Fordham Law Review

Volume 26 | Issue 1 Article 6

1957

The Pain Doctrine and Problems Raised by the Fermac Case

courts of last resort have passed on it and in one of those courts comment on the subject was merely dictum.

It is submitted that the *Dempsey* case states a sound rule.[36] An uninformed jury might *inadvertently* deviate from the court's charge and add to the award, under the misconception that it will be reduced by taxes. If the jury is informed of the exemption, and is specifically instructed neither to add to nor deduct from the actual damages, neither party can complain, since it must be presumed that a jury will not *deliberately* violate the instructions of the court. In the exceptional case in which the jury fails to follow its instructions, and returns a verdict, the amount of which is against the weight of the evidence, the trial court has not only the power, but also the duty of ordering a new trial.[37]

THE PAIN DOCTRINE AND PROBLEMS RAISED BY THE FERMAC CASE

INTRODUCTION

A surety's basic function is to secure a debt or obligation running from the principal debtor to the creditor. A consensual surety is, after payment, entitled to reimbursement[1] and subrogation,[2] while before payment, he is entitled to exoneration.[3] In addition to this right of exoneration, many jurisdictions[4] recognize the surety's right to demand or request that the creditor proceed against the principal, and hold that a surety is discharged at least to the extent that he is injured by noncompliance on the part of the creditor with such demand or request. Although New York is among those states adhering to this rule known as the doctrine of *Pain v. Packard*,[5] the rule's exact limits in this state are not clearly defined. The decision in *National Sav. Bank v. Fermac Corp.*[6] exemplifies several New York cases which apparently extended the doctrine[7] and reversed the prior restrictive attitude of the majority of

36. Accord, Note, 9 Vand. L. Rev. 543, 550 (1956).

37. Southern Pac. Co. v. Guthrie, 186 F.2d 926 (9th Cir.), cert. denied, 341 U.S. 904 (1951).

1. Simpson, Suretyship § 48, at 224-37 (1950).

2. Matthews v. Aikin, 1 N.Y. 595, 599 (1848). See In re McClancy's Estate, 182 Misc. 866, 869, 45 N.Y.S.2d 917, 921 (Surr. Ct. 1943).

3. Hayes v. Ward, 4 Johns Ch. 123, 130 (N.Y. 1819). See Roberts v. Keene, 74 Misc. 238, 240, 133 N.Y. Supp. 1091, 1093-94 (Sup. Ct. 1911).

4. Very few states outside New York allow it by case law. See Martin v. Skehan, 2 Colo. 614 (1875); Hellen v. Crawford, 44 Pa. 105 (1862). Eighteen states allow it by statute: Alabama, Arizona, Arkansas, Georgia, Illinois, Indiana, Iowa, Kentucky, Mississippi, Missouri, North Carolina, Ohio, Tennessee, Texas, Virginia, Washington, West Virginia, Wyoming. Comment, 37 Yale L.J. 971, 973 n.9 (1928).

5. Pain v. Packard, 13 Johns. 174 (N.Y. 1816). See Church v. Simmons, 83 N.Y. 261, 264 (1880); Albany Dutch Church v. Vedder, 14 Wend. 165, 171 (N.Y. 1835); The Court Press, Inc. v. Aronstein, 139 Misc. 145, 249 N.Y. Supp. 70 (N.Y. Munic. Ct. 1931).

6. 241 App. Div. 204, 271 N.Y. Supp. 836 (3d Dep't), aff'd mem., 266 N.Y. 443, 194 N.E. 145 (1934).

7. See notes 32-34 infra.

decisions in New York.[8] The *Fermac* case grants an opportunity to reexamine the development of this doctrine in New York, and to consider several correlative problems respecting the discharge of a surety.

The Rule of Pain v. Packard

In the ordinary case, a creditor's mere inactivity or leniency in pursuing the principal, so as to enforce the obligation after maturity, does not justify a discharge of the surety, since the latter, on or after the maturity date, may pay and avail himself of his remedies of reimbursement or subrogation against the principal.[9] However, there are two instances where the dilatory creditor loses the surety's protection. First, a surety who as a guarantor of collection, promises to be liable only if the principal debtor becomes insolvent or for other reasons can not pay,[10] is entitled to a discharge to the extent that he is injured as a result of the neglect of the creditor to enforce his rights against the principal.[11] This is not a true exception to the general rule, however, inasmuch as its basis is contractual and does not depend upon the nature of the surety relationship. A second, and more basic departure from the ordinary case involving dilatory creditors is the *Pain v. Packard* doctrine which imposes a duty of diligence upon a creditor where he has been urged to sue his debtor by an apprehensive surety.

Under English law there is no protection similar to that granted in *Pain v. Packard.* The fact that the surety has a right of exoneration whereby he may force payment of the debt in equity is considered a sufficient safeguard.[12] In the United States, the *Pain v. Packard* doctrine owes its origin to a Virginia statute enacted in 1794.[13] It was not, however, until the *Pain* decision in 1816 that the doctrine found its way into the cases. There, a co-maker on a demand note urged the holder to proceed immediately to collect the money from the maker. The holder delayed taking action against the maker until the latter had become insolvent and absconded. The court held that the request to sue, under these circumstances, bound the holder to proceed with due diligence against the maker, and that his failure to act discharged the surety.[14] Although

8. See notes 20-24 infra.

9. Schroeppell v. Shaw, 3 N.Y. 446, 461-62 (1850). See Otto v. Lincoln Sav. Bank, 49 N.Y.S.2d 407, 410 (Sup. Ct.), rev'd on other grounds, 268 App. Div. 400, 51 N.Y.S.2d 561 (1944), aff'd, 294 N.Y. 798, 62 N.E.2d 236 (1945).

10. Consolidated Steel Corp. v. Pressed Steel Car Co., 118 Misc. 480, 483, 194 N.Y. Supp. 649, 651 (Sup. Ct. 1922); 4 Williston, Contracts § 1211 (1936).

11. This is the view of the Restatement, Security § 130(2) (1941). Cf. Standard Factors Corp. v. Kreisler, 53 N.Y.S.2d 871, 875 (Sup. Ct.), aff'd, 269 App. Div. 830, 56 N.Y.S.2d 414 (1st Dep't 1945).

12. The only negligence on the part of a creditor which operates to discharge a surety is that amounting to connivance or fraud. Black v. Ottoman Bank, 15 Moo. 472, 15 Eng. Rep. 573 (P.C. 1862). Where a creditor refuses to sue his debtor, the surety's remedy is a suit in equity in exoneration to force the principal to pay the debt. Padwick v. Stanley, 9 Hare 627, 68 Eng. Rep. 664 (Ch. 1852).

13. Va. Rev. Code 323 (1803).

14. Although the rule of Pain v. Packard is today recognized as part of the common law of New York, §§ 3 and 55 of the New York Negotiable Instrument Law render the rule

the court did not say so explicitly, it was clear that the discharge was meant to be commensurate with the injury sustained by the surety by reason of such noncompliance. Thus, since the creditor did not take action until the principal debtor had become insolvent, the surety was absolved of *all* liability.

The Early History of the Rule of Pain v. Packard

One year after its decision, the *Pain* case encountered vigorous disapproval by Chancellor Kent in *King v. Baldwin*,[15] where the rule was criticized for unnecessarily placing a new duty upon the creditor. A suit for exoneration, said the court, would afford a fully adequate remedy to the surety. Moreover, it was suggested that to base the existence of such a duty upon mere oral notice would open a wide area for fraud. Despite such criticism, the New York Court of Appeals reversed the lower court and reaffirmed the *Pain* rule.[16] In so doing, the court stated that the very fact that there existed an equitable remedy pointed to the existence of a legal right,[17] and that the difficulties of proving proper notice were not sufficiently unique to warrant discarding the rule. Since the *King* case was finally decided by the tie-breaking vote of the then Lieutenant Governor, a layman, it has been argued to be of weak authority.[18] The undisguised disapproval of later courts seems to support this contention.[19]

The controversial origin of the rule of *Pain v. Packard* forecast its subsequent history. There began a gradual, almost systematic attempt by the New York courts to distinguish and severely limit its application. In the early case of *Warner v. Beardsley*,[20] the court, while conceding its status as law, explicitly disapproved of extending the application of the rule to cases in which the facts were materially different. It was stated that to bring a case within the rule, the surety must show that the principal was solvent at the time he requested the creditor to proceed and collect his debts,[21] that the principal was within the jurisdiction of the state at such time, and that the creditor, without any reasonable excuse, neglected or refused to proceed until the principal debtor became insolvent and unable to pay.[22] Subsequent courts constantly sought

inapplicable to the very facts of that case, since an accommodation maker is now primarily liable and not liable merely as a surety. Citizens First Nat'l Bank v. Parkinson, 266 App. Div. 1055, 44 N.Y.S.2d 840 (4th Dep't 1943); Loughran, Pain Against Packard, 3 Fordham L. Rev. 35, 38-39 (1917).

15. 2 Johns. Ch. 554, 563 (N.Y. 1817).

16. King v. Baldwin, 17 Johns. 384 (N.Y. 1819).

17. The legal right here referred to is the right of a surety to set up, as a defense to an action at law, the pro tanto release resulting from the failure of the creditor to sue after notice.

18. See Herrick v. Borst, 4 Hill 650, 656 (N.Y. 1843).

19. See notes 20-24 infra.

20. 8 Wend. 194, 198 (N.Y. 1831).

21. See also Huffman v. Hulbert, 13 Wend. 377 (N.Y. 1835); Herrick v. Borst, 4 Hill 650 (N.Y. 1843); Field v. Cutler, 4 Lans. 195 (N.Y. Sup. Ct., Gen. T. 1871); Hunt v. Purdy, 82 N.Y. 486, 490 (1880).

22. A discharge under this rule is based upon injury to the surety by reason of the failure of the creditor to sue after notice. Where it was not shown that the mortgaged premises had depreciated in value after the notice was given, the guarantor of payment of a bond secured

reasons to deny the surety the benefits of the rule. Their exaggerated insistence on the requirement of an absolutely clear request by the surety upon the creditor to take legal action, for example, displayed an intent to narrow the scope of the rule.[23] Furthermore, in their reluctance to grant a surety the benefits of the rule, the courts limited the rule to its exact facts, so that unless the suretyship agreement was a part of the principal contract, the surety was deemed not entitled to the *Pain* remedy.[24] Finally, it was required that a surety assume his obligation solely for the benefit of the principal debtor in order for him to be able to invoke the rule.[25]

The Rule of Pain v. Packard as Extended

Although the over-all tendency of the New York courts has been to limit the rule of *Pain v. Packard* to its original facts, there have been a few instances where the courts have seen fit to extend it. *Remsen v. Beekman*[26] was the first New York Court of Appeals decision to apply the doctrine to a new situation. The court held that *Pain v. Packard* applied to a person, who was not a surety in the technical sense, but a mortgagor who had conveyed the mortgaged premises "subject to" the mortgage.

In a "subject to" transfer, the mortgagor and his grantee agree that as between them, the land is to be the primary fund for payment of the mortgage debt.[27] If the mortgagee chooses to proceed first against the land, the mortgagor will be liable on his bond only to the extent that the value of the land is less than the amount of the debt. But if the mortgagee chooses to proceed first against the mortgagor on the bond, the mortgagor is then entitled to be

by the mortgage was held not injured and therefore not discharged. Hunt v. Purdy, 82 N.Y. 486, 489 (1880).

23. This was in response to the original objection that oral notice tended to produce fraud. See Fulton v. Matthews, 15 Johns. 433 (N.Y. 1818) (creditor must be "fairly and fully apprised" of the fact that he is required to prosecute the maker); Valentine v. Farrington, 2 Edw. Ch. 53 (N.Y. 1833) (notice must be "full and explicit"). See also Mutual Life Ins. Co. v. Davies, 56 How. Pr. 440, 445 (N.Y. Super. Ct. 1878); Hunt v. Purdy, 82 N.Y. 486, 490 (1880); Denick v. Hubbard, 27 Hun 347, 351 (N.Y. Sup. Ct. 1882). There was no requirement that the notice be in writing. King v. Baldwin, 17 Johns. 384 (N.Y. 1819). When the rule has been adopted by statute, however, this requirement has often been imposed. Stearns, Suretyship § 6.38 (5th ed., Elder 1951). See Myers v. Hoeheimer, 173 Ark. 726, 293 S.W. 42 (1927). The surety had to demand that the creditor take legal action and no other. Singer v. Troutman, 49 Barb. 182 (N.Y. Sup. Ct., Gen. T. 1867). A demand merely to collect the money from the debtor was insufficient. Hunt v. Purdy, 82 N.Y. 486, 490 (1880).

24. An indorser of a note, though he is a surety, may not give notice, since his contract does not arise simultaneously with the transaction creating the indebtedness. Trimble v. Thorne, 16 Johns. 152, 154 (N.Y. 1819). A party who took a note in payment of a debt and then transferred it in part payment for a farm purchased by him, at the same time signing it under the maker's signature, was not a surety within the rule. Wells v. Mann, 45 N.Y. 327 (1871). A mortgagee, though he, when selling the mortgage, guarantees payment, was held not entitled to give notice. Newcomb v. Hale, 90 N.Y. 326 (1882).

25. See note 24 supra.

26. 25 N.Y. 552 (1862).

27. Osborne, Mortgages § 252 (1951).

subrogated to the position of the mortgagee. The result is that the land is "primarily liable" to the extent of its value, and the mortgagor is "secondarily liable" in that, due to his bond, he is responsbile for the differential between the value of the land and the full amount of his personal liability.[28] Unlike the situation where the grantee assumes the mortgage, a transfer merely "subject to" a mortgage involves no personal obligation to pay on the part of the grantee.[29] For this reason, it has been held that the "subject to" transfer gives rise to a "quasi surety" relationship.[30]

The holding in the *Remsen* case contravened the prior limitation that the surety be one for accommodation whose contract was part and parcel of the original transaction,[31] since not only does a transferring mortgagor receive concrete consideration in the form of the purchase price of the land, but his suretyship arises in an entirely distinct transaction from that creating the indebtedness. *Remsen* appears further to extend the rule by including within its bounds one who is not technically a surety.

Several years later, the New York Court of Appeals, in *Colgrove v. Tallman*,[32] broadened further the concept of a surety entitled to the protection of the rule of *Pain v. Packard*. Under the facts of that case, a partnership was dissolved, one of the two copartners purchasing the interest of the other, and agreeing to pay the partnership debts. The retiring partner was held an equitable surety for those debts and entitled to the remedy of *Pain v. Packard*.

Thus the *Colgrove* case is similarly in opposition to the previously established limitations. Even assuming that the retiring partner received no consideration for his exit from the firm, which apparently was not the case, the transaction creating the partnership debts had no relation in time to his becoming a surety.

Common to both *Remsen* and *Colgrove* is the fact that the surety was not such by voluntary agreement. Rather this status as a surety was imposed upon him by operation of law. Perhaps the court felt equitably justified, for this reason, in extending the added benefit of *Pain v. Packard*.[33]

There is some lower court authority for extending the *Pain* rule to cases

28. Johnson v. Zink, 51 N.Y. 333, 336 (1873).

29. Where the premises are transferred to an assuming grantee, the latter agrees that as between himself and the mortgagor he will be personally liable for the mortgage debt. Osborne, op. cit. supra note 27, § 253 n.58. A discussion of the rights of the mortgagee as against the assuming grantee may be found in Osborne, op. cit. supra note 27, §§ 260-64.

30. See Murray v. Marshall, 94 N.Y. 611, 615 (1884), where it is said: "While . . . no strict and technical relation of principal and surety arose . . . from the conveyance subject to the mortgage, an equity did arise . . . which bears a very close resemblance to the equitable right of a surety . . . ."

31. See note 24 supra.

32. 67 N.Y. 95 (1876).

33. Apparently on similar reasoning, several later appellate division cases have applied the Pain rule to a mortgagor who transfers "subject to" the mortgage. See Osborne v. Heyward, 40 App. Div. 78, 57 N.Y. Supp. 542 (2d Dep't 1899); Gottschalk v. Jungmann, 78 App. Div. 171, 173, 79 N.Y. Supp. 551, 552-53 (1st Dep't 1903); Union Trust Co. v. Rogers, 261 App. Div. 882, 25 N.Y.S.2d 120 (4th Dep't 1941).

where a mortgagor transfers to an assuming grantee.[34] Although such a mortgagor is, of course, a true surety, as apposed to a quasi surety, he is also a surety by operation of law whose status is not that of an accommodation surety who simultaneously became obligated with the principal debtor.

The Fermac Case

The right of a mortgagor, transferring property "subject to" the mortgage, to invoke the rule of *Pain v. Packard* confronted the Appellate Division, Third Department in the *Fermac* case. On appeal, the mortgagor asserted, as a defense to a deficiency judgment rendered against him, that he had given notice to the mortgage to foreclose at a time when the land's value was sufficient to satisfy the entire mortgage debt, that the mortgagee had neglected to do so and that the land had depreciated, creating the deficiency in question. The court held that this was an adequate ground for discharge of the mortgagor, citing as authority, the *Remsen* case.

The decision, however, was "two pronged" in that, immediately prior to the request to sue, when the land's value was sufficient to satisfy the entire mortgage debt, the mortgagor had made a tender to the mortgagee offering to pay the debt in full for an assignment and such was refused by the mortgagee. The court held that this was an alternative ground for discharge, and were not the rule of *Pain v. Packard* adhered to under this set of circumstances, the mortgagor would still not be liable for the deficiency on the basis of such tender.

Critique of Pain v. Packard as Applied in New York

There is conflict as to the justification of the *Pain* doctrine.[35] Those authorities favoring the rule emphasize that since equity, when it does act in enforcing the surety's right of exoneration, proceeds on the principle that it is the duty of the creditor to obtain payment in the first instance from the principal debtor, there is no reason why this same duty cannot be brought into exercise by an act in pais and without the interposition of a court of equity, so as to give a right at law.[36] On the other hand, disapproval of the rule is grounded on the fact that it unjustifiably imposes an added duty of active diligence upon the creditor, while the surety's right of exoneration places no such burden upon him.[37] Additionally, the rule is argued to be a source of unnecessary litigation inasmuch as it opens a ". . . litigious inquiry as to the certainty and efficiency of the notice. . . ."[38] Finally, it is contended that the rule affords to a surety

34. Russell v. Weinberg, 4 Abb. N. Cas. 139 (Brooklyn City Ct. 1878); Buffalo Sav. Bank v. Threeinwon Realty Corp., 175 Misc. 807, 26 N.Y.S.2d 324 (Sup. Ct. 1940).

35. See note 4 supra for authorities which accord justification for the doctrine and note 40 infra for authorities which refuse to accord justification for the rule.

36. King v. Baldwin, 17 Johns. 384 (N.Y. 1819); Remsen v. Beekman, 25 N.Y. 552 (1862).

37. See, for example, the lower court opinion in King v. Baldwin, 2 Johns. Ch. 554 (N.Y. 1817).

38. King v. Baldwin, 17 Johns. 384, 391 (N.Y. 1819), wherein the court was speaking of the reasons put forth by the lower court which held the rule to be unnecessary.

a temptation to fraud.[39] The reasoning for disapproval of the rule has been accepted by the weight of authority,[40] and appears to be the more logical, notwithstanding the enactment of the rule of *Pain v. Packard* into statutes by eighteen states.[41] If to transpose an equitable right into a court of law involves, as it does in the application of the rule, the unwarranted impairment of the creditor's contractual rights against the surety, such a transposition seems clearly unjustified. The rationale behind the numerous New York cases, attempting to limit the rule of *Pain v. Packard,* therefore, has considerable merit. Nevertheless cases like the *Fermac* decision seem intent upon continuing to extend the application of the rule to persons who are sureties by operation of law.

Are there any specific equities in favor of a surety by operation of law which, though they cannot fully justify such an extension of *Pain v. Packard,* might at least render it more acceptable? It would appear not. There is nothing altruistic about a mortgagor who transfers "subject to" the mortgage. Unlike an accommodation surety, he receives concrete value in the form of the purchase price, and, therefore, can in no manner be considered as having entered the contract solely for the benefit of his grantee.[42] Nor did his status as a surety arise simultaneously with the principal contract.[43] Finally, he stands to lose nothing by being deprived of the protection offered under *Pain v. Packard,* since the alternative is the tried and proven remedy of exoneration.[44] The single factor in his favor, and in favor of a retiring partner, seems to be that they are sureties by operation of law, not having voluntarily chosen their positions. However, in viewing the transactions which give rise to a suretyship by operation of law, it is evident that such an obligation is imposed solely as a means of preserving an existent obligation intact, thereby preventing a mortgagor or retiring partner from gaining any unfair advantages. In the mortgage transfer situation, for example, the personal liability of the mortgagor must be preserved in the form of a "suretyship" or the mortgagee would stand to lose his original investment if the land depreciated below the amount of the debt. Likewise, a retiring partner ought not be permitted to withdraw from the firm to the detriment of firm creditors.

It would seem then that this phase of the *Fermac* decision, holding that a transferring mortgagor is privileged to invoke the rule of *Pain v. Packard,* as well as all other cases which tend to perpetuate the unwarranted extension of an equally unwarranted rule, are subject to grave criticism. Whether the New York Court of Appeals may see fit to overrule *Pain v. Packard,* or at least to

39. King v. Baldwin, 2 Johns. Ch. 554, 563 (1817).

40. Stearns, Suretyship § 6.38 (5th ed., Elder 1951). See Kemp Lumber Co. v. Stanley, 22 N.M. 198, 160 Pac. 351 (1916); Bank v. McAllister's Estate, 56 Neb. 183, 76 N.W. 552 (1898); Inkster v. First Nat'l Bank, 30 Mich. 143, 147 (1874); Bull v. Allen, 19 Conn. 101, 106 (1848); Frye v. Barker, 21 Mass. (4 Pick.) 382 (1826); and cases cited in Annot., 1918C L.R.A. 11-12. See also Restatement, Security § 130(1) (1941).

41. See note 4 supra.

42. See note 24 supra.

43. Ibid.

44. See note 3 supra; Marsh v. Pike, 10 Paige Ch. 595 (N.Y. 1844); Friedman, Discharge of Personal Liability on Mortgage Debts in New York, 52 Yale L.J. 771, 795 (1943).

curtail these liberal extensions of the doctrine is problematical.[45] As of the present, of course, both remain the law.

Rules Relating to Discharge of Quasi Surety

The rule of *Pain v. Packard* from its inception has afforded a pro tanto discharge, that is, a discharge to the extent that the surety is injured by the creditor's failure to sue.[46] On the other hand, where a creditor refuses a true surety's tender, the latter is discharged from *all* liability on his contract, without regard to the actual injury sustained.[47]

The court in *Fermac* held that the mortgagor was discharged of *all* liability for deficiency, because the tender occurred when the land's value was in excess of the mortgage debt. Can such a position with respect to a quasi surety be reconciled with the above rules concerning the discharge of a true surety? It would appear so.

The facts in the *Fermac* case indicate that between the time when the mortgagee was requested to sue and the time of trial, twenty months intervened and the land depreciated $7,000 in value. The trial court held that one month after the request was an excusable delay and that the seven month calendar wait was also an excusable delay, so that of the twenty month delay, the delay for twelve months only was inexcusable on the part of the mortgagee. Apparently proceeding on the theory that the quasi surety received a pro tanto discharge on the basis of either the tender or request to sue, the trial court, assuming that the rate of depreciation was uniform, apportioned the depreciation between the date of the request to sue and the date of trial. It held the mortgagor was discharged from liability for the deficiency caused by the inexcusable delay of twelve months, amounting to $4,200 or 12/20 of $7,000, but that the mortgagor would be liable for any deficiency in excess of $4,200.

Nevertheless, the appellate division, on the facts of the case, ruled that the trial court erred even in the application of the rule of a pro tanto discharge, since it had disregarded the fact that, at the time of the tender of the full amount then unpaid on the mortgage, the mortgaged premises were of sufficient value to satisfy the mortgage debt in full. In modifying the judgment of the trial court, the appellate division, without explicit statement to such effect, apparently only decided that the lower court had merely wrongly applied the correct rule of a pro tanto discharge. By implication, the rule to be derived

45. Since the decision in the Fermac case, there have been no Court of Appeals cases adopting its position with the exception of its affirmance in 266 N.Y. 443, 195 N.E. 145 (1934), without opinion, leaving serious doubt as to the grounds on which it was affirmed. Several lower court cases, however, seem to view it with approval. See Matter of Lafayette Nat'l Bank, 254 App. Div. 207, 4 N.Y.S.2d 356 (2d Dep't 1938); Union Trust Co. v. Rogers, 261 App. Div. 882, 25 N.Y.S.2d 120 (4th Dep't 1941); Mutual Life Ins. Co. v. Barca Realty Corp., 48 N.Y.S.2d 306 (Sup. Ct. 1943).

46. Chapman v. Hoage, 296 U.S. 526, 530 (1936); Friedman, op. cit. supra note 44; Glenn, Purchasing Subject to Mortgage, 27 Va. L. Rev. 853, 869 (1941); Osborne, op. cit. supra note 27, § 258. Where statutes have been enacted, there is some conflict. See Stearns, op. cit. supra note 23.

47. Arant, Suretyship § 59 (1931); Stearns, op. cit. supra note 23, § 6.53.

from *Fermac,* relating to the "tender" discharge of a quasi surety may be summarized as follows: a discharge on the ground of a refusal of a quasi surety's tender is a pro tanto discharge computed as of the time of the tender, since that is when the injury to the surety's right of subrogation accrues. It can be, as it was in *Fermac,* a complete discharge from all liability for deficiency, if the land's value is equal to, or more than, the mortgage debt at the time of tender. It does not lose its character as a pro tanto discharge, but merely, on such facts, discharges the mortgagor from all liability.

A full understanding of this proposition may be attained by examining the similarities which exist between the "tender" discharge in *Fermac* and the settled law concerning the discharge of a quasi surety on another ground, *viz.,* an extension of the maturity date by the creditor without the surety's assent. It is generally held that such an extension, like a refusal of tender, discharges a *true* surety from all liability on his contract.[48] Courts take this position partly because the contract with a new due date is not the one to which the surety agreed.[49] The major reason appears to be that an extension defers and thus impairs the surety's right to pay at maturity and sue the principal for reimbursement.[50] With respect to a quasi surety, there has been conflict. Originally, a few jurisdictions subscribed to the view that he is not strictly a surety, and is, therefore, not released at all.[51] New York and the present weight of authority, however, grant the quasi surety a pro tanto release to the extent of the value of the land at the time when the extension agreement is made.[52] In the leading case on the discharge of a quasi surety (a transferring mortgagor) by such an extension of the maturity date, it was held that he was discharged only to the extent he was a surety, that the mortgagor was a surety only up to the value of the land, and that beyond the value of the land, the mortgagor was still the principal debtor with no remaining equities.[53] Such reasoning is settled law with respect to the

48. Calvo v. Davies, 73 N.Y. 211 (1878); National Park Bank v. Koehler, 204 N.Y. 174, 97 N.E. 468 (1912).

49. See Stearns, op. cit. supra note 23, § 6.16; Becker v. Faber, 280 N.Y. 146, 19 N.E.2d 997 (1939).

50. Arant, op. cit. supra note 47, § 68, at 285.

51. Scholten v. Barber, 217 Ill. 148, 75 N.E. 460 (1905). But cf. Carlen v. Cottrell, 309 Ill. App. 440, 33 N.E.2d 234 (1941); Chilton v. Brooks, 72 Md. 554, 20 Atl. 125 (1890); Shepherd v. May, 115 U.S. 505, 511 (1885).

52. Murray v. Marshall, 94 N.Y. 611, 616 (1884); Metzger v. Nova Realty Co., 214 N.Y. 26, 107 N.E. 1029 (1915). See Brockton Sav. Bank v. Shapiro, 311 Mass. 695, 42 N.E.2d 826 (1942); Wittson v. Englewood Plumbing Supply Co., 121 N.J. Eq. 323, 189 Atl. 920 (Ch. 1937); Sime v. Lewis, 112 Minn. 403, 128 N.W. 468 (1910); Bunnell v. Carter, 14 Utah 100, 46 Pac. 755 (1896). Cf. Braun v. Crew, 183 Cal. 728, 192 Pac. 531 (1920).

53. "The grantee stood in the quasi relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in any manner disturbed. The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value." Murray v. Marshall, 94 N.Y. 611, 616 (1884).

"extension" discharge of a quasi surety, and, being so readily applicable to a "tender" discharge of a quasi surety, appears to be the basis for the "tender" discharge granted by the *Fermac* case.

Since the *Pain* rule has always afforded a pro tanto discharge, there is no question but that a quasi surety also receives a pro tanto discharge under the rule. However, as in the case of a "tender" or "extension" discharge, so under the *Pain* rule, a quasi surety can only be discharged to the extent he, as a surety, is injured. Nevertheless, there is authority lacking as to the method of computing the extent of a quasi surety's injury under the *Pain* rule.

Although the *Pain* rule was applicable in the *Fermac* case as an alternative ground for discharge, the discharge to be derived from its application was nevertheless absorbed within the more extensive "tender" discharge, which the court held was alone ground for a reversal of the deficiency judgment. The appellate division left unanswered the question concerning the method to be used in computing the pro tanto discharge of the quasi surety under the *Pain* rule. Granting that the ruling of the trial court in *Fermac* was incorrect due to the tender being made and refused when the value of the land was sufficient to satisfy the debt, and due to the unwarranted assumption that the land depreciated at a uniform rate during the time between the request and the foreclosure, its basic theory for computing the pro tanto discharge of a quasi surety under the *Pain* rule was sound, since an attempt was made to compute the *actual* injury sustained.

In view of the lack of clear or conclusive authority as to the method of computing the pro tanto discharge of a quasi surety under the *Pain* rule, it is submitted that in attempting to determine the time of computation at which the quasi surety's injury begins to accrue, consideration be given to two time periods following the request to sue. First, the creditor should be accorded a "reasonable time" after the request within which to bring the foreclosure suit. Secondly, any court calendar wait that would be incurred by the creditor if suit were brought within such "reasonable time" should be considered. These successive time periods, when added together, constitute an excusable delay on the part of the creditor, since the foreclosure could not under any circumstances be decreed any sooner in time than at the end of such delay. The time for computing a quasi surety's discharge under the *Pain* rule should, therefore, be the last day of such excusable delay following the date of the request, no matter when the foreclosure suit was actually brought by the creditor, with the result that the quasi surety is discharged from liability for any deficiency accruing subsequent to such date.

Conclusion

The proposition that *Pain v. Packard* extends to a quasi surety as well as other sureties by operation of law, whatever its merit, must be accepted as subsisting law until the question is conclusively passed upon by the New York Court of Appeals. *Pain* applies in this state, therefore: (1) to an accommodation surety who assumes this position simultaneously with the creation of the debt, and (2) to a person who becomes a true or quasi surety by operation of law.