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Guarantor Distinguished from Surety

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CONCLUSION

Looking back over the ten situations enumerated, it will be seen that the facts of the *McDonald* case fit it into only three of them. As applied to the third situation, where the defendant occupies a room in a dwelling house, it may be said to have broadened the pre-existing law. Previously the defendant could complain only if his room had been searched. Under the *McDonald* decision, if the concurring opinion is given full effect, he may complain of a criminal intrusion into any portion of the house. As applied to the fifth situation, where the defendant is a casual visitor on the premises, the decision left the law unchanged. As applied to situation ten, where defendant is tried jointly with one whose rights were violated, the effect of the decision can not be determined at this time; seemingly its immediate effect will be to create confusion. The real importance of the case of *McDonald v. United States* lies in the fact that it is the first Supreme Court decision which has given any consideration to the problem of who may complain of an unlawful search and seizure. The total impression that one gains from reading it is that the court desired to liberalize existing law so as to give greater scope to the guarantees of the Fourth Amendment. Probably in the long run this decision will tend to have that result. When future courts, faced with a novel fact situation, are in doubt as to whether or not defendant's rights have been violated by an unlawful search, the liberalizing spirit of *McDonald v. United States* will act as a lever to throw the judgment of the court in favor of the defendant.

MILTON D. HOLMES

Guarantor Distinguished from Surety

THE CONTRACT OF GUARANTY belongs to a family of similar and closely related contracts wherein the rights and liabilities of the parties depend in some way on another contractual relation or on performance by another party. Some of these contracts are distinguishable by brief definition, but the relation between guaranty and suretyship, with the concomitant necessity of recognizing two distinct kinds of guaranty itself, has given rise to such confusion both of terminology and of thought that a careful study seems warranted. This is illustrated by four recent cases: one, In re *Bitkert Estate*,[1] defines a guaranty as a "direct promise by the guarantors to pay, and not only to pay if the principal fails to do so . . . . This

is an original undertaking on the part of [the guarantors]." Another, In re *Williams' Estate,*[2] holds on the contrary that (1) a guaranty is a *collateral* undertaking to answer for the payment of a debt or the performance of a duty of another who is primarily liable therefor, and (2) the contract of guaranty is independent of the principal contract and the liability of the guarantor *secondary,* not primary or original. Neither of these cases has to do with the liability of a surety, but the former definition would embrace it, while the latter properly excludes it. Two other cases are concerned with the kinds of guaranty.[3]

This distinction is of substantial importance in Ohio, for in addition to the differences in time of accrual of the liability of surety and guarantor, in their respective rights to notice of the principal's default, and in joinder provisions, discussed below in the summary of recognized distinctions at common law, the Ohio General Code further provides certain statutory remedies available to the surety but not to the guarantor. Section 12191 gives the surety the right to require the creditor, by notice in writing, to commence an action against the principal debtor or forfeit his right against the surety: this was held not to include a guarantor or indorser in *Galloway v. Barnesville Loan, Inc.*[4] Section 11713 provides that when a judgment is recovered against principal and surety, the clerk must certify which of the parties defendant is in the latter capacity, and all available property of the principal must be exhausted before any of the surety's is taken in execution; such certification was held not available to a guarantor or indorser in *Crawford v. Turnbaugh.*[5] Section 12194 provides that a surety so certified who pays the judgment has all the rights and remedies of the creditor to the extent of his payment, and may revive the judgment in his own name against the principal; this, because of the prerequisite certification, would likewise be unavailable to a guarantor or indorser. Sections 12206-12208 give the surety a

[1]251 Wis. 538, 30 N.W.2d 449 (1947). A claim was filed against the estate, based on the decedent's guaranty of payment of a promissory note, on which the maker had defaulted in 1930. This was *held* barred by the Statute of Limitations, computed from the date of default.

[2]148 Neb. 208, 26 N.W.2d 847 (1947). Here a claim had been filed and allowed against the estate based on decedent's guaranty of payment of a promissory note in default, and the estate was permitted to obtain reimbursement by withholding a like amount from a legacy to the principal obligor.

[3]Bank of America v. McRae, 81 Cal. App. 2d 1, 183 P.2d 385 (1947); Scott v. City of Tampa, 158 Fla. 712, 30 So.2d 300 (1947).

[4]74 Ohio App. 23, 57 N. E.2d 337 (1943).

[5]86 Ohio St. 43, 98 N. E. 858 (1912).

right to an independent action against the principal to compel payment after the debt is due and under certain circumstances to obtain indemnity before it is due, and afford him the full benefit of a creditor's provisional remedies in these actions. These sections have not been expressly construed either to include or to exclude the guarantor and indorser, but since they follow Sections 12191 and 12194 in the same chapter, the same definition and scope of the term "surety" should apply.

Some courts, however, have fallen into the error of using the words "guarantor" and "surety" interchangeably; even the Supreme Court of the United States in *Davis v. Wells-Fargo & Co.*,[6] declared that "the contract of guaranty is the obligation of a surety," but since the same opinion also holds (1) that notice of acceptance of a guaranty is *"essential to an inception of the contract"* but (2) that lack of notice discharges the guarantor only to the extent of his loss (leaving him otherwise bound on the contract which never arose!), the whole opinion must be taken as a model rather of confusion than of authority. In *Steele v. Gonyer,* an Ohio court referred to the signers of a "guaranty" as "co-sureties"; and the appellate court improved upon this by calling the instrument itself an "indemnity bond".[7] No doubt some of the difficulty arises from the fact that all three, surety, guarantor, and indorser execute different forms of a single contract of suretyship; that the abstract noun *suretyship* includes, in the words of the Statute of Frauds, "any special promise to answer for the debt, default or miscarriage of another person." Stearns points out this fact,[8] but unfortunately the courts outside Ohio do not generally recognize it: those which distinguish "surety" and "guarantor" make a similar distinction between "suretyship" and "guaranty".[9]

For this reason, the abstract nouns will not be used in discussing the difference in liability between the sub-classes "guarantor" and "surety". The distinction between guarantor and indorser is now for most practical purposes governed by the Negotiable Instruments Law, which is outside the scope of this note. The

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[6]104 U. S. 159 (1881).

[7]1 Ohio App. 331 (1913).

[8]STEARNS, SURETYSHIP § 1 (3d ed. 1922).

[9]Cartwright v. Farmers Bank, 74 Ga. App. 877, 41 S. E.2d 818 (1947); other cases are collected in 40 WORDS & PHRASES 835, *s. v.* Suretyship (1940), and see WEBSTER, NEW INTERNATIONAL DICTIONARY, *s. v.* Guaranty (2d ed. 1935). Exceptions to the Ohio rule are Hecker v. Mahler, 64 Ohio St. 398, 60 N. E. 555 (1901) (syllabus); Liquidating Midland Bank v. Stecker, 40 Ohio App. 510, 179 N. E. 504 (1930).

distinction between guarantor and surety on the one hand and indemnitor on the other is simply that in both the former contracts there must be privity of obligation between the creditor and the principal debtor, whereas in the latter there need be no privity between the one indemnified and the third person against whose acts he is indemnified.[10]

An incidental source of further confusion is the double use of "guaranty" as noun and verb, and still worse the triple use of "guarantee" as verb and noun in the same sense as "guaranty", and also as a noun meaning the person in whose favor the guaranty runs.[11] Without any statistical analysis, the writer believes that the better courts follow the rule of Webster's *New International Dictionary,*[12] that "guaranty" is the older and preferable noun form meaning "the contract of a guarantor", and "guarantee" the preferable verb. The use of "guarantee" to mean a person is condemned by Webster as a mistaken identification of the ending with the *-ee* suffix found in such words as "mortgagee". The word "obligee" or "creditor" is clear in this sense and therefore preferable.

In England no distinction between surety and guarantor is recognized: in the accepted definition by Jessel, M. R., the term "surety" embraces any person liable to answer for the debt, default, or miscarriage of another who as between them ought to pay or perform.[13] This same principle is adopted by the Restatements,[14] and approved by some authorities.[15] In the United States, however, the existence of a distinction and its nature are generally recognized. The first clear case is *Oxford Bank v. Haynes,*[16] which held

[10]24 AM. JUR., Guaranty § 13 (1939).

[11]Davis v. Wells-Fargo & Co., 104 U. S. 159 (1881); Clay v. Edgerton, 19 Ohio St. 549 (1869).

[12]2d ed. 1935.

[13]"Whoever is liable to pay the debt of another, whether for value, as in the case of a broker who receives a commission for incurring liability, or gratuitously as between himself and the person primarily liable, is a surety." Imperial Bank v. London Docks Co., 5 Ch. D. 195 (1877) at p. 200. Also ". . . the guaranty given . . . must be construed . . . in favor of the surety." Samuell v. Howarth, 3 Mer. 272, 36 Eng. Rep. 105 (Ch. 1817).

[14]RESTATEMENT, CONTRACTS § 92, Comment *a* (1932) speaks of "guarantors" as a sub-class under "sureties"; RESTATEMENT, SECURITY § 82 (1941) uses "guarantor" as a synonym for "surety": this is hardly less confusing than certain of the cases.

[15]4 WILLISTON, CONTRACTS § 1211 (Rev. ed., Williston and Thompson, 1936) (He recognizes, however, the prevailing American distinction.); Radin, *Guaranty and Suretyship,* 17 CALIF. L. REV. 605 (1929) and 18 CALIF. L. REV. 21 (1929); HANNA, CASES AND MATERIALS ON SECURITY, 345 (2d ed. 1940).

[16]8 Pick. (25 Mass.) 423 (1829).

that while a surety could be sued as a promisor on the original note, a guarantor must be sued on his own contract separately set forth. A later Massachusetts case stated practically the modern rule "that a surety is in the first instance answerable for the debt for which he makes himself responsible . . . while a guarantor is only liable where default is made by the party whose undertaking is guaranteed."[17]

The rule developed by these and later cases sets forth at least four substantial distinctions between the contracts of the surety and guarantor:[18]

(1) the surety undertakes to pay the debt or perform the obligation of another, i. e. an obligation on the same terms as his principal;[19] the guarantor undertakes only to answer for his principal's default, i. e. to pay or perform only if the principal does not (or cannot, see below);[20]

(2) the surety *joins* in the contract of his principal, and becomes an original party;[21] the guarantor makes an *independent* contract which is a collateral undertaking;[22]

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[17]Courtis v. Dennis, 7 Metc. (48 Mass.) 510, 518 (1844); *followed, see* Welch v. Walsh, 177 Mass. 555, 559, 59 N. E. 440, 442 (1901).

[18]This classification is adapted from that of STEARNS *op. cit. supra* note 8.

[19]Vermont Marble Co. v. Bayne, 356 Ill. 127, 190 N. E. 291 (1934); Hess v. Watkins Medical Co., 70 Ind. App. 416, 123 N. E. 440 (1919); McMillan v. Bull's Head Bank, 32 Ind. 11 (1869); Bedford v. Kelley, 173 Mich. 492, 139 N. E. 250 (1913); Emerson-Brantingham Implement Co. v. Raugstad, 65 Mont. 297, 211 Pac. 305 (1922); Short v. Sinai, 50 Nev. 346, 259 Pac. 417 (1927); Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N. E. 2d 337 (1943); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912).

[20]Douglass v. Reynolds, 7 Pet. (32 U. S.) 113 (1833); Pavlantos v. Garoufalis, 89 Fed. 203 (C. C. A. 10th 1937); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Durant v. Snyder, 65 Idaho 678, 151 P.2d 776 (1944); Vermont Marble Co. v. Bayne, 356 Ill. 127, 190 N. E. 291 (1934); McMillan v. Bull's Head Bank, 32 Ind. 11 (1869); Kushnick v. Lake Drive Bldg. & Loan Assoc., 153 Md. 638, 139 Atl. 446 (1927); Courtis v. Dennis, 7 Metc. (48 Mass.) 510 (1844); Bedford v. Kelley, 173 Mich. 492, 139 N. E. 250 (1913); Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N. E. 2d 337 (1943); Cincinnati, H. & D. Ry. v. Kleybolte, 80 Ohio St. 311, 88 N. E. 879 (1909); Greene v. Dodge & Cogswell, 2 Ohio 430 (1826); Farmers' & Merchants' Nat. Bank v. Lillard Milling Co., 210 S. W. 260 (Tex. Civ. App. 1919); Robey v. Walton Lumber Co., 17 Wash. 2d 242, 135 P.2d 95 (1943). *Contra:* Clay v. Edgerton, 19 Ohio St. 549 (1869) (changed by adoption of Negotiable Instruments Law); *In re* Bitker's Estate, 251 Wis. 538, 30 N. W. 2d 449 (1947).

[21]Pavlantos v. Garoufalis, 89 Fed. 203 (C.C.A. 10th 1937); Howell v. Commissioner of Internal Revenue, 69 F.2d 447 (C.C.A. 8th 1934); *cert. denied sub nom.* Howell v. Helvering, 292 U. S. 654, 54 Sup. Ct. 864 (1934); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); McMillan v. Bull's Head Bank, 32 Ind. 11 (1860); Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430 (1906); Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57

(3) the liability of the surety is *primary* and *direct*;[23] that of the guarantor is *secondary* and *contingent*;[24]

(4) the liability of the surety begins with the *execution* of the agreement;[25] that of the guarantor begins only with the *default* of the principal.[26]

N. E. 2d 337 (1943); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912); Leonard v. Sweetzer, 16 Ohio 1 (1847). *But cf.* Kuchnick v. Lake Drive Bldg. & Loan Assn., 153 Md. 638, 139 Atl. 446 (1927) (mortgage signed jointly by mortgagor and guarantor; this criterion held outweighed by manifest intent of guarantor to assume only secondary liability).

[22]Douglass v. Reynolds, 7 Pet. (32 U.S.) 113 (1833); Pavlantos v. Garoufalis, 89 Fed. 203 (C.C.A. 10th 1937); Howell v. Commissioner of Internal Revenue, 69 F. 2d 447 (C.C.A. 8th 1934); Dibble v. Duncan, 7 Fed. Cas. 646, No. 3, 880 (C.C.D. Ohio 1841); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Durant v. Snyder, 65 Idaho 678, 151 P. 2d 776 (1944); McMillan v. Bull's Head Bank, 32 Ind. 11 (1869); Kushnick v. Lake Drive Bldg. & Loan Assn., 153 Md. 638, 139 Atl. 446 (1927); Bedford v. Kelley, 173 Mich. 492, 139 N. E. 250 (1913); Emerson-Brantingham Implement Co. v. Raugstad, 65 Mont. 297, 211 Pac. 305 (1922); *In re* Williams' Estate, 148 Nebr. 208, 26 N. W. 2d 847 (1947); Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430 (1906); Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N. E. 2d 337 (1943); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912); Tobey v. Walton Lumber Co., 17 Wash. 2d 242, 135 P. 2d 95 (1943); *see In re* Bitker's Estate, 251 Wis. 538, 30 N. W. 2d 449 (1947).

[23]Howell v. Commissioner of Internal Revenue, 69 F. 2d 447 (C.C.A. 8th 1934); Transcontinental Petroleum Co. v. International Oil Co., 262 Fed. 278 (C.C.A. 8th 1919); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Kushnick v. Lake Drive Bldg. & Loan Assn., 153 Md. 638, 139 Atl. 446 (1927); Courtis v. Dennis, 7 Metc. (48 Mass.) 510 (1844); Schmidt v. McKenzie, 215 Minn. 1, 9 N. W. 2d 1 (1943); Galloway v. Barnesville Loan, Inc. 74 Ohio App. 23, 57 N. E. 2d 337 (1943); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912); United States Fid. & Guar. Co. v Green, 18 Ohio L. Abs. 525 (1934); Ricketson v. Lizotte, 90 Vt. 386, 98 Atl. 801 (1916); Goodrich Rubber Co. v. Fisch, 141 Va. 261, 127 S. E. 187 (1925).

[24]Douglass v. Reynolds, 7 Pet. (32 U.S.) 113 (1833); Hall v. Weaver, 34 Fed. 104 (C.C.D. Ore. 1888); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Kushnick v. Lake Drive Bldg. & Loan Assn., 153 Md. 638, 139 Atl. 446 (1927); Courtis v. Dennis, 7 Metc. (48 Mass.) 510 (1844); Schmidt v. McKenzie, 215 Minn. 1, 9 N. W. 2d 1 (1943); *In re* Williams' Estate, 148 Nebr. 208, 26 N. W. 2d 847 (1947); Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N. E. 2d 337 (1943); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912); Goodrich Rubber Co. v. Fisch, 141 Va. 261, 127 S. E. 187 (1925).

[25]*E. g.*, Hall v. Weaver, 34 Fed. 104 (C.C.D. Ore. 1888); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888 (1910).

[26]Douglass v. Reynolds, 7 Pet. (32 U.S.) 113 (1833); Pavlantos v. Garoufalis, 89 Fed. 203 (C.C.A. 10th 1937); Bank of America v. McRae, 81 Cal. App. 2d 1, 183 P. 2d 385 (1947); News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Scott v. City of Tampa, 158 Fla. 712, 30 So. 2d 300 (1947); Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N. E. 2d 337 (1943); Robey v. Walton Lumber Co., 17 Wash. 2d 242, 135 P. 2d 95 (1943).

Two procedural distinctions also follow from the above:

(a) the surety, in the absence of an express provision, is not entitled to notice of the principal's default; the guarantor, under certain circumstances, is;[27]

(b) the surety may be sued on the original contract, either alone or jointly with the principal; the guarantor, in the absence of statute, must be sued alone on his separate contract.[28]

It should further be noted that under the Negotiable Instruments Law many of the rights and liabilities of the parties are made to depend on whether the party is primarily or secondarily liable on the instrument; this largely supplants the earlier special rules on sureties and guarantors of negotiable paper, the general rule being, in conformity with the above, that a surety is primarily and a guarantor secondarily liable.[29]

Another distinction, frequently overlooked, and thus giving rise to no little confusion in stating the distinction between the liability of a surety and guarantor is that between an ordinary or unconditional guaranty and a guaranty of collectibility or conditional guaranty. In the former, the guarantor warrants that the principal *will* pay or perform, and his liability is contingent only on the principal's default; in the latter, the guarantor warrants only that the principal *can* pay, and his liability is therefore contingent on (1) the principal's default and (2) the creditor's use of due diligence to collect from the principal before proceeding against the guarantor—a distinction recognized in several recent cases.[30] Some jurisdictions, however, ignore the former type and regard the latter as the only normal form of guaranty.[31] This, consistently applied,

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[27]Courtis v. Dennis, 7 Metc. (48 Mass.) 510 (1844); Short v. Sinai, 50 Nev. 346, 259 Pac. 417 (1927) (both); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912) (surety only); Greene v. Dodge & Cogswell, 2 Ohio 430 (1826) (guarantor only).

[28]*E. g.*, Oxford Bank v. Haynes, 8 Pick. (25 Mass.) 423 (1829); Madison Nat. Bank v. Weber, 117 Ohio St. 290, 158 N. E. 543 (1927); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912); other cases supplementing footnotes 19-28 are collected in 28 C. J., Guaranty § 5, n. 45, 47, 49, 51, 53, 54, and 38 C. J. S., Guaranty § 6, n. 63-65, 67, 74.

[29]*E. g.*, Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888 (1910) (leading case); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912).

[30]Pavlantos v. Garoufalis, 89 Fed. 203 (C.C.A. 10th 1937); Bank of America v. McRae, 81 Cal. App. 2d 1, 183 P. 2d 385 (1947); Scott v. City of Tampa, 158 Fla. 712, 30 So. 2d 300 (1947); Robey v. Walton Lumber Co., 17 Wash. 2d 242, 135 P. 2d 95 (1943); *see* Liquidating Midland Bank v. Stecker, 40 Ohio App. 510, 522, 179 N. E. 504, 508 (1930) (dissenting opinion).

[31]This is firmly the rule in Pennsylvania: Rudy v. Wolfe, 16 S. & R. 79 (Pa. 1827) and see 4 WILLISTON, *op. cit. supra* note 15, § 1237, n. 5; it is also followed in: Rawleigh Co. v. Overstreet, 71 Ga. App. 783, 32 S. E. 2d 574

is in reality the adoption of a new and much narrower definition of guaranty, one which is not in accord with the weight of American authority or with normal popular and business usage.[32] It has, moreover, another mischievous effect in giving rise to such purported distinctions between surety and guarantor as "a surety is one who undertakes to pay if the debtor does not; a guarantor, if the debtor cannot,"[33] and "a surety is an insurer of the debt, a guarantor is an insurer of the solvency of the debtor."[34] It is clear from the definition of ordinary guaranty that the guarantor also undertakes to pay if the debtor does not, while quite apart from solvency, neither a surety nor a guarantor is an "insurer" of anything: both the former contracts necessarily involve dealings among three persons, the latter only two.

A hint of the possible source of this misconception is given in *Oxford Bank v. Haynes,* where a guarantor is called the insurer of the solvency of his principal in the sense that he is bound to keep informed of it and is not entitled to notice if the principal is insolvent when the note becomes due (whereas an indorser is entitled to notice in any event). In this sense it is used in an English case[35] and in an early Pennsylvania case,[36] but even thus restricted the word "insurer" is poorly chosen.

A concrete example of the confusion so caused is furnished by two Ohio cases. In *Madison National Bank v. Weber,*[37] the Supreme Court, through Chief Justice Marshall, says "the Webers were guarantors, and not sureties or insurers, and while these terms

(1944); Arkansas Fuel Oil Co. v. Young, 66 La. App. 33, 16 S. E. 2d 909 (1941); Bishop v. Currie-McGraw Co., 133 Miss. 510, 97 So. 886 (1923); Kearnes v. Montgomery, 4 W. Va. 29 (1870); and Plant City v. Scott, 148 F. 2d 953 (C.C.A. 5th 1945) which followed the former Florida rule, now overruled by Scott v. City of Tampa, 158 Fla. 712, 30 So. 2d 300 (1947).

[32]Parkhurst v. Vail, 73 Ill. 343, 347 (1874): "the liability of a guarantor depends not upon, nor is it in any manner affected by the solvency or insolvency of the maker." All the cases cited *supra* n. 20 likewise rest liability simply upon default regardless of solvency. See also 4 WILLISTON, *op. cit. supra* note 15, § 1211.

[33]Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 963, 10 So. 539 (1891) (where the court also lays down the generally accepted definition, without recognizing the inconsistency). It has been aptly described by Stearns as "a very catchy phrase . . . [whose] legal excellence seems to have captivated legal writers and jurists from the very start." STEARNS, SURETYSHIP §. 6, n. 9 (3d ed, 1922).

[34]*See* News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 390, 118 Pac. 974, 977 (1911); Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888 (1910); Madison Nat. Bank v. Weber, 117 Ohio St. 290, 158 N. E. 543 (1927).

[35]Warrington v. Furbor, 8 East 242, 103 Eng. Rep. 334 (K. B. 1807).

[36]Gibbs v. Cannon, 9 S. & R. 197 (Pa. 1823).

[37]117 Ohio St. 290, 158 N. E. 543 (1927).

have in many instances been employed indiscriminately, there are certain well-defined distinctions and differences in the nature of the legal obligations created." From this it is clear that the opinion was meant to reiterate the established Ohio rule of *Crawford v. Turnbaugh* (in accord with the better decisions elsewhere, as shown by notes 19 to 28 *supra*), and it correctly states the liability of a surety; but in its definition of the guarantor, it states that his liability "is fixed by the inability of the principal debtor to discharge the obligation for which he is primarily liable." This language of course is not applicable to an ordinary guarantor of payment, but only to a special and comparatively small class, guarantors of collectibility; hence the opinion does not really define *guaranty* at all. The court unfortunately seems to employ the very indiscriminate terminology which it condemns in others. The erroneous portion is apparently inadvertent, and clearly not necessary to the decision reached, since the court itself cites similar decisions involving an ordinary guaranty of payment. The statement is therefore gratuitous, but in the case of *Liquidating Midland Bank v. Stecker*[38] the Court of Appeals, without citing this or any other Ohio case in the majority opinion, makes a similar holding the basis of its decision. There, however, the court quotes the plaintiff as arguing in his attempted distinction between guaranty of payment and guaranty of collectibility, that in the former, the guarantor is bound with the principal and primarily liable—admittedly a proposition which the court was correct in rejecting, but which only the dissenting opinion corrected to a true statement of the distinction. Fortunately the most recent case, *Galloway v. Barnesville Loan Inc.*,[39] reverts to the earlier rule of the Supreme Court and declares affirmatively every one of the four major distinctions of the majority rule except that of the time from which the surety is bound (which was not presented by the case). The force of the majority rule in Ohio is not, therefore, greatly shaken.

The guiding principle to be drawn from this study is clear. Since these logical distinctions exist and are recognized by the weight of authority, but are overlooked, distorted, or subordinated to a logical rule or statute in occasional decisions, lawyers and judges should exercise the greatest care to avoid reliance on such decisions, and by observing the settled rules promote desirable uniformity of interpretation in this class of common business contract.

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[38] 40 Ohio App. 510, 179 N. E. 504 (1930).
[39] 74 Ohio App. 23, 57 N. E. 2d 337 (1943).