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SURETYSHIP-EFFECT OF DEATH OF SURETY ON RIGHTS OF CREDITOR

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SURETYSHIP—EFFECT OF DEATH OF SURETY ON RIGHTS OF CREDITOR—In a suit on a bond filed in accordance with statutory requirements [1] by a depository designated by a court of bankruptcy, it was pleaded in defense that the surety died before any deposits were received by the designated bank. The circuit court of appeals held for the defendant, ruling that the bond was only a multiple offer and lapsed with the death of the surety. The Supreme Court reversed this decision on the ground that the bond was a single offer, and the designation of the bank as an official depository constituted an acceptance thereof. *United States for the use of Wilhelm v. Chain*, (C. C. A. 4th, 1936) 84 F. (2d) 138; (U. S. 1937) 57 S. Ct. 394.

No single comprehensive rule can be formulated as to the effect of a surety's death upon the rights of the creditor. Where the claim of the creditor is based upon transactions occurring prior to death, the fact of death is irrelevant.[2] Where, on the other hand, the claim is based upon transactions subse-

[1] Section 50 (a), Bankruptcy Act of 1898, 30 Stat. L. 544 at 558, 11 U. S. C., § 78.

[2] Sulter v. Citizens' Bank & Trust Co., 51 Ga. App. 798, 181 S. E. 694 (1935); Midland Nat. Bank v. Security Elevator Co., 161 Minn. 30, 200 N. W. 851 (1924); In re Lorch's Estate, 284 Pa. 500, 131 A. 381, 42 A. L. R. 922

quent to the surety's death, the relevance of the fact of death, on the typically conceptual approach to the problem, depends on the construction of the arrangement with the surety. If the arrangement is construed as merely a multiple offer contemplating a series of seperate contracts, then it is generally held that the unaccepted offers lapse with the death of the offeror, and recovery on transactions occurring subsequent to the surety's death is denied.[3] The usual explanation is the impossibility of a meeting of the minds of surety and creditor.[4] This contract doctrine has not, however, been universally approved by the courts in the suretyship situation. It has been repeatedly held that the mere death of the guarantor does not terminate the unaccepted offers.[5] The ordinary rule, it has been said, tends to destroy the security of the suretyship arrangement,[6] and any public interest in favor of the early and final settlement of

(1925); Exchange Nat. Bank of Spokane v. Hunt, 75 Wash. 513, 135 P. 224 (1913); In re Menzner's Estate, 189 Wis. 340, 207 N. W. 703 (1926); Baker v. Elliot, 73 Me. 392 (1882); Dodd v. Whelan, [1897] 1 I. R. 575; Gay v. Ward, 67 Conn. 147, 34 A. 1025 (1895).

[3] Jordan v. Dobbins, 122 Mass. 168 (1877); Illinois Roofing & Supply Co. v. Gorton, 19 Pa. Co. Ct. 124 (1897); American Chain Co. v. Arrow Grip Mfg. Co., 134 Misc. 321, 235 N. Y. S. 228 (1929); Aitken v. Lang's Admr., 106 Ky. 652, 51 S. W. 154 (1899); L. Teplitz Silk Co. v. Rich, 13 N. J. Misc. 494, 179 A. 305 (1935); United States v. Robson, (D. C. W. Va. 1935) 9 F. Supp. 446, facts identical with those of the principal case; 5 MERCER BEASLEY L. REV. 83 (1936). And see dicta in Hyland v. Habich, 150 Mass. 112, 22 N. E. 765 (1889); and In re Kelly's Estate, 173 Mich. 492, 139 N. W. 250, Ann. Cas. 1914D 848 (1913).

[4] Oliphant, "The Duration and Termination of an Offer," 18 MICH. L. REV. 201 (1920). See also, Parks, "Indirect Revocation and Termination by Death of Offers," 19 MICH. L. REV. 152 at 158 (1920); Ferson, "Does the Death of An Offeror Nullify His Offer?" 10 MINN. L. REV. 373 (1926).

[5] Garrett v. Trabue, 82 Ala. 227, 3 So. 149 (1887); Davis v. Davis, 93 Ala. 173, 9 So. 736 (1891); Mennard v. Scudder, 7 La. Ann. 385, 56 Am. Dec. 610 (1852); Buckeye Cotton Oil Co. v. Amrhein, 168 La. 139, 121 So. 602 (1929); Bradbury v. Morgan, 1 H. & C. 249, 158 Eng. Rep. 877 (1862); Fennell v. McGuire, 21 U. C. C. P. 134 (1870); Dodd v. Whelan, [1897] 1 I. R. 575.

And see Knotts v. Butler, 10 S. C. Eq. 143 (1858); Coulthart v. Clementson, 5 Q. B. D. 42 (1879); Harris v. Fawcett, 8 Ch. App. 866 (1872); Gay v. Ward, 67 Conn. 147, 34 A. 1025 (1895).

[6] 30 MICH. L. REV. 809 at 810 (1932); Gay v. Ward, 67 Conn. 147 at 156-157, 34 A. 1025 (1895): "To adopt the Massachusetts doctrine would impose upon the guarantee the burden of knowing at all times whether or not the guarantors are in life. There could be no safety in relying upon the credit of the guarantor, unless at the moment of reliance the guarantee knew the guarantor to be in life. The practical difficulties in the way of a guaranty so construed, would prevent credit being given upon it and curtail a useful method of commercial business."

But compare the language of Aitken v. Lang's Admr., 106 Ky. 652 at 658, 51 S. W. 154 (1899): "The duty should be imposed upon one who attempts to sell goods upon the credit of another to ascertain that such one is living at the time of the sale. Slight diligence will always enable him to acquire such information, and it certainly works no hardship upon him to be required to do so."

decedents' estates can adequately be cared for by the nonclaim statutes.[7] Where the surety's offer is construed as a single, rather than multiple offer, only a single acceptance is necessary to consummate a contract for both present and future transactions.[8] Given acceptance of the offer during life, the death of the surety is irrelevant. Recovery can be had for transactions occurring both before and after that date. The main problem, then, is the construction of the surety's offer as multiple or as single. Since, in this situation, the choice between these alternative constructions generally is, in effect, a choice between contrary legal consequences, it would seem quite proper to do as was done by the dissenting judge in the circuit court of appeals, to take account of the consequences. The cases generally, however, so far as any approach is apparent, have purported to deal exclusively with concepts, rather than with consequences. An approach in terms of consequences is especially feasible in the principal case in that it involves both the guaranty of the repayment of sums given to the principal debtor and the creation of an official status. Since the latter feature would seem to point to a single,[9] and the former to a multiple offer construction, the court can make a choice.

In terms of consequences, the construction of the Supreme Court seems preferable to that of the circuit court of appeals. The latter, that it is merely a multiple offer, is open to the serious objection that it permits the depository to retain its official status without furnishing the bond protection intended by the Bankruptcy Act.[10] Although the court has power to revoke the privilege,[11] the existence of this power is irrelevant until the fact of death is known to the

[7] Cases on nonclaim statutes are collected in 41 A. L. R. 144 (1926).

[8] Lloyd's v. Harper, 16 Ch. Div. 290 (1879); McClaskey v. Barr, (C. C. Ohio 1897) 79 F. 408 at 415; Zimetbaum v. Berenson, 267 Mass. 250, 166 N. E. 719 (1929); Kernochan v. Murray, 111 N. Y. 306, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744 (1888); Bennett v. Checotah State Bank, 176 Okla. 518, 56 P. (2d) 848 (1936); In re Crace, [1900] 1 Ch. 733, and extensive annotation in 2 B. R. C. 929 at 937 (1912). Additional cases are cited in note 9 infra.

[9] Official bonds are typically construed in this way. Moore v. Wallis, 18 Ala. 458 (1850), guardian; Hightower v. Moore, 46 Ala. 387 (1871), administrator; Rapp v. Phoenix Ins. Co., 113 Ill. 390, 55 Am. St. Rep. 427 (1885), insurance agent; Voris v. State ex rel. Davis, 47 Ind. 345 (1874), guardian; Royal Ins. Co. v. Davies, 40 Iowa 469, 20 Am. Rep. 581 (1875), insurance agent; Green v. Young, 8 Me. 14, 22 Am. Dec. 218 (1831), deputy sheriff; Wood v. Leland, 42 Mass. 387 (1840), guardian; In re Sullard, 114 Misc. 288, 186 N. Y. S. 251 (1921), trustee; Schackamaxon Bank v. Yard, 143 Pa. St. 129, 22 A. 908, 24 Am. St. Rep. 521 (1891), 150 Pa. 351, 24 A. 635, 30 Am. St. Rep. 807 (1892), cashier; Snyder v. State, 5 Wyo. 318, 40 P. 441 (1895), court clerk.

In the following cases the estate was held liable even though the decedent died before the bond was approved. Broome v. United States, 15 How. (56 U. S.) 143, 14 L. Ed. 636 (1853), customs collector; Mowbray v. State ex rel. City of Peru, 88 Ind. 324(1882), city treasurer. In the latter case this result was reached despite the additional fact that the death occurred before the person bonded even took office.

[10] Dissent of Parker, J., in the Circuit Court of Appeals, 84 F. (2d) 138 at 142 (1936).

[11] Section 61 (a) Bankruptcy Act of 1898, 30 Stat. L. 544 at 562, 11 U. S. C., § 101.

court. Nor can any substantial justification be found in the requirement that the bonds be filed of record [12] with the clerk of the court. If the trustee is to be charged with investigating the sureties, the utility of an official designation is in part, at least, destroyed. Even if the trustee should discover that the surety is dead, to charge him with knowledge of the termination of the bond is to assume the result of the controversy. The Supreme Court wisely avoided these consequences by construing the bond as a single offer, accepted by the designation of the bank as an official depository.

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[12] Section 50 (h) Bankruptcy Act of 1898, 30 Stat. L. 544 at 558, 11 U. S. C., § 78.