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Guaranty and Suretyship

The fact that there are two groups of words, guaranty and suretyship, guarantor and surety, which express the relation of a third person who attempts to make secure an obligation created by two other persons, has been the source of considerable confusion at various times and places. It is stoutly asserted that the ideas expressed by them are the same and maintained with even greater vigor that they are different. That must be my excuse for examining them at some length.

1. HISTORY OF THE TERMS

Both words are of respectable antiquity. "Guaranty" is the low Latin garantia or garandia, which is merely a variant spelling of warrantia. It may have been influenced in respect of modern spelling by the Spanish or the French forms, but it was widely current in Western Europe in Latin and it is not discernible why it should not have directly found its way — as it did early enough — into English legal and popular usage. Ultimately the word is Teutonic, and means "protect," "defend" and the like (Germ. wehren) a meaning which remained its exclusive sense for a long while. It is found in a charter of St. Germain of 1200.1 Spelman says succinctly2 that there is scarcely an ancient English charter in which there is no warranty clause with the word garantus, garantia or its equivalent. The meaning, however, is exclusively that of "warranty" in the sense in which this word is most commonly used at present, i.e., the obligation assumed by a transferor of title, or some one called by him for that purpose, ("vouched," vocatus ad warrantandum) to maintain its validity. In that sense in regard to land, it developed the highly technical forms of "lineal" and "collateral" warranties.

But the practice of "warranting" other things than land was quite common and was especially common among merchants. Among merchants, also, the word "warrant," "guaranty," gained a little broader signification and meant any "affirmation" in respect of a thing without vouching a third person for it. It is from this usage that the common employment of the word in the loose sense of "promise" is derived, as well as the ordinary sense of "warrant."3

1 Ducange, s. v. garantia (2).
2 Glossarium Archaologieum (3d ed. 1687) 257, s. v. garandia.
3 "Warrant" continued to be used for "guarantee" long after the latter word was in common use. Cf. Taylor & Otis v. Bullen (1827) 6 Cow. (N. Y.) 624; Curtis v. Smallman (1835) 14 Wend. (N. Y.) 231.
The old law dictionaries, *Termes de la Ley*, 1521 (?), Cowell's *Interpreter*, 1605, Blount's *Nomolexicon*, 1671, Giles Jacobs' *Law Dictionary*, 1729, all treat of guaranty—which they discuss fully—in the sense of "warranty" of land titles and it would seem that they know no other sense of the word. Yet the extension of the meaning to a person who protects or defends another's rights without being the old vouchee to warranty, had already taken place, since it had come into English literature in that sense, especially in political and theological applications. Sir William Temple uses it in 1665 as does the author of *Scenderbeg Redivious* in 1684.

The legal use, however, is somewhat later. The Statute of Frauds, which describes what we call a "guaranty," calls it "a special promise to answer for the debt etc. of another." The cases applying the statute likewise have no general word for it. It was not in common use until the end of the eighteenth century and the beginning of the nineteenth and is to be met with in American cases almost as soon as in English ones.

The word "surety" has an unbroken lineage which is far older. It is the Latin *securitas*, perfectly classical in its obvious sense of freedom from anxiety or fear. This literary sense is also the legal sense. It is found in the legal sources both within and without the *Corpus Iuris* of Justinian. The more special sense of "discharge from an obligation" is at least as old as Gaius (circ. 160 A.D.).

From this it is transferred to the instrument which evidences such discharge, the receipt, for which the Greek word *apocha* was a little commoner. In this meaning it is found in the Theodosian Code (circ. 435 A.D.) and still earlier in the non-jurists, e.g. Ammianus Marcel-

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4 Professor Winfield in his admirable little book on *The Chief Sources of English Legal History* (1925) does not mention the *Nomolexikon* of Thomas Blount (1st ed. 1671, 3d ed. 1711). Blount was perhaps the T. B. who edited the 1667 edition of *Termes de la Ley*. His *Nomolexikon* has distinct value first in its sharp criticisms of Cowell's *Interpreter*, in which it finds several gross errors, and secondly, in the material it adds from the writer's own researches and experience. Blount was an antiquarian of merit, although some of the documents he quotes, e.g. the rhymed charter of King Athelstan, are of doubtful authenticity.

Blount's book is not mentioned by Holdsworth, where we should expect a reference to it. *5 Holdsworth, History of English Law* (1924) 22, 401.

5 Since warranting a title was warranting a status in the feudal system, we can readily see that the political application would be one ready at hand.

6 *Murray, English Dictionary* (Oxford) s. v. guaranty. The citation from Temple is from his letter to the Duke of Ormond.

7 *Cf. Dresen, Mantuale Latinitatis* (1837) s. v. *securitas*, *Heumann-Seckel, Hundlexikon* (1891) s. v. *securitas*; *D. 19, 1, 1, 1; C 4, 29, 6 pr. Inst. 2, 8, 2.

8 *Gaius, Inst. H*, 258. The word seems to come from the Trebellian *actum* (56 A.D.).

9 *C. The. xi, 1, 19; V. 13, 20. Cf. also *Fragmenta Vaticana*, §12 (end of 4th cent. A.D. (?)), where the word is used almost as though it meant "warranty."
linus (circ. 350 A.D.) Later it came to mean any document which in Spelman's words was a cautio validior, a somewhat stronger bond than the usual one, and that often would mean one in which another person joined. It is so used as early as 860, in England. It remained in use for the document by which the surety bound himself for a long while, being so used in 1425 in the Rolls of Parliament.

Then in Medieval Latin we find it employed of the person who signs the bond as additional obligor and not of the bond itself. This shift must have taken place early enough, since in Medieval French, seurté is used both for a person and for the contract. So, for example in 1273-1280, in Registre des Faides de Tournai, we read, "raporta as provos et as jures le seurtet firme et estaule," which seems to be the document itself, while in a book of the 13th century, the Coutume des francs hommes de Cambrai, it is the obligation. In many of the instances it is difficult to tell whether it is the person or the contract which is called by that name, but it is evident that the shift must have been an easy one and that it became established very early. When the word was taken into early English, a new word, suertiship, was coined by those who had forgotten that securitas was itself an abstract. But suertiship was applied only to the relation and never to the contract itself.

Suertie occurs in Chaucer (1386) and indeed an earlier use is recorded in English literature, though not precisely dated. As long as Latin was the language of law, the older words plegius (pledge), vas, vadium, made it unnecessary to add another word for surety, but in Law-French the word plegge gave way to suertie although the former word continued in use, as did pledge in English.

Accordingly the pedigrees of the two words are of unequal dignity. While "guaranty" in the sense of warranty, both of lands and chattels, is very old, "guaranty" in the sense of the "special promise" of the Statute of Frauds is younger than the Statute of Frauds itself. It does not certainly appear until toward the end of the eighteenth century either in law or literature. "Surety," on the contrary, in the sense of the engagement to answer for another's performance is very old indeed.

10 AM. MARC. 17, 10.
11 SPELMAN, op. cit. supra n. 2, s. v. securitas, p. 509.
12 IV, 289, 291.
13 GODFROY, Dictionnaire de l'Ancienne Langue Française (Paris, 1892) s. v. seurté and seurtance.
14 KNIGHT'S TALE, 746, WIFE OF BATH'S TALE, 58.
15 MURRAY, English Dictionary (Oxford) s. v. surety.
16 Cf. TERRÉS DE LA LEY (1721 ed.) s. v. Pledges, 479. COWELL, The Interpreter (1637) s. v. pledge.
17 Cf. MURRAY, English Dictionary (Oxford) s. v. Pledge.
both in the legal and non-legal records and it is applied to a third person who makes this engagement, at least as early as the thirteenth century. "Suretyship" comes in later but is freely used as soon as it does appear, but there seems in law to be no special name for the contract of suretyship, except the word bond—a fact not in the least surprising.

As for "guarantee" (guaranty), that denoted the contract and also the person who made it. That is indicated in Johnson's Dictionary where apparently no other meaning is known of it. The later English cases uniformly say "guarantee" of the person making the promise side by side with the older term surety. This usage is also found in the early Massachusetts cases.

A dictionary almost contemporary with Johnson's uses "guarantee" of the person to whom the promise is made, the creditor in the original obligation. This use never obtained much of a foothold in legal expression, principally no doubt because there was no occasion for giving a technical designation to the creditor.

But in the place of "guarantee" meaning the maker of a guarantee, we find a very recent coinage, "guarantor." In the exhaustive Murray's English Dictionary the earliest instance cited is that in Bowyer's Law Dictionary printed in Philadelphia in 1853. The word does not occur in Richardson's Dictionary published in 1851 in Philadelphia, nor in any of the earlier dictionaries, such as the first few editions of Webster, Stormouth or Worcester. But it is used as early as 1809 in Carver v. Warren if we may trust the reprint of 1855, and in 1823 in the case of Gibbs v. Cannon. It appears in the argument of counsel in Cumpton v. McNair although the court seems to avoid it. In recent cases it is quite common, even in England, where it is used interchangeably with the older "surety."

The obvious reason for the late date at which the word guarantor appears is that lawyers and merchants were already supplied with a convenient term. "Surety," as we have seen, was not only established in the sense of the person making the promise afterwards called "guarantor," but from at least the thirteenth century on, was a common word in that sense. The old "warrantor" of title, the "vouchee to warranty" of lands, even could be so called. In fact "surety" could be used in

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19 Bailey, Etymological Dictionary (1721) sub. foce.
20 (1809) 5 Mass. 545.
21 (1823) 9 Serg. & Rawle (Pa.) 198, 202.
22 (1828) 1 Wend. (N. Y.) 457, 460.
23 Capps v. Watts (1867) 43 Ill. 60, uses "guarantor" of such a vouchee.
all the senses in which a third person appears to confirm or support or supplement an obligation between two other persons. We very much want a general word of that kind at present, a word, that is, that would cover surety, guarantor, indorser, indemnitor, assurer, etc. Perhaps we might adopt the Civil-Law intercessor for that purpose, since such an intercessor, the medieval surety was.24

But "surety" was used in the special sense of our surety, in bonds to keep the peace, in judicial bonds and in commercial undertakings. Malynes' Lex Mercatoria was written in 1622 by a man who was a merchant and not a lawyer. Chapter X treats of "Suretiship and Merchant's promises," and Malynes deals throughout with mere verbal agreements or promises and not with covenants under seal, and distinguishes between "conditional suretiships" in which the surety need only pay after an attempt has been made to collect from the principal debtor and the "absolute suretiship" in which the surety was liable at once. The word guaranty does not occur at all, even in the sense of warranty.

That there was a real need for a word to cover generally the man who promises to answer for the "debt default or miscarriage of another" in the words of the Statute of Frauds, is shown by one of the earliest cases under the Statute, the much discussed case of Buckmyr (Burkmire, Birkmeyer, Bour Kamire) v. Darnell. As it appears in Modern Reports the word most commonly used for the contract is "undertaking" and for the person making it "undertaker." This last word is freely and frequently used by both counsel and court. In the report as it appears in Lord Raymond's Reports which is the form in which Ames printed it in his Cases on Suretiship, and in which it appears in nearly all collections of cases after Ames, the word "undertaker" is used only at the very end where it is contrasted with "principal." In the second report of the case in Salkeld the word "undertaker" is found again and particular attention directed to it.29

As a matter of fact, the words "undertake," "undertaking," "undertaker" were before this time and particularly just about the time of the Statute of Frauds, fairly common expressions in the specific sense

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24 D. 15, 1, 3, 5. In (1929) 24 Illinois L. Rev. 255, I suggest the word adobligor as an approximate equivalent.
25 (1704) 6 Mod. 248, 87 Eng. Reprint 996.
27 Ames, Cases on Suretiship (1901) 12.
28 (1704) 3 Salk. 15, 91 Eng. Reprint 663.
29 "Collateral promises" for such undertakings seems to have been the expression most in use before the Statute of Frauds. Cf. Rolle's Abridgment (1668 ed.) 14.
of surety. The word occurs in Elyot's *Lexicon* (1548) where *spondere pro aliquo* is rendered "to undertake for one," and also in Shakespeare's *Lover's Complaint.* But in the *J. Owen, Justification* we find "considering the person and Grace of this Undertaker or Surety." In 1706, Phillips defines "sponsor" as "surety or undertaker for another," and a similar expression occurs in Arbuthnot's *John Bull III, V,* published in 1713. It would therefore have needed very little to give this word an additional currency as the maker of the "collateral" promise under the Statute of Frauds. Unfortunately the prior liens on the word "undertake" held by various significations seemed to have prevented it.

Finally we may notice that the oldest law term for "surety," "pledge," *plegius,* was used for warranty in the restricted modern sense as well. It is so used in Exeter in 1282, although at about the same time *garant* was used of the third person who is a warrantor of title as of quality. When this term, *plegius,* was displaced by surety, the warrantor very naturally was described by the newer word as well as the older one. Therefore as far as the common law is concerned, there can be no talk of a difference between surety and guarantor, in view of the late origin of the latter term. And equally we cannot speak of a difference between the contract of suretyship and that of guaranty, since the latter does not arise until many centuries after the former had been freely used in all the cases in which guaranty is now used. There is no difference whatever in the usage of merchants as contrasted with that of the Common Law, nor in that of ordinary speech as contrasted with law in general.

Why were the newer terms, first guaranty, and then, guarantor, invented at all? Human speech does not stay for questions like these and ordinarily gives no account to its questioners. The fact that "guaranty" and "warranty," which at first were merely different spellings of the same word were both current, may have suggested differentiation in meaning. The fact that the vouchee to warranty of chattels or of land, or a third person warrantor of either, was in effect a surety, helped the process. The result would create a need for distinguishing warranty from guaranty, although it was never completely done. But there was

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30 Cf. Murray, *English Dictionary* (Oxford) s. v. undertaker, 7; undertake, 4 g. and 10; undertaking, 3.
31 (1597) Vs. 280.
32 (1677) xi, 349.
33 In Giles Jacob's *Dictionary* (1729) undertakers appears confined at least to the King's deputies and those who contract public works; s. v. Undertakers.
34 Cf. The Court Baron, 4 Seld. Soc. 128; Borough Customs, 18 Seld. Soc. 57, n. 6, 59, 21 Seld. Soc. 182, 183.
no need of distinguishing contracts of guaranty and of suretyship and we cannot find that it was ever attempted at the Common Law.

It must be remembered that the word "surety" itself came into common use at a time when there were three words well-known and frequently employed to express the general relation—the words, pledge (plegge), borow (borh) and wedde—as well as the special word bail (bayle).\footnote{Bayle and surety are treated as the same in Shakespeare. \textit{Cf. All's Well} (1601) v, iii, l, 298.}

In Thomas Cooper's \textit{Thesaurus Romano-Britannicus} (1578) the Latin fideiubeo is translated: "to be surety for: to undertake for: to will one to doe or deliver to a certayne man upon the assurance of his undertaking."

\textit{Fideiussio} is "suertishippe", fideiussor, "a suretie or borow", and sponsor, "a suretie that undertaketh."

This term borow, the German bürge, which is the ordinary term for surety, is common in Anglo Saxon laws and charters, and remained a common word in English law and speech till the end of the eighteenth century.\footnote{Cf. the \textit{Oxford Dictionary} and the instances quoted under borrow 1, and 2.} It is still a term of Scots law and occurs several times in Walter Scott's novels.

It may be noted also that the proper and original meaning of "undertake" is to be secondarily liable, to be "surety." If "guarantee" is not used till late, it is not because of the lack of English words for the idea.

\section*{2. THE TERMINOLOGY AT ROMAN LAW AND AT CIVIL LAW}

As has been already indicated "guaranty" is of Germanic origin, and although "surety" is derived from the Latin securitas, the latter word never had the meaning of "surety" or "suretyship" in classical or post-classical Latin or in Roman Law.

At Roman law there was a wealth of names for the surety. In fact, the words sponsio and sponsor, which properly mean "promise" and "promiser," were normally understood in the technical sense of the formal surety. The suretyship so created was itself highly technical and subject to various limitations. To avoid them, the ordinary formal contract, the so-called verbal contract or stipulation, was extended so that it could be used for suretyship, the sureties being called fideiusiores or fidepromissores, depending upon the words used, and the term adpromissores was applied to all such accessory debtors. That gives three names, besides the older sponsor. However it was fideiusssor and not adpromissor which came to be much the commonest and continued in all the later stages of Latin and of Roman Law to be the general word for surety.
Besides these there were the *praedes* and *vades*. These are apparently the oldest types of sureties, but they seem to have been confined to public transactions, or contracts with the state.

The formal *fideiussio* was not available in all cases or between all persons. To fill this gap, a very loose consensual contract of mandate was utilized as a suretyship undertaking. In *mandate* the mandator authorized the creation of the obligation and thus became responsible for its fulfillment. *Mandator* and *fideiussor*, therefore, could be used interchangeably and the Digest discusses their obligations together.\(^{37}\)

There were still other ways in which a suretyship could be created. One was the *constitutum*. A third person could agree to make an already existing obligation his own without a novation, *i.e.*, without discharging the original debtor. This again was in Justinian's law almost fully assimilated to the other forms of suretyship.\(^{38}\)

Finally there was the *receptum argentariorum*, the special case of a banker who guaranteed a debt which a customer of the bank owed or would be conclusively presumed to owe, to the promisee. The situation was not like that which is presented at the present day by the acceptance of a check or a draft, especially since the banker at Roman Law was liable even though there was in fact no principal debt.\(^{39}\)

It will be seen at once that the distinctions here made in no way correspond with those assumed or pretended for suretyship and guaranty. Any result reachable by *fideiussio* could be obtained in the law of Justinian by mandate, and there were a few cases in which mandate alone was available. But the relations created were precisely the same, and the various defenses and privileges of the *intercessor* were finally made equal.

In modern civil law a terminology derived from the Roman Law, from the Germanic customs and from mercantile usage has developed a wealth of terms. So in French we have a general term *caution* which may be used for the surety or for the contract of suretyship, and *cautionnement* which is used only for the latter.\(^{40}\) *Cautio*, like *securitas*,

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\(^{37}\) D. 461, 1, Cod. Just. 8, 40. Gasquet v. Thorn (1840) 14 La. 506, distinguishes with no great success between *mandate* and suretyship. The court cites Pothier, *Contrat de Mandat* No. 18, where nothing of the kind is found. In Pothier's edition of the Pandects III, 329 (D. 46, 1) as in his works generally, no difference is suggested between a suretyship made by stipulation or informally by mandate, as to the legal effects of the two.


\(^{39}\) Buckland, *Textbook of Roman Law* (1921) 527, Cod. Just. 4, 18, 2.

was originally the memorandum, and was in fact a very common word for a very common document.\(^4\)

Then there was *fidejusseur,\(^4\) when one spoke of the Roman *fideius-sor*, in any of the forms in which the surety could make his contract. Besides these, certain special mercantile engagements were known which strengthened forms of suretyship, such as *ducroire* (*del credere*), *portefort,\(^4\) in which the suretyship's promise while not superseding the principal one, was practically the only important one, not unlike the *receptum argentariorum* already mentioned.

Again, in medieval French *plevine*, the contract (compare the Common Law *replevin*) and *pleige,\(^4\) the surety, were the usual terms for the personal surety.

Side by side with these words, the words derived from *garandia* (*cf. supra* p. 605) were in common use in law and literature. *Garantir* is the usual expression for the making of the contract, *cautionner* being much rarer. Similarly, *garant* is used for the surety and *garantie* for the contract. But just as in English, the technical use of *garantie* and *garantir* is for "warranty," particularly in the warranty of sales. Just as such a warranty, both express and implied, was an essential ingredient of a sale, so a warranty of solvency (*garantie de solvabilité*) of the debtor was usually attached to any assignment of a claim, and between such a warranty and a guaranty there is obviously a difference only in the occasion of its making.\(^4\)

Courts speak of a difference between *mandate* and *cautionnement,\(^4\) and between the latter and *garantie*. The former difference, however, is one of theoretic analysis. It seems to have no consequences at the present time on the legal relations of the parties. The latter has apparently to do only with the *garantie* in the sense of warranty.

It is stated that there was at one time a tendency to confuse the joint and several obligation in general (solidary) with the relation of

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\(^4\) *Cautio* had in Latin the special significance of real or personal security. *Cf. D. 50, 17, 25 and passim*. It was also widely used for the memorandum, *Paul, Sentences*, V, 25, 5. *C. IV, 30, 14.*

\(^4\) *Fidejusseur* is the modernized French form of the Latin *fideius-sor*. It is not often employed except in discussing Roman Law. It is quite common in the older writers. *Cf. Pothier, Des Obligations* (2d Amer. ed. 1839) §§ 365-366.

\(^4\) 2 *Planitol, Traité Élementaire de droit civil* (7th ed. 1915) § 2326, 2. *Cf.* especially the decision in Dalloz, P. 1912, 2, 164.

\(^4\) *Loysel, Instituts Coutumiers*, III, 7, 4; IV, 5, 2. (Ed. 1758, II, p. 63, 156).

\(^4\) *Garantie* is the general word under which all forms of suretyship can be classified, including the warranties in sales. *Cf. 2 Planitol, op. cit.* 2307-2322, especially 2316.

\(^4\) *Baudry-Lacantinerie, op. cit. supra*, n. 40, § 916.
principal and surety. But at the present time, these are sharply distinguished.\textsuperscript{47}

In none of these cases, however, is there anything remotely like the difference sought to be established between the American suretyship and guaranty. The only differences of practical moment at American Law were those which dealt with pleading and with the requirement to exhaust the remedy against the principal debtor. The former is nonexistent in Continental practice, and the latter is a requirement of all contracts of the kind however named. It is the so-called \textit{beneficium excursionis} or \textit{discussionis} which every surety may claim as a matter of course, unless it is waived by special agreement.\textsuperscript{48}

The modern German law has similar categories. The general word for surety is \textit{Bürge}; for suretyship, \textit{Bürgschaft}; for becoming surety, \textit{verbiürgen}; with which we may compare the old English and Scotch \textit{borow}, \textit{borh}.\textsuperscript{49}

But the term \textit{Garantie} is likewise in use both under that name and under the name of \textit{Gewährvertrag}.\textsuperscript{50} It is especially noted that the \textit{Garantie} and the \textit{Bürgschaft} have several points in common. The most striking difference lies in this fact. The \textit{Garantie} assures the creditor that the performance guaranteed will be made, without reference to the validity of the claim to such a performance on the creditor’s part. In other words, the guaranty is an absolute undertaking of insurance in no way dependent on the original or principal contract. We may note consequently that the distinction is quite the opposite of that assumed for the American cases which have discussed it.

There is, besides the \textit{Garantie}, a type of suretyship called \textit{selbstschuldnerische Bürgschaft}, \textsuperscript{51} “self-obligating suretyship,” of which the characteristic is that the \textit{beneficium discussionis} is waived, and the surety thereby becomes unqualifiedly responsible for performance on the due date. From this must be distinguished the \textit{Schuldbmirübernahme}, \textsuperscript{52} the addition of a new debtor in an already existing obliga-


\textsuperscript{48} Buckland, \textit{Text-Book of Roman Law} (1921) 448. All manuals of Roman law discuss it.

\textsuperscript{49} Bürgerliches Gesetzbuch (The German Civil Code, usually abbreviavted, B. G. B.) Title XVIII.

\textsuperscript{50} Cf. \textit{Juristische Wochenschrift} (1910) 231, and the decisions in Reichsgericht, \textit{Civilsachen}, (R. B.) 61, 157; 92, 121. The distinction between \textit{Garantie} and \textit{Bürgschaft} has been the subject of many special studies, most fully, perhaps, in Westerkamp, \textit{Bürgschaft und Schuldbmirbeitritt} (Marburg, 1907) and Kroener, \textit{Der Garantievertrag und seine Abgrenzung von der Bürgschaft} (Erlangen, 1911). Stammeler, \textit{Der Garantievertrag}, (Arch. f. Civ. Praxis, 69) 1-140.

\textsuperscript{51} German Commercial Code §§ 349, 351.

\textsuperscript{52} This and the previous forms are discussed in any annotated German Code, under § 764 B. G. B. Cf. the recent annotated Code of Bausch and others, 1923, 5th edition, I, pp. 976-977.
tion. This may be a type of the former "self-obligating suretyship," but when the new debtor enters the transaction to secure his own interest or in some way to pursue a goal quite independent of the original contract, it is of this second type and the usual rules and consequences of suretyship do not apply. We may take as illustration the case of a building contract made by C, the builder, with M, the materialman. If S guaranties C's payment, and C's interest, he is a surety. If S is a realty agent who desires prompt construction for his own benefit and with this end in view, makes the contract with M to induce him to furnish the supplies, he is co-debtor.

Somewhat less involved and less minutely classified is the situation which presents itself in Italian law. Garanzia (garantia) is the ordinary word for security of any sort including the warranty of the common law. Of this general garanzia, the fideiussione is a type. Fideiussione is discussed in articles 1898-1931 of the Italian Civil Code which in the main repeat the provisions of the French Code. Its characteristics are those of the Roman suretyship with its various equitable claims, of which discussion is perhaps the most frequently used.

But just as in France and Germany it is possible to create a type of additional obligation which creates a new and "immediate" liability. This seems to be the characteristic of the commercial fideiussione, of which the special trait is solidarietà. There is no discussion and the surety takes the liability on himself. He may, however, specially provide even in commercial transactions that his fideiussione is civil and not commercial, with the consequent attaching of his various equities. Here again it is the term guaranty which in effect negatives suretyship.

In common speech we must remember that garantire, garantia, garanto are used quite as they are in English and French as the ordinary words for answering for another's debts, even when the Roman fideiussio is discussed, as for example by G. Rotondi, in referring to the Roman statutes on suretyship.

3. THE ENGLISH USAGE

Since there was only one set of terms at the common law it is not likely that we should find any differences in the relations expressed at the present day by suretyship and guaranty. The phrases "absolute

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53 Cf. Chironi, Istituzioni di diritto civile (2d ed. 1912) I, § 55, and Studi di diritto civile I, 283; Responsabilità & Garanzia (reprinted from Stud. Scioloja (1904).)
54 Chironi, Inst. II, § 313, La Fideiussione è un contratto accessorio di garanzia (Suretyship is an accessory contract of warranty.)
55 Cf. Baldi, Manuale pratico, s. v. Fideiussio, No. 3.
56 Leges publicae populi Romani (1912) 476-477.
and conditional sureties" found in Malynes', *Lex Mercatoria*, do not occur in the cases. When guarantee (guaranty) and guarantor do appear, no attempt whatever is made to differentiate them from the already existing expressions. English Cyclopedias do not recognize any distinction. Halsbury, *Laws of England*\(^6\) treats of the subject only under the term Guarantee and identifies the surety and guarantor.\(^6\)

The same may be said for the *Encyclopedia of the Laws of England*.\(^6\)

The two contracts are there in so many words declared to be precisely the same. All the English text-books are equally innocent of any attempt at differentiating the two. Pitman's, *A Treatise on the Law of Principal and Surety*,\(^6\) says that "Those instruments which are not under seal are usually termed guarantees, though every contract of suretyship is, substantially, and in fact, a guarantee.\(^6\)

However, no notice is taken of that distinction in the course of the book and guaranty and suretyship contract are used apparently interchangeably,\(^6\) and guarantor does not appear at all. Similarly, Theobald's, *A Practical Treatise on the Law of Principal and Surety*, particularly with relation to Mercantile Guaranties, Bills of Exchange and Bail Bonds\(^6\) seems in its title to make "mercantile guarantie" distinguishable from surety, but throughout the book uses "guarantie" and "contract of surety" as interchangeable. Burge in *Commentaries on the Law of Suretyship*\(^6\) speaks of the "contract of surety or guarantee." Fell in his *Treatise on the Law of Mercantile Guaranties and of Principal and Surety in General*, of which the first edition appeared some time before 1820, uses surety and that only, for the person who makes the "guarantie."\(^6\)

And finally, Sir S. A. T. Rowlatt's book on *The Law of Principal and

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\(^6\) (1911) vol. 15, pp. 437-534.
\(^6\) Section 867.
\(^6\) (1907) vol. 6, p. 436, vol. 11, p. 557.
\(^6\) (1843) 40 LAW LIBRARY 1.
\(^6\) Ibid. at 23.
\(^6\) Cf. ibid. at 38 et seq.
\(^6\) (1833) 1 LAW LIBRARY.
\(^6\) (1st Am. ed. 1847) 16.

\(^6\) In a copy of the second English edition of Fell on Guaranty and Suretyship (1820) in the possession of Mr. A. C. Skaife of San Francisco, I find a note in a careful English hand of 1827:

"The V. Ch. takes a distinction between surety and guarantor (sic)—suretyship and guaranty. I have not heard him define it. Qy. whether there be any substantial distinction supposing that in respect of terms it may be admitted to exist—treating as "surety" one who binds himself by the same instrument—perhaps—without expressing the real nature of the obligation:—"guarrantor" one who undertakes expressly to guarantee or pay etc. on the default of the principal."

It is not clear who the Vice Chancellor is and I have not been able to identify the case. We may note that the statement is made at about the same
Surety (1899) regularly uses guarantee of the contract and indifferently “guarantor” or “surety” of the undertaker.66

As far as the cases are concerned, there is equally no sign that the courts in England during the nineteenth century were aware of any attempt in practice or in law to distinguish between an agreement to be surety and to guarantee. It follows consequently that when American cases have used the term “the surety in the contract of guaranty” they were not guilty of confusion and inaccuracy. On the contrary, the expression is excellent English and sound law, and if they had chosen to say “the guarantor in the contract of suretyship,” they were still quite within the limits of proper speech, although the term “guarantor” is something of a parvenu compared to the older word.

The law of Scotland in mercantile matters is very like that of England despite its delightfully abstruse terminology. The ordinary word for suretyship is cautionry, for contract of suretyship, cautionary obligation, for the document, caution. Side by side with these words, we find the term “guarantee.”

In Bell’s Dictionary and Digest of the Law of Scotland67 there is a special heading for cautionary and guarantee, mercantile, but no distinction is noted between them, though both “cautionary obligation and guarantees” are used in the English statute of 1856.68 And in George Joseph Bell’s Commentaries on the Law of Scotland69 under Cautionary Obligations, guarantees are discussed.70 However, the following statement is made “It is distinguished from a formal cautionary obligation chiefly by the looser epistolary form of the writing.”

There is, further, a Scotch Appeal, Wilson v. Tait71 in which Cottenham declared that the term “guarantee” was not the same as the Scotch (and Civil Law) caution, although in the court below, Lord Mackenzie72 had said they were. But if we examine Lord Cottenham’s

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66 De Cölyar, Law of Guaranty and of Principal and Surety (1879) attempts no distinction. Childs, The Law of Suretyship and Guaranty (1907) merely repeats in one form or another some of the distinctions already listed.

67 (Watson’s 7th ed. 1890) 151, 494.
68 19 & 20 Vict. c. 60, §6 (1856).
69 (McLaren’s 7th ed. 1870) III, 1, IV, pp. 364 et seq.
70 Ibid, Subsect. IV, p. 387.
71 (1840) 1 Rob. Sc. App. 136, 150.
72 Ibid, at 142.
words, we see that the "guarantee" in this case was not a guaranty in the ordinary sense at all, but an independent obligation. It did not imply the continued existence of a principal obligation upon which it was dependent, but was loosely used in the sense of promise, as it still is in ordinary speech.\textsuperscript{73}

This comment of G. J. Bell and this Scotch case are the only British instances in which there is even an approach at distinguishing the two words. Both instances are later than the American cases in which the attempted distinction was already treated as existing. The utmost that we can say of the Common Law and of the later English Law is that the term guaranty generally suggested a mercantile transaction, while the term suretyship did not necessarily do so, but that "surety" itself was as freely used of mercantile as of more formal transactions.

4. The American Usage

Where and how did the notion originate that a guaranty was in some way different from a contract of suretyship? We have seen that the Common Law knew nothing of it and that the English courts continue to know nothing of it. It is evidently in American courts somewhere that it arose, since it is found only there.

Now in the case of Clarke v. Russell,\textsuperscript{74} decided in the United States Supreme Court in 1799, neither word is used by the court but counsel for the plaintiff referred to the contract involved in the case as a guarantee, and to the persons liable on it as "sureties." The court chose to call the contract an "understanding." Similarly six years earlier, in 1793, in Eddowes v. Neill,\textsuperscript{75} a Pennsylvania case, an undoubted letter of credit was discussed, in which the words of the letter were "that he would guaranty all the dealings (of the principal debtor) with his (the creditor's) house." The writer of the letter in the pleadings and the opinion was called a "surety."

But in the case of Gibbs v. Cannon,\textsuperscript{76} decided in 1822 in Pennsylvania, it was held that a guarantor could not complain of want of notice of the principal's default, if the principal was insolvent, whereas an indorser or a party to a negotiable instrument was discharged by lack of notice. For this, abundant English and American authority was cited, especially Mansfield's judgment in 1809 in the case of

\textsuperscript{73} The word "guaranty" is used in 1796 in the Scottish case of Stein v. Stewart, 3 P. 462, in the pleadings but not in the court's opinion.

\textsuperscript{74} (1799) 3 U. S. (3 Dall.) 415.

\textsuperscript{75} (1793) 4 U. S. (4 Dall.) 133.

\textsuperscript{76} (1822) 9 Searg. & Rawle (Pa.) 198, 201.
Philips v. Astling.\(^77\) The point, therefore, was simply a discrimination of the guarantor from the ordinary indorser or drawer. The court quotes Warrington v. Furbor;\(^78\) to the same effect in which Ellenborough emphasized the distinction by the statement that the "guarantees (guarantors) insure, as it were, the solvency of the principal." The "guarantor" was in that case a guarantor of payment, just as in the Pennsylvania case, but in both, his liabilities were contrasted with those of an actual indorser.

Then in Oxford Bank v. Haynes,\(^79\) it is said:

"That a guarantee differs in character from a surety, cannot be questioned, for he cannot be sued as a promisor, as the surety may: his contract must be specially set forth. That he differs from an indorser is equally clear, and for the same reason: and also because he warrants the solvency of the promisor which the indorser does not."

The issue in Oxford Bank v. Haynes was the same as in Gibbs v. Cannon, and the cases which the court cites are, besides the Cannon case, the two English cases already mentioned, Warrington v. Furbor and Philips v. Astling. No one of these cases has anything whatever to do with a distinction between guarantor and surety. The Massachusetts case proceeds upon the assumption that surety and accommodation indorser are identical. Of course it is true that every accommodation indorser is a surety, but it is not equally certain that we may invert that proposition. Obviously the indorser, whether accommodation or not, has contracted for notice of default and ought therefore to have it. The question should accordingly have been whether by implication or directly, the defendants in this case had also contracted for such notice. The actual words used were: "I guaranty the payment of the within note." In other words, the court in Warrington v. Furbor, as in Oxford Bank v. Haynes, is really interpreting the meaning of the word "payment" and not the word "guaranty," and it is this misconception that is at the root of the difficulty.

Another perhaps was the very learning of the court. Since it was aware that "warrant" and "guarantee" were originally the same words, it strove to find in the guaranty a warranty of something, that is to say, an assertion as to a present or future fact, which could be put by the side of the warranties in conveyances. That could only be the question of solvency. But as a matter of fact, "guarantee" had already been used for some time in the sense of the special promise of the Stat-

\(^{77}\) (1809) 2 Taunt. 206, 127 Eng. Reprint 1056.
\(^{78}\) (1807) 8 East. 242, 103 Eng. Reprint 334.
\(^{79}\) (1825) 25 Mass. (8 Pick.) 423, 428.
ute of Frauds, and its aboriginal identity with "warranty" was irrelevant.

The court does not cite, but counsel does, an earlier Massachusetts case, *Hunt v. Adams*,\(^8^0\) in which Parsons says "The defendant, therefore, is not the guarantor of the performance by Chaplin of a subsisting promise of his to Bennett (the plaintiff's intestate); but he is an original promiser with Chaplin."

In this case, Adams had written under an ordinary note, the words: "I acknowledge myself to be holden as surety for the payment of the above note. Witness my hand: Barnabas Adams."

If we compare it with the Haynes case we must admit that the Massachusetts court thought they could see a difference between a surety and guarantor; and they drew from the distinction certain inferences. What was the difference? Both Adams and Haynes had signed the same instrument as the principal debtor. The court would allow no evidence in the *Adams* case that the intention of the parties had been to demand notice of default. That is to say, the only difference lay in the words used, and Adams was a surety because he had said so and Haynes a guarantor for the same reason.

This appears still more clearly in *Talbot v. Gay*.\(^8^1\) The words used here were: "I guaranty payment." Justice Wilde, relying on the cases already mentioned, says: "The contract of the defendant is one of guaranty only... This appears from the express terms of the contract, which cannot be construed so as to charge the defendant as a surety. The parties must be presumed to have known the legal distinction between such contracts, and to have framed the present contract with a full knowledge of the legal duties and liabilities imposed and undertaken thereby."

The inferences which the court again drew in these cases is that the guarantors must ordinarily have notice of default and the surety need not have it.

It may be noted that although the cases discuss the question as though the issue were notice, the *Oxford Bank* case and the cases on which it is assumed to depend, really raise another question. It is conceded that the guarantor ought to pay only if payment cannot be made out of the principal debtor. The surety is to pay whether the principal can or cannot. In other words, we have in germ the phrase which was later to have such success in discriminating the two contracts: the phrase that the surety promises to pay if the principal does not; the guarantor, if he cannot. To this we must add such a case as

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\(^8^0\) (1810) 6 Mass. 519, 523.
\(^8^1\) (1836) 35 Mass. (18 Pick.) 534.
GUARANTY AND SURETYSHIP

Courtis v. Dennis,\(^{82}\) in which the court sets forth the "true distinction," which is that the surety is liable for the debt and the guarantor only where default is made by the principal debtor, and that the surety is bound by a specialty, the guarantor by a simple contract. The insubstantiality of these distinctions I shall discuss later.

Yet in spite of these attempts, Massachusetts found the "true" distinction untenable. In Welch v. Walsh,\(^{83}\) the Oxford Bank case is so qualified as to be practically overruled and the court in its judgment speaks of surety and guarantor as interchangeable terms.

The Massachusetts cases therefore ultimately abandoned any thoroughgoing attempt to make the discrimination. The Pennsylvania courts, on the contrary, taking from Gibbs v. Cannon what Massachusetts found there, applied it systematically. In Lisky v. O'Brien,\(^{84}\) Craddock v. Armor,\(^{85}\) Sherman v. Roberts,\(^{86}\) the doctrine is announced that a surety and a guarantor are very different, the former being liable if the principal does not pay; the latter if he cannot. In the last case mentioned the words used were:

"I hereby guarantee that the within-named R. will fulfill the within contract as agreed, and in case of his neglect or refusal so to do, I agree to pay all the damages sustained in consequence thereof."

This was held, in spite of the language, to be the undertaking of a surety. It maintains, accordingly, that the words used are no longer conclusive and the test is the undertaking to pay as against the warranty of the principal's solvency. And the Pennsylvania courts consistently and doggedly enforced this distinction until relieved by a recent statute.

In New York, just as in England, the alleged distinction never gained a footing. In Cumpston v. McNair,\(^{87}\) the court clearly distinguished between an absolute guaranty and a guaranty of collection. This is at the very time when the Massachusetts and the Pennsylvania courts were entangling themselves in what proved to be the meshes of terminology. And just as the New York cases avoided the pitfall, so did the courts of the United States, in spite of a few cases in courts of lower jurisdiction. The leading case on the subject, Davis v. Wells,\(^{88}\) certainly lends no support to it, although it is often cited as if it did. Indeed the court states that the "contract of guaranty is the obligation of a surety."\(^{89}\)

\(^{82}\) (1844) 48 Mass. (7 Metc.) 510.
\(^{84}\) (1835) 4 Watts (Pa.) 141.
\(^{85}\) (1840) 10 Watts (Pa.) 258.
\(^{86}\) (1855) 1 Grant (Pa.) 260.
\(^{87}\) (1828) 1 Wend. (N. Y.) 457.
\(^{88}\) (1881) 104 U. S. 159.
\(^{89}\) Ibid, at 169.
But a great many other jurisdictions have solemnly seen the distinguishing marks which they were told were there. Besides the states already mentioned, these are: Alabama, Arkansas, California, Colorado, Georgia, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, South Dakota, Texas, Vermont, Virginia, West Virginia. If we add to cases in those states, *dicta* in Illinois and Michigan cases, and several cases in United States Circuit courts, we have a formidable list. The bell-wethers of this error, the courts of Massachusetts and Pennsylvania have, as we have seen, abandoned it, the former by ignoring it, the latter by statute. In Michigan, if the court in one case said that guarantors and sureties were not alike in all respects, it was to add that they were alike in the issue of that case. In other Michigan cases the distinction is disregarded. As far as Illinois is concerned, a number of statements repeat the doctrinal assertion that a distinction exists, although nothing is made to turn on it, but at least one case says roundly that whatever the distinction is, it is a purely formal one. We may safely assert that a purely formal distinction is also non-existent.

Max Radin.

*(TO BE CONCLUDED)*

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92 Jamieson v. Holm (1896) 69 Ill. App. 119, 121.