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PAIN AGAINST PACKARD

A century ago, the New York Supreme Court of Judicature, in an action on a promissory note, by Pain, the payee, against Packard and Munson, the joint makers, gave judgment for the defendant Packard, upon demurrer to his plea:

"That he signed the note, which was for 100 dollars, payable on demand, *as surety* for Munson; that he urged the plaintiff to *proceed immediately in collecting* the money *due* on the note from Munson, who was then *solvent*; and that, if the plaintiff had then proceeded immediately to take measures to collect the money of Munson, he might have obtained payment from him, but that the plaintiff *neglected* to proceed against Munson, until he became *insolvent*, absconded, and went out of the state *whereby the plaintiff was unable to collect the money of Munson.*"¹

The decision modified the rule; theretofore uniformly applied, that the creditor's "mere delay in calling on the principal will not discharge the surety,"² and has generally been repudiated in other jurisdictions.³

In this state, the case has survived the assaults of high authority,⁴ and remains the law. Its history is a striking commentary upon the unhappy character of a piece of judicial legislation which, even in a limited field, substituted for a sound and wholesome rule of law a number of issuable questions of fact.

¹Pain v. Packard, 13 Johns. *174. The Court held that the fact, that the accommodation character of Packard's undertaking had been known to Pain, was a fair inference from the pleading.

Elements of fact in the plea, subsequently regarded as material, have been emphasized by the writer's italics.

²Per, Kent, C., in King v. Baldwin, 2 Johns. Ch. *555, *559. See Clark v. Sickler, 64 N. Y. 231.

³I Brandt on Suretyship and Guaranty (3rd ed.), sec. 265, note 21; II Daniels on Negotiable Instruments (6th ed.), sec. 1339, note 82; III Kent's Comm. (14th ed.), *124, note (c); II Parsons on Contracts (9th ed.), *23, note 1; II Amer. Lead. Cas., Hare and Wallace (5th ed.), 415-416; Ames, Cas. on Suretyship, 222, note 2.

⁴What principle such a defence should ever have found to stand upon in any court, it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent (Pain v. Packard, 13 John. 174), was afterwards repudiated even by the court of chan-

The scope of the rule of this celebrated case, and the limitations which control its operation upon situations wherein it has application, have apparently been nowhere fully stated.

SCOPE OF THE RULE

The doctrine of *Pain v. Packard* is sometimes broadly announced as one of almost unrestricted working affecting all classes of suretyships,⁵ a method of statement that does not square with the authorities. The cases are best considered with reference to the form of the undertaking by the proponent of the defense.

Negotiable Suretyship Obligations

It seems, that one who has undertaken to perform the obligation of a negotiable instrument may make Packard's plea only when he can show himself to be a *true conventional surety*.

The obligation of Packard was unconditional. The suretyship relation between him and Munson was not apparent upon the surface of the transaction. Indeed, by the terms of the note, Packard was, as to Pain, as much a primary obligor as Munson. The judgment overruling Pain's demurrer necessarily decided that parol evidence was admissible to show the fact situation,—that Packard undertook only as surety upon the instrument. In that respect, the holding was sound and required no violation of the parol evidence rules.

One whose undertaking, by the terms of a negotiable instrument, is absolute at law, may, by parol, establish that he is in fact the surety of another party thereto, and may thus show also

cery (*King v. Baldwin*, 2 John. Ch. Rep. 554), as it always has been both at law and in equity in England; but was restored on a tie in the court of errors, turned by the casting vote of a layman. (*King v. Baldwin*, 17 John. 384.)—Cowen, *J.*, in *Herrick v. Borst*, 4 Hill, 650, 656.

It was Chancellor Kent who denied the authority of *Pain v. Packard* in *King v. Baldwin*, *supra*. See 2 Johns. Ch. *555. The layman, whose vote decided that the Chancellor's decree should be reversed, was the President of the Court of Errors, Lieutenant Governor Taylor. See 17 Johns. *404.

⁵And see the criticisms of *Pain v. Packard* by Walworth, C., in *Warner v. Beardsley*, 8 Wend. 194, 198; and by Andrews, *J.*, in *Wells v. Mann*, 45 N. Y. 327, 330.

⁶"Whatever may have been the current of decision elsewhere, the principle was settled in this state more than forty years ago, and has since been steadily maintained, that if a surety request the creditor to collect the debt from the principal, and the creditor refuse or neglect to do so at a time when it is collectible, and from a subsequent change of circumstances it becomes uncollectible, the surety is by such conduct of the creditor, exonerated from his liability." Wright, *J.*, in *Remsen v. Beekman*, 25 N. Y. 552, 555, citing *Pain v. Packard*, *supra*, and *King v. Baldwin*, 17 Johns., *supra*. And so, Folger, *J.*, in *Colgrove v. Tallman*, 67 N. Y. 95, 99.

why it would be inequitable to enforce the paper against him according to its terms.⁶ The difficulty with *Pain v. Packard* is, not that parol evidence would have been inadmissible to show that Packard, as a surety, had an equitable defense to the action, but that the facts, which the parol evidence would have established, should not constitute such a defense.

In any event, by the parol evidence it would have been made to appear that Packard's only object in the execution of the note was to lend his obligation to Munson in support of Munson's obligation to Pain. That is to say, Packard was a true conventional surety. This circumstance has served to fix boundaries outside which the rule of *Pain v. Packard* fails to affect the obligations of parties to commercial paper.

Whenever a negotiable instrument is issued for value, and value is actually given in each subsequent negotiation thereof,—that is, where there is no accommodation party in the whole transaction,—the rule is, that, in the absence of special agreement to the contrary, the ultimate liability among such parties is in the inverse order of the time of the appearance of their respective names on the paper: the party first on the paper is ultimately liable thereon. It results, by the operation of this rule of Bills and Notes, that each such party is, in respect of his rights to reimbursement, in the position of surety to every earlier party on the instrument. Obviously, however, such a party is not, like Packard, a true conventional surety; his obligation is assumed to subserve a business advantage of his own, and is lent to no one. Packard's plea does not avail a party thus secondarily liable upon negotiable paper.⁷

But whenever, either the inception of a negotiable instrument, or any transfer thereof, is without value, the party so issuing or transferring the paper is, in the adjustment of ultimate liability among them all, not merely clothed with some of a surety's rights, but is, in all respects, a true conventional veiled surety to all the parties whom he has thus accommodated.⁸ Such a party was

⁶Hubbard v. Gurney, 64 N. Y. 45.

⁷Trimble v. Thorne, 16 Johns. *152. "We do not think the case of *Pain v. Packard* applies; for the indorser, though in the nature of a surety, is answerable upon an independent contract, and it is his duty to take up the bill when dishonored." *Per*, Spencer, Ch. J., *154.

⁸"In a variety of cases, and in books of undoubted authority, we find it said that drawers and endorsers are in the 'light of sureties, in the nature of sureties', etc. . . . But we have been referred to no adjudication, nor have I been able to find one, in which it has been held, that they are sureties in fact. . . .

"When an individual becomes a party to a note or bill, at the request

Packard, and his plea has been successfully made by others situated as he was.⁹

Packard was an accommodation maker. Would his defense have failed him as an accommodation indorser? It has been so held.¹⁰ Yet *Converse v. Cook* is sound only if *Pain v. Packard* should be made a precedent for its precise facts and no others, and the authority of the former case is doubtful, in any event, for it was decided under a misconception of the holding in *Trimble 1. Thorne*.¹¹

It is to be noticed that, since the enactment of the Negotiable Instruments Law in this state, a position was once taken which, independently of any definition of the scope of the doctrine of *Pain v. Packard*, would make the case no longer a precedent for the liability of any party to commercial paper. A learned judge long ago expressed regret that any party to a negotiable instrument should be regarded as a true surety,¹² and the Appellate

and for the benefit of another, the relation of principal and surety exists, and must be regarded by all other parties or holders, affected with notice."—Gardiner, *J.*, in *Pitts v. Congdon*, 2 N. Y. 352, 353-354. See also, *Blanchard v. Blanchard*, 201 N. Y. 134.

In *Pitts v. Congdon*, *supra*, the distinction between a party secondarily liable upon a negotiable instrument, and a true conventional surety, was observed so as to continue the liability of the former holder of a note, who had transferred it for value, as indorser, although the indorsee, without the indorser's consent, had surrendered to the maker, collateral which he held from the latter to secure payment of the instrument. In general, however, the rights and liabilities of such sureties, *sub modo*, are so much like those of true conventional sureties, that what will discharge the latter will discharge the former. *Newcomb v. Raynor*, 21 Wend. 108. See also, *Spies v. National City Bank*, 174 N. Y. 222.

**King v. Baldwin*, 17 Johns. *384 (reversing 2 Johns. Ch. *554); *Manchester Iron Manufacturing Co. v. Sweeting*, 10 Wend. 163; *Crandall v. Moston*, 24 App. Div. 547. See also, *Huffman v. Hulbert*, 13 Wend. 377; *Herrick v. Borst*, 4 Hill, 650; *Field v. Cutler*, 4 Lans. 195; *Fulton v. Matthews*, 15 Johns. *433; *Merritt v. Lincoln*, 21 Barb. 249; *Thompson v. Hall*, 45 Barb. 214; *Singer v. Troutman*, 49 Barb. 182; *Marsh v. Dunckel*, 25 Hun, 167; *Wheeler v. Benedict*, 36 Hun, 478; *Coykendall v. Constable*, 48 Hun, 360; *Lawson v. Buckley*, 49 Hun, 329; *De Caumont v. Rasines*, 38 App. Div. 153 (*Semble*).

¹⁰*Converse v. Cook*, 25 Hun, 44; 31 Hun, 417.

¹¹"It is not stated that Thorne was an accommodation indorser, though it is fairly inferable from the report of the case." *Per*, Hardin, *J.*, in *Converse v. Cook*, 25 Hun, 46. *Sed qu.* "The doctrine of *Pain v. Packard*, though frequently criticised, has not been overruled. . . . In *Trimble v. Thorne* (16 Johns. 151), the court refused to apply it to the case of an indorser for value. . . ." *Per*, Andrews, *J.*, in *Newcomb v. Hale*, 90 N. Y. 326, 329-330. And so the same learned judge in *Wells v. Mann*, 45 N. Y. 327, 330.

¹²"As an original question, it would, perhaps, be well that a man should never be allowed to become a party to commercial paper as a surety—or rather, that his character as surety should be wholly disregarded. But it is quite too late to agitate that question in this state. It has long been settled that a man may become a party to a promissory note or a bill of

Division quite recently held that a true suretyship undertaking to perform the obligation of such an instrument is impossible under the Negotiable Instruments Law. In *National Citizens' Bank v. Topplitz*,¹³ the defendant executed, for the accommodation of the payee, a promissory note, and the plaintiff's assignor, who had discounted it with knowledge of its accommodation character, after its maturity, gave the payee-indorser time for the payment thereof, without the defendant's knowledge or consent. It was held that the defendant was not discharged.¹⁴ That decision was affirmed by the Court of Appeals on the ground, that, whether the defendant was a true surety or not, she was not discharged, since no consideration was alleged to support the agreement to give time to the principal debtor.¹⁵ Thus the holding of the Appellate Division amounts to no more than a dictum, and the Court of Appeals has since refused to recognize the case as authority for anything but the immediate liability, at law, of an accommodation party to negotiable paper, as a contractor, by a decision that the Negotiable Instruments Law has not nullified the equities of such a party as a true veiled surety.¹⁶

Other Suretyship Obligations Absolute in Form

Any obligor, whose undertaking is independent and absolute at law, may, it seems, make Packard's plea, when he is, in fact, a true conventional surety.¹⁷

Constructive Suretyships

Where the liability of a principal obligor is assumed by another, as between them, the former thereby becomes, by operation of

exchange as a surety, and that he is entitled to all the privileges of that character, as fully as though he were a surety in a different form of contract." Bronson, *J.*, in *Griffith v. Reed*, 21 Wend. 502, 503-504, citing *Pain v. Packard*.

¹³81 App. Div. 593.

¹⁴"There is no relation of surety. By section 3 of the Negotiable Instruments Law, the person primarily liable is the one who *by the terms* of the instrument is absolutely required to pay the same, and all other persons are secondarily liable. No other question of liability can arise in this case than such as appears upon the face of the instrument." *Per*, Patterson, *J.*, in *National Citizens' Bank v. Topplitz*, *supra*, 594-595.

¹⁵*National Citizens' Bank v. Topplitz*, 178 N. Y. 464.

¹⁶*Building & Engineering Co. v. Northern Bank*, 206 N. Y. 400.

¹⁷*Row v. Pulver*, 1 Cow. 246; *Howe Machine Co. v. Farrington*, 82 N. Y. 131; *Toles v. Adee*, 84 N. Y. 222, 239; *Sheppard v. Conley*, 9 N. Y. Supp. 777. See also, *Valentine v. Farrington*, 2 Edw. Ch. 52; *Steinbock v. Evans*, 18 S. R. 325, 327. The precedents are few because of the many limitations upon the operation of the rule of *Pain v. Packard*.

law, a surety for the latter's performance of the obligation.¹⁸ Packard's plea may be made by such a constructive surety.

The cases furnish two instances of successful reliance by a constructive surety upon Packard's defense.

In *Remsen v. Beekman*,¹⁹ Packard's plea was held to avail an owner of real property, who by his conveyance of it, subject to the lien of a mortgage, had been put in the position of a surety to the land, as the primary fund out of which the mortgage indebtedness was to be satisfied, to the extent of the value of the property. And in *Colgrove v. Tallman*,²⁰ one of two co-partners, who, upon the dissolution of the firm had retired therefrom, upon the other's promise to pay the partnership debts, and had thereby become, as between them, surety to the other, was allowed to make the plea of Packard.

Guarantees

It seems, that a guarantor may make Packard's plea only when the object of his undertaking to answer for another's default was to benefit the principal obligor therein. Since the dictum of Chief Justice Comstock in *Mallory v. Gillett*,²¹ one who, for a consideration beneficial to himself, guarantees another's obligation, does not promise to answer for that other's debt, default or miscarriage within the statute of frauds.²²

The tenor of the cases is to the effect that this test, by which it is determined whether or not a promise to answer for another's default is a guaranty within the statute of frauds, is also the test by which it is to be determined whether or not a guarantor is a

¹⁸*Crafts v. Mott*, 4 N. Y. 604; *Palmer v. Purdy*, 83 N. Y. 144.

¹⁹25 N. Y. 552. *Osborne v. Heyward*, 40 App. Div. 78, 81; *Gottschalk v. Jungmann*, 78 App. Div. 171. See also, *Wiener v. Boehm*, 126 App. Div. 703, 707-708; *Cohn v. Spitzer*, 145 App. Div. 104, 107. *Accord.*

And so, by the acceptance of a deed conveying premises subject to a mortgage, which the grantee thereby assumes and agrees to pay, the grantee becomes, as between himself and the grantor, the principal debtor, and the grantor, as a constructive surety, may rely upon Packard's defense. *Russell v. Weinberg*, 4 Abb. N. C. 139. See also *Mutual Life Insurance Co. v. Davies*, 56 How. Pr. 440, 443.

²⁰67 N. Y. 95. See also, *Maier v. Canavan*, 8 Daly, 272.

²¹21 N. Y. 412. The chief justice adopted a classification of the cases upon the statute of frauds as affecting guarantees made earlier by Chief Justice Kent in *Leonard v. Vredenburg*, 8 Johns. *29. Chief Justice Kent had said that "cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties" are not within the statute. 8 Johns., *supra*, *39.

²²A pecuniary advantage accidentally resulting to the guarantor, at the grace of the principal debtor, seems to be enough to put the guaranty beyond the operation of the statute of frauds. *Raabe v. Squier*, 148 N. Y. 81.

surety who may rely upon Packard's defense: that a guarantor may make Packard's plea only when the object of his undertaking was not to procure a pecuniary advantage for himself. Thus Packard's defense has not been permitted the assignor of a chose in action, who, upon transferring it for value, guaranteed payment thereof.²³

Where, however, a guarantor's undertaking is supported by a consideration beneficial, not to him, but to the principal obligor, the guarantor is, like Packard, a conventional surety, and the defense of the latter avails him.²⁴

LIMITATIONS UPON THE OPERATION OF THE RULE

The operation of the rule of *Pain v. Packard*, upon the few situations wherein it may work to a surety's benefit, has been greatly restricted by a strict insistence upon the materiality of most of the fact allegations in Packard's statement of his defense.

What must be the tenor of the surety's request to the creditor to proceed against the principal? "The terms in which the request is made are not material, but they should be unequivocal, and clearly and plainly intended, and understood, as a request to collect by prosecution. He should never be absolved from his deliberate and valid promise, upon any doubtful or uncertain request not plainly intended and understood as a request to enforce collection by legal means."²⁵

²³*Wells v. Mann*, 45 N. Y. 327; *Newcomb v. Hale*, 90 N. Y. 326. The language of the opinion in *Newcomb v. Hale*, *supra*, is almost that of Chief Justice Kent in *Leonard v. Vredenburg*, *supra*. "The guaranty of the defendant was not entered into for the benefit of the original debtor, but for his own benefit, subsequent to the original transaction, and upon a new and independent consideration moving from the plaintiff." *Per*, Andrews, Ch. J., in *Newcomb v. Hale*, *supra*, 331.

²⁴*Remsen v. Beekman*, 25 N. Y., opinion of Gould, J., 561. See also, *Hunt v. Purdy*, 82 N. Y. 486.

²⁵*Per*, Johnson, J., in *Singer v. Troutman*, 49 Barb. 182, 185.

The following notices by the surety to the creditor have been held insufficient: "Go and get your money, there is enough to pay you" (*Maier v. Canavan*, 8 Daly, 272, 275); "You must push Jacob, and keep pushing him" (*Singer v. Troutman*, *supra*); "Collect that mortgage in the spring; don't let it run over the time it is due" (*Hunt v. Purdy*, 82 N. Y. 486, 490); "I would urge collection of the note" (*Coykendall v. Constable*, 48 Hun, 360, 361); "You must make Daniel come to time this fall; you know it is the best time for making money with farmers" (*Lawson v. Buckley*, 49 Hun, 329, 331. See also, *Goodwin v. Simonson*, 74 N. Y. 133, 136; *Howe Machine Co. v. Farrington*, 82 N. Y. 121, 131; *Denick v. Hubbard*, 27 Hun, 347, 351-352.

The cases cited, *Passim*, as applying the rule of *Pain v. Packard*, decide that a notice by the surety to the creditor, to proceed to collect the debt from the principal, is sufficiently explicit. As to *Colgrove v. Tallman*,

A request sufficient in the foregoing particulars amounts to nothing, it would seem, unless performance of the principal obligation is due.²⁶

And a surety must show that his principal's inability to make reimbursement has arisen subsequently to the request. If the principal is insolvent at the time the request is made, it is without legal effect.²⁷ The same result would probably follow if the principal and all his estate were without the jurisdiction of the creditor at that time.²⁸

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cited *supra*, note 20, see, upon the sufficiency of the surety's notice to the creditor, the report of that case in 5 Hun, 103.

It seems, that the notice should be given to the creditor in person, and that the creditor's attorney is not the proper party to receive it, although he holds the principal obligation for collection. *Coykendall v. Constable*, *supra*. Of course, if the notice may properly be given to an agent of the creditor, the former must be under a duty to communicate it to the latter or it has no effect. See *Mutual Life Insurance Co. v. Davies*, 56 How. Pr. 440, 444-445.

²⁶See *Hunt v. Purdy*, 82 N. Y. 486.

²⁷*Huffman v. Hulbert*, 13 Wend. 377; *Herrick v. Borst*, 4 Hill, 650; *Field v. Cutler*, 4 Lans. 195; *Maier v. Canavan*, 8 Daly, 274; *Merritt v. Lincoln*, 21 Barb. 250; *Thompson v. Hall*, 45 Barb. 214; *Converse v. Cook*, 25 Hun, 44, 45; *Marsh v. Dunckel*, 25 Hun, 167; *Wheeler v. Benedict*, 36 Hun, 478; *Hunt v. Purdy*, 82 N. Y. 486.

²⁸See *Warner v. Beardsley*, 8 Wend. 194.

The doctrine of *Pain v. Packard* is not to be confounded with another doctrine of suretyship, like the former in some respects, namely, the equity of a known surety, against the creditor, that the latter shall not deal with securities in his hands to the detriment of the surety, except insofar as the creditor's own repayment requires; with the seeming corollary that, if required by such surety, the creditor must realize first upon such securities, and that his failure to do so, upon request, will avail the surety to the extent of the subsequent depreciation of the securities. Such seeming corollary is not the law (*First National Bank of Buffalo v. Wood*, 71 N. Y. 405), though sometimes, apparently, regarded as a development of *Pain v. Packard*.