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PRINCIPAL AND SURETY - CONSTRUCTION OF GUARANTY

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PRINCIPAL AND SURETY — CONSTRUCTION OF GUARANTY — Defendant's testator guaranteed the payment in full of a mortgage note for $8,000 "until such time as the sum of sixteen hundred (1600) dollars has been paid on the principal of said note." Upon default before the sum of $1,600 had been paid, the balance came due and the plaintiff foreclosed the mortgage, crediting the proceeds, which exceeded the sum of $1,600, on the note. *Held*, crediting the proceeds of foreclosure on the note did not, as the defendant contended, discharge the obligation of the guarantor, but merely amounted to a payment pro tanto for the benefit of both the maker of the note and the guarantor. *Security Co-Op. Bank v. Corcoran*, (Mass. 1937) 10 N. E. (2d) 57.

It is reasonable to conclude that the mortgagee here felt that the mortgaged property was probably sufficient security for the payment of the indebtedness to the extent of $6,400 and interest; so, for the payment of the sum secured by the mortgage beyond that amount ($1,600), he desired as additional security the personal guaranty of the defendant's testator; [1] but, in the interests of conservatism, he procured from the defendant's testator a guaranty of the note

[1] Smith v. Ferris, 143 N. Y. 495 at 497, 39 N. E. 3 (1894).

in full, conditioned upon the payment of $1,600. Viewing this as the object of the guaranty, it is evident that the obligation of the guarantor could not be discharged by applying on the note the proceeds of the foreclosure unless the foreclosure produced the entire amount of the indebtedness, for otherwise the intention of the parties with respect to the added security would be frustrated. The construction placed upon the guaranty by the defendant would attribute to the instrument no value as additional security, save in the instance where the foreclosure failed to produce the sum of $1,600; and, carried to its logical conclusion, would make the promise of the guarantor illusory in that it would permit satisfaction of the obligation by the payment of $1,600 from the guarantor himself.[2]

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[2] The cases state various rules with regard to the liberality with which guaranties are to be construed. (1) Any ambiguity in a guaranty is to be construed most strongly against the person writing the instrument, the guarantor: Newcomb v. Kloeblen, 77 N. J. L. 791, 74 A. 511 (1909); Sales Corp. v. United States Fidelity & Guaranty Co., 215 Ala. 198, 110 So. 277 (1926) (here the guarantor was a professional); Gold v. Smith, 155 Misc. 221, 279 N. Y. S. 911 (1935); 105 Am. St. Rep. 502 at 521 (1905); 4 L. R. A. 343 (1889). (2) Any ambiguity is to be construed in favor of the guarantor: Schiff v. Continental Nat. Bank & Trust Co., 255 Ill. App. 333 (1930) ("in a sense a guarantor is the favorite of the law"); Castle v. Powell, 261 Ill. App. 132 (1931); Liquidating Midland Bank v. Stecker, 40 Ohio App. 510, 179 N. E. 504 (1930) (instrument construed a guaranty of collectibility rather than one of payment); 105 Am. St. Rep. 502 at 519 (1905). (3) The intention of the parties is to be determined by a fair and reasonable interpretation of the terms used, as read in the light of the purposes for which the guaranty was made: Ouachita Valley Bank v. De Motte, 173 Ark. 52, 291 S. W. 984 (1927); Mosaic Tile Co. v. Jones, 111 N. J. L. 385, 168 A. 629 (1933); Gay, Exr. v. Ward, Admx., 67 Conn. 146, 34 A. 1025 (1895); W. Irving Herskovits Fur Co. v. Hollander, 138 Misc. 456, 246 N. Y. S. 588 (1930); 28 C. J. 930 (1922); 12 R. C. L. 1074 (1916); 105 Am. St. Rep. 502 at 520 (1905).