulgence is craved if at times the discussion shall seem to be meticulous. It is believed that the reader who does not fall by the wayside will become convinced that, in attempting to ascertain the state of the law under these statutory provisions, it is easy to fall into error if they are not kept constantly in mind. Under the code definitions it is not left to the parties to determine whether a secondary obligation shall be one of suretyship or of guaranty. It seems that any terminology indicating which type is intended is not controlling, and that an express stipulation is unavailing.

With suretyship a subdivision of guaranty, every problem must be approached from the standpoint of an assumption that a guaranty only is involved, unless some basis can be found for also placing the particular obligation in the more limited category of suretyships. As far as the present writers recall, the universal practice of the courts in all States is to the contrary, i.e., to assume that the situation is one of suretyship, where the parties have not made any indication through their terminology of an intent to create a guaranty, and there are no other special circumstances been eliminated, and the material on guaranty and suretyship divided into chapters, or, in Oklahoma, articles, as follows: Montana: c.174, Guaranty—Definition, Creation, and Interpretation; c.175, Liability and Exoneration of Guarantors—Continuing Guaranty; c.176, Suretyship—Sureties and Their Liability; c.177, Rights of Sureties and Creditors, North Dakota: c.84, Guaranty; c.85, Suretyship; Oklahoma: Art. VIII, Guaranty; Art. IX, Suretyship; South Dakota: c.13, Guaranty; c.14, Suretyship.

In Alexander v. Bosworth, 26 Cal.App. 589, 595, 147 Pac. 607, 610 (1915), it was pointed out that the relation of a wife to her husband's transaction came within the language of both definitions.

In Mahana v. Alexander, 88 Cal.App. 111, 117, 263 Pac. 260, 263 (1927), Mr. Justice Hart criticized usage strictly in accordance with the code definitions: "... In many of the cases dealing with suretyship contracts the word 'guarantee' is obviously used in its colloquial and not in its technical sense, as, for illustration, 'the surety, by his contract, guarantees,' stating the nature of his obligation or what he has agreed to do."

Professor Radin has included a brief discussion of the code definitions in his excellent article. Radin, Guaranty and Suretyship, 18 CAL.L.REv. 21, 21-23 (1929).

In Cawston Ostrich Farm v. Salomon, 72 Cal.App. 550, 558, 237 Pac. 808, 811 (1925), in which the assignor of a lease assumed secondary liability for the payment of rent, Mr. Presiding Justice Conrey said: "On the facts of this case, Cawston Ostrich Farm is a surety for the principal obligor, and it is of no consequence that the word 'guarantees' was used in making the promise."

In Bailey Loan Co. v. Seward, 9 S.D. 326, 331, 69 N.W. 58, 60 (1896), Mr. Presiding Judge Corson said: "But, while the defendants ... used the term 'guaranty' in their contract, it would seem that they were, under our Code, sureties, assuming, as it is apparently conceded, that they executed the guaranty to give credit to the principal debtor, and not for any benefit to themselves."

For example, when the purchaser of property assumes the payment of an incumbrance.
"Guaranty" is defined by Field as a promise, whereas a "surety" is a person. These definitions are in harmony with ordinary usage, but under his scheme of organization result in defining a subdivision of a category of promises by describing a person.

Under the code, in order to have a surety, it is necessary to satisfy the requirements of clauses (a) and (b) of the definition—the obligation must be assumed "at the request of another," and "for the purpose of securing to him a benefit." Clause (c) makes it clear that "another" and "him" refer to the principal debtor—the surety "becomes responsible for the performance by the latter [the principal debtor] of some act in favor of a third person."

As it thus is required that the obligation be assumed at the request of the principal debtor, the conclusion is inescapable that if it is assumed at the request of the creditor, that is, the obligee, the situation is one of guaranty only, and not of suretyship. This applies to all fidelity bonds secured by banks or other concerns covering their employees. Also included are cases where the creditor requests a landlord to stand back of his tenant, or asks a husband, wife, friend or relative of the principal to assume secondary liability. In many situations it will be a matter of chance whether the request is made by the creditor or by the debtor, but nevertheless the difference is made vital in the present connection. No logical basis for the distinction can be seen.

Professor Radin says that such an interpretation of the code definition is "obviously nonsense." The remark is apposite, but hardly serves to distinguish this part of the subject from any other in this legal "Alice-in-Wonderland" situation. At any rate, the provisions under discussion are the law of the land in five sovereign States, and presumably are to be taken seriously. The results indicate the dangers inherent in large scale codification.

In order to have a surety it is also necessary to satisfy the requirement of clause (b), that the obligation be assumed "for the purpose of securing to him [the principal debtor] a benefit." Under a familiar canon of construction, these words must, if possible, be interpreted so as to add...
something to the definition. If "purpose" refers merely to the contemplation of the parties that the carrying out of the transaction will be of some advantage to the principal debtor, the clause is without effect, as the principal debtor does not enter into transactions unless such is the case. The only exception to this would be the extremely unlikely situation where the principal is an accommodation party for the benefit of the one assuming secondary liability. This remote contingency may be dismissed from further consideration. We are therefore led to adopt the alternative, and much more plausible, interpretation which is possible, namely, that "purpose" refers to the subjective motive of the secondary party which induces him to assume liability, whether to benefit the principal or himself, that is, whether he is a gratuitous or a compensated party, only the former satisfying the definition.\textsuperscript{27}

If this interpretation is adopted, no surety company is ever a surety.\textsuperscript{28} At first glance this seems to be another instance of a conclusion which is "obviously nonsense." However, it fits in with the general plan of the code provisions to constitute sureties a privileged class of guarantors, enjoying special protections against liability. In addition to the specific provisions inserted for the benefit of sureties, it is provided that a surety "has all the rights of a guarantor,"\textsuperscript{29} and that he is exonerated "in like manner with a guarantor."\textsuperscript{30} The efficacy of the provisions as to sureties in giving them added advantages will be examined later, but if certain secondary parties

\textsuperscript{27}Cole Mfg. Co. v. Morton, 24 Mont. 61, 60 Pac. 587 (1900); Bailey Loan Co. v. Seward, 9 S.D. 326, 331, 69 N.W. 53, 60 (1896), quoting Field's note, set forth in the text, infra, at footnote #31.

\textsuperscript{28}It is hardly necessary to state that this has not been followed by the courts. For example, in Clark County v. Howard, 58 S.D. 457, 459, 237 N.W. 561, 562 (1931), involving the liability of a surety company, after referring to the definitions of suretyship and guaranty, Mr. Commissioner Miser stated that the two subjects "are defined, not by the two sections 1474 and 1498 alone, but by the entire chapters of which these sections are parts and by the decisions of this and other courts," and concluded: "Appellant herein contracted as a surety;"

\textsuperscript{29}Field §1505; Cal. §2844; Mont. §8202; N.D. §6682; Okla. §5154; S.D. §1506.

\textsuperscript{30}Field §1564(1); Cal. §2840(1); Mont. §8201(1); N.D. §6681(1); Okla. §5153(1); S.D. §1504(1).
are to have a specially privileged position there is reason for selecting gratuitous ones as the beneficiaries. Field, in his notes on the code, stated that such a distinction is intended:

"The distinction between a surety and a mere guarantor is, that the former enters into the contract primarily for the benefit of the debtor, while with the latter the benefit of the principal debtor is no material part of the inducement to him to contract."[^81]

Such a distinction is in line with the tendency in a number of jurisdictions to require more extensive alterations of the contract between the creditor and the principal to release compensated sureties than to discharge those who are gratuitous.[^82] The Supreme Court of California, wisely, though, in view of the code, somewhat paradoxically, has refused to make such a distinction.[^83] It must be remembered that the discrimination in favor of gratuitous sureties can operate only when the obligation is assumed at the request of the principal debtor. It will be remembered that under clause (a) of the definition, if the request proceeds from the creditor, all secondary parties are merely guarantors.

Clauses (c) and (d), which are in the disjunctive, and dependent upon compliance with the requirements of clauses (a) and (b), cover personal and real suretyship—the surety "[c] becomes responsible for the performance by the latter [the principal debtor] of some act in favor of a third person, or [d] hypothecates property as security therefor." Clause (c) refers to "some act," whereas the definition of a guaranty refers to a "debt, default, or miscarriage"—"A guaranty is a promise to answer for the debt, default, or miscarriage of another person"—but it is believed that this divergence in form of statement is immaterial.

The situation in regard to the hypothecation of property presents some interesting questions. It must again be kept in mind that, under clauses (a) and (b), suretyship can exist only when the secondary obligation is


[^82]: For example, in Chapman v. Hoage, 296 U.S. 526, 531, 56 Sup.Ct. 333, 335, 80 L.Ed. 370, 373-374 (1936), Mr. Justice Stone, citing numerous cases, said: "One who engages in the business of insurance for compensation may properly be held more rigidly to his obligation to indemnify the insured than one whose suretyship is an undertaking uncompensated and casual." The draft of a codificatory abolition of the distinction between suretyship and guaranty, which will be set forth at the end of this article, puts both classes of sureties upon the same basis. Comparative lack of sympathy for the compensated surety should not lead courts to undertake the task of building up two bodies of suretyship law, one for the compensated surety and the other for the gratuitous.

[^83]: In First Cong. Church of Christ v. Lowrey, 175 Cal. 124, 126, 165 Pac. 440, 441 (1917), Mr. Justice Henshaw said: "It is to be noted, then, that neither our statute law nor our decisions under it have ever recognized that there is any distinction between a compensated and uncompensated surety or guarantor, nor between a corporate surety and an individual surety, nor between a corporation or an individual engaging in the business of suretyship or guarantyship for compensation and a corporation or individual who enters into a like contract without compensation. To impose such distinctions, while sections 2819 and 2840, Civil Code [Field
SURETYSHIP AND GUARANTY

assumed at the request of the principal, and when it is gratuitous. If either of these features is absent, the situation is one of guaranty only. Whenever the latter is the case, we therefore have, in connection with the hypothecation of property, "real guaranty"—a conception new to legal science. The expression "real suretyship" is an old one; and, by reason of familiarity with it, the courts in all States uniformly have assumed that the hypothecation of property presents a situation of suretyship rather than of guaranty.84

There is also another difficulty in connection with the use of property. The definition of guaranty refers to a "promise"—"A guaranty is a promise to answer for the debt, default, or miscarriage of another person." The word "promise" indicates that there must be a promisor, that is, that there must be someone assuming personal secondary liability.35 In the present connection this could be none other than the owner of the property. Mr. Justice Lorigan, of the Supreme Court of California, said: "A guaranty imports a personal liability exclusively."36 An assumption of personal liability does not occur in a situation described as the hypothecation of property, without more;37 and the code definition of surety sets off

§§1551 & 1564; Mont. §§8188 & 8201; N.D. §§6668 & 6681; Okla. §§5140 & 5153; S.D. §§1491 & 1504], read as they now read upon the books, would not be to interpret and to enforce the written law, but to make new law in hostility to it. It is for the Legislature, and not for the courts, to modify our statute law, if the lawmaking body shall believe that its former declarations touching the rights and liabilities of sureties and guarantors should be modified in respect to those sureties and guarantors who become such for compensation.41

However, in Turner v. Fidelity & Deposit Co., 187 Cal. 76, 85, 200 Pac. 959, 962 (1921), Mr. Justice Sloane said: "In the matter of the obligations of corporations organized to execute surety bonds and securities as a business there is a growing disposition in the courts to hold such sureties to their obligations unless there has been some material departure from the conditions of the agreement." In Hunstock v. Royal Securities Corp., 51 Cal.App. 769, 774, 197 Pac. 963, 965 (1921), Mr. Justice James said: "While there seems to be no occasion for invoking the exception to the rule in this case, it may be remarked that the tenor of more recent authorities is to hold that surety companies issuing their obligations for a price, and being in the business of furnishing bonds, are less entitled to insist that they stand as favorites under the law than those who become bound as a matter of friendly accommodation." This statement was quoted with approval in Ramish v. Astor, 5 Cal.App. (2d) 225, 226, 42 Pac.(2d) 334, 334-335 (1935). Contra, see Cormack, Review of Stearns: 'Suretyship, 9 SOUTHERN CALIFORNIA LAW REVIEW 295 (1935).

In like manner, the familiar terminology of "guaranty of collection," and "continuing guaranty" (but see footnote #51, infra), has been decisive.

35Where a wife joined with her husband in a deed of trust upon her separate property to secure the performance of an obligation assumed by him, the problem being one of extension of time, it was properly held to be immaterial whether her contract was one of guaranty or of suretyship. It was pointed out that her relation to the transaction came within the definitions both of guaranty and suretyship. Alexander v. Bosworth, 26 Cal.App. 589, 595, 147 Pac. 607, 610 (1915).

36A corporation used a deed given as a security by a director and stockholder of a corporation to secure payment of future indebtedness. It was argued that the grantor was liable as a continuing guarantor, but the court held that the situation was one of real suretyship.

37When property is put up in connection with an assumption of personal liability, it is assumed that the situation as to the property is governed by the nature of the personal obligation.
the hypothecation of property against the assumption of personal liability. Strength is lent to the inference of a code requirement of personal liability in connection with guaranty, by the reference to the debt, default, or miscarriage "of another person," also by the fact that the following section commences, "A person" may become guarantor—"A person may become guarantor even without the knowledge or consent of the principal." Throughout the chapter on "Guaranty in General," setting forth the provisions as to guaranties which are not suretyships, there are references to the guarantor, and none to the hypothecation of property. Coupled with these features of this chapter, are the provisions in the chapter on suretyship expressly referring to hypothecation, from which an added inference can be drawn that the hypothecation of property is conceived always to be a matter of suretyship. This is particularly true in regard to the section reading:

"Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." There is no corresponding provision with regard to guaranties in general, and it is inconceivable that it should be intended that this form of equitable relief should not be available to any person who has put up his property as security for the obligation of another.

If it is to be concluded that personal liability is essential to the creation of a mere guaranty, then, in accordance with what previously has been noted, if property is hypothecated without an assumption of such liability, either at the request of the creditor or for consideration to the owner of the property, the situation is one neither of suretyship nor of guaranty. This result can be avoided by treating the hypothecation of property, in our newly discovered "real guaranty," as merely involving a limitation upon the personal liability of the one making the promise of guaranty, that is, that he is not to be liable except to the extent of the proceeds of the property. This method of escape from the dilemma is somewhat strained, as it would indicate that the guarantor could sell the property at any time, and for the further reason that the usual conception, as indicated by the term "real" suretyship, is that one putting up property does not assume personal liability, but merely lets his property stand as security. He may assume responsibility in connection with the care and disposition of the property, but this is not conceived of as personal liability for performance of the obligation as such.

38 Vide clauses (c) and (d).
39 Field §1535; Cal. §2788; Mont. §8172; N.D. §6652; Okla. §5124; S.D. §1475.
40 See footnote #18, supra, for titles in States other than California.
41 Field §1571; Cal. §2850; Mont. §8208; N.D. §6688; Okla. §5160; S.D. §1511.
42 Where a mortgage was given without assumption of personal liability, it was held that "the land described in the mortgage became the guarantor of the payment of the note." Carson v. Reid, 137 Cal. 253, 255, 70 Pac. 89, 90 (1902).
SURETYSHIP AND GUARANTY

It may be assumed, in conclusion, that a court will find some way to interpret the code provisions so as to consider the hypothecation of property, at the request of the creditor or for consideration to the owner, as constituting either "real suretyship" or "real guaranty"—if worked out as a matter of statutory interpretation choice of the latter would seem to be indicated.\textsuperscript{43} If it should be felt impossible to find the situation to be one of either suretyship or guaranty under the code, the court would then be confronted with the necessity of developing legal principles to apply to the newly discovered \textit{sui generis} situation, without the intervention of the code, and no doubt familiar results would be reached. Being free from the code restrictions, as between suretyship and guaranty the rules applicable to the former would be preferred, because of the predilection, already noted,\textsuperscript{44} for "real suretyship."

II. THE CODE PROVISIONS IN GENERAL

As only the section numbers of the California Civil Code will be given in the text, the following cross reference table is inserted for the convenience of those who desire to locate provisions in the Field Code or in that of another State.

<table>
<thead>
<tr>
<th>Field\textsuperscript{46}</th>
<th>Cal.\textsuperscript{46}</th>
<th>Mont.\textsuperscript{47}</th>
<th>N.D.\textsuperscript{48}</th>
<th>Okla.\textsuperscript{49}</th>
<th>S.D.\textsuperscript{50}</th>
</tr>
</thead>
<tbody>
<tr>
<td>1534</td>
<td>2787</td>
<td>8171</td>
<td>6651</td>
<td>5123</td>
<td>1474</td>
</tr>
<tr>
<td>1535</td>
<td>2788</td>
<td>8172</td>
<td>6652</td>
<td>5124</td>
<td>1475</td>
</tr>
<tr>
<td>1536</td>
<td>2792</td>
<td>8173</td>
<td>6653</td>
<td>5125</td>
<td>1476</td>
</tr>
<tr>
<td>1537</td>
<td>2793</td>
<td>8174</td>
<td>6654</td>
<td>5126</td>
<td>1477</td>
</tr>
<tr>
<td>1538</td>
<td>2794</td>
<td>8175</td>
<td>6655</td>
<td>5127</td>
<td>1478</td>
</tr>
<tr>
<td>1539</td>
<td>2795</td>
<td>8176</td>
<td>6656</td>
<td>5128</td>
<td>1479</td>
</tr>
<tr>
<td>1540</td>
<td>2799</td>
<td>8177</td>
<td>6657</td>
<td>5129</td>
<td>1480</td>
</tr>
<tr>
<td>1541</td>
<td>2800</td>
<td>8178</td>
<td>6658</td>
<td>5130</td>
<td>1481</td>
</tr>
<tr>
<td>1542</td>
<td>2801</td>
<td>8179</td>
<td>6659</td>
<td>5131</td>
<td>1482</td>
</tr>
<tr>
<td>1543</td>
<td>2802</td>
<td>8180</td>
<td>6660</td>
<td>5132</td>
<td>1483</td>
</tr>
<tr>
<td>1544</td>
<td>2806</td>
<td>8181</td>
<td>6661</td>
<td>5133</td>
<td>1484</td>
</tr>
<tr>
<td>1545</td>
<td>2807</td>
<td>8182</td>
<td>6662</td>
<td>5134</td>
<td>1485</td>
</tr>
<tr>
<td>1546</td>
<td>2808</td>
<td>8183</td>
<td>6663</td>
<td>5135</td>
<td>1486</td>
</tr>
<tr>
<td>1547</td>
<td>2809</td>
<td>8184</td>
<td>6664</td>
<td>5136</td>
<td>1487</td>
</tr>
<tr>
<td>1548</td>
<td>2810</td>
<td>8185</td>
<td>6665</td>
<td>5137</td>
<td>1488</td>
</tr>
<tr>
<td>1549</td>
<td>2814</td>
<td>8186</td>
<td>6666</td>
<td>5138</td>
<td>1489</td>
</tr>
<tr>
<td>1550</td>
<td>2815</td>
<td>8187</td>
<td>6667</td>
<td>5139</td>
<td>1490</td>
</tr>
<tr>
<td>1551</td>
<td>2819</td>
<td>8188</td>
<td>6668</td>
<td>5140</td>
<td>1491</td>
</tr>
<tr>
<td>1552</td>
<td>2820</td>
<td>8189</td>
<td>6669</td>
<td>5141</td>
<td>1492</td>
</tr>
</tbody>
</table>

\textsuperscript{43}Violation of the seeming restriction upon guaranties to situations involving personal liability would be less objectionable than to disregard the clearly stated restrictions upon the limited category of guaranties which are defined as suretyships.

\textsuperscript{44}In the third preceding paragraph, \textit{supra}.

\textsuperscript{46}Field and Bradford, The Civil Code of the State of New York (Albany, 1865).


\textsuperscript{48}Mont.Rev.Code (1935).

\textsuperscript{49}N.D.Comp.Laws (1913).

\textsuperscript{50}Okla.Comp/stats.Ann. (1921).

\textsuperscript{51}S.D.Comp.Laws (1929).
The code provisions on the subjects of suretyship and guaranty afford no evidence that Field was aware of the nature of the distinction between the two which he created through the form in which he cast his definitions. The following possibly over-simplified comparative outline of the code sections may be useful for purposes of reference, and will indicate the fragmentary character of the provisions:

<table>
<thead>
<tr>
<th>&quot;GUARANTY IN GENERAL&quot;</th>
<th>&quot;SURETYSHIP&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>§2787 definition</td>
<td>§2831 definition</td>
</tr>
<tr>
<td>2788 knowledge of principal not necessary</td>
<td>2832 apparent principal</td>
</tr>
<tr>
<td>2792 consideration—necessity of</td>
<td>2845 Pain v. Packard</td>
</tr>
<tr>
<td>2793 writing—generally required</td>
<td>2837 usual interpretation</td>
</tr>
<tr>
<td>2794 Statute of Frauds exceptions</td>
<td>2838 judgment against surety</td>
</tr>
<tr>
<td>2795 acceptance</td>
<td></td>
</tr>
<tr>
<td>2799 incomplete contract</td>
<td></td>
</tr>
<tr>
<td>2800 guaranty of collection</td>
<td></td>
</tr>
<tr>
<td>2801 where efforts hopeless</td>
<td></td>
</tr>
<tr>
<td>2802 out of state</td>
<td></td>
</tr>
<tr>
<td>2806 deemed unconditional</td>
<td></td>
</tr>
<tr>
<td>2807 when liable</td>
<td></td>
</tr>
<tr>
<td>2808 conditional obligation—notice of default</td>
<td></td>
</tr>
<tr>
<td>2809 not beyond principal's obligation</td>
<td></td>
</tr>
<tr>
<td>2810 illegal contract</td>
<td></td>
</tr>
<tr>
<td>&quot; personal disability</td>
<td></td>
</tr>
</tbody>
</table>

Field 45 Cal. 46 Montana 47 N.D. 48 Oklahoma 49 Southern 50
1553 2821 8190 6670 5142 1493
1554 2822 8191 6671 5143 1494
1555 2823 8192 6672 5144 1495
1556 2824 8193 6673 5145 1496
1557 2825 8194 6674 5146 1497
1558 2831 8195 6675 5147 1498
1559 2832 8196 6676 5148 1499
1560 2836 8197 6677 5149 1500
1561 2837 8198 6678 5150 1501
1562 2838 8199 6679 5151 1502
1563 2839 8200 6680 5152 1503
1564 2840 8201 6681 5153 1504
1565 2844 8202 6682 5154 1505
1566 2845 8203 6683 5155 1506
1567 2846 8204 6684 5156 1507
1568 2847 8205 6685 5157 1508
1569 2848 8206 6686 5158 1509
1570 2849 8207 6687 5159 1510
1571 2850 8208 6688 5160 1511
1572 2854 8209 6689 5161 1512
III. THE ROLE OF EXPRESSIO UNIS

In interpreting the body of code provisions in regard to suretyship and guaranty, it is possible to apply "expressio unis" reasoning in three ways:

(1) To exclude from applicability to guaranties in general all provisions inserted only as to sureties;

(2) To exclude from applicability to sureties all matters stated only as to guaranties in general; and

(3) To exclude from applicability to sureties all matters stated only as to guaranties in general other than those relating to methods of exoneration and rights.

As sureties are made a class of guarantors, it would seem that the second of the above possibilities, to exclude from application to sureties all provisions relating to guaranties in general, may be rejected at once.\(^5^1\) This conclusion is reinforced by several factors: nearly all the code pro-

\(^5^1\) In denying the necessity of demand upon the principal in an action against sureties, Mr. Justice Paterson said: "... Sections 2806 and 2807 of the Civil Code [Field §§1544 & 1545; Mont. §§8181 & 8182; N.D. §§6661 & 6662; Okla. §§5133 & 5134; S.D. §§1494 & 1485], ... in the absence of anything in the contract calling for a demand, render the liabilities of the sureties absolute." Coburn v. Brooks, 78 Cal. 443, 448, 21 Pac. 2, 4 (1889). In a suit upon a continuing secondary liability, Mr. Justice Shaw said: "Although technically a contract of suretyship, it is governed by the same rule as a continuing contract of guaranty under section 2815 of the Civil Code [Field §1550; Mont. §8187; N.D. §6667; Okla. §5139; S.D. §1490]." White Sewing Machine Co. v. Courtney, 141 Cal. 674, 676, 75 Pac. 296, 297 (1904).
visions relating either to guarantors in general or to sureties are inserted for their protection; the character of the provisions in regard to sureties is such as to indicate an intent to extend to them certain additional advantages; and the provisions in regard to sureties are much less complete in scope than those as to guarantors in general. A contrary result has, nevertheless, been reached in South Dakota.62

Logic would seem to require adoption of the first possible application of *expressio unis*, the exclusion as to guarantors in general of matters inserted only as to sureties. As it is the purpose of the code to give sureties special advantages, it would seem clear that it is conceived that any privilege or protection expressly stated only as to them is not also to be enjoyed by guarantors in general. This would exclude application to the latter of the following sections:

"2832.63 One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal."

"2836.64 A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.64A

"2838.65 Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

62Clark County v. Howard, 58 S.D. 457, 459, 237 N.W. 561, 562 (1931). Mr. Commissioner Miser stated: " . . . Section 1485 [Field §1545; Cal. §2807; Mont. §8182; N.D. §6662; Okla. §5134] in the chapter on guaranty applies to guarantors and not to sureties." The learned commissioner previously had reasoned that the two terms are defined not only by the code definitions but also "by the entire chapters of which these sections are parts and by the decisions of this and other courts." It should be noted that, in South Dakota, there is no general title "Guaranties in General," but only chapters entitled "Guaranty" and "Suretyship." As to titles in other States, see footnote #18, *supra*. The section in question reads: "A guarantor of payment of performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

Certain loose language at the beginning of the third paragraph of the opinion in Parrish v. Rosebud Min. & Mill Co., 7 Cal.Unrep. 117, 121, 71 Pac. 694, 695 (1903), is also subject to the interpretation that it indicates that provisions stated only in the chapter on guaranty in general do not apply to sureties.

63Field §1559; Mont. §8196; N.D. §6676; Okla. §5148; S.D. §1499. The reader is reminded that section numbers in the text or footnotes (other than in quotations) refer to the California Civil Code (1935) unless otherwise indicated. As to section titles, see footnote #1, *supra*.

64Field §1550; Mont. §8197; N.D. §6677; Okla. §5149; S.D. §1500. 64A§2837 (Field §1561; Mont. §8198; N.D. §6678; Okla. §5150; S.D. §1501) provides, as to sureties: "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." The same result seems to be reached by §§2808 & 2809 (Field §§1546 & 1547; Mont. §§8183 & 8184; N.D. §§6663 & 6634; Okla. §§5135 & 5136; S.D. §§1486 & 1487) as to guaranties in general: "2808. Where one guarantees a conditional obligation, his liability is commensurate with that of the principal . . . 2809. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation."

65Field §1562; Mont. §8199; N.D. §6679; Okla. §5151; S.D. §1502.
"2839.56 Performance of the principal obligation, or an offer of such performance, duly made as provided in this code, exonerates a surety."\(^{56A}\)

"2845.57 A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

"2846.58 A surety may compel his principal to perform the obligation when due.

"2847.59 If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.

"2848.60 A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

"2849.61 A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

\(^{56A}\)Field §1563; Mont. §8200; N.D. §6680; Okla. §5152; S.D. §1503.

\(^{57}\)Part performance is covered, as to guaranties in general, by §2822 (Field §1554; Mont. §8191; N.D. §6671; Okla. §5143; S.D. §1494): "The acceptance, by a creditor, of anything in partial satisfaction of an obligation, reduces the obligation of a guarantor thereof, in [Cal., "is"] the same measure as that of the principal, but does not otherwise affect it."

\(^{58}\)§2840(2) (Field §1564; Mont. §8201; N.D. §6681; Okla. §5153; S.D. §1504) provides, as to sureties: "A surety is exonerated . . . 2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security."

The same result would seem to be reached, as to guaranties in general, by §2819 (Field §1551; Mont. §8188; N.D. §6668; Okla. §5140; S.D. §1491): "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

\(^{59}\)§2840 (3) (Field §1564; Mont. §8201; N.D. §6681; Okla. §5153; S.D. §1504) provides, as to sureties: "A surety is exonerated . . . 3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do." This seems to add nothing to the effect of §2845 (Field §1556; Mont. §8203; N.D. §6683; Okla. §5155; S.D. §1506), which will be quoted in the text.

\(^{57}\)Field §1556; Mont. §8203; N.D. §6683; Okla. §5155; S.D. §1506.

\(^{58}\)Field §1557; Mont. §8204; N.D. §6684; Okla. §5156; S.D. §1507.

\(^{59}\)Field §1568; Mont. §8205; N.D. §6685; Okla. §5157; S.D. §1508.

\(^{60}\)Field §1569; Mont. §8206; N.D. §6686; Okla. §5158; S.D. §1509.

\(^{61}\)Field §1570; Mont. §8207; N.D. §6687; Okla. §5159; S.D. §1510.
Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.

A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

Of the foregoing sections, 2832 and 2845 may be considered reasonable applications of the plan of the code to extend special privileges to sureties. As to the provisions set forth in the other sections, it is believed that their nature is such as to indicate with sufficient clarity that their application will not be confined to sureties. In interpreting the code definitions, the present writers have not been deterred from reaching conclusions which are "obviously nonsense." It is felt, however, that the maxim "expressio unius," constituting only a general guide to the ascertaining of intention, and being much less compelling than direct statements, particularly in definitions, must yield when its application would produce such utterly absurd results.

The third possible use of the canon is to exclude from application to sureties all matters stated only as to guarantors in general, other than those relating to methods of exoneration and rights. It is provided in the chapter on sureties:

A surety is exonerated—

1. In like manner with a guarantor; . . . .

A surety has all the rights of a guarantor, whether he become personally responsible or not.

These sections would indicate that all other provisions as to guarantors in general are not to be used in connection with sureties, and that the maxim may be applied here. If this is to be done, a difficult question is presented as to when "rights," or methods of exoneration, are created. If the character of a provision, e.g., in regard to interpretation of contracts, is such that it may give rise to a defense in behalf of a party, is there created in him a "right," or a method of exoneration? Or must there be a granting of authority to him to take some sort of action? The broad sense

---

62 Field §1571; Mont. §8208; N.D. §6688; Okla. §5160; S.D. §1511.
63 Field §1572; Mont. §8209; N.D. §6689; Okla. §5161; S.D. §1512.
64 As to §2845, see IV. 14. Request to Proceed Against Principal, at footnote #130, infra.
65 A dictum has limited the application of §§2849 & 2850 to sureties. Mr. Justice Henshaw, in Adams v. Wallace, 119 Cal. 67, 70, 51 Pac. 14, 15 (1897).

For purposes of attachment it has been held that a guaranty of a debt secured by deed of trust of another is not secured, because §2850 is limited to sureties. Kelley v. Goldschmidt, 47 Cal.App. 38, 42, 190 Pac. 55, 57 (1920).
66 Field §1564; Mont. §8201; N.D. §6691; Okla. §5153; S.D. §1504.
67 Field §1565; Mont. §8202; N.D. §6682; Okla. §5154; S.D. §1505.
SURETYSHIP AND GUARANTY

in which "exonerate" is used in Section 2840, supra, as a whole, indicates adoption of the former view. If so, obviously there is nothing left upon which the principle of exclusion can operate, except provisions adverse to guarantors in general, among which are the following:

"2806. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

"2807. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

"2810. A guarantor . . . is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal."

"2820. A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section."

"2823. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor.

"2824. A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

"2825. A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor."

It is believed that the conclusion is inescapable that these provisions, in view of their nature, will be applied to sureties as well as guarantors.

If, in order to have a "right," or a method of exoneration, a granting of authority to take some kind of action is necessary, the only section fulfilling the requirement is the following:

68 The entire section (Field §1564; Mont. §8201; N.D. §6681; Okla. §5153; S.D. §1504) reads as follows:
"A surety is exonerated—
"1. In like manner with a guarantor;
"2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,
"3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do."

76 A complete list of the sections in the chapter on guaranties in general which may be considered adverse to guarantors, in whole or in part, including those quoted
"2815.77 A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce."

This involves a result striking by its triviality. The conclusion seems clear, as to all three possible uses, that the canon "expressio unis" has small place in the interpretation of the code provisions in this field.

IV. EFFECTS OF THE DISTINCTION

1. PAROL EVIDENCE

The following, in the chapter on Suretyship, is the only code provision upon the subject of parol evidence:

"2832.78 One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal."

This provision is in accord with the previously mentioned judicial assumption in all States, in the absence of special circumstances, that a secondary party is a surety and not a guarantor.79 As pointed out, this provision is in harmony with the purpose of the code to extend special advantages to sureties, as compared with guarantors, and there is no objection to the use of expressio unis reasoning in connection with this particular section.80

It may be concluded, therefore, that parol evidence may be used to establish that an apparent principal is a surety, but not that he is a guar-
Complications would arise, along the lines of previous discussion, if the evidence should disclose either that the alleged surety had received compensation, or that he had assumed liability at the request of the creditor.

2. STATUTE OF FRAUDS

In view of the many text and judicial statements to the effect that suretyship obligations are original and primary, while guaranties are collateral and secondary, it would seem natural to expect that difference to be disclosed in connection with the Statute of Frauds. However, such statements never have been sound on principle, and it seems to be universally true that the same tests are applied to both classes of obligations in order to determine when they are required to be in writing. All the code provisions of this character appear in the chapter entitled “Guaranty in General.”

3. KNOWLEDGE OR CONSENT OF PRINCIPAL

In the chapter on “Guaranty in General” there is the following section:

“2788. A person may become guarantor even without the knowledge or consent of the principal.”

A suretyship obligation must be assumed at the request of the principal, but this difference produces no effects in the application of the distinction.

4. SEPARATE CONSIDERATION

It has often been said, in distinguishing sureties from guarantors, that the former are bound at the same time as the principal, by the same instru-

---

81 Illustrations of cases considering parol evidence of this sort, and either holding or assuming that if the evidence is admitted and sufficient the secondary party will be proved to be a surety, are: Harlan v. Ely, 56 Cal. 340 (1880); Farmers’ Natl. Gold Bank v. Stover, 60 Cal. 387 (1882); Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032 (1902); Farmers etc., Bank v. De Shorb, 137 Cal. 685, 70 Pac. 771 (1902); McCarthy v. Madison, 190 Cal. 243, 212 Pac. 7 (1922); Granger v. Harper, 217 Cal. 16, 17 Pac.(2d) 135 (1932); Osborn v. Hamilton, 16 Cal.App. 634, 117 Pac. 786 (1911); First Natl. Bank of Escondido v. Williams, 54 Cal.App. 537, 202 Pac. 164 (1921); Stovall v. Adair, 9 Okla. 620, 60 Pac. 282 (1900).

No attempt to use parol evidence to establish that the secondary party was a guarantor has been found, nor any discussion of such possibility.


83 Of course, in a particular case, the presence or absence of consideration may be relevant both from the standpoint of the Statute of Frauds and in distinguishing between suretyship and guaranty.

Early in his work, Arant states that suretyship contracts are not within the Statute of Frauds. Arant on Suretyship (1931), 24, §16. This seems to be a slip, as later the statement apparently is corrected, or at least overlooked. Ibid. 84, §§30 et seq. Cf. Stearns on Suretyship (Feinsinger’s 4th ed. 1934), 41, §35.

84 §§2793 & 2794 (Field §§1537 & 1538; Mont. §§8174 & 8175; N.D. §§6654 & 6655; Okla. §§5126 & 5127; S.D. §§1477 & 1478). There are, of course, apart from the portion of the code dealing with suretyship and guaranty, general provisions along the lines of the original Statute of Frauds.

85 As to titles in States other than California, see footnote #18, supra.

It is assumed that expressio unis reasoning will not be used here.

86 As to titles in States other than California, see footnote #18, supra.

87 Field §§1535; Mont. §§8172; N.D. §§6652; Okla. §§124; S.D. §§1475.

88 As discussed in text at footnote #24, supra.
ment, and with the same consideration: However, it is believed that, in dealing with contemporaneous assumptions of liability purporting to be guarantees, the courts never have failed to find, when necessary in order to uphold the same, that entering into the contract with the principal is sufficient consideration to support the undertaking of the guarantor, thus, in effect, eliminating the requirement of separate consideration. Assuming that expressio unius reasoning is not to be used to reach absurd results, the following section in the chapter on “Guaranty in General” creates no distinction between the two classes of obligations:

“2792. Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.”

5. STATEMENT OF CONSIDERATION

Presumably the rule set forth in the following section, in the chapter on “Guaranty in General”, applies to sureties as well as guarantors:

“2793. A guaranty . . . need not express a consideration.”

6. CONSTRUCTION

The following provisions in the chapter on “Guaranty in General” relate to construction. It may be assumed that they are not to be limited to guarantors who are not sureties.

“2799. In a guaranty of a contract, the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.”

“2806. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.”

“2808. Where one guarantees a conditional obligation, his liability is commensurate with that of the principal, unless he is

---

88 As to titles in States other than California, see footnote #18, supra.
89 Field §1536; Mont. §8173; N.D. §6653; Okla. §5125; S.D. §1476.
90 As to titles in States other than California, see footnote #18, supra.
91 It is assumed that no unreasonable application of expressio unius reasoning will be made. See discussion under III. The Role of Expressio Unis, at footnotes #51 & 52, supra.
92 Field §1537; Mont. §8174; N.D. §6654; Okla. §5126; S.D. §1477.
93 §2800 (Field §1541; Mont. §8178; N.D. §6658; Okla. §5130; S.D. §1481), relating only to guaranties of collection, is not set forth.
94 As to titles in States other than California, see footnote #18, supra.
95 Field §1540; Mont. §8177; N.D. §6657; Okla. §5129; S.D. §1480.
96 Field §1544; Mont. §8181; N.D. §6661; Okla. §5133; S.D. §1484.
97 Field §1546; Mont. §8183; N.D. §6663; Okla. §5135; S.D. §1486.
unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof.

"2809. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation."

The following provision, in the chapter on suretyship, if interpreted to exclude as to sureties the introduction of any implied terms, would bring about absurd results.

"2836. A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty."

The next section provides:

"2837. In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts."

The latter provision is relatively general, and under usual canons of construction would yield to the more specific prohibition in the preceding section. In a widely quoted passage, the Supreme Court of California has, however, indicated an intention to make reasonable implications in interpreting suretyship contracts. Section 2836 seems to be thought of as merely a mild retention of strictissimi juris. Mr. Justice Lorigan said, in the leading Sather case:

"While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear; but it means that the contract will be fairly construed with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of strictissimi juris applies only to the extent, that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are. (Civ. Code, sec. 2837 . . .)."

Mr. Commissioner Thacker, of the Supreme Court of Oklahoma, said, on the other hand:

"In interpreting the terms of a contract of suretyship, the same rules will be observed as in the case of other contracts [citing

---

88Field §1547; Mont. §8184; N.D. §6664; Okla. §5135; S.D. §1487.
89Field §1550; Mont. §8197; N.D. §6677; Okla. §5149; S.D. §1500.
90Field §1561; Mont. §8198; N.D. §6678; Okla. §5150; S.D. §1501.

The statements quoted must be regarded as dicta, as the facts do not disclose any necessity for implying terms.
§2837]; but, after being so interpreted, and the intelligible meaning of its language is ascertained, the same will be construed and applied strictly, in favor of the surety, and so as to not allow any implication against him [citing cases].

Notwithstanding the dictum of the learned commissioner, possibly influenced to some extent by Section 2836, supra, it seems safe to conclude that none of the code provisions quoted will cause any departure from usual modes of interpretation in dealing with either suretyship or guaranty contracts, and that the distinction between them is without significance in this connection.

7. DATE OF MATURITY

The following provision appears only in the chapter on “Guaranty in General”:

“2807. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.”

A South Dakota decision refused to apply this section to sureties upon an official bond. In general a contrary result would seem to be required.

8. COMPENSATED SECONDARY PARTIES

Under the code provisions, whether secondary parties are gratuitous or compensated is relevant only in drawing the suretyship-guaranty distinction,

---

102 Dolese Bros. Co. v. Chaney & Rickard, 44 Okla. 745, 749, 145 Pac. 1119, 1120 (1914). Upon the facts implication of terms was not necessary.

103 Both before and after the Sather case, just quoted in the text, supra, Mr. Commissioner Cooper, of the Supreme Court of California, dropped remarks to the effect that implications against sureties would not be permitted: Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. 1004, 1005 (1902); County of Glenn v. Jones, 146 Cal. 518, 520, 80 Pac. 695, 696 (1905), but the strict decision in the Boas case, the only one in which the repudiation of implications could have been relevant on the facts, was later expressly disapproved by the Supreme Court of California in denying a petition for hearing. Callan v. Empire State Surety Co., 20 Cal.App. 483, 491, 129 Pac. 978, 981 (1912).

104 It seems reasonable to expect that, insofar as the canon of construction against the one preparing the instrument is used, it will be applied more often against sureties than against guarantors.

105 As to titles in States other than California, see footnote #18, supra.

106 Field §1545; Mont. §8182; N.D. §6662; Okla. §§134; S.D. §1485.


108 It was held that interest ran against the sureties upon a county treasurer’s bond only from date of demand by the obligee, based upon defalcations, rather than from the dates of the various wrongful acts. Without citing any statute specially relating to official bonds, Mr. Commissioner Miser said: “In this case we are not attempting to determine when sureties on all manner of bonds should become liable for interest. We are dealing only with the case of a surety on an official bond where the principal has embezzled money, of which many acts of embezzlement
and not in connection with its effects. As has been pointed out at length, the code definition of a surety seems to constitute all compensated secondary parties guarantors.

9. NOTICE OF ACCEPTANCE

In the chapter on "Guaranty in general," it is provided:

"2795. A mere offer to guaranty is not binding, until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance."

While there is no corresponding provision in the chapter on suretyship, the requirement of notice would seem equally applicable in behalf of sureties. Apart from the impropriety of applying the expressio unis canon in this connection in any event, the right to insist upon notice would seem to be within the scope of the rights and methods of exoneration of guarantors extended to sureties. A South Dakota decision was, however, put upon the ground that the relation contemplated in connection with an offer was one of suretyship and, therefore, that notice of acceptance was not necessary.

10. DEFENSES OF PRINCIPAL

The following sections in the chapter on "Guaranty in general" relate to the effect of defenses which the principal may have at the time the obligation is entered into:

neither the surety nor the obligee were aware until several years thereafter." The learned commissioner referred to the code definitions of suretyship and guaranty, but held that the terms are defined by the entire chapters of which they form parts. It is true that the South Dakota code departs from Field's organization of the materials. There is no general title covering both suretyship and guaranty, and the first chapter is entitled "Guaranty," instead of "Guaranty in General." However, the code definitions have been left untouched, so that suretyship obligations also satisfy the more general requirement of the definition of guaranty. A North Dakota decision, Dickinson v. White, 25 N.D. 523, 143 N.W. 754, 49 L.R.A.[N.S.] 362 (1913), is quoted, in which a similar holding was made without referring to the code provisions.

Consult III. The Role of Expressio Unis, in the text, at footnotes #51 & 52, supra.

108See I. The Statement of the Distinction, at footnotes #27-33, supra.

109As to titles in States other than California, see footnote #18, supra.

110Field §1539; Mont. §8176; N.D. §6656; Okla. §5128; S.D. §1479.

111See III. The Role of Expressio Unis, at footnotes #51 & 52, supra.


113Dennis v. Great Northern Const. Co., 53 S.D. 652, 222 N.W. 269, 270 (1928). The court pointed out that it probably could have disposed of the case upon the ground that, in any event, the writing signed would constitute an absolute guaranty, and not a mere offer.

In Aluminum Cooking Utensil Co. v. Rohe, 43 N.D. 433, 435, 175 N.W. 620, 621 (1919), it was held that a letter of credit constituted a contract of guaranty, and not suretyship, and, therefore, that it was necessary to plead notice of acceptance.

114As to titles in States other than California, see footnote #18, supra.
The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

A guarantor is not liable if the contract of the principal is unlawful, but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

It seems clear that these provisions are applicable to sureties. The reasoning set forth in the preceding sub-section is apropos here.

11. ALTERATIONS

The sections, in each of the chapters, dealing with alterations, are in harmony with the state of the law throughout the country, and create no differences between suretyships and guaranties.

In California and Montana, however, a difference seems to exist apart from the Field Code provisions. In these States, for reasons which will be pointed out later, in situations in which there are several secondary parties, if certain forms of security are taken, either from the principal or from another secondary party, subsequent to the execution of the obligation, there are two consequences which result as to sureties which do not occur in the case of guarantors:

(1) One surety can not sue another without previously or simultaneously taking advantage of the security; and

(2) Where there previously has been no other security from any party, the theretofore existing remedy of attachment against a surety not putting up security is lost.

Field §1547; Mont. §8184; N.D. §6664; Okla. §5136; S.D. §1487.

Field §1548; Mont. §8185; N.D. §6665; Okla. §5137; S.D. §1488.

If an extreme application of expressio unis reasoning were to be made here, it could be urged that the reference to unlawful contracts excludes the guarantor from taking advantage of other causes of invalidity of the principal's contract—for example, that it was secured through duress. Such a possibility has received no judicial consideration, and the code provision should not be given any such effect in this connection.

Field Cal. Mont. N.D. Okla. S.D.
1551 2819 8183 6668 5140 1491
1552 2820 8189 6669 5141 1492
1553 2821 8190 6670 5142 1493
1556 2824 8193 6673 5145 1496
1564(2) 2840(2) 8201(2) 6681(2) 5153(2) 1504(2)


See subsections 18 and 19, at footnotes #144 & 152, infra.

It is assumed that the facts are such that the various guarantors can be regarded, as among themselves, as liable upon separate contracts.

As to suits by one guarantor against another, after the putting up of security by a guarantor, it is assumed that they are liable upon separate contracts of guaranty.

It is assumed that the facts are such in other respects as to make the remedy of attachment available.
SURETYSHIP AND GUARANTY

It is possible, therefore, under these conditions, for sureties to claim (though guarantors cannot) that their remedies have been impaired through the taking of such additional security; and, therefore, that they have been discharged from liability. The doctrine of implied consent on the part of a surety or guarantor to certain alterations, if held applicable, as it should be, would avoid this result; but anyone familiar with this field can have no sense of assurance in this regard.123

12. RELEASE OF SECURITY

While the only reference to subrogation of the secondary party to the rights of the creditor as to security appears in the chapter on suretyship, it is not conceivable that familiar principles in this regard would not be applied to guarantors.125

13. NOTICE OF DEFAULT

It is provided in the chapter on “Guaranty in general,” that a guarantor of payment or performance is liable immediately upon default, without demand or notice.127 It would seem clear that this should be held applicable to sureties, and it has been so held in California, the court saying, per curiam:

“Cases often occur in which it is difficult to determine whether a given contract is one of surety or of guaranty, and it is believed the object of the code was to place the contract of guaranty on the same plane with that of surety by dispensing with the necessity of demand and notice in the former, as the courts in a majority of instances have held the latter. Coburn v. Brooks, 78 Cal. 443, and Chafoin v. Rich, 77 Cal. 476, have settled the doctrine in this state that no demand or notice is necessary to fix the liability of a surety, except in cases where such demand and notice are expressly required by the language of the contract.”129

123In Granger v. Harper, 68 Cal.App.Dec. 704, 8 Pac.(2d) 204 (1932), revd. on another ground, 217 Cal. 16, 17 Pac.(2d) 135 (1932), it was held that a surety was discharged when security was taken later from the principal. In cases where there is only a single secondary party, there would seem to be no distinction possible between a surety and a guarantor, as to impairment of remedies, in connection with the taking of security from the principal. In either case the situation upon subrogation to the creditor’s position is the same.
124§2849 (Field §1570; Mont. §§8207; N.D. §§6687; Okla. §§5159; S.D. §§1510). As to titles in States other than California, see footnote #18, supra. §§2819 & 2840(2) (Field §§1551 & 1564 [2]; Mont. §§8188 & 8201 [2]; N.D. §§6668 & 6681 [2]; Okla. §§5140 & 5153 [2]; S.D. §§1491 & 1504 [2]) could be interpreted to include this matter in their general provisions.
125See II. The Role of Expressio Unis, at footnote #65, supra.
126As to titles in States other than California, see footnote #18, supra.
127§2807 (Field §1545; Mont. §§8182; N.D. §§6662; Okla. §§1534; S.D. §§1485). In the following section there is a special provision with regard to conditional obligations.
128See III. The Role of Expressio Unis, at footnotes #51 & 52, supra.
Professor Radin, speaking of the situation throughout the country generally,
14. **REQUEST TO PROCEED AGAINST PRINCIPAL**

The doctrine of *Pain v. Packard*, which is somewhat broader than the above title, is codified as follows in the chapter on suretyship:

"2845. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

It does not apply to guarantors.

15. **PERFORMANCE AND TENDER**

In the chapter on suretyship it is provided:

"2839. Performance of the principal obligation, or an offer says: "The reason for trying to distinguish between a surety and a guarantor is generally to determine whether or not the intercessor is entitled to notice or whether the principal must be sued first. But that, as a matter of fact, is determined, as it should be, by conclusions about the intentions of the parties in the matter, based in most cases on such knowledge of mercantile custom as the court possesses." Radin, Guaranty and Suretyship, 18 Cal.L.Rev. 21, 29 (1929).

Although it is not entirely clear that the court is referring to a principle of law, as distinguished from insufficiency of the facts, there is apparently a holding to the same effect in First Natl. Bank v. Babcock, 94 Cal. 96, 104, 29 Pac. 415, 416, 28 Am.St. Rep. 94, 98 (1892). See also Mahana v. Alexander, 88 Cal.App. 111, 116, 263 Pac. 260, 262 (1927). See III. The Role of Expressio Unis, at footnote #64, supra.

In an Oklahoma case, the court apparently misconceived the nature of the *Pain v. Packard* doctrine, and apparently misinterpreted the code section embodying it, in a holding that it is controlled by another relating generally to joinder of parties in suits where a number of persons are severally liable upon the same obligation. National Bank of Poteau v. Lowrey, 57 Okla. 304, 308, 157 Pac. 103, 104 (1916).

The *Pain v. Packard* doctrine was, however, applied as one ground of the decision in Hollis v. Parks, 92 Okla. 291, 219 Pac. 110 (1923). The doctrine is set forth by way of dictum in Gregg v. Oklahoma State Bank, 72 Okla. 193, 195, 179 Pac. 613, 615 (1919), although the court also quoted an opinion criticizing the doctrine. In Union Mutual Insurance Co. v. Page, 65 Okla. 101, 164 Pac. 116, L.R.A. 1918C 1 (1917), it was held that a "simple request" is not sufficient to gain for the surety the benefit of the *Pain v. Packard* doctrine. Miller v. State ex rel. Lankford, 52 Okla. 76, 152 Pac. 409 (1915), re-affirms Palmer v. Noe, supra, this note. The authors are indebted to Professor Maurice H. Merrill for assistance in connection with the Oklahoma cases.

13§2845 (Field §1566; Mont. §8203; N.D. §6683; Okla. §5155; S.D. §1506). See also §2840(3) (Field §1564 [3]; Mont. §8201 [3]; N.D. §6681 [3]; Okla. §5153 [3]; S.D. §1504 [3]).
of such performance, duly made as provided in this code, exonerates a surety.”

Notwithstanding the expressio unis inference to be drawn from the express statement of a provision only as to sureties, it seems safe to conclude that a court would find some ground upon which to apply the same rule to guarantors. If this were not done, the result would be even more absurd as to performance than as to tender, for the chapter on “Guaranty in General” provides for partial discharge through part performance, but contains no reference to full performance.

16. LIMITATION OF ACTIONS

Under the Field Code no consequences from the distinction between suretyship and guaranty can be observed, either as to the time when the period of limitation begins to run in favor of the secondary party against the creditor, or as to the effect upon the liability of the secondary party of the barring by the statute of the creditor’s claim against the principal.

17. JOINDER WITH PRINCIPAL

In the history of the distinction between suretyship and guaranty throughout the country it often has been said that the surety is bound by the same contract as the principal, and the guarantor by a separate contract. This has led to holdings that the guarantor can not be sued with the principal, and that the surety must be. The point is not touched upon

---

134See III. The Role of Expressio Unis, at footnote #65, supra.
135As to titles in States other than California, see footnote #18, supra.
136§2822 (Field §1554; Mont. §8191; N.D. §6671; Okla. §5143; S.D. §1494).
137§2807 (Field §1545; Mont. §8182; N.D. §6662; Okla. §5134; S.D. §1485), in the chapter on “Guaranty in General” (as to titles in States other than California, see footnote #18, supra), provides: “A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.”

As pointed out under III. 7. Date of Maturity, at footnote #106, supra, a South Dakota decision, Clark County v. Howard, 58 S.D. 457, 459, 237 N.W. 561, 562 (1931), held that interest did not commence to run against the sureties upon an official bond until demand upon them by the creditor. The reasoning of the court in that case would, in like manner, lead to a holding that the statute of limitations does not begin to run in favor of the sureties upon such a bond until demand.

138§2825 (Field §1557; Mont. §8194; N.D. §6674; Okla. §5146; S.D. §1497), in the chapter on “Guaranty in General” (as to titles in States other than California, see footnote #18, supra), reads: “A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor.” While it would not seem to be doubtful whether it should not be considered that the running of the period of limitation involves an omission upon the part of the creditor, in Gaffigan v. Lawton, 1 Cal.(2d) 722, 37 Pac.(2d) 79 (1934), this section was applied to the obligation of a surety in this connection, coupled with §2840(1) (Field §1564 [1]; Mont. §8201 [1]; N.D. §6681 [1]; Okla. §5153 [1]; S.D. §1504[1] in the chapter on Suretyship (as to titles in States other than California, see footnote #18, supra), providing that a surety is exonerated “in like manner with a guarantor.”

139In Emerson-Brantingham Imp. Co. v. Raugstad, 65 Mont. 297, 303, 211 Pac. 305, 307 (1922), Mr. Justice Galen said: “A contract of guaranty is distinguishable from one of surety, in that the former is an independent contract, whereby the promisor is bound independently of the person for whose benefit it is made, while
in the code sections on suretyship and guaranty, but in Field’s Code of Civil Procedure it was provided:

“Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff.”

This provision is now in force, in amplified form, in each of the five States under consideration, and would seem clearly to cover both sureties and guarantors. It has, however, been held in Montana, without referring to this section, that the distinction persists in this connection, Mr. Justice Stark saying:

“A creditor may bring an action jointly against a surety and the debtor, but he cannot join both the guarantor and the debtor in one suit, because there is neither privity of contract, mutuality, nor joint liability between the principal debtor and his guarantor.”

18. PROCEEDING FIRST AGAINST SECURITY TO CREDITOR FROM OTHER PARTIES

In the chapter on suretyship it is provided:

“Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.”

It may be assumed that expressio unis reasoning will not be used to ex-

the latter is a contract whereby the promisor is bound jointly with the principal on the same contract.”

In Square Butte State Bank v. Ballard, 64 Mont. 554, 560, 210 Pac. 889, 890 (1922), Mr. Justice Cooper said: “A guarantor’s agreement is to pay if the principal does not or cannot. He does not join in the contract, but in an independent undertaking promises that the principal will perform his agreement, and if he does not then he (the guarantor) will do it for him.”

In Adams v. Wallace, 119 Cal. 67, 71, 51 Pac. 14, 15 (1897), Mr. Justice Henshaw said: “There is no privity or mutuality or joint liability between the principal debtor and his guarantor.”

Code of Procedure of Pleadings and Practice of the State of New York (April 11, 1849), §120. This was §100 of the original code of the same title, April 12, 1848, in which it was derived from the N.Y.Laws (1832), c. 276. The authors are indebted to Mr. Miles O. Price, Law Librarian of Columbia University, for this information.


Butte Machinery Co. v. Carbonate Hill Mining Co., 75 Mont. 167, 170, 242 Pac. 956, 957 (1926). In Cole Mfg. Co. v. Morton, 24 Mont. 61, 60 Pac. 587 (1900), it was held that the secondary parties were sureties, and, therefore, could be joined with the principal.

Field §1571; Mont. §8208; N.D. §6688; Okla. §5160; S.D. §1511.

See III. The Role of Expressio Unis, at footnote #65, supra.
SURETYSHIP AND GUARANTY

clude application of this familiar principle to cases involving guaranties.¹⁴⁶

A special problem arises in California and Montana, apart from the Field Code provisions. The “but one action” rule provides that where an obligation is secured by mortgage or deed of trust there can be but one action brought, which must include proceedings against the property, unless the property previously has been subjected to the debt through private sale.¹⁴⁷ A distinction arises here between sureties and guarantors, in cases where property is put up by the principal alone.¹⁴⁸ The difference is due to the erroneous conception that the surety is a party to the same contract as the principal, whereas the guarantor is liable upon a separate contract. As the surety is a party to the contract secured by the property put up by the principal, he can not be proceeded against without making use of the mortgage or deed of trust.¹⁴⁹ In the case of the guarantor, his separate

¹⁴⁶But see careless citations of this section in Adams v. Wallace, 119 Cal. 67, 70, 51 Pac. 14, 15 (1897), and Kelley v. Goldschmidt, 47 Cal.App. 38, 42, 190 Pac. 55, 57 (1920).

¹⁴⁷Until 1933 the rule was set forth only in Cal.Code Civ.Proc. (1935), §726 (Mont.Rev.Code [1935], §9467). While this section in terms refers only to mortgages, in the leading case of Bank of Italy Natl. Trust & Sav. Assn. v. Bentley, 217 Cal. 644, 658, 20 Pac.(2d) 940, 945 (1933), it was held that “either by reason of implied agreement or by reason of public policy” the same rule applied to deeds of trust. In 1933, Cal.Code Civ.Proc. §580a was enacted, expressly creating such a requirement as to trust deeds. The Montana statute refers only to mortgages.

¹⁴⁸If a secondary party who is sued has given a mortgage or deed of trust, there would seem to be no doubt that the “but one action” rule should be applied.

¹⁴⁹Birkhofer v. Krumm, 4 Cal.App.(2d) 43, 50, 40 Pac.(2d) 553, 557 (1935). In this case the grantee of land had assumed payment of a deed of trust, referred to by the court for convenience as a mortgage, given by the grantor. It was held, Mr. Justice Marks delivering the opinion, that "from the point of view of the mortgagee, both the grantor and the grantee stand in the relation of sureties for the payment of the debt due the mortgagee." The reasoning that the grantee is only a surety seems open to criticism, but is not relevant for purposes of the present inquiry. The opinion continued: "A surety may require his creditor to exhaust the principal fund to lighten the surety's burden before proceeding against the surety personally. (Sec. 2845, Civ. Code; Murphy v. Hellman etc. Bank, 43 Cal. App. 579, 185 Pac. 485.) This reasoning brings us to a point where the rules we have announced governing the relations of the mortgagor, his grantee and the mortgagee are in strict harmony with the provisions of section 726 of the Code of Civil Procedure and the multitude of decisions which hold that the mortgagee must exhaust the security before he can recover against his debtor and that this recovery must be limited to the deficiency remaining after applying the funds derived from the sale of the property on the debt." No action having been taken in regard to the land, it was held that the grantee could not be sued personally and his other property attached. There had been no request by the grantee to the creditor to take proceedings, so that the reference to the Pain v. Packard doctrine and §2845 setting it forth is only dictum.

In Adams v. Wallace, 119 Cal. 67, 70, 51 Pac. 14, 15 (1897), in which the defendant secondary party was held to be a guarantor, Mr. Justice Henshaw said: "Were she a mere surety, as distinguished from a guarantor, she would have the unquestioned right to demand that plaintiff should first apply to the discharge of the debt the property of the principal, Pierce, which had been mortgaged. (Civ. Code, secs. 2849, 2850.) Upon the other hand, if she be a guarantor for the payment of the debt upon default, then it would matter not whether there were other security for the payment of that debt; the principal creditor would have the right to prosecute his action against the guarantor, without proceeding to realize upon other securities or without going into equity to foreclose his mortgage. (London etc. Bank v. Smith, 101 Cal. 415; Brandt on Suretyship and Guaranty, 97; Baylies on Sureties and Guarantors, 189, 303, 304, 305.) . . . The contention that the action cannot be maintained at all, as being violative
of the provisions of 776 [726] of the Code of Civil Procedure, is not well taken. It is not an action for the collection of the Pierce [principal] debt as such, even if it be conceded that this debt was secured by mortgage. It is an action upon an independent contract of the defendant, with which Pierce had nothing to do, and which might have been entered into by the parties to it without his knowledge or against his wishes. There is no privity, or mutuality, or joint liability between the principal debtor and his guarantor. (Bull v. Coe, 77 Cal. 54; 11 Am.St.Rep. 235; Baylies on Sureties and Guarantors, 4; Cole v. Watertown Merchants’ Bank, 60 Ind. 350.)

It is believed that the learned justice was in error in citing in this connection §§2849 & 2850, the latter quoted in the text, supra. §2849 relates to subrogation of the surety upon payment; §2850 refers only to situations in which both the principal and the surety have hypothecated property.

In Kelley v. Goldschmidt, 47 Cal.App. 38, 42, 190 Pac. 55, 57 (1920), Mr. Justice Hart, in deciding that, although the principal had given a deed of trust, attachment could still be had in an action against guarantors as upon an unsecured obligation, said: "A mortgage or a trust deed given to secure the performance of an obligation to pay money and a guaranty given for the same purpose are each intended, of course, to subserve the same purpose, and where both are given to secure one single obligation of that character, the one operates merely as additional security to the other. But the creditor may resort either to the one or the other to enforce the payment of the money to secure the payment of which both were given. In case of a contract of surety executed to secure the performance of the obligation which is also secured by a mortgage or other collateral security the law is different. In the latter case, the holder of the mortgage or other security would be compelled to apply to the payment of the debt the property of the debtor which had been mortgaged to secure the debt. (Civ. Code, sec. 2850; Adams v. Wallace, supra.) Such, however, is not the case as to a guarantor, as we have shown."

Professor Radin, without citation of authorities, says: "... If the obligation is secured both by a mortgage and by personal securities, the surety cannot be sued without foreclosing the mortgage, but the guarantor can." Radin, Guaranty and Suretyship, 18 Cal.L.Rev. 21, 29 (1929).

But see Murphy v. Hellman Commercial, etc., Bank, 43 Cal.App. 579, 586, 185 Pac. 485, 488 (1919), cited in the quotation from the Birkhofer case, in this note supra, in which Mr. Justice Nourse said: "... The rule in this state as to section 726 clearly is that this section applies to the primary debtor and was enacted for his benefit; that it does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract existing between the two obligations—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations." It is not believed that, on the facts of the case, the decision is in conflict with the statement in the text. The defendants, without assuming personal liability, had placed a deed absolute in escrow to secure the obligation of another as principal debtor and his guarantor. (Bull v. Coe, supra.)

The defendants, without assuming personal liability, had placed a deed absolute in escrow to secure the obligation of another as principal debtor. It was not decided whether the defendants acted as sureties or as guarantors. The principal had not given any security other than property purchased which had given rise to the obligation, and this property had been returned by him to the creditor before the creditor had brought an action against anyone. Thus, apart from the property put up by the defendants, the obligation had ceased to be secured before the creditor commenced his first action. The first suit instituted by the creditor was against the principal alone, and judgment in it was secured against the principal before the present action was commenced. When the suit under consideration was brought, to subject the land covered by the deed to the balance of the indebtedness, it was properly held, there having been no previous action against the owners or their property, that they could not avail themselves of the "but one action" rule. The "but one action" rule should not be interpreted to set up any requirement of joinder of parties or causes of action, any farther than is necessary to give effect to the rule. The rule simply enables a party, when sued, to object if a second action is being brought against him or his property, or if he is being sued personally without prior or simultaneous proceedings to take advantage of property securing the obligation. In this case, the owners, having assumed no personal liability, had not previously been sued personally, and were not being so sued, and there had been no previous proceedings against any of their property. When the creditor brought his first action, against the principal alone, the obligation had ceased to be secured, by reason of the return by the principal to the creditor of the property the purchase of which gave rise to the obligation, so that there had been no omission, in connection with any of the various steps of the litigation, to take advantage of security put up by the principal. The owners of
SURETYSHIP AND GUARANTY

contract is not secured, and proceedings may be had against him without regard to the property. The same distinction would seem to prevail in cases where security is taken from other secondary parties, assuming that the facts are such that the guarantors, among themselves, can be regarded as liable upon different contracts.

19. ATTACHMENT

There is no special problem in regard to attachment under any of the Field codes, but the reasoning used in connection with the preceding topic leads to a similar distinction between suretyships and guaranties in California and Montana. In these States, under certain conditions, attachment can not be had if the obligation is secured by mortgage, deed of trust, lien or pledge. If such security is taken from the principal alone, or from another secondary party, attachment remains possible against guarantors, but not against sureties.

the property covered by the deed were not in position to complain that their property had not been proceeded against prior to the present action. As to their property the present suit was the single action permitted by the “but one action” rule. The portion of the opinion in this case which is quoted supra is set forth in Craiglow v. Williams, 45 Cal.App. 514, 517, 188 Pac. 76, 77 (1920). While the latter opinion is obscure, in the use made of the passage it seems either to constitute dictum or to be misapplied.

In Knowles v. Sandbrock, 107 Cal. 629, 642, 40 Pac. 1047, 1050 (1895), there is reasoning which, standing by itself, would indicate that no party to a contract other than the one giving a mortgage or deed of trust could take advantage of the “but one action” rule. And yet, in the course of the reasoning, it is stated that the parties involved were not sureties, making possible the inference that, if they had been, a different rule would have been applied. The action was one against stockholders to enforce their liability as such for the debts of a mortgagor corporation. Mr. Justice Temple said: “The mortgage only affects the remedy against the mortgagor—the corporation. The liability of the stockholder, as has already been said, is primary in the sense that he is not a surety. He is not injured nor is he benefited by the fact that the corporation has given security.” It seems that the real ground of the decision is that the stockholders are not parties to, or liable upon, the contract of the corporation as such, but upon a different liability created by statute, to which the “but one action” rule clearly is not applicable. At 107 Cal. p. 638, 40 Pac. p. 1049, it had been pointed out that the “stockholder is, perhaps, not strictly liable on the contract, but on the statute.”

To constitute the “one action” permitted, a suit must be on the debt; and not a suit of some other character, such as replevin, Harper v. Gordon, 128 Cal. 489, 61 Pac. 84 (1900), or unlawful detainer. Schchr v. Berkey, 166 Cal. 157, 135 Pac. 41 (1913); Toplitz v. Standard Co., 25 Cal.App. 575, 143 Pac. 52 (1914); Ashcroft Estate Co. v. Nelson, 26 Cal.App. 400, 147 Pac. 101 (1915). Therefore, after such an action as detinue or unlawful detainer, another may be brought against a debtor or his property.

Loeb v. Christie, 6 Cal.(2d) 416, 57 Pac.(2d) 1303 (1936). This case involved a trust deed. Others relating to mortgages are cited in the opinion.

The further assumption is involved that all the secondary parties are guarantors. If some were sureties, the effect upon the guarantors of the taking of security from them would be the same as though it had been taken from the principal.

The statement in regard to the existence of the distinction in Montana is based upon the persuasiveness in that State of code interpretations by the California courts.


As to guaranties, see Kelley v. Goldschmidt, 47 Cal.App. 38, 190 Pac. 55
In California and Montana it is also provided that, under certain circumstances, attachment may issue upon a contract for the "direct" payment of money. The reasoning that the surety is liable upon the same contract as the principal, and the guarantor upon a separate contract, would seem to lead to the conclusion that the obligation of the surety is direct, and that of the guarantor indirect. Such a distinction has been drawn in Montana, but in California "direct" was early interpreted to mean "liquidated."

20. CONCLUSIVENESS OF JUDGMENTS

The following section appears in the chapter on suretyship, with no corresponding provision in the chapter on "Guaranty in general":

"2838. Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety."

The following section, applying only to sureties, appears in the chapter on indemnity in the Field Code:

"2778. In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

6. If the person indemnifying, whether he is a principal or surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former;"

Apart from the Field Code provisions, the following appears in the California and Montana Codes of Civil Procedure:

(1920). Dictum in this case to the effect that the law is different as to sureties is quoted in footnote #149, supra.

The text statement refers to a suit by the creditor, or someone basing his suit upon subrogation to the creditor's position, and assumes that, if the security has been put up by another guarantor, the facts are such that the various guarantors can be regarded as liable upon separate contracts. The same assumption is necessary in connection with a suit by one guarantor against another after a third guarantor has put up security.

167 State v. Reynolds, 68 Mont. 572, 220 Pac. 525 (1923). To be "direct" the liability of the surety must also be neither uncertain as to amount nor conditional. Ancient Order of Hibernians v. Sparrow, 29 Mont. 132, 74 Pac. 197, 101 Am.St.Rep. 563, 1 Ann.Cas. 144, 64 L.R.A. 128 (1903); Wall v. Brookman, 72 Mont. 228, 232 Pac. 774 (1925).
168 Hathaway v. Davis, 33 Cal. 161, 168 (1867). In rejecting the suggestion set forth in the text, Mr. Justice Sanderson said: "To read 'direct' as the opposite to 'collateral,' would be to create a distinction of very doubtful foundation and certainly opposed to the general policy of the Act. To so read it would be to exempt all collateral contracts from the operation of the Act. Indorsers, guarantors, sureties and all others who undertake to pay or become responsible for the debts of another could not be reached by attachment; and yet there can be no good reason why they should be excepted. We are of the opinion that the Legislature intended no such distinction."

169 As to titles in States other than California, see footnote #18, supra.
170 Field §1530; Mont. §8169; N.D. §6647; Okla. §5177; S.D. §1470.
"1912. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceedings, and an opportunity at the surety's request to join in the defense."

It may be safely assumed that the expressio unis canon, notwithsanding its logical applicability, will not be given any effect in connection with any of the foregoing provisions.

21. EQUITABLE REMEDIES

Again it is safe to assume that the logical requirements of the expressio unis doctrine will not be permitted to have any practical consequences. There are a number of sections in the chapter on suretyship relating to contribution, exoneration, indemnity, and subrogation with no corresponding provisions in the chapter on "Guaranty in general."  

22. NEGOTIABLE INSTRUMENTS

There are no problems relating to sureties and guarantors upon negotiable instruments in the States having the Field Code provisions that do not exist generally. The problems that exist arise out of principles of the law of negotiable instruments, and once it has been determined that a party upon such an instrument is to be treated as a guarantor or surety the effects are the same as in other connections. The problems have to do with whether parol evidence may be used to show that an apparent principal upon a negotiable instrument is a secondary party, whether, under the Negotiable Instruments Law, suretyship principles can be applied to one who signs expressly as surety, and whether one who places a guaranty upon the back of a negotiable instrument is to be held as guarantor or indorser, or both.

162 See III. The Role of Expressio Unis, at footnote #65, supra.
163 See III. The Role of Expressio Unis, at footnote #65, supra.
164 Field §1569; Cal. §2848; Mont. §8206; N.D. §6686; Okla. §5158; S.D. §1509.
165 Professor Merrill has ably criticized the doctrine which has been given some recognition in other States, that there can be no contribution between sureties and guarantors. Merrill, Contribution Between Sureties and Guarantors. 2 Idaho L. Jour. 1, 8 (1932), 2 Okla. State Bar Jour., #12, p.15 (1932).
166 Field §1567; Cal. §2846; Mont. §8204; N.D. §6684; Okla. §5156; S.D. §1507.
It is provided also that, where property of both principal and surety is hypothecated, the surety may require that the property of the principal be taken first. Field §1571; Cal. §2850; Mont. §8208; N.D. §6688; Okla. §5160; S.D. §1511.
168 Field §1568; Cal. §2847; Mont. §8205; N.D. §6685; Okla. §5157; S.D. §1508. Implied obligations of indemnity are in their essence equitable. Stearns on Suretyship (Feinsinger's 4th ed. 1934), 503, §279.
169 Field §§8156, 1570 & 1572; Cal. §§2834, 2849 & 2854; Mont. §§8206, 8207 & 8209; N.D. §§6686, 6687 & 6689; Okla. §§8153, 8159 & 8161; S.D. §§1509, 1510 & 1512.
168 As to titles in States other than California, see footnote #18, supra. §§2819 & 2824 (Field §§1551 & 1556; Mont. §§8188 & 8193; N.D. §§6688 & 6673; Okla. §§5140 & 5145; S.D. §§1491 & 1496), in the latter chapter, prevent discharge of guarantors through alterations, insofar as they have been indemnified by the principal.
23. SUMMARY OF EFFECTS

Upon dissection, the distinction between suretyship and guaranty is vapid. Making reasonable assumptions as to the interpretation of code provisions, the effects which have been found under the Field Code resolve themselves into the following:

(1) Parol evidence may be used to establish that an apparent principal is a surety, but not that he is a guarantor.  

(2) In North and South Dakota sureties upon official bonds, at least, are distinguished from guarantors in regard to date of maturity of obligation.  

(3) In South Dakota notice by the creditor of acceptance of an offer to assume secondary liability is necessary in the case of guaranties, but not in connection with suretyships.  

(4) The doctrine of *Pain v. Packard* applies to sureties, but not to guarantors.  

Apart from the Field Code provisions, we have the following additional effects, in one or more of the five States under consideration:

(5) In California and Montana there seems to be a distinction as to whether an impairment of the secondary party's remedies results under certain circumstances if security is taken from another party subsequent to the execution of the obligation.  

(6) In Montana it is held that only a surety may be joined with the principal as defendant.  

(7) In California and Montana a distinction arises in connection with the "but one action" rule when a mortgage or deed of trust is taken from another party.  

(8) In California and Montana there is a difference in regard to the availability of attachment when certain forms of security are taken from other parties.  

(9) In Montana the obligation of a surety is "direct," for purposes of attachment, but not that of a guarantor.  

It should be pointed out also that, as long as the distinction under consideration appears upon the statute books, whenever in any legal provision the term "surety" is used, without "guarantor," or vice versa, a potential source of danger exists. The question is always pertinent whether a dis-
tinction is intended. Indices disclose that there are many statutes of this sort. Provisions outside the Field Code have been referred to only where effects of the distinction have been found to exist.

V. PROPOSED CODIFICATORY ABOLITION

A distinction so formidable upon first impression, so difficult of application and so empty in effective content, should not be retained in the law. It creates confusion and requires great expenditures of effort upon the part of judges and practitioners, with almost infinitesimal results. From the standpoint of legal science the situation is intolerable. Professor Radin says of the distinction:

"It is in the highest degree unfortunate that the decision of any case should be allowed to turn upon the whimsy of a Pennsylvania or Massachusetts judge of nearly a century ago. It has no roots in the past. It has no sense in the present. If it is disregarded—as it is in many jurisdictions—it will clear the subject of a portentous amount of confused phrases and economize effort in investigating, besides avoiding the obvious injustice of refusing or granting relief on so insubstantial a basis." 178

A draft of a proposed recodification of that portion of the law, designed to abolish the distinction, will be set forth. The draft has been prepared with as little violence as possible to the form of existing provisions. All matters previously set forth in the code are covered by the draft, as it seems inadvisable to return to the field of case-made law matters which have been in statutory form for a considerable period of time. The present section numbers have been retained, at the expense, because of omissions, of preventing the numbers from being consecutive. 179 The proposed section numbering for States other than California is shown in the footnotes.

When terms have become established in legal usage, it is futile to attempt to supplant them, or to restrict their use. Therefore no new terminology is suggested. Rather the familiar terms are made interchangeable. "Surety" has been employed in preference to "guarantor," except where there has been a special usage of the latter in a particular connection, as with guaranties of collection and continuing guaranties. In these situations it has been felt that to attempt to depart from familiar language would increase rather than diminish confusion. In expressing his preference for suretyship terminology, Professor Williston says:

"The English terminology of calling any obligor a surety who is liable in any form for the debt of another not only is in inveterate common use in America also, but is intrinsically the better since it centers attention on the one vital point that the debt as between principal and surety is the debt of the principal. Most of the peculiar rules of suretyship in any form, whether of guaranty or otherwise, are based on this relation of the principal debtor to the surety and not on any difference in the form of contract which the

178Radin, Guaranty & Suretyship, 18 CAL.L.REV. 21, 30 (1929).
179In California, the numbering has not been consecutive.
surety makes with the creditor. It is desirable to have a single word which includes all cases where the relation in question exists."

"Surety" is the more commonly used term; and, in view of the increasing importance of surety companies and surety bonds, it is believed that the relative predominance of the word will, in any event, increase rather than diminish. Preference for this term is also in harmony with the practice of the courts, previously discussed, normally to assume, when the way is left open under the facts to do so, that a secondary obligation is one of suretyship rather than of guaranty.

Should not advantage be taken of the opportunity presented by revision, to introduce other improvements into the law, in addition to abolition of the suretyship-guaranty distinction? In an endeavor to accomplish this, a number of changes have been inserted. They are almost entirely either by way of clarification, or to settle definitely points upon which conflicts of authority have arisen in other parts of the country. These additional modifications of the law are not essential to the main purpose of the revision, and easily can be eliminated, in whole or in part, if considered undesirable. In addition to setting forth these proposed alterations in the following list, only brief comment will be made in regard to them. The changes inserted, in addition to abolition of the distinction, are as follows:

1. It is made clear that a promise to answer for a debt, default, or miscarriage of another need not be in writing where there is consideration to the secondary promisor, even though the promise is made at the time of execution of the principal obligation.

2. Where notice of acceptance of the suretyship obligation is not expressly required, it is made possible to accept an offer to become a surety by acting upon it.

3. The position of the surety, where there are defenses in behalf of the principal, is clarified; and the recovery back by the creditor of a res which has been transferred is prevented from terminating the surety's liability.

4. The established practice of implying the surety's consent to certain alterations is incorporated in the code.

5. The doctrine of express reservation of rights is abolished.

6. The rule that a void or voidable promise by a creditor can not constitute an alteration discharging the surety is eliminated.

7. In connection with the use of parol evidence to establish that a

---

180 Williston, Contracts (rev.ed. 1936), 3484, §1211.
181 See I. The Statement of the Distinction, at footnotes #13, 22 & 23, supra.
182 The authors of this article plans to treat of these changes in greater detail in a subsequent article.
183 See §2794(4), in text at footnote #210, infra.
184 See §2795, in text, at footnote #212, infra.
185 See §2810, in text, at footnote #232, infra.
186 See §2819, in text, at footnote #240, infra.
187 This is accomplished through the repeal of the present §2820 (Field §1552; Mont. §8189; N.D. §6669; Okla. §5141; S.D. §1492).
SURETYSHIP AND GUARANTY

party is a surety, it is made unnecessary to prove that the creditor accepted him as such.

(8) The position of a compensated surety is made the same as that of one who is gratuitous.

(9) The Pain v. Packard doctrine is abolished.

To effect the abolition of the distinction between suretyship and guaranty, and to make the foregoing changes, the existing Sections 2820, 2831, 2836, 2840, and 2844 should be repealed. The other Sections from 2787 to 2854 should be retained, either in their present or in amended form, so that the body of code provisions on suretyship and guaranty will read as follows:

TITLE XIII. SURETYSHIP

ARTICLE I. DEFINITION OF SURETYSHIP

2787. Suretyship and guaranty, what. The distinction between sureties and guarantors is hereby abolished. The terms

---

1937]
and their derivatives, wherever used in this code or in any other statute or law of this State now in force or hereafter enacted, shall have the same meaning, as hereafter in this section defined. A surety or guarantor is one who promises to answer for the debt, default or miscarriage of another, or hypothecates property as security therefor. Guaranties of collection and continuing guaranties are forms of suretyship obligations, and, except insofar as necessary in order to give effect to provisions specially relating thereto, shall be subject to all provisions of law relating to suretyships in general.\textsuperscript{201}

2788.\textsuperscript{202} Knowledge of principal not necessary to creation of suretyship. A person may become surety even without the knowledge or consent of the principal.\textsuperscript{203}

ARTICLE II. CREATION OF SURETYSHIP\textsuperscript{204}

2792.\textsuperscript{205} Necessity of a consideration. Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.\textsuperscript{206}

2793.\textsuperscript{207} Suretyship to be in writing, etc. Except as prescribed by the next section, a suretyship obligation must be in writing, and signed by the surety; but the writing need not express a consideration.\textsuperscript{208}

2794.\textsuperscript{209} Engagement to answer for the obligation of another, when deemed original. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise;

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety;

\textsuperscript{201}The last sentence is inserted in an endeavor to prevent any expressio unis or other confusing inferences from the retention of guaranty terminology, because of familiar usage, in these two connections.

\textsuperscript{202}Mont. §8172; N.D. §6652; Okla. §5124; S.D. §1475.

\textsuperscript{203}This section has been changed only through the substitution of suretyship terminology for guaranty.

\textsuperscript{204}Article titles to be omitted in Montana and Oklahoma.

\textsuperscript{205}Mont. §8173; N.D. §6653; Okla. §5125; S.D. §1476.

\textsuperscript{206}This section has been changed only through the substitution of suretyship terminology for guaranty.

\textsuperscript{207}Mont. §8174; N.D. §6654; Okla. §5126; S.D. §1477.

\textsuperscript{208}This section has been changed only through the substitution of suretyship terminology for guaranty.

\textsuperscript{209}Mont. §8175; N.D. §6655; Okla. §5127; S.D. §1478.
SURETYSHIP AND GUARANTY

(3) Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation;

(4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person;

(5) Where a factor undertakes, for a commission, to sell merchandise and act as surety in connection with the sale;

(6) Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

2795. Acceptance of Suretyship. Unless notice of acceptance is expressly required, an offer to become a surety may be accepted by acting upon it, or by acceptance upon other consideration. An absolute suretyship obligation is binding upon the surety without notice of acceptance.

ARTICLE III. INTERPRETATION OF SURETYSHIP

2799. Suretyship of incomplete contract. In an assumption of liability as surety in connection with a contract the terms of which are not then settled, it is implied that its terms shall be such as will not expose the surety to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.

2800. Guaranty of collection. A guaranty to the effect that an obligation is good, or is collectable, imports that the debtor is solvent, and that the demand is collectable by the usual legal proceedings, if taken with reasonable diligence.

210Subdivision 4 represents a change in the form of the corresponding final portion of subdivision 3 in the Field Code ($1538), in order to remove the limitation of the rule to antecedent obligations. It has been so confined through the operation of the expressio unis canon.

211Subdivision 5 has been changed through the substitution of suretyship terminology for guaranty.

212Mont. §8176; N.D. §6556; Okla. §5128; S.D. §1479.

213This is substituted for the present form of the section, reading as follows: "A mere offer to guaranty is not binding, until notice of its acceptance is communicated by the guaranty to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance." It should be possible to accept an offer to become a surety by shipping goods, for example, in reliance upon it.

214Article titles to be omitted in Montana and Oklahoma.

215Mont. §8177; N.D. §6557; Okla. §5129; S.D. §1480.

216This section has been changed only through the substitution of suretyship terminology for guaranty.

217Mont. §8178; N.D. §6558; Okla. §5130; S.D. §1481.

218This section is unchanged, except that, for simplification, the title set forth
2801.219 Recovery upon such guaranty. A guaranty such as is mentioned in the last section is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.220

2802.221 Guarantor's liability upon such guaranty. In the cases mentioned in section two thousand eight hundred, the removal of the principal from the State, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor.222

ARTICLE IV. LIABILITY OF SURETIES223

2806.224 Suretyship, how construed. A suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the surety.225

2807.226 Liability upon suretyship of payment or performance. A surety who has assumed liability for payment or performance is liable to the creditor immediately upon the default of the principal, and without demand or notice.227

2808.228 Liability upon suretyship of a conditional obligation. Where one assumes liability as surety upon a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof.228

2809.230 Obligation of surety cannot exceed that of the principal. The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.231

has been substituted for the present title, reading: "Guaranty that an obligation is good or collectable."

It is felt that confusion would be increased rather than diminished by an attempt to depart from established terminology in connection with guaranties of collection. See §2787, in text, supra, and footnote #201, in connection therewith.219Mont. §8179; N.D. §6659; Okla. §5131; S.D. §1482.220This section is unchanged.

221Mont. §8180; N.D. §6660; Okla. §5132; S.D. §1483.222This section is unchanged.

222Article titles to be omitted in Montana and Oklahoma.223Mont. §8181; N.D. §6661; Okla. §5133; S.D. §1484.

224This section has been changed only through the substitution of suretyship terminology for guaranty.225Mont. §8182; N.D. §6662; Okla. §5134; S.D. §1485.

226This section has been changed only through the substitution of suretyship terminology for guaranty.227Mont. §8183; N.D. §6663; Okla. §5135; S.D. §1486.

228This section has been changed only through the substitution of suretyship terminology for guaranty.229Mont. §8184; N.D. §6664; Okla. §5136; S.D. §1487.

230This section has been changed only through the substitution of suretyship terminology for guaranty.
SURETYSHIP AND GUARANTY

2810.232 Surety not liable on an illegal contract. A surety is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal; but he is not liable if for any other reason there is no liability upon the part of the principal at the time of the execution of the contract, or the liability of the principal thereafter ceases, unless the surety has assumed liability with knowledge of the existence of the defense. Where the principal is not liable because of mere personal disability, recovery back by the creditor of any res which formed all or part of the consideration for the contract shall have the effect upon the liability of the surety which is attributed to the recovery back of such a res under the law of sales generally.233

ARTICLE V. CONTINUING GUARANTY234

2814.235 Continuing guaranty, what. A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.238

2815.237 Revocation. A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce.238

ARTICLE VI. EXONERATION OF SURETIES239

2819.240 What dealings with debtor exonerate surety. A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended, except, as to any of the foregoing, insofar as the surety's consent thereto may be reasonably implied.240A

232Mont. §8185; N.D. §6665; Okla. §5137; S.D. §1488.
233This section in its present form, in addition to covering satisfactorily personal disability of the principal, reads: "A guarantor is not liable if the contract of the principal is unlawful . . ." This has been clarified, to remove the expressio unis inference that the surety would be liable notwithstanding the existence of defenses in favor of the principal other than illegality and those relating to personal disability.
234Article titles to be omitted in Montana and Oklahoma.
235Mont. §8186; N.D. §6666; Okla. §5138; S.D. §1489.
236This section is unchanged. It is felt that confusion would be increased rather than diminished by an attempt to depart from established terminology in connection with continuing guaranties. See §2737, in text, supra, and footnote #201, in connection therewith.
237Mont. §8187; N.D. §6667; Okla. §5139; S.D. §1490.
238This section is unchanged.
239Article titles to be omitted in Montana and Oklahoma.
240Mont. §8188; N.D. §6668; Okla. §5140; S.D. §1491.
240A The exception at the end inserts the doctrine of implied consent, setting forth the result usually attained through judicial construction.
consent shall be implied in connection with extensions of time, addition of principal obligors or secondary parties, and lending of money in an amount larger or smaller than that provided for.

The preceding sentence shall not be interpreted to restrict the implication of consent in other connections. An express reservation of rights shall not continue the surety's liability under circumstances such that it would otherwise be terminated.

2821. Recession of alteration. The recession of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a surety who has been exonerated by such agreement.

2822. Part performance. The acceptance, by a creditor, of anything in partial satisfaction of an obligation, reduces the obligation of a surety thereof, in the same measure as that of the principal, but does not otherwise affect it.

2823. Delay of creditor does not discharge surety. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a surety.

2824. Surety indemnified by the debtor, not exonerated. A surety, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the surety, may have modified the contract or released the principal.

241 Discharge of sureties because of extensions of time granted to the principal debtor is based, as others have pointed out, upon the absurd assumption that the surety is eager to perform at maturity, in order to obtain rights of subrogation and indemnity. Cardozo, Nature of the Judicial Process (1921), 153.

242 Unless the parties added are sureties, and are so irresponsible financially as to impair the right of contribution, in which event the special circumstances negative implication of consent, as provided for in the text, it would be a very unusual situation where a surety, if contacted, would not welcome the addition of other parties.

243 Unless there is some special reason why the principal should be advanced the exact sum mentioned in the contract, in which event the special circumstances will create an exception, as provided for in the text, the surety should not be discharged because of a departure from the terms of the agreement.

244 The highly artificial reasoning upon which the doctrine of express reservation of rights is based should not be permitted longer to continue its existence.

The first sentence of the section is changed through the substitution of suretyship terminology for guaranty, and the insertion of the exception at the end. The remaining sentences of the section are new.

245 This section has been changed only through the substitution of suretyship terminology for guaranty.
SURETYSHIP AND GUARANTY

2825. Discharge of principal by act of law does not discharge surety. A surety is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor.

ARTICLE VII. POSITION OF SURETIES

2832. Apparent principal may show that he is surety. One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal. It is not necessary for him to show that the creditor accepted him as surety.

2837. Rules of interpretation. In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Except as provided in section two thousand seven hundred and ninety-four, the position of a surety to whom consideration moves is the same as that of one who is gratuitous.

2838. Judgment against surety does not alter the relation. Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

2839. Surety exonerated by performance or offer of performance. Performance of the principal obligation, or an offer of such performance, duly made as provided in this code, exonerates a surety.

2845. Surety may require the creditor to proceed against the principal. If the contract expressly so provides, but not otherwise, a surety may require his creditor to proceed against the prin-

2825. N.D. §6674; Okla. §5146; S.D. §1497.
2826. This section has been changed only through the substitution of suretyship terminology for guaranty.
2827. Article titles to be omitted in Montana and Oklahoma.

This article, with a title meaningless from the standpoint of delimitation, has been created in order to provide a place for the sections previously in the chapter on Suretyship which it is necessary to carry forward. As to chapter divisions in Montana, see footnote #18, supra.

§2831, defining a surety, has been omitted.
2828. Mont. §8196; N.D. §6676; Okla. §5148; S.D. §1499.
2829. The first sentence is unchanged. The second sentence has been inserted. Unreasonable limitation of the use of parol evidence in this connection should be prevented.

§2836 (Mont. §8197; N.D. §6677; Okla. §5149; S.D. §1500) has been repealed through omission. See footnote #193, supra.

§2838 (Mont. §8198; N.D. §6678; Okla. §5150; S.D. §1501).
2829. The first sentence is unchanged. The second sentence has been inserted. See text, supra, at footnotes #31 & 33, and said footnotes.

§2803. Mont. §8199; N.D. §6679; Okla. §5151; S.D. §1502.
2829. This section is unchanged.

§2802. Mont. §8200; N.D. §6680; Okla. §5152; S.D. §1503.
2829. This section is unchanged.

§§2840 & 2844 (Mont. §§8201 & 8202; N.D. §§6681 & 6682; Okla. §§5153 & 5154; S.D. §§1504 & 1505) have been omitted. See text, supra, at footnotes #194 & 195, and said footnotes.

§2804. Mont. §8203; N.D. §6683; Okla. §5155; S.D. §1506.
principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.\(^{266}\n
2846.\(^{268}\) Surety may compel principal to perform obligation, when due. A surety may compel his principal to perform the obligation when due.\(^{267}\n
2847.\(^{268}\) A principal bound to reimburse his surety. If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.\(^{269}\n
2848.\(^{270}\) The surety acquires the right of the creditor. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.\(^{271}\n
2849.\(^{272}\) Surety entitled to benefit of securities held by creditor. A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.\(^{273}\n
2850.\(^{274}\) The property of principal to be taken first. Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.\(^{275}\n
2854.\(^{278}\) Creditor entitled to benefit of securities held by surety. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.\(^{277}\n
---

\(^{266}\) This section has been changed in order to eliminate the doctrine of Pain v. Packard. It is felt that that object will be more certainly attained through retention of the section in this form than by dropping it from the code. For criticisms of Pain v. Packard, see Arant on Suretyship (1931), 317, §71; Stearns on Suretyship (Feinsinger's 4th ed. 1934), 174, §115; Note, 37 Yale L.Jour. 971 (1928).

\(^{268}\) Mont. §8204; N.D. §6684; Okla. §5156; S.D. §1507.

\(^{269}\) This section is unchanged.

\(^{270}\) Mont. §8206; N.D. §6686; Okla. §5158; S.D. §1509.

\(^{271}\) This section is unchanged.

\(^{272}\) Mont. §8207; N.D. §6687; Okla. §5159; S.D. §1510.

\(^{273}\) This section is unchanged.

\(^{274}\) Mont. §8208; N.D. §6688; Okla. §5160; S.D. §1511.

\(^{275}\) This section is unchanged.

\(^{276}\) Mont. §8209; N.D. §6689; Okla. §5161; S.D. §1512.

\(^{277}\) This section is unchanged.