

property without due process of law.³⁶ One difficulty, not present in condemnation proceedings, which has prevented a clear test of the taxing power is that there is ordinarily not sufficient interest to give the individual standing in the courts and a right to contest the legislation.³⁷ But the dispute over the extent of the national power to tax is based on two fundamental theories; one, that Congress may levy to provide for the general welfare in the broadest sense, and two, that it can tax only in connection with and to enable it to carry out the powers specifically granted by the Constitution.³⁸ And the same two opinions exist in the field of eminent domain. Taking is proper, on the one hand, where it is for the welfare, good, or benefit of the people;³⁹ or it is improper unless necessary to the execution of granted powers.⁴⁰ The authoritative adoption of one of these conflicting theories would aid the settlement of a situation which is none too clear.

T. S. MCPHEETERS. JR. '36.

THE JUDICIAL RECOGNITION OF THE DISTINCTION BETWEEN COMPENSATED AND ACCOMMODATION SURETIES IN MISSOURI

The term "surety" as used before the latter part of the nineteenth century indicated the private accommodation surety who assumed legal obligations from motives of friendliness and not pecuniary gain, by becoming a party to a contract prepared and drawn by another.¹ The contract of suretyship antedated the Christian era by more than 2500 years; as a consequence, the rules of suretyship were formulated during the earlier and more plastic period of legal development.² In view of the gratuitous nature of the undertaking of the private accommodation surety, and the severity of the penalty imposed upon him in case of the

³⁶ *Loan Association v. Topeka* (1874) 20 Wall. 655; *Cole v. La Grange* (1884) 113 U. S. 1. When the highest court of a state has declared a tax was for a public purpose its decision has never been reversed, though power to do so has not been disclaimed. See *Hairston v. Danville & Western Ry.* (1908) 208 U. S. 598.

³⁷ Cf. *Massachusetts v. Mellon* (1923) 262 U. S. 447.

³⁸ Corwin, *The Spending Power of Congress* (1923) 36 Harv. L. Rev. 548. The case of *Washington Water Power Co. v. City of Coeur D'Alene*, supra note 33, takes the contrary view, holding that because of the Xth Amendment Congress can appropriate only in the exercise of its enumerated powers.

³⁹ See the quotations from Mr. Justice Holmes, supra notes 30 and 31.

⁴⁰ *Cherokee Nation v. Southern Kansas Ry. Co.*, supra note 5; U. S. v. *Oregon Ry. & Navigation Co.*, supra note 6.

¹ See Arnold, *The Compensated Surety*, 26 Col. L. Rev. 171 (1926).

² Lloyd, *The Surety*, (1917) 66 U. Pa. L. Rev. 40; Morgan, *The History and Economics of Suretyship*, (1927) 12 Cornell L. Quart., 153, 487; Brandt, *Suretyship and Guaranty*, (3rd. ed. 1905) 17.

principal debtor's default, it was to be expected that the courts would be reluctant to declare a forfeiture of the property of the surety. As a result, a logical basis may be found for the rule of *strictissimi juris*, which has been expanded until today it is sometimes applied regardless of the equities of the parties in the particular case.³

With the advent of the corporate surety, the law of suretyship in late years has undergone a considerable change. The corporate surety being of comparatively recent origin, it is not surprising that the development of this new type has caused resultant difficulties, and that distinctions have been made between this compensated surety and its predecessor, the accommodation surety. It would necessarily follow that an application of different principles is required when the surety is one who, for compensation and as a regular business, contracts to become responsible for the obligations of others, than where we are concerned with a gratuitous surety. The limits of this difference in treatment have not yet been completely and clearly defined by the Missouri courts, but it is quite evident from the cases that at least insofar as the rule of *strictissimi juris* produces results peculiar to the contract of the accommodation surety in contrast with ordinary contracts in general, that rule is not invoked to favor the compensated surety. In distinguishing the two types of sureties, the courts of Missouri have expressed themselves in varying language. Some times the statement is merely that the corporate compensated surety is not entitled to the benefit of the rule *strictissimi juris*.⁴

³ Stearns, *Suretyship*, (3rd. ed. 1922) 59, 60.

⁴ *Kansas City, to Use of Ingalls Stone Co. v. New Amsterdam Casualty Co.*, (1925) 219 Mo. App. 283, 269 S. W. 693 (suit on surety's covenant in contract guaranteeing payment of labor and materials furnished in constructing park improvements where the court merely said, "Of course, the surety being a compensated surety, the rule of *strictissimi juris* does not apply."); *State, ex rel. Concrete and Steel Const. Co. v. Southern Surety Co.*, (1927) 221 Mo. App. 67, 294 S. W. 123 (The question was whether the subletting of a contract for the tearing down of an old bridge without the written consent of the commission and engineers was such an alteration of the contract as to discharge the surety. "The law is well settled that, in construing the contract of a surety for hire, as in this case, the rule of *strictissimi juris* is greatly relaxed, and the rule that sureties are the favorites of the law does not apply."). In the case of *State, ex rel. Brennan v. Dierker*, (1903) 101 Mo. App. 636, 74 S. W. 153, 156, a sheriff's bondsmen were held not liable on the sheriff's bond. Brennan, the injured party, was arrested by the sheriff without a warrant, for a misdemeanor not committed in his presence. In the opinion by Goode, J., "so far as Dierker is concerned, the case is clear. But his bondsmen must be considered, and their rights are of prime importance in legal contemplation." But in the case of *State, ex rel. and to Use of Kaecher v. Roth*, (Mo. 1932) 49 S. W. (2d.) 109, a deputy constable, in pursuit of a driver of a car who had committed a misdemeanor, fired at the fleeing car and struck a passenger therein. The constable and the surety were held liable. In the words of the court, "The only basis we can find for the doctrine announced in the opinion in the above case (*Brennan v. Dierker*) and kindred cases is, as

At other times, the court states that the contract is to be construed strictly against the compensated surety, or liberally in favor of the promisee.⁵ The rule for construction, in the latter instance, is the one applied to the interpretation of other instruments. The court will resort to the same aids and invoke the same canons of construction which apply to other contracts, the intention of the parties constituting the main issue.⁶ Accordingly, when there is room for construction of language, or more than one possible effect of language used in the suretyship contract, the benefits from any such construction inure to the promisee rather than the promisor.⁷ Elsewhere, it has been said that

the learned Judge Goode said: “* * the overweening tenderness of the law for sureties.” This tenderness of the law for sureties had its origin when the courts were called upon to decide the liability of gratuitous sureties on bonds. However, this so called tenderness for sureties has no place in the law in cases of sureties for hire. These sureties receive compensation, and for a valuable consideration bind themselves and guarantee that, in cases of sheriffs or constables, the officers will not abuse the power with which they have been vested. The sureties should be held to their contract.”

⁵ See *Noonan v. Indep. Co.*, (1931) 328 Mo. 706, 41 S. W. (2d.) 162.

⁶ Though a surety has the right to limit his liability to the very terms of his undertaking, nevertheless a bond is so construed, as any other contract, with regard to the intention of the parties, and its purpose as disclosed by the instrument, read in the light of the surrounding circumstances. *Evans v. U. S. Fidelity and Guaranty Co.*, (1917) 195 Mo. App. 438, 192 S. W. 112; *School Dist. v. McClure*, (Mo. 1920) 224 S. W. 831; *Board of Education of St. Louis v. U. S. Fidelity and Guaranty Co.*, (1911) 155 Mo. App. 109, 134 S. W. 18 (The obligation of a surety on a contractor's bond was held to be measured by the contract for the work and the bond, read together; the suretyship contract being given a reasonable interpretation according to the intention of the parties as disclosed by the contract read in the light of the surrounding circumstances, and the purpose for which it was made); *Kansas City v. Davidson*, (1911) 154 Mo. App. 269, 133 S. W. 365; *Missouri, K. & T. Ry. v. American Surety Co. of N. Y.*, (1921) 291 Mo. 98, 236 S. W. 657 (bond of indemnity to the railway company against loss in the purchase of ties from the principal contractor. It was held that the general rule that sureties were favorites of the law, and that their contracts should be construed most strongly in their favor, did not apply where a surety was a corporation organized and empowered to act as such for a price, and the contracts of such compensated sureties were to be construed in accordance with the reasonable intent of the parties as plainly indicated by their terms.)

⁷ If the bond of the compensated surety be reasonably susceptible of an interpretation favorable to the beneficiary, and of another favorable to the compensated surety, the former, if consistent with the objects for which the bond was given, will be adopted. *Long Bro's. Grocery Co. v. U. S. Fidelity and Guaranty Co.*, (1908) 130 Mo. App. 421, 110 S. W. 29; *Hurley v. Fidelity and Deposit Co.*, (1902) 95 Mo. App. 88, 68 S. W. 958; *Dorr v. Bankers' Surety Co.*, (Mo. 1920) 218 S. W. 398; *State, to Use of Hubbard and Moffitt Comm. Co. v. Cochrane*, (1915) 264 Mo. 581, 175 S. W. 602 (where the bond of the compensated surety was held enforceable as a valid common law obligation aside from stipulations to comply with the inspection laws); *Lackland v. Renshaw*, (1914) 256 Mo. 133, 165 S. W. 314; *Union State Bank v. American Surety Co.*, (Mo. 1929) 23 S. W. (2d.) 1038 (any ambiguity of a written contract of a compensated surety is to be construed most strongly against the surety).

the contract of the compensated surety is to be construed as are contracts of insurance.⁸ A survey of the subject shows that a majority of the cases contain statements that the promisor is not so much a surety as an insurer and that the rules of insurance apply.⁹ The surety, it is said, is an insurer of the debt, the fidelity, or the undertaking of his principal, and when he engages in the business of furnishing surety for hire, his obligation is no longer construed under the rule of *strictissimi juris* but is subject to the rules of construction applicable to insurance policies generally.¹⁰ So that, speaking generally, the contracts of surety-

⁸ *Roark v. City Trust and Surety Co.*, (1908) 130 Mo. App. 401, 110 S. W. 1 (a contract of suretyship against loss by dishonesty of an employee is, in effect, a contract of insurance, and must be construed as an insurance policy); *State, ex rel. Matter v. Ogden*, (1915) 187 Mo. App. 39, 172 S. W. 1172 (surety company bond of a notary public; the rights of the ordinary surety being considered *strictissimi juris*, while the contracts of the compensated sureties being construed as contracts of insurance); *Boppart v. Illinois Surety Co.*, (1909) 140 Mo. App. 683, 126 S. W. 768; *Fairbanks Canning Co. v. London Guaranty and Accident Co.*, (1911) 154 Mo. App. 327, 133 S. W. 664; *Fidelity and Deposit Co. v. John Gill and Sons Co.*, (Mo. 1924) 270 S. W. 700 (surety on contractor's bond was said to be in reality an insurer and the contract was to be construed most strongly in favor of the obligee); *Rule v. Anderson*, (1911) 160 Mo. App. 347, 142 S. W. 358; *St. Louis Ass'n. v. American Bonding Co.*, (1917) 197 Mo. App. 430, 196 S. W. 1148 (indemnity bond securing the faithful performance of a secretary of the association. A corporation engaged in the business of acting as a surety for hire in respect to its obligation to indemnify the employer for any loss sustained by reason of dishonesty of the employee, was said to be virtually in the position of an insurer); *Burton Mchg. Co. v. National Surety Co.*, (Mo. 1916) 182 S. W. 801; *Schnitzer v. Couch*, (Mo. 1925) 279 S. W. 165 (contract of suretyship for erecting of a building; the surety being declared to be an insurer); *State, ex. rel. Elberta Peach and Land Co. v. Chicago Bonding and Surety Co.*, (1919) 279 Mo. 535, 215 S. W. 20; the failure of the owner to reserve a percentage of the contract price as stipulated in the building contract, would operate to release an accommodation surety under the rule that any change in the contract without his consent releases the surety. This rule was rejected, however, when it was sought to have it applied to the case of a surety for hire whose position was said to be that of an insurer. *Barton v. Title Guaranty and Surety Co.*, (1916) 192 Mo. App. 561, 183 S. W. 694; *Krey Packing Co. v. U. S. Fidelity and Guaranty Co.*, (1915) 189 Mo. App. 591, 175 S. W. 322 (indemnity bond of traveling salesman).

⁹ See footnote 8, *supra*.

¹⁰ Note, for example, the following language in *State, ex. rel. Elberta Peach and Land Co. v. Chicago Bonding and Surety Co.*, *supra* footnote 8, where the court expresses itself thus: "The domain of insurance law is no longer limited to the interpretation and enforcement of fire, life, and marine insurance contracts. In recent years a multitude of other forms of insurance have obtained, covering almost every conceivable risk incident to modern business and industrial life. Concurrently with the extension of the insurance business, there has been a corresponding development of insurance law, through the application to the new and varied forms of insurance contracts of the fundamental rules and principles governing the older ones. By this means there has come into existence, with many others, a branch of the insurance law known as guaranty insurance, which embraces

ship issued by the surety companies, organized for the purpose of furnishing surety for hire, are contracts of insurance.¹¹

On the other hand, the accommodation surety is, and has been in the past, a favorite of the law, and his contract is *strictissimi juris*.¹² The contract of the accommodation surety will be strictly construed and all doubts and technicalities resolved in favor of the surety. This rule has been applied in order to determine the meaning of the language used and the operative effect of that

fidelity, commercial, and judicial insurances. Of these commercial, or indemnity, insurance and judicial insurance, so called, are of the more recent origin. In the bonds or policies of guaranty insurance, the more natural attitude of a surety is assumed; but they are contracts of insurance none the less. . . . In current decisions dealing with such contracts, the courts continually refer to them indifferently as "bonds," "indemnity contracts," "insurance bonds," "insurance contracts," and "guarantee policies." *Fidelity and Deposit Co. v. John Gill and Sons Co.*, (Mo. 1924) 270 S. W. 700.

¹¹ See footnote 8, *supra*.

¹² *Stearns, Suretyship*, (4th. ed.) 401; *Lange Co. v. Freeman*, (Mo. 1929) 13 S. W. (2d.) 1092 (voluntary surety is entitled to a favorable strict construction of the contract); the contract of a surety must receive a strict interpretation and cannot be extended beyond the fair scope of its terms. *Blair v. Perpetual Ins. Co.*, (1847) 10 Mo. 559, 47 Am. Dec. 129; *State, ex rel. Bell v. Yates*, (1910) 231 Mo. 276, 132 S. W. 672; *Same v. Grant*, (1910) 231 Mo. 292, 132 S. W. 676; *Beers v. Strimple*, (1893) 116 Mo. 179, 22 S. W. 620; *Evans v. Graden*, (1894) 125 Mo. 72, 28 S. W. 439 (the liability of a surety was said to be measured by the strict terms of his contract, and could not be extended by construction or implication); *Bank of Moberly v. Meals*, (1927) 316 Mo. 1158, 295 S. W. 73 (liability of sureties consenting to be bound to a certain extent only must be found within the terms of that consent, strictly construed); *Springfield Lighting Co. v. Hobart*, (1903) 98 Mo. App. 227, 68 S. W. 942; *Fisse v. Einstein*, (1878) 5 Mo. App. 78; *State, ex rel. Blair v. Pittman*, (1908) 131 Mo. App. 299, 111 S. W. 134 (the relation between the creditor and the security debtor is comprised within the strict letter of the contract, and the obligation of the latter should not be extended by any liberal intendment beyond the undertaking); *Harris v. Taylor*, (1910) 150 Mo. App. 291, 129 S. W. 995; *Moore v. Title Guaranty and Trust Co.*, (1910) 151 Mo. App. 256, 131 S. W. 477; *Killoren v. Meehan*, (1893) 55 Mo. App. 427 (a surety has the right to stand on the strict terms of his contract, and if a variation is made without his consent, he is discharged; and the principle applies to building contracts the same as to other contracts); *State, ex rel. Moore v. Sandusky*, (1870) 46 Mo. 377; *Utterson v. Elmore*, (1911) 154 Mo. App. 646, 136 S. W. 9 (any change in a building contract without the surety's consent discharges the surety, regardless of whether the changes injure him); *Leavel v. Porter*, (1893) 52 Mo. App. 632; *Stulz v. Lentin*, (1927) 221 Mo. App. 840, 295 S. W. 487 (sureties must be given benefit of *strictissimi juris*); *Erath v. Allen*, (1893) 55 Mo. App. 450; *State, ex rel. School Dist. v. Weeks*, (1902) 92 Mo. App. 359; *Matthews v. Hill*, (Mo. 1926) 287 S. W. 789; *Citizens' Trust Co. v. Tindle*, (1917) 272 Mo. 681, 199 S. W. 1025 (sureties are the favorites of the law and the doctrine of *strictissimi juris* is to be invoked in construing the contracts); *Taylor v. Jeter*, (1856) 23 Mo. 244; *Gray v. Davis*, (1901) 89 Mo. App. 450; *Higgins v. Deering Harvester Co.*, 181 Mo. 300, 79 S. W. 959; *Swasey v. Doyle*, (1901) 88 Mo. App. 536; *Mallory v. Brent*, (1898) 75 Mo. App. 473; *Hendley v. Barrows*, (1897) 68 Mo. App. 623; *Chapman v. Ry. Co.*, (1893) 114 Mo. 543, 21 S. W. 858; *London v. Funsch*, (1915) 189 Mo. App. 14, 173 S. W. 88.

language as ascertained.¹³ It is equally well settled that the rule of strictissimi juris does not apply to contracts of the compensated surety and that it is not a favorite of the law;¹⁴ the favorable considerations accorded the gratuitous surety being denied

¹³ Obligations reduced to writing are to be construed according to their obvious meaning, and obligators, especially where mere sureties, are not to be held bound by any forced construction. *Cochrane v. Stewart*, (1876) 63 Mo. 424; *London v. Funsch*, (1915) 188 Mo. App. 14, 173 S. W. 88 (where a surety was held entitled to a strict performance of the principal contract); *Saginaw Medicine Co. v. Dykes*, (1922) 210 Mo. App. 399, 238 S. W. 556 (in determining the liability of sureties, the rule of strictissimi juris applies, and they cannot be held beyond the letter of their obligation); *National Union Fire Ins. Co. v. Nevils*, (1925) 217 Mo. App. 630, 274 S. W. 503 (a strained construction of the contract should not be resorted to to release or hold sureties for they are not bound beyond the letter of their obligation).

¹⁴ *Fidelity and Deposit Co. v. John Gill and Sons Co.*, (Mo. 1924) 270 S. W. 700 (surety on bond of contractor constructing state capitol; rule of strictissimi juris not applicable and there is no presumption of loss or prejudice in favor of the compensated surety); *State, to Use of Hubbard and Moffitt Comm. Co. v. Cochrane*, (1915) 264 Mo. 581, 175 S. W. 599 (surety on bond of warehouseman to enable the principal to secure a license to conduct a public grain elevator was held to indemnify the public as to the common law obligation of the warehouseman as well as the statutory obligation; the surety being denied a strict construction of the contract in its favor because of having received compensation for the undertaking); *Farmers Bank of Deepwater v. Ogden*, (1915) 192 Mo. App. 243, 182 S. W. 501, judgment affirmed on rehearing 192 Mo. App. 243, 188 S. W. 201 (surety company issued contract of surety insurance indemnifying the bank against loss through its officers; the contract being construed most strongly against the compensated surety and in favor of the party indemnified); *Lackland v. Renshaw*, (1914) 256 Mo. 133, 165 S. W. 314 (surety on the bond of a building contractor, the court holding that the rule of strictissimi juris did not apply to a bond executed for a consideration by a corporation organized to make such bonds for a profit, and its contracts must be construed most strictly in favor of the obligee); *State, ex rel. Elberta Peach and Land Co. v. Chicago Bonding and Surety Co.*, (1919) 279 Mo. 535, 215 S. W. 20; *Dorr v. Bankers' Surety Co.*, (Mo. 1920) 218 S. W. 398; *School Dist. v. McClure*, (Mo. 1920) 224 S. W. 831; *Roark v. City Trust and Surety Co.*, supra footnote 8; *Long Bro's. Grocery Co. v. U. S. Fidelity and Guaranty Co.*, supra footnote 7; *Boppart v. Illinois Surety Co.*, supra footnote 8; *Kansas City v. Davidson*, supra footnote 6; *State, ex rel. Matter v. Ogden*, supra footnote 8; *Rule v. Anderson*, (1911) 160 Mo. App. 347, 142 S. W. 358 (surety on a building contract and such contracts, conditioned on the performance by others of contracts, were declared to be contracts of indemnity, and, since they were prepared by the surety companies, were to be construed strictly against the compensated surety); *Barton v. Title Guaranty and Surety Co.*, (1915) 192 Mo. App. 561, 183 S. W. 694 (surety on a contractor's bond; the doctrine of strictissimi juris being declared inapplicable where the bond was executed for hire by a corporation engaged in the surety business for profit); *Fairbanks Canning Co. v. London Guaranty and Accident Co.*, (1911) 154 Mo. App. 327, 133 S. W. 664 (surety on indemnity bond); *Schnitzer v. Couch*, (Mo. 1925) 279 S. W. 165 (surety on apartment house contractor's bond; the rule that a contract of suretyship for the erection of a building may be strictly construed in the surety's favor held inapplicable in case of a corporation engaged in business of acting as surety for hire); *Missouri, K. & T. Ry. v. American Surety Co. of N. Y.*,

the compensated surety when ascertaining the nature and extent of the liability assumed. It has been suggested that in both accommodation and compensated suretyship, the choice of principles of construction to be applied should be determined with reference to the person drawing the contract.¹⁵ It has been so held in a case involving accommodation sureties where the language was construed with a view to carrying out the intention of the parties as expressed in the instrument executed by them.¹⁶

supra footnote 6; *Mercantile Trust Co. v. Donk*, (Mo. 1915) 178 S. W. 113 (where directors of a corporation, who were also its sole owners, became sureties for money borrowed and used by the corporation, they were said to be sureties for a consideration and not entitled to the benefit of the rule favoring voluntary sureties); *School Dist. v. Aetna Accident and Liability Co.*, (Mo. 1921) 234 S. W. 1017 (surety "to repay the school district all sums of money which they may pay to other persons on account of work and labor done or materials furnished on or for said buildings," was not entitled to have the language of the bond construed strictly in its favor since it was a compensated surety); *Uhrich v. Globe Surety Co.*, (1914) 191 Mo. App. 111, 166 S. W. 845 (a bond of a compensated surety will be given effect as a good common law bond, although it does not comply with the requirements of the statute under which it is attempted to be made); *Farmers Loan and Trust Co. v. Southern Surety Co.*, (1920) 285 Mo. 621, 226 S. W. 926 (surety on bond given to indemnify employer against larceny); *N. K. Fairbanks Co. v. American Bonding Co.*, (1902) 97 Mo. App. 205, 70 S. W. 1096; *Kansas City, to Use of Ingalls Stone Co. v. New Amsterdam Casualty Co.*, supra footnote 4; *Bagwell v. American Surety Co.*, (1903) 102 Mo. App. 707, 77 S. W. 327; *State, ex rel. Concrete and Steel Const. Co. v. Southern Surety Co.*, supra footnote 4; *St. Louis Ass'n. v. Bonding Co.*, supra footnote 8; *Krey Packing Co. v. U. S. Fidelity and Guaranty Co.*, supra footnote 8; *Kline Cloak and Suit Co. v. Morris*, (1922) 293 Mo. 478, 240 S. W. 96 (surety on contractor's bond; the reason for applying the strict rules of suretyship said to have no application in the case of compensated sureties); *Orpheum Theater and Realty Co. v. Kansas City Casualty Co.*, (Mo. 1922) 239 S. W. 841 (surety on contractor's bond; the surety having received a valuable consideration, the rule that subsequent changes in the contract without the surety's consent releasing the surety was deprived the compensated surety).

Compare *Kansas City, to Use of Missouri Pac. Ry. Co. v. Southern Surety Co.*, (Mo. 1920) 219 S. W. 727, where the court said: "The surety company was engaged in the business of executing bonds of suretyship for a consideration, yet its liability is not to be extended by implication beyond the terms of the contract, but in ascertaining the meaning of the language of its obligation, and thus determining the extent of the contract, the same rules of construction are to be applied as are applied in the construction of other written contracts." And see *City of St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co.*, (Mo. 1930) 26 S. W. (2d.) 1018, where it was held that the compensated surety's liability is fixed by the terms of the instrument it signs, and such undertaking cannot be varied by judicial construction. Further, *State, ex rel. Southern Surety Co. v. Haid*, (Mo. 1932) 49 S. W. (2d.) 41, quashing cert. *Texas Co. v. Wax*, (1931) 226 Mo. App. 850, 36 S. W. (2d.) 122 (surety cannot be held liable beyond the terms of his contract); *Southern Real Estate and Financial Co. v. Bankers' Surety Co.*, (Mo. 1916) 184 S. W. 1030.

¹⁵ *Arant, Suretyship*, (1931) 150, 151.

¹⁶ *National Union Fire Ins. Co. v. Nevils*, (1925) 217 Mo. App. 630, 274 S. W. 503. See also *Baers v. Wolf*, (1893) 116 Mo. 179, 184, 22 S. W. 620, 621.

Likewise, in the case of a compensated surety of a building contractor, whose bond contained nothing to indicate that its terms originated with the surety, it was held that the surety had a legal right to stand equally before the law with the owner in the construction of the bond.¹⁷ It seems clear, however, that in applying the rule of *strictissimi juris* to accommodation sureties generally, the Missouri courts have been influenced as much by the absence of any pecuniary gain as by the fact that the contract was prepared by some one other than surety.

The modern treatment of the compensated surety is emphasized by the construction placed upon statutory provisions. Where a statute makes no distinction between gratuitous sureties and compensated sureties, the legislative intent might very well be deemed to give all defenses to the compensated surety that are available to the accommodation surety, whether there has been injury to the paid promisor or not. The use of the term surety or guarantor without any other limitation would ordinarily include the compensated surety. It was held, however, that a statute providing for the release of surety companies from liability on the same terms as individuals, does not entitle such surety companies to the benefit of the rule of *strictissimi juris*.¹⁸ Moreover, it has been stated that in view of the public policy shown by R.S. Mo. (1929),¹⁹ a surety which executed indemnity bonds for profit is not entitled to a strict construction of the bonds in its favor.²⁰ The point is, that the promisor being a professional risk taker, its contract must be construed most strictly in favor of the obligee.²¹

There are at least three factual differences between the individual and the corporate compensated surety which distinguish and warrant a different treatment of the two distinct types. First, the private surety becomes such purely as an accommodation for the principal debtor. The corporate compensated surety, on the other hand, seldom becomes liable without being paid a premium. Second, the accommodation surety generally does not

¹⁷ *Southern Real Estate and Financial Co. v. Bankers' Surety Co.*, (Mo. 1916) 184 S. W. 1030.

¹⁸ R.S. Mo. (1909, section 1209, now R.S. Mo. (1929), section 2857; *Dorr v. Bankers' Surety Co.*, supra footnote 7; *Barton v. Title Guaranty and Surety Co.*, supra footnote 8.

¹⁹ Section 2853, formerly R.S. Mo. (1909), section 1211. "Every company which shall execute any bond or other obligation, as surety for another, under the provisions of the two preceding sections, shall be estopped to deny its corporate power to execute such instruments, or assume such liability."

²⁰ *State, to Use of Hubbard and Moffitt Comm. Co. v. Cochrane*, supra footnote 7.

²¹ *Lackland v. Renshaw*, supra footnote 7; *Kansas City v. Davidson*, supra footnote 6; *Farmers Bank of Deepwater v. Ogden*, supra footnote 14; *Dorr v. Bankers' Surety Co.*, supra footnote 7.

prepare the contract which he signs. The compensated corporate surety, however, usually subscribes to its own language, on its own forms, as prepared by its own employees. Third, the obligation of the accommodation surety is often assumed in haste, in reliance entirely upon the oral representations of the principal debtor. The compensated surety never relies upon the statements of the principal debtor but, on the contrary, investigates completely before entering into the suretyship relation; and, in addition to that, provides a staff of competent legal advisers for that purpose.²² These are cogent reasons that not only account for the recognition in Missouri of the distinction between the compensated surety and the accommodation surety but justify the difference in judicial treatment. In consideration of the contrasting motive and method of conducting its business, it is manifest that the corporate compensated surety merits separate consideration.

Thus, in *Rule v. Anderson*,²³ the court said: "The deep solicitude of the law for the welfare of voluntary parties who bound themselves from purely disinterested motives never comprehended the protection of pecuniary enterprises organized for the express purpose of engaging in the business of suretyship for profit. To allow such companies to collect and retain premiums for their services, graded according to the nature and extent of the risk, and then to repudiate their obligations on slight pretext that have no relation to the risk, would be most unjust and immoral, and would be a perversion of the rise and just rules designed for the protection of voluntary sureties. The contracts of surety companies are contracts of indemnity, and, as such, fall under the rules of construction applicable to contracts of insurance. Since they are prepared by the companies, and generally abound with conditions and stipulations devised for the restriction of the obligation assumed by the company, such limitations providing for forfeiture of the contract, they must be strictly construed, and no unreasonable right of forfeiture allowed." Insurance is properly comparable with compensated suretyship in the sense that both are businesses of a quasi-public²⁴ character and, as a general rule, surety companies for hire have often been classified with the insurance companies for purposes of legislative control because of the similarity in their business methods. Both do not undertake to assure persons in any instance until a careful calculation of the risks of the business is made, and then with such restrictions of their liability as may seem sufficient to make it safe, and only in return for premiums sufficiently high to make it commercially profitable. In addition to this, both the

²² See Arnold, *The Compensated Surety*, supra footnote 1.

²³ See footnote 8, supra.

²⁴ Starns, *Suretyship*, (3rd. ed. 1922), Sections 233-243a; R.C.L. 1157-1164.

insurance companies as well as the corporate sureties, furnish their own forms of contracts and ordinarily act advisedly as to the language and the terms that are used in those contracts.²⁵ It is apparent, then, that the compensated corporate surety and the insurance company bear a strong resemblance to each other, both being enterprises for their own commercial profit, and very often governed by the same principles of law, regardless of the practical differences between contracts of insurance and contracts of suretyship. The consequence of this attitude toward the compensated surety is that, in determining when facts subsequent to its promise should operate as a discharge, the scope of the risk assumed is first determined.²⁶ The problem is to determine just what facts should operate as a discharge. It is significant that the compensated surety is entitled to the same rights of exoneration, indemnity, subrogation and contribution as the accommodation surety.²⁷ It is in the field of suretyship defenses that the compensated surety is frequently not discharged by facts which would have discharged the accommodation surety, particularly in such matters as extension of time, premature payments to the principal, and alterations of construction contracts. It is then advisable, at this point, to see how far these suretyship defenses are available to the compensated surety as recognized in Missouri.

It is fundamental that any agreement or dealings between the creditor and the principal in an obligation or debt, which essentially varies the terms of the contract, without the consent of the surety, will release the accommodation surety from liability.²⁸ A

²⁵ See 11 Tenn. L. Rev. 61.

²⁶ Arant, Suretyship, 146.

²⁷ Stearns, Suretyship, (4th. ed.) 408.

²⁸ *Matthews v. Hill*, (Mo. 1926) 287 S. W. 789 (change in the contract between the parties without the consent of the surety of contractor was held to release the surety, although the change did not prejudice the surety); *Harris v. Taylor*, supra footnote 12; *Mallory v. Brent*, (1898) 75 Mo. App. 473 (a material change with a surety's consent in the contract entered into by him releases the surety from all liability); *W. T. Rawleigh Co. v. Herzog*, (Mo. 1927) 299 S. W. 1113 (a surety is discharged by material change in the principal contract); *Springfield Lighting Co. v. Hobart*, supra footnote 12; *Kane v. Theuner*, (1895) 62 Mo. App. 69 (the substitution of a different superintending architect in a building contract was held to release the surety); *Schuster v. Weiss*, (1893) 114 Mo. 158, 21 S. W. 438, 19 L.R.A. 182 (any agreement between the principal parties which varies the principal contract without the consent of the surety, will release the surety from all liability); *Highland Inv. Co. v. Kansas City Scales Co.*, (1919) 277 Mo. 365, 209 S. W. 895 (any alteration of the principal contract will release the surety); *Warden v. Ryan*, (1889) 37 Mo. App. 466 (the changing of the consideration of the principal contract will release the surety where the change was to correct a clerical mistake); *Fred Heim Brewing Co. v. Hazen*, (1893) 55 Mo. App. 277 (the unauthorized addition of the word "seal" to the signatures of a contract was held to discharge the sureties); *Bank of Moberly v. Meals*, supra footnote 12.

voluntary surety has the right to stand upon the strict letter of his contract, and if any material alteration or change is, without his knowledge and consent, made in the contract entered into by him, or in the contract or obligation, the performance of which is secured, he is discharged.²⁹ The alteration may be accomplished either by material changes in the language of the instrument, or by material departures from its terms in its execution and enforcement. It is immaterial that the alteration was made without fraudulent intent,³⁰ or under a mistake of law. It is not necessary that the alteration or change be prejudicial or beneficial to the surety in order that he be discharged; the fact that it was not prejudicial to him,³¹ will not vary the rule, it being held that he will be discharged regardless of whether such alteration or change was beneficial or prejudicial to him.³² But the compensated surety must show injury in order to be discharged by such alterations.³³ The alteration of, or departure from, the contract or obligation must be prejudicial.³⁴ The character of the bond of the corporate surety is immaterial, the rule of strictissimi juris being relaxed with respect to such a surety on either a statutory or a common law bond.³⁵ Even where injury is shown, the corporate compensated surety is only discharged pro tanto.³⁶ This does not mean, however, that the undertaking of the compensated surety is to be arbitrarily construed so as to extend its liability beyond the terms of the contract which has been made.³⁷ The relaxation of the rule of strictissimi juris, with respect to

²⁹ See footnote 12, supra.

³⁰ *Springfield First National Bank v. Fricke*, (1881) 75 Mo. 178, 42 Am. Rep. 397.

³¹ *Higgins v. Deering Harvester Co.*, (1904) 181 Mo. 360, 79 S. W. 959; *Matthews v. Hill*, supra footnote 28; *Leavel v. Porter*, supra footnote 12.

³² *Utterson v. Elmore*, (1911) 154 Mo. App. 646, 136 S. W. 9 (any substantial change in a building contract, without the contractor's surety consent, discharges the surety, regardless of whether the changes injure him); *Matthews v. Hill*, supra footnote 28; *Fred Heim Brewing Co. v. Hazen*, supra footnote 28; *Warden v. Ryan*, supra footnote 28.

³³ *Lackland v. Renshaw*, supra footnote 7; *Rule v. Anderson*, supra footnote 8; *State, ex rel. Hardy v. Farris*, (Mo. 1932) 47 S. W. (2d.) 198 (surety on bond of guardian was held liable where there was no proof in the case that the defendant compensated surety was prejudiced or hampered in its just rights); *Southern Real Estate Co. v. Bankers' Surety Co.*, (1918) 276 Mo. 18, 207 S. W. 506.

³⁴ See footnote 33, supra.

³⁵ *School Dist. v. McClure*, supra footnote 6; *Uhrich v. Globe Surety Co.*, (1914) 191 Mo. App. 111, 166 S. W. 845.

³⁶ *Southern Real Estate Co. v. Bankers' Surety Co.*, supra footnote 33; *State, ex rel. Union Indemnity Co. v. Shain*, (Mo. 1934) 66 S. W. (2d.) 102, quashing cert. *Chernus v. Kennedy-Coats Const. Co.*, (1934) 227 Mo. App. 582, 55 S. W. (2d.) 582.

³⁷ A compensated surety has the right to stand on the letter of his bond, and his obligation will not be enlarged by implication. *Moore v. Title Guaranty Co.*, (1910) 151 Mo. App. 256, 131 S. W. 477; See *Kirkwood ex. rel. Blacker and P. Co. v. Byrne*, (1910) 146 Mo. App. 481, 125 S. W. 810.

compensated sureties, does not go, then, to the extent of denying them the aid of the courts in the enforcement of their fair and reasonable contracts, or of refusing to interpret these as other contracts are interpreted—in accordance with the reasonable intent of the parties as plainly expressed.³⁸

A material alteration of a contract is said to be such a change in the terms of the agreement as either imposes some new obligation on the party promising or takes away some obligation already imposed.³⁹ Two reasons are advanced for this: First, it is an increase of the promisor's risk. This might result in the principal's failure to perform and render the guaranteed performance impossible. Secondly, the contract as changed is a substituted contract for which the surety has never agreed to stand good. A conspicuous example of the departure from the absolute rule that any alteration of the principal contract releases the surety is to be found in the case of building contracts. The statement that where changes in a building contract made without the consent of the surety of the contractor affect the validity of the contract, the surety is discharged, though the changes do not increase the risk of the surety, does not apply where the surety is one engaged in the business of suretyship for hire; and in such cases mere immaterial variations or unsubstantial deviations, which do not prejudice the right of the compensated surety, do not discharge it.⁴⁰ Such changes are deemed to be incidental to any building operation and contemplated by the parties.⁴¹

It is a common practice for the parties to a working contract when stipulating for alterations to provide that such alterations shall be made only on written agreement of the parties, or upon written order of the owner's architect, or that the parties shall agree upon the cost thereof before they shall be made. When a material alteration is made without the observance of such formalities the question arises whether the sureties are discharged. It has been held that a failure to observe such formalities will discharge the surety.⁴² In *Chapman v. Eneburg*,⁴³ the contract

³⁸ The liability of a compensated surety must be determined under the ordinary rules of law with attention to the reasonable intent of the parties. *Southern Real Estate and Financial Co. v. Bankers' Surety Co.*, (Mo. 1916) 184 S. W. 1030; *Kansas City, to Use of Missouri Pac. Ry. Co. v. Southern Surety Co.*, supra footnote 14; See further *State, ex. rel. Southern Surety Co. v. Haid*, (Mo. 1932) 49 S. W. (2d.) 41, quashing cert. *Texas Co. v. Wax*, (1931) 36 S. W. (2d.) 122, 226 Mo. App. 850; *City of St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co.*, (Mo. 1930) 26 S. W. (2d.) 1018.

³⁹ *Stearns, Suretyship*, (4th. ed.) 98.

⁴⁰ *Bagwell v. American Surety Co.*, supra footnote 14; *Boppart v. Illinois Surety Co.*, supra footnote 8; *Rule v. Anderson*, supra footnote 8.

⁴¹ See footnote 40, supra.

⁴² *Beers v. Strimple*, (1893) 116 Mo. 179, 22 S. W. 620 (contract provided that the superintendent might make alterations without invalidating it and, in case of any difference in expense, the contract price should be changed

permitted alterations when made by an agreement in writing. It appeared in that case that the alterations were made pursuant to an oral agreement. The referee concluded that the provision in the contract was solely for the benefit of the owner of the building and could be waived by him. On appeal the judgment was reversed to release the accommodation surety. The court said: "It may be conceded that the clause was to protect the owner, but it was wholly so; and if it was, the sureties would be entitled to whatever incidental benefits might flow to them from its observance. The clause was, however, highly important to the sureties, independent of the welfare of the owner. . . . It is true that in agreeing to see that the contract was performed by their principal they agreed that the sum to be paid might be raised by extra work but only on condition that it was put down in writing beforehand." Contrast the case of *Bagwell v. Surety Co.*,⁴⁴ where the referee found that eight changes from the original plans and specifications for the house were made by order of Bagwell during construction, without the knowledge of the compensated surety, and without written orders from the architects and computation of the cost by them. The court said: "That contract provided that no alteration should be made except on a written order from the architect, and that, when made, the value of the work added to or omitted should be computed by the architects, and added to or deducted from the contract price. This course was not pursued, and if the bond contained no more than an obligation for faithful performance of the contract, the surety was released when the principal parties to the contract altered it without the knowledge or consent of the surety." The court then cited cases supporting the proposition that if a building contract is materially altered without consulting the surety on the contractor's bond, the surety is discharged; and further that, when the contract contains a provision for computation by the architects of the cost of the changes, this must be done before the changes can be lawfully made. These rules were recognized as applying to an accommodation surety but were rejected as to the compensated surety and a construction of the compensated surety's bond was made so as to hold that surety unconditionally

as determined by him; and that, in case of any such alteration, the expense must be agreed on in writing before the work was done or any allowance made therefor. It was held that the superintendent had no authority to make alterations without consulting the sureties); *Kane v. Thuener*, (1895) 62 Mo. App. 69 (where the sureties agreed that the architect might make deviations or alterations in the plans by additions or omissions it was held that they were discharged by the substitution of a different architect).

⁴³ *Chapman v. Eneburg*, (1902) 95 Mo. App. 128, 68 S. W. 974.

⁴⁴ *Bagwell v. American Surety Co.*, supra footnote 14. But see *Joblin v. Illinois Surety Co.*, (1916) 193 Mo. App. 132, 182 S. W. 143 (no recovery of the contractor's sureties any expenses not certified by the architect according to the terms of the contract).

liable within the amount specified in the bond. As in the case of *Chapman v. Eneburg*, it was said that where a provision required that money should be paid only on an architect's certificate as the work progressed, and on the basis of a certain percentage of its value, subject to additions and reductions as might thereafter be provided, the original stipulations could not be changed without the consent of the surety.⁴⁵ But we find in *Lackland v. Renshaw*,⁴⁶ that the surety for a consideration, in a bond conditioned on performance by the contractor of a building contract, stipulating for payment in installments and final payment on the architect certifying that all of the work for which payment was to become due had been done to his satisfaction, was not discharged from liability because the owner made partial payments to the contractor on account of the contract. In the words of the court, "The surety in this case is in no position to complain that the tenderness courts see fit to show the accommodation surety, always an object of the greatest solicitude, is not shown to it. Its situation is entirely different. It is to be dealt with in the light of its real relation to the contract—an insurer of its performance." It was also held that an accommodation surety for the performance of a contract giving the owner the right to retain the last payment to meet lienable claims was not liable for a claim which could have thus been met, where the last payment was made to the contractor without a certificate from the architect that it was due as required by the contract.⁴⁷ Yet in *Barton v. Surety Co.*,⁴⁸ it was held that where a building contract provided that progress payments on the contract price were to be made from time to time on certificates from the architect, the final payment to be held over until after completion, the fact that there were overpayments which impaired the reserve fund so provided for, did not discharge the compensated surety, the parties being bound by any overvaluation honestly made. Quoting from the court: "It is clear the decision (referring to a cited case) is grounded on the idea that the true test for the application to the particular case of the rule of strict law is whether or not the surety incurred the obligation as a matter of business for profit, and where, as in the instant case, it appears that such was the nature of the relationship, the rule

⁴⁵ *Reissaus v. Whites*, (1907) 128 Mo. App. 135, 106 S. W. 603.

⁴⁶ *Lackland v. Renshaw*, supra footnote 7. But see *Southern Real Estate and Financial Co. v. Bankers' Surety Co.*, (Mo. 1916) 184 S. W. 1030 (where a building contract required the owner to make payments only upon architect's certificate based upon a computation of the value of the work done, and payments were made upon certificates defectively made, it was held that payments on such certificates constituted a breach of the building contract, so that the surety would not be held liable for the payments made on those certificates).

⁴⁷ *Harris v. Taylor*, supra footnote 12.

⁴⁸ *Barton v. Title Guaranty and Surety Co.*, supra footnote 14.

should not be allowed to govern whether the surety be a natural or an artificial person."

A creditor by extending the time of payment of the debt discharges a surety who does not consent to such an extension.⁴⁹ The rule tends to become more formal and absolute and to be applied without limitation, although its application to cases where the extension of time appears to have caused little or no actual injury to the surety has been criticized.⁵⁰ In conformity with the rule that a surety company can be relieved from its obligation only where an alteration or departure from the contract is shown to be a material variance to the prejudice and injury of the surety for hire, it has been held that the compensated surety will not be relieved of his contract by an extension of time to the principal, and that there will be no presumption that such surety was injured by the extension; such injury must be alleged and proved.⁵¹ In such cases it is said that the surety must not only allege and prove an extension of time by the creditor without the consent of the surety, but must further show that he was prejudiced thereby.⁵² A presumption of injury, under like circumstances, is indulged in favor of the accommodation surety because of the rule that such a surety is a favorite of the law. That rule is not applicable to a surety whose engagement is undertaken for a compensation; hence no presumption of injury found as a fact not to have incurred ought to be indulged to

⁴⁹ *Kincaid v. Yates*, (1876) 63 Mo. 45; *Thompson v. Elliott*, (1838) 5 Mo. 118 (a surety on a bond is released by the granting of further time to the principal without consent of the security, where the security has failed to avail himself of the remedy provided by the statute by giving written notice to the creditor to proceed against the debtor); *Russell v. Brown*, (1886) 21 Mo. App. 51; *Marquardt Sav. Bank v. Freund*, (1899) 80 Mo. App. 657; *First National Bank v. Leavitt*, (1877) 65 Mo. 562 (acceptance of renewals notes, each renewal note being taken as a conditional payment of the one which preceded it, discharged the surety); *Barrett v. Davis*, (1891) 104 Mo. 549, 16 S. W. 377; *Stillwell v. Aaron*, (1879) 69 Mo. 539, 33 Am. Rep. 517; *Commercial Bank v. Wood*, (1894) 56 Mo. App. 214 (where the indorsee granted an extension of the time of payment a prior indorsee was relieved of liability); *Lane v. Hyder*, (1912) 163 Mo. App. 688, 147 S. W. 514; *State v. Johnson*, (1902) 96 Mo. App. 147, 69 S. W. 1065; *German Sav. Ass'n. v. Helmrick*, (1874) 57 Mo. 100; *Johnson v. Franklin Bank*, (1903) 173 Mo. 171, 73 S. W. 191.

⁵⁰ *Cardozo*, *The Nature of The Judicial Process*, 152. *Arant*, *Suretyship*, 146.

⁵¹ 50 C. J. 153, par. 252; *State ex rel. Hardy v. Farris*, (Mo. 1932) 47 S. W. (2d.) 198 (surety on bond of guardian where it was held that the surety being compensated must prove that it was prejudiced or hampered in its just rights by reason of the alleged extension of time before a discharge would be permitted. The surety was liable); *Burton Mchg. Co. v. National Surety Co.*, *supra* footnote 8; *Lackland v. Renshaw*, *supra* footnote 7; *Fidelity and Deposit Co. v. John Gill and Sons Co.*, *supra* footnote 8.

⁵² See footnote 51, *supra*.

release the surety for hire.⁵³ In *Mercantile Trust Co. v. Donk*,⁵⁴ the sureties claimed discharge because time had been given to the principal, and security released. The court concluded that these contentions were not supported by the facts, but suggested that even if they were, "yet they (sureties) having received compensation for becoming such, the technical rules of suretyship do not apply, and they are liable under the more liberal rule which is more akin to that of insurance than that of ordinary suretyship." An extension of time to a subcontractor, without an affirmative showing of resulting damage to the principal contractor, would not release the latter and his sureties from their obligations on the bond.⁵⁵ It has also been held that since a provision of a building contract for the extension of time for completion as fixed by the architects, if a claim for the extension was made within a certain time, was for the benefit of the owner, he waived it by himself agreeing with the contractor as to the time for extension so that such extension did not discharge the contractor's surety.⁵⁶ In the majority of instances, an extension of time does not, in any way, prejudice the interest of the surety and, in many cases, consent is made in advance to such an arrangement.

Very often a surety company bond contains the condition stipulating the requirement that the obligee notify the surety promptly of any act of fraud or dishonesty on the part of the principal of the indemnity bond. Such a compensated surety may not be relieved of all liability upon the bond by reason of the failure of the obligee to give notice according to the terms of the bond. The provision is undoubtedly intended to extend the common law obligation sometimes resting upon the obligee to give notice to the surety if he continues the principal in his employ, after he has knowledge of acts of fraud or dishonesty which increases the peril on the bond. A liberal construction will be made here, if possible, in order to avoid a forfeiture of the bond and so relieve the compensated surety. It was said in *Farmers Bank v. Ogden*,⁵⁷ that although the officers of the bank had heard rumors that the president had been sentenced to the penitentiary for larceny, and failed to notify the surety on the president's bond of this fact, the surety was not discharged. Quoting the court: "It may be stated at the outset that the defendant's obligation as surety is not so limited and circumscribed with protective requirements as that of an ordinary surety who acts for accommodation without gain to himself. Organized companies and corporations have now taken up suretyship as a business which they prosecute through-

⁵³ State ex rel. Hardy v. Farris, supra footnote 51; Burton Mchg. Co. v. National Surety Co., supra footnote 51.

⁵⁴ See footnote 14, supra.

⁵⁵ Burton Mchg. Co. v. National Surety Co., supra footnote 51.

⁵⁶ Boppart v. Illinois Surety Co., supra footnote 8.

⁵⁷ Farmers Bank v. Ogden, supra footnote 14.

out the country for profit, and their engagements are considered more in the nature of guaranty insurers. These contracts are made out by themselves, and their terms, when subject to two meanings, are construed in favor of the party indemnified."

It is evident that in many cases contrary results are reached by virtue of the fact that the surety is compensated. In these instances, the decisions are couched in entirely different language than that found in the cases involving accommodation sureties. From the preceding discussion we find that the courts of Missouri ascribe these holdings to the abnormal status of the compensated surety, and yet the same results have been reached in cases involving accommodation sureties.⁵⁸ Ordinarily, under a contract authorizing variations and changes from specifications, such changes may be made without discharging the sureties.⁵⁹ It is often said, with respect to either an accommodation or a compensated surety, that the changes must be substantial and material if they are to operate as a discharge of the surety.⁶⁰ Nevertheless the absence of the protection of the rule of strictissimi juris has affected decision results both in problems of construction and the operative effect of language used in the contract. Accordingly, it is held, as regards the accommodation promiser, that any substantial change in a building contract affecting the identity of the contract without the surety's consent, regardless of whether the changes injure him, will dis-

⁵⁸ *City of Kennett v. Katz Const. Co.*, (1918) 273 Mo. 279, 202 S. W. 558 (where bond of contractor provided that alterations in the work should not violate the bond nor discharge the surety, though made without consent of the surety, the changes in the work at the contractor's request did not release the surety); *Hax-Smith Furn. Co. v. Toll*, (1908) 133 Mo. App. 404, 113 S. W. 650 (the contract of the accommodation surety authorized changes and the surety was held not to be released on the ground that the alterations were made in an unauthorized manner); *Howard Co. v. Baker*, (1894) 119 Mo. 397, 24 S. W. 200; *Fullerton Lumber Co. v. Gates*, (1901) 89 Mo. App. 201 (while a surety has the right to stand upon the letter of his contract, and any alteration thereof without his consent, even though designed for his benefit, will discharge him, yet when the contract itself contemplates its alteration, it may be altered without affecting the liability of the surety).

⁵⁹ *Reissaus v. Whites*, (1907) 128 Mo. App. 135, 106 S. W. 603 (where a building contract authorizes changes from the specifications, such changes may be made without discharging the surety on the contractor's bond); *Ashenbroedel Club v. Finley*, (1893) 53 Mo. App. 256 (where a building contract provided for such alterations as should become necessary, a deviation from the original plan did not affect the validity of the contract or release the surety). See also *School Dist. v. Green*, (1908) 134 Mo. App. 421, 114 S. W. 578 (where the building contract did not provide for alterations, the sureties were discharged by deviations from the plans and specifications made without the assent of the sureties and the owner).

⁶⁰ *W. T. Rawleigh Co. v. Herzog*, (1927) 299 S. W. 1113; *City of Kennett v. Katz Const. Co.*, *supra* footnote 58; *Fullerton Lumber Co. v. Gates*, *supra* footnote 58; *Ashenbroedel Club v. Finley*, *supra* footnote 59; *Lackland v. Renshaw*, *supra* footnote 7; *Boppart v. Illinois Surety Co.*, *supra* footnote 8.

charge the surety.⁶¹ But the courts then proceed in many cases to add a further qualification, in the case of the compensated surety, and require it to show injury before the change will be permitted to relieve it.⁶²

The fact that compensation was received by the corporate surety as the inducement for its undertaking is not of itself sufficient to deprive the surety of all defenses.⁶³ In many respects the law of suretyship sustains the same attitude to this corporate surety as to the private accommodation surety. Where the creditor makes performance impossible and discharges the principal in some way without payment or satisfaction, the compensated surety is not liable.⁶⁴

Furthermore, whenever a creditor has the right to apply property of the principal debtor to the satisfaction or security of his debt, he owes the compensated surety to duty to do so, and a failure to perform that duty to the surety's prejudice, and without its consent, discharges the surety *pro tanto*.⁶⁵ A creditor must act in good faith and with reasonable diligence to preserve for the surety—accommodation or compensated—the liens on the debtor's property or any security of the debtor in his hands.⁶⁶ Construction contracts often provide that payments shall be made to the contractor at the end of stated intervals, and shall amount to a certain percentage of the estimated value of the work done and the materials furnished. If the owner makes a payment before the time designated or one in excess of the amount required, the question arises whether such a payment amounts

⁶¹ *Utterson v. Elmore*, (1911) 154 Mo. App. 646, 136 S. W. 9; *Matthews v. Hill*, (1926) 287 S. W. 789; *Leavel v. Porter*, (1893) 52 Mo. App. 632.

⁶² *Lackland v. Renshaw*, *supra* footnote 7; *Burton v. Mchg. Co. v. National Surety Co.*, *supra* footnote 51.

⁶³ *Stearns, Suretyship*, (4th. ed.) 408.

⁶⁴ *Blanke Bro. Realty Co. v. American Surety Co. of N. Y.*, (1923) 297 Mo. 41, 247 S. W. 797 (a lessor by forfeiting a lease for nonpayment of rent and taxes, and thereby putting it out of the power of the lessee to comply with the terms of the lease with respect to the erection of a building, released the surety company); *Sharon v. American Fidelity Co.*, (1913) 172 Mo. App. 309, 157 S. W. 972 (where within the time allowed for performance of a contract by a party thereto the adverse party makes performance impossible, the surety on the bond of the party conditioned on performance is not liable).

⁶⁵ *Kansas City, to Use of Missouri Pac. Ry. Co. v. Southern Surety Co.*, (1920) 203 Mo. App. 148, 219 S. W. 727.

⁶⁶ *Lakenan v. N. Missouri Trust Co.*, (1910) 147 Mo. App. 48, 126 S. W. 547 (a creditor must act in good faith to preserve liens on the property of the principal); *Troll v. Dougherty & Bush Real Estate Co.*, (1914) 186 Mo. App. 196, 171 S. W. 665 (it is the duty of a creditor holding collateral security to perform all acts necessary to make the security available, and if the security is lost by the creditor's failure, a surety for the debt is discharged to the extent of the loss.); *Barton v. Title Guaranty Co.*, (1916) 192 Mo. App. 561, 183 S. W. 694 (surety for hire on contractor's bond is released by owner's failure to retain part of contract price only to extent of impairment thereof).

to an alteration of the contract which will release the surety. The argument in the affirmative is that not only are the sureties entitled to have the amounts reserved in the contract applied to the satisfaction of possible liens or claims against the building, but also that the fact that there are earned, but unpaid, moneys in the hands of the owner, will act as an incentive to the contractor to execute his contract in a faithful manner. In *Taylor v. Jeter*,⁶⁷ it was held that sureties upon a contractor's bond had a right to stand upon the agreement that the owner would not pay the contractor during the progress of the work more than 70 percent of the value of the work done; and, if he did pay more without the consent of the surety, he was thereby discharged. This decision is cited with approval and followed by *Evans v. Graden*.⁶⁸ And to the same effect is *Watkins v. Pierce*.⁶⁹ This rule has been retained but modified when applied to compensated sureties. Overpayments to the contractor, or failure to retain a certain percentage of the contract price until completion of the work, are treated as being in the nature of releasing security taken by the contractor, which releases the surety only pro tanto, and prejudice or damage done is measured by the value of the security released.⁷⁰

The results of the Missouri cases show that the courts take cognizance of the compensated surety's function in present day business transactions. To discharge the compensated surety under the same circumstances as are found to discharge the accommodation surety would seem to be unfair when one considers the extreme leniency of the law of suretyship toward the gratuitous promisor. If the creditor's conduct accords substantially with what is ordinary reasonable business prudence, the compensated surety should be held liable, since those business standards are contemplated by the surety in assuming the risk.

J. CHARLES CRAWLEY '35.

⁶⁷ *Taylor v. Jeter*, (1856) 23 Mo. 244.

⁶⁸ *Evans v. Graden*, (1894) 125 Mo. 72, 28 S. W. 439.

⁶⁹ *Watkins v. Pierce*, (1881) 10 Mo. App. 595. See also *Tinsley v. Kemery*, (1905) 111 Mo. App. 87, 84 S. W. 993.

⁷⁰ *State, ex rel. Union Indemnity Co. v. Shain*, (Mo. 1934) 66 S. W. (2d.) 102, quashing cert. *Chernus v. Kennedy-Coats Const. Co.*, (1934) 227 Mo. App. 582, 55 S. W. (2d.) 582; *Barton v. Title Guaranty and Surety Co.*, supra footnote 14; *Southern Real Estate and Financial Co. v. Bankers' Surety Co.*, (1916) 184 S. W. 1930.