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Recent Decisions: Creditor's Rights--Guaranty--Discharge of Guarantor [*Mutual Finance Co. v. Politzer*, 16 Ohio App. 2d 83, 241 N.E.2d 906 (1968)]

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Recent Decisions

CREDITOR'S RIGHTS — GUARANTY — DISCHARGE OF GUARANTOR

Mutual Finance Co. v. Politzer, 16 Ohio App. 2d 83, 241 N.E.2d 906 (1968).

The confusing distinction between surety and guarantor[1] has been utilized by courts as a foundation for decision-making without sufficient attention being paid to the close similarity between the

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[1] This distinction is best understood by first examining the difference between the contract of the principal and that of the surety or guarantor. The principal makes a contract in which he receives a benefit from and incurs an obligation to the other party, the creditor. Thus, there are two parties to the contract and the principal has the burden of discharging the obligation to the creditor. However, in order to provide security for the creditor, an accessorial agreement may be made. This agreement is made for the creditor's benefit by a third party, the surety or guarantor, acting on behalf of the principal. It gives the creditor an additional person toward whom to look for ultimate performance of the principal's obligation. However, as between the principal and the accessorially bound third party, the principal should pay. If he does pay and the third party must discharge the principal's obligation, the principal becomes obligated to him.

The distinction between surety and guarantor depends upon the nature of the accessorial agreement. The surety's agreement is usually made contemporaneously with the principal's contract and becomes a part of it. Thus, the surety is said to be primarily liable with the principal. The liability of both surety and principal originates at the same time. In contrast, the guarantor characteristically makes his separate contract at a time different from that of the principal's contract. The guarantor's agreement does not render him liable until the principal defaults. Thus, the guarantor is said to be secondarily liable. Consequently, while the creditor must sue principal and guarantor separately, the surety and principal may be joined in the same action.

A further dimension of the guarantor's contractual liability is the distinction among guarantors. The guarantor may be either absolute and unconditional or merely conditional. The former is a guarantor of payment; the latter is a guarantor of collection. The guarantor of payment agrees to pay if the principal does not, and he becomes liable to the creditor immediately upon the principal's default. On the other hand, the guarantor of collection agrees to pay only if payment cannot be judicially extracted from the recalcitrant principal debtor. *See* Arnold, *Primary and Secondary Obligations*, 74 U. PA. L. REV. 36 (1925).

The ancillary nature of the surety's and guarantor's contracts makes them appear very much the same. The practical difference existing between them is that while the surety's liability is unconditional, the guarantor's liability is conditioned upon default by the principal and may be further conditioned upon the creditor's judicial attempt to collect from the principal. Apart from the rather technical differences noted above, the two security arrangements are indistinguishable, a fact attested to by the unitary treatment accorded them by the RESTATEMENT OF SECURITY § 82 & comment *g* at 231 (1941). Additionally, the distinction generally made between them has been deplored by most commentators. *E.g.*, Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 YALE L.J. 833, 841 & n.41 (1968). For further discussion of the distinction, see L. SIMPSON, SURETYSHIP § 14, at 16-23 (1950); A STEARNS, SURETYSHIP § 1.5 (5th ed. 1951); 10 S. WILLISTON, CONTRACTS § 1211 (3d ed. 1967); Cormack & McCarroll, *The Distinction Between Suretyship and Guaranty in States Having the Field Code Pro-*

two.[2] The technical difference between them, even though each serves essentially the same function,[3] occasionally gives rise to different allocations of legal rights and remedies.[4] Ohio courts have long recognized and placed great weight upon the distinction.[5] At times it can be a useful tool with which to measure the liability assumed by the respective parties when analysis of the terms of an agreement proves useless.[6] However, when the equitable principles associated with suretyship are disregarded as a result of the empha-

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visions, 10 S. CAL. L. REV. 371 (1937); Green, *Distinction Between Suretyship and Guaranty in Georgia*, 9 GA. B.J. 273 (1947).

[2] *See* Radin, *Guaranty and Suretyship*, 18 CALIF. L. REV. 21, 29-30 (1929); 24 GA. B.J. 273 (1962).

[3] The function of either a surety or a guarantor is to answer for "the debt, default or miscarriages" of another person by contract. Downs, *A Surety's Basic Rights and Remedies*, 15 DEFENSE L.J. 139 (1966).

[4] The difference in the allocation of rights is well illustrated by the means available to guarantors and sureties for protecting themselves from loss through liability to a creditor. A surety may recover from the principal debtor by way of subrogation or by the equitable doctrine of reimbursement. A guarantor appears to have only subrogation rights. *Compare* 50 AM. JUR. *Suretyship* § 221 (1944), *with* 30 AM. JUR. 2D *Guaranty* § 127 (1968). This seems to be the trend in Ohio. *Compare* 50 OHIO JUR. 2D *Suretyship* §§ 144, 145 (1961), *with* 26 OHIO JUR. 2D *Guaranty* § 40 (1957). In Ohio a surety does have both means of recovery available to him. *See* Seward v. National Surety Co., 120 Ohio St. 47, 165 N.E. 537 (1929) (subrogation); Elsea v. Pepple, 12 Ohio N.P. (n.s.) 468 (C.P. 1912) (reimbursement). The question of the availability of reimbursement to Ohio guarantors has never been raised. The treatises indicate that the answer would be negative. *But see* Barger v. Gething, 39 Ohio L. Abs. 221, 52 N.E.2d 94 (Ct. App. 1943). Other jurisdictions give the guarantor reimbursement rights. *See* Dykes v. Clem Lumber Co., 58 Ariz. 176, 118 P.2d 454 (1941); Leslie v. Compton, 103 Kan. 92, 172 P. 1015 (1918). The RESTATEMENT OF SECURITY § 104 (1)(a) & comment *f* at 278 (1941) suggests that a guarantor should have this right; however, in Ohio the question is open, and a potential for different treatment for sureties and guarantors exists.

An additional difference occurs in the application of statutory protection. The doctrine as announced in Pain v. Packard, 13 Johns. 174 (N.Y. Sup. Ct. 1816) which allows a surety to require the creditor to first proceed against the principal debtor has been codified in Ohio. *See* OHIO REV. CODE ANN. § 1341.04 (Page 1962). This statute has been construed to apply only to sureties. Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N.E.2d 337 (1943). For other statutes which are written in favor of sureties and which seem to afford guarantors no relief, see OHIO REV. CODE ANN. §§ 1341.19 (exoneration), 1341.20 (indemnity prior to debt's maturity), § 1341.21 (provisional remedies) (Page 1962).

[5] *See, e.g.*, Madison Nat'l Bank v. Weber, 117 Ohio St. 290, 158 N.E. 543 (1927). For an example of the same distinction made in other jurisdictions, see Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 So. 539 (1892). Some states, however, reject the distinction. Hamilton v. Meiks, 210 Ind. 610, 4 N.E.2d 536 (1936) (the obligations of guarantors and sureties differ only slightly in a technical and insubstantial manner); Brock v. State Bank & Trust Co., 187 La. 766, 175 So. 569 (1937) (contracts of guaranty and suretyship are the same); Plummer v. Wilson, 322 Pa. 118, 185 A. 311 (1936) (a contract of guaranty is a contract of suretyship unless expressly stated otherwise).

[6] *See* Lakemore Plaza, Inc. v. Shoenterprise Corp., 91 Ohio L. Abs. 140, 188 N.E.2d 203 (C.P. 1962).

sis placed on the distinction, the result merely promotes confusion as demonstrated by the recent case of *Mutual Finance Co. v. Politzer.*[7]

In *Mutual*, the Politzers executed absolute and unconditional personal guaranties as security for a loan made by the finance company to their closely held corporation.[8] The loan was also secured by a chattel mortgage executed by the corporation to the finance company. Upon default by the corporation, the finance company seized the mortgaged chattels and sold them without complying with the notice requirements of section 1319.07 of the *Ohio Revised Code.*[9] The sale, however, left a deficiency remaining on the corporation's debt, and the finance company sued the Politzers on their guaranties in an attempt to collect the deficiency. At trial the Politzers successfully argued that the finance company's failure to comply with section 1319.07 barred it from collecting the deficiency from the principal debtor, the corporation, and therefore they, as guarantors, were also relieved of any liability. The Court of Appeals for Cuyahoga County reversed on the grounds that the single purpose of the statute's notice requirement is to enable a mortgagor to protect his equity interest in his chattels and that this protection does not inure to the benefit of any person not a party to the mortgage.[10]

The court's interpretation of the purpose of the statute's notice

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[7] 16 Ohio App. 2d 83, 241 N.E.2d 906 (1968).

[8] The Politzers, a husband, his wife, and his mother, had individually executed the guaranties on behalf of the corporation because the husband was the sole shareholder. The loan constituted the financing for the corporation's inventory which consisted of used cars. These cars were the subject of a chattel mortgage executed as additional security for the loan. Since the guarantors represented the total ownership interest in the corporation, it is difficult to separate the identities of the Politzers from that of the corporation. This may, in part, account for the court's attitude toward the guarantors' liability to pay the corporation's debt.

[9] OHIO REV. CODE ANN. § 1319.07 (Page 1962) [hereinafter cited as § 1319.07] provides in part that any chattel mortgagee who, before foreclosure, takes property covered by the chattel mortgage out of possession of the mortgagor and sells or otherwise disposes of it may not collect any deficiency on the mortgage from the mortgagor or his successors in interest. The effect of the statute may be avoided by giving the mortgagor written notice stating the date and time of sale and the minimum acceptable price tor the chattel. This notice must reach the mortgagor 10 days prior to the sale. At any time prior to the time of the sale stated in the notice the mortgagor may redeem his property by paying the mortgagee the amount due and unpaid on the obligation secured by the mortgage.

[10] The Politzers conceded that as guarantors they were not entitled to receive statutory notice of the sale. It was their position that the corporation was relieved of its obligation secured by the mortgage because of the finance company's failure to give requisite notice. Hence, the effect of discharge of the principal was the central thrust of the Politzers' argument. Brief for Appellee at 4, 6, Mutual Fin. Co. v. Politzer, 16 Ohio App. 2d 83, 241 N.E.2d 906 (1968).

requirement accords with prior decisions.[11] The benefits of the statute by its plain meaning[12] and by judicial interpretation[13] are intended to flow to the mortgagor or his successors in interest. To this end the Ohio courts have required strict compliance with the time limit of 10 days prior to which notice must be received.[14] In addition, the obligation of the mortgagee to notify is not affected by voluntary surrender of the chattels to him by the mortgagor.[15] The Politzers were not mortgagors of the chattels sold and thus were not entitled to notice prior to the sale of the chattels. However, the corporation, being the principal debtor and mortgagor, was within the statute's protection, and the lack of notice prior to sale served to prevent the finance company from collecting any deficiency remaining on the debt from the corporation. The question before the court was whether the statute's bar to an action by the finance company against the principal debtor had any effect on the liability of the party secondarily liable, the Politzers.[16]

Prior to *Mutual* the statute had been raised as a defense by persons other than a mortgagor. In *Economy Savings & Loan Co. v. Weir*,[17] the accommodation maker of a promissory note was sued for a deficiency remaining after the creditor had sold the principal debtor's chattel which had been mortgaged as security for the note. The creditor had failed to give notice of the sale to either the prin-

[11] *See* Cities Serv. Oil Co. v. Burkett, 176 Ohio St. 449, 200 N.E.2d 314 (1964). Information concerning the sale enables the mortgagor to purchase the chattel himself or decrease the possibility of a deficiency by bidding up the price.

[12] *See* § 1319.07 which speaks of the mortgagor or his successor in interest in the chattel being relieved of liability for a deficiency.

[13] Economy Sav. & Loan Co. v. Weir, 105 Ohio App. 531, 153 N.E.2d 155 (1957).

[14] *See, e.g.*, Associates Discount v. Barstow, 2 Ohio Misc. 73, 78, 205 N.E.2d 667 (Mun. Ct. 1964).

[15] James Tolcott, Inc. v. Taylor Indus., Inc., 1 Ohio App. 2d 111, 198 N.E.2d 271 (1963).

[16] *See* note 10 *supra*.

[17] 105 Ohio App. 531, 153 N.E.2d 155 (1957). *Economy* involved three parties. *C*, the holder of the promissory note, had loaned money to *D*, the maker of the note and *C* had required that *D* secure the transaction by a mortgage and by obtaining an accommodation maker. *S* was not party to the mortgage but signed the note as an accommodation maker. Thus the mortgage involved only *C* and *D* whereas the note involved all three parties. It is noteworthy that *S*'s plea when sued by *C* for the deficiency was that *C* was required to notify *S* as well as *D* in order to be able to collect the deficiency. In rejecting this contention the court observed that *S* was not involved in the mortgage and had no interest in *D*'s chattel. *See also* Modern Finance Co. v. Reynolds, 108 Ohio App. 535, 161 N.E.2d 240 (1958), where the statute was raised by a defendant having no interest in mortgaged chattels which had been sold without the required notice. The court followed *Economy* on the issue of who could avail himself of the statute's protection, but never reached the question of the statute's effect on codebtors since the creditor was not barred from proceeding against the mortgagor and codebtor of the defendant.

cipal debtor or the accommodation maker, and the latter argued that he was discharged by virtue of the creditor's failure to notify him. The court rejected this contention stating that section 1319.07 requires that notice be given only to the mortgagor of the chattel. However, it went on to point out that an accommodation maker would be discharged as a result of the creditor's failure to give notice because "[t]he mortgagee . . . thus divested itself of any and all rights against the mortgagor to which the accommodation maker could have otherwise become subrogated for reimbursement."[18] That is, an accommodation party essentially serves as a surety for the party accommodated.[19] Thus the court recognized that while the benefits of section 1319.07 do not directly inure to a party acting as a surety for a mortgagor, release of the mortgagor would work a similar release of the accommodating party on general suretyship principles. By implication the *Economy* case indicates that individuals subject to the requirements of the statute may not fail to give the required notice and expect to recover against the mortgagor's surety. This implication suggests that a guarantor, whose right of subrogation is as fragile as a surety's, should also be protected by the statute.[20]

In making its decision the *Mutual* court placed primary emphasis on the sphere of the statute's protection rather than on the statute's effect. The court reasoned that since a guarantor is distinguishable from a surety, in that the former's position is weaker,[21] the statute's protective shield excluded guarantors as well. Satisfied that the Politzers could not claim the benefit of the statute, the court faced the issue of whether or not discharge of the principal because

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[18] The court approvingly noted the rule that discharge of the maker will also discharge his accommodation maker. *See* OHIO REV. CODE ANN. § 1303.34 (Page 1954), *as amended*, §§ 1303.67, .69, .71 (Page 1962). Unfortunately for *S*, his plea did not include the affirmative defense of the effect of the statute and he could not raise it on appeal. 105 Ohio App. 531, 153 N.E.2d 155 (1957). For further discussion of the decision, see 10 W. RES. L. REV. 433 (1959).

[19] *See* OHIO REV. CODE ANN. § 1303.51 & comment 1 (Page 1962).

[20] This implication was not accepted by the *Mutual* court. For a discussion of possible reasons for this rejection, see notes 26 & 27 *infra* & accompanying text.

[21] *See* Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N.E.2d 337 (1943). The *Galloway* case pointed out that a surety is primarily liable with the principal debtor whereas the guarantor's liability is only secondary. Apparently the surety's primary liability entitles him to protection which is unavailable to the guarantor because primary liability is greater than secondary liability. This reasoning, however, seems to be faulty. A better reason would be that the contract of a guarantor of payment specifically waives the protection which section 1341.04 affords while the obligation of a guarantor of collection specifically includes the same form of protection. Nevertheless this case was cited by the *Mutual* court for the proposition that sureties are entitled to defenses to which guarantors are not. For additional discussion of the distinction, see notes 1 & 4 *supra*.

of the creditor's action similarly would discharge the Politzers as absolute guarantors. In order to resolve this the court examined the nature of an absolute guarantor's liability. Generally, this liability commences immediately upon maturity of the debt guaranteed;[22] consequently, the Politzers were liable at the moment the corporation defaulted.[23] Moreover since the finance company was under no obligation to seek collection from the corporation prior to proceeding against these absolute guarantors, the finance company made no preclusive election when it proceeded directly against the corporation. Rather, because the abortive attempt to collect from the corporation had no effect upon the guarantors' separate contractual obligations, Mutual was simply capitalizing upon the in depth contractual protection with which it had secured its loan to the corporation.

The court rejected the Politzers' argument, based on *Economy*, that since a surety is discharged when a creditor is prevented from collecting a deficiency from the principal debtor because of the operation of section 1319.07, a guarantor is likewise discharged. In disposing of this contention the court emphasized the separateness of the Politzers' agreement and that existing between the finance company and the corporation.[24] The effect of the statute while precluding the finance company from proceeding against the corporation on the basis of the obligation secured by the mortgage did not reach the separate guaranties. The specific grounds for the court's rejection of the *Economy* rationale are not clear.[25] The court's emphasis on the fact that the Politzers' liability arose from a contractual agreement separate from the obligation of the corporation whereas the surety's liability in *Economy* was predicated on a promissory note which was coextensive with the debtor's liability suggests several possible readings of *Economy* by the *Mutual* court: (1) The surety's liability in *Economy* was based solely on the note itself. Once the creditor was barred by the statute's effect from collecting the deficiency remaining on the note, the creditor's rights against the surety were lost.[26] (2) The surety possessing both rights of re-

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[22] Gould v. Gerkin, 28 Ohio App. 309, 315, 162 N.E. 701, 703 (1927). *See also* note 1 *supra.*

[23] *See* Castle v. Rickly, 44 Ohio St. 490, 497, 9 N.E. 136, 138 (1886).

[24] 16 Ohio App. 2d at 88-89, 241 N.E.2d at 912. The fact that a guaranty contract is separate security or is on a separate instrument has served as a rationale for not allowing the guarantor to assert the defenses of his principal. *See* Green, *supra* note 1, at 278.

[25] *See* note 18 *supra* & accompanying text.

[26] This reasoning is suggested by the nature of section 1319.07. The statute specifically provides that the creditor is barred from collecting any deficiency remaining on the mortgage or any obligation secured thereby. *See* note 9 *supra.* It could be argued that

imbursement and subrogation would be able to recover from the principal debtor after paying the creditor.[27] Thus, in order to preserve the statute's protection for the principal, the court discharged the surety along with the principal.

Whichever reading of the *Economy* case was utilized by the *Mutual* court, it rested its rejection of the Politzers' *Economy* argument on the basis of the distinction between guarantors and sureties. Had the Politzers been liable as sureties, their obligation to the finance company would have been discharged by the statute's operation. However, as guarantors, the Politzers could not claim that their agreements were effected by the statute's operation.[28] The Politzers did not have the rights of sureties and the *Mutual* court refused to discharge them, indicating that once the principal has defaulted, his unconditional guarantor's liability to the creditor is indefensible.[29]

The reasoning of the court reflects a disregard for the general

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the note was rendered worthless by the creditor's failure to give notice since it was secured by the mortgage. Such a result would give the creditor no basis on which to proceed against the surety since his liability arose from the note itself.

27 *See* note 4 *supra.* The surety's right of subrogation would be barred by the statute's operation. However, the equitable right of reimbursement existing separate from the subrogation right would allow the surety to recover from the principal the amount paid the creditor. By allowing the creditor to recover the deficiency by going against the surety and thereby exposing the principal to liability, the court would permit a fraud to be worked on the principal. *See* Gholson v. Savin, 137 Ohio St. 551, 556, 31 N.E.2d 858, 861 (1941).

28 Apparently the question of a guarantor's right of reimbursement by indemnity remains open in Ohio. *See* note 4 *supra.* However, the *Mutual* court accepted the finance company's contention that a guarantor recovers only by way of subrogation. 16 Ohio App. 2d at 91, 241 N.E.2d at 911. This contention was raised when the Politzers argued that the statute's purpose would be subverted if they were able to recover from the corporation by way of reimbursement.

29 The conclusion follows from the court's reasoning that since the finance company could sue the Politzers immediately after the corporation's default, no act by the finance company toward the corporation could possibly affect the Politzers' liability. The reasoning suggests that once the guarantor's liability obtains, no act by the creditor subsequent to the accrual of liability will affect that liability unless the creditor acts directly toward the guarantor. Nevertheless, there are a number of theories from which a guarantor might argue that he should be discharged by such a subsequent act. *See* Whalen v. Devlin Lumber & Supply Corp., 251 Md. 51, 246 A.2d 247 (1968) (any act by the creditor which increases the guarantor's risk or injures his rights will release the guarantor to the extent of injury); Gholson v. Savin, 137 Ohio St. 551, 31 N.E.2d 858 (1941) (when the creditor makes an absolute settlement with the principal debtor, releasing him from the obligation, the debtor secondarily liable is discharged because there can be no subrogation to the rights of the creditor against the principal for reimbursement, that right having been extinguished by the settlement with and release of the principal debtor); Procaccino v. Elberon Bldg. & Loan Ass'n, 16 Ohio Misc. 182, 241 N.E.2d 758 (C.P. 1968) (failure of creditor to foreclose on security for debt after principal's default releases guarantor); Arant, *Why Release of Security Discharges a Surety*, 14 MINN. L. REV. 725 (1930) (imprudent release of security by creditor releases secondarily liable party pro tanto); 2 DE PAUL L. REV. 81 (1953) (failure of creditor to perfect a security interest releases the guarantor).

rule that the rights of a guarantor must not be prejudiced by the creditor.[30] In order to avoid a direct confrontation with this principle the court distinguished between voluntary prejudice and prejudice which occurs by operation of law. The finance company had not voluntarily released the corporation from its debt, but rather was barred by operation of the statute from collecting the remaining deficiency. Few Ohio cases have dealt with this exception;[31] and, the various rationales proffered by other jurisdictions may well be inapplicable to the operation of section 1319.07.[32] Unfortunately the court did not inquire into any of the reasons why a release of the principal by operation of law should not discharge a guarantor, thus the court closed the question as to the alternatives that may be available to relieve a guarantor of liability.[33]

In effect, *Mutual* relieves creditors from complying with the requirements of section 1319.07 when selling repossessed or seized chattels so long as there is an unconditional guarantor of the debt. Although the Ohio case law requires strict compliance with this statute if the mortgagee expects to collect any deficiency resulting from a sale of such chattels, *Mutual* shifts the risk of loss resulting from noncompliance with the statute's notice requirements from the mortgagee to the unconditional guarantor. Thus, while commercial reality suggests that lenders should be encouraged to make loans and be

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[30] *See* RESTATEMENT OF SECURITY § 122 & comment *b* (1941).

[31] *See* Moore v. Gray, 26 Ohio St. 525 (1875) (statute of limitations). *Compare* Central Nat'l Bank v. Mills, 62 Ohio App. 413, 427, 24 N.E.2d 607, 614 (1939), *with* Merrit v. Pritchard, 4 Ohio N.P. (n.s.) 571, 574-76 (C.P. 1906) (bankruptcy).

[32] The majority of jurisdictions refuse to allow a surety to be discharged when the creditor's claim is barred by the statute of limitations. *E.g.*, Auchampaugh v. Schmidt, 70 Iowa 642, 27 N.W. 805 (1886); *see* Annot., A.L.R.2d 1272-73 (1958). However, the better view is that if the creditor does not proceed against the guarantor within a reasonable time, his prejudice of the guarantor's right of subrogation discharges the guarantor. RESTATEMENT OF SECURITY § 130, comment *g*, at 354-55 (1941). *See also* Mulvane v. Sedgley, 63 Kan. 105, 114, 64 P. 1038, 1041 (1901) (concurring opinion); Arnold, *The Statute of Limitations in the Law of Suretyship*, 17 ILL. L. REV. 1 (1922).

The most often cited reason for not allowing the guarantor to raise the defense of the statute of limitations is that the surety or guarantor is not released when the creditor does not contribute to the release by his own positive act. Wagoner v. Watts, 44 N.J.L. 126 (Sup. Ct. 1882). The operation of section 1319.07 is analogous to the statute of limitations since a deficiency barred by the statute is not extinguished; it is simply uncollectable. However, rather than resulting from the creditor's failure to act, a debt made unenforceable by section 1319.07 is a direct result of the creditor's positive act. The statute specifies how the mortgagee may protect his interests against the mortgagor — he need only follow the statute's notice requirements.

[33] For additional discussion of such principles, see Clark, *Suretyship in the Uniform Commercial Code*, 46 TEXAS L. REV. 453, 458-59 (1968); Peters, *supra* note 1, at 875 n.171; Note, *The Availability of a Principal's Defense to His Uncompensated Surety*, 46 YALE L.J. 833 (1937); Note, *Liability of a Surety When the Principal Obligor is Unenforceable*, 13 COLUM. L. REV. 426 (1913).

afforded ample security in exchange for responsible treatment of the rights of the parties providing such security, *Mutual* seems to discourage this balance.[34]

The guarantor of a debt which is also secured by a chattel mortgage can protect himself from the effects of *Mutual* by conditioning his agreement on the mortgagee's compliance with the requirements of section 1319.07.[35] In addition, the mortgagor would do well to request that his guarantor include such a condition in his contract. In this way the mortgagee would be strongly encouraged to comply with section 1319.07 and the problems raised in *Mutual* would be obviated.[36]

Central to the court's decision is the distinction drawn in Ohio between guarantors and sureties. This distinction enabled the court to reach a decision contrary to the result which would have been required had the Politzers borne the label of surety.[37] This absurd result is not supported by analysis of the essential differences between guarantors and sureties because these differences are less than substantial. Certainly they do not justify the difference in judicial attitude toward the two.[38] Therefore, a most unfortunate aspect of the decision is the perpetuation of this awkward and undesirable distinction. The court suggested that the legislature might protect guarantors by specifically including them in the class of persons pro-

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[34] The result in *Mutual* gives the mortgagee as much security as he has ever been able to obtain but relieves him of the obligation of protecting the mortgagor's right of redemption; *Mutual* places this loss upon the guarantor. Such a trend is wholly inconsistent with the traditional view that the guarantor or surety is a favored debtor. *See* Magee v. Manhattan Life Ins. Co., 92 U.S. 93, 98 (1875). For an example of how this situation could be handled more equitably, see Coast Fed. Sav. & Loan v. Crawford, 117 F.2d 913 (9th Cir. 1941). For a treatment of deficiency liability and notice of the sale of seized chattels under the *Uniform Commercial Code* sections 9-504(2), 9-507(1), see Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696, 702 (W.D. Pa. 1963).

[35] However, a realistic view of the negotiations which produce guaranties suggests that the average person has no knowledge of the need to specifically condition his obligation on a mortgagee's compliance with section 1319.07.

[36] One of the aspects of the case which seemed to trouble the court was that the Politzers' argument was based on a technicality. Had the finance company complied with the written notice requirement, the Politzers conceded that both they and the corporation would have been liable on the debt. In addition, the identity of the Politzers being so closely linked with the corporation undoubtedly led the court to conclude that since they had incurred the debt, they should not be allowed to avoid paying it by means of a technicality. This suggests a conflict within the court between the purpose of section 1319.07 and the idea that all men should pay their debts. The court resolved the conflict by stating that the statute's protection does not include guarantors.

[37] *See* notes 17-20 *supra* & accompanying text.

[38] *See* note 1 *supra.* The absolute guarantor is primarily liable upon default by his principal in the same way that the surety is liable. Neither guarantor nor surety can be sued prior to default; thus, the practical difference between their liability after default is nonexistent.