

SUPREME COURT OF OHIO

Helt v. Whittier

31 Ohio St. (N.S.) 475 (Ohio 1877) · Decided December 15, 1877

SUMMARY

The court holds that a surety's undertaking must be construed in connection with applicable statutes and is not subject to the same strict construction as a penal statute or forfeiture. It concludes that the surety's liability for Ward's default remains within the terms of the undertaking despite the rendition of judgment against Smith, reverses the judgment, overrules the demurrer, and remands the cause.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Okey, J.
JURISDICTION	Ohio
DECIDED	December 15, 1877
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Helt brought an action against Whittier, the surety on Ward's appeal undertaking, after judgment was rendered against Ward and Smith in the court of common pleas. Whittier demurred to the petition, the demurrer was sustained, and the petition was dismissed. The district court affirmed, and Helt sought review by petition in error.
STANDARD OF REVIEW	Review of the judgment sustaining a demurrer to the petition, accepting the petition's well-pleaded allegations for purposes of determining whether it stated a claim against the surety.
PRECEDENTIAL VALUE	Published Ohio Supreme Court opinion
PARTIES	Helt v. Whittier

TOPICS

- pleadings
- appellate procedure
- contracts
- civil procedure

PRACTICE AREAS

- civil procedure
- appellate procedure
- suretyship
- contracts

QUESTIONS PRESENTED

1. Whether the addition of Smith as a party and the entry of judgment against both Smith and Ward placed the judgment outside the terms of Whittier's appeal undertaking.
2. Whether the petition adequately alleged Whittier's liability as surety for Ward's default despite the judgment's inclusion of Smith.

HOLDINGS

1. The surety remained liable because the undertaking covered a judgment against Ward, and the judgment against Smith did not alter the nature or extent of Ward's default or charge Whittier for Smith's default.
2. A surety's contract is not to be construed as strictly as a penal statute or forfeiture provision; it must be construed according to its terms in connection with applicable statutes.

KEY QUOTATIONS

"We do not think it is in conflict with our conclusion here, which is to order the Motion granted, judgment reversed, demurrer overruled, and cause remanded for further proceedings." (477)

"Suit may be maintained against a surety, when his liability is shown to be within the terms of his agreement; and the contract must be construed in connection with the statutes, if any, relating to the same matter."

FACTUAL BACKGROUND

Hiram E. Smith and James H. Ward jointly and severally executed a promissory note payable to George Helt. Helt obtained a judgment against Ward, and Ward appealed; Whittier became surety on an undertaking promising that, if judgment were awarded against Ward, Whittier would satisfy the judgment, interest, and costs. Smith was added as a defendant in the court of common pleas on Ward's motion, and judgment was entered against both Smith and Ward. After neither maker had property subject to levy, Helt sued Whittier on the undertaking.

PROCEDURAL HISTORY

Helt obtained a judgment against Ward on a promissory note. Ward appealed, and Whittier executed an undertaking promising to satisfy any judgment rendered against Ward. Smith, another maker of the note, was added as a party in the appellate court, and judgment was entered against both Smith and Ward. The common pleas court sustained Whittier's demurrer and dismissed the petition; the district court affirmed. The Supreme Court of Ohio granted the motion, reversed the judgment, overruled the demurrer, and remanded the cause.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The judgment was reversed, the demurrer was overruled, and the cause was remanded for further proceedings.

CASES CITED

- Long v. Pike, 27 Ohio St. 498

OPINION

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OKEY, J.

Okey, J. Language has sometimes been employed from which it might be inferred that the contract of a surety is to be construed as strictly as a statute highly penal, or one providing for a forfeiture. That such a view is erroneous admits of no doubt. Suit may be maintained against a surety, when his liability is shown to be within the terms of his agreement; and the contract must be construed in connection with the statutes, if any, relating to the same matter. Here, the statute authorized the court to make Smith a party to the action. Justices' Code, secs. 56, 115; Civil Code, sec. 137. He was made a party on motion of the appellant. Making a new party could not harm, but might relieve the surety for the appeal. "Why does not the case made in the petition show the liability of Whittier, within the strict rule on the subject? There is no analogy between this case and one in which a surety has guaranteed the performance of a duty, or the payment of money, by a firm, and the firm has been changed before default is made. There, ordinarily, without assent of the surety, the default is not within the guaranty, even if the firm name remains unchanged, but here the default is in legal effect, as well as in terms, embraced by the undertaking. The liability of the surety is neither more nor less, nor different, bjr reason of the rendition of the judgment against Smith. While it is true that he did not agree to answer for the default of Smith, it is also true there is no attempt to charge him for Smith's default. He agreed *477 to answer for the default of Ward, and there is no attempt to charge him for the default of any other person. Long v. Pike, 27 Ohio St. 498, is said to be, in principle, like this case. Whether this court would be willing to follow that decision, I am not prepared to say. We do not think it is in conflict with our conclusion here, which is to order the Motion granted, judgment reversed, demurrer overruled, and cause remanded for further proceedings.