

CHARLES G. MIDDLETON, JR.
HENRY MEIGS II
PHILIP M. LANIER
O. GRANT BRUTON
KENNETH S. HANDMAKER
IAN Y. HENDERSON
CHARLES G. MIDDLETON III
CHARLES D. GREENWELL
BROOKS ALEXANDER
JOHN W. BILBY
C. KENT HATFIELD
TIMOTHY P. O'MARA
JAMES H. LAUBACH**
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D. RANDALL GIBSON
JEFFREY S. ANDERSON
G. KENNEDY HALL, JR.
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LEE TROUTMAN CORY
KATHIEJANE OEHLER
JAMES C. EVANS
KENDRICK R. RIGGS
APRIL A. CAIN
*ALSO ADMITTED INDIANA
**ALSO ADMITTED TENNESSEE

MIDDLETON & REUTLINGER

25TH FLOOR
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OF COUNSEL
HUBERT T. WILLIS
ALBERT F. REUTLINGER

April 27, 1984

EDWIN G. MIDDLETON (1920-1980)

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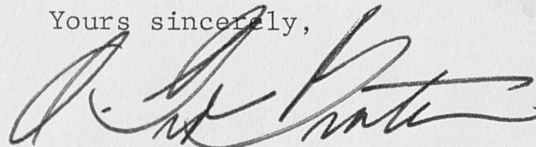
Honorable G. Wix Unthank
United States District Judge
Eastern District of Kentucky
at Pikeville
Federal Building
Lexington, Kentucky 40507

RE: Civil Action No. 78-122
Fidelity & Deposit Company
of Maryland v. Cora Frances
Holbrook (formerly Hunter)

Dear Judge Unthank:

In accordance with the Court's Order of January 30, 1984, further proof in this case has been taken by deposition and, also in accordance with that Order, Fidelity & Deposit Company of Maryland has filed a supplemental brief in support of its Motion for Judgment. The time for the filing of supplemental briefs having expired, the Court is respectfully notified that the matter is ready to be taken under submission.

Yours sincerely,



O. Grant Bruton
Counsel for Plaintiff

OGB:mkh
CC: Hon. Herman W. Lester
Hon. Pamela Todd Robinette

LAW OFFICES

207 CAROLINE AVENUE
PIKEVILLE, KENTUCKY 41501

HERMAN W. LESTER

March 14, 1984

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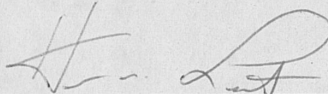
Hon. G. Wix Unthank, Judge
United States District Court
Eastern District of Kentucky
Federal Building
Pikeville, KY 41501

Re: Fidelity and Deposit Company of Maryland vs. Cora Frances
Holbrook, Action No. 78-122

Dear Judge Unthank:

After correspondence with my client, and pursuant to the directives of the Court's order of January 31, 1984, this letter is to inform the Court, and opposing counsel, that the defendant has no new evidence to present to supplement her affidavit heretofore submitted.

Sincerely,



Herman W. Lester

HWL/lfs

cc: Middleton & Reutlinger
25th Floor, Brown & Williamson Tower
401 Fourth Avenue
Louisville, KY 40202
ATTENTION: Hon. O. Grant Bruton

cc: Hon. Pamela Todd Robinette
Attorney at Law
P. O. Drawer 851
Pikeville, KY 41501

*Give this and file to
Law clerk for review on
motion for S/J.*

offered files

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February 27, 1984

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Hon. G. Wix Unthank
United States District Judge
Eastern District of Kentucky
Federal Building
Pikeville, Kentucky 41501

RE: Civil Action No. 78-122
Fidelity & Deposit Company of Maryland, Plaintiff,
v. Cora Frances Holbrook (f/n/a Hunter), Defendant

Dear Judge Unthank:

As your Honor may recall, on January 30, 1984, you entered an Order which provided, inter alia, that counsel for the Defendant was to inform the Court and counsel for Plaintiff whether or not the Defendant intended to put on evidence in the form of a deposition, to supplement her Affidavit heretofore filed. We have received no letter from Defendant's counsel, so we assume that she does not intend to put on any additional evidence.

The purpose of this letter is to inform the Court that Plaintiff does intend to supplement its evidence with the deposition of Ewing Gott.

By a copy of this letter to Mr. Lester, we seek his agreement that the deposition be taken in Lexington on the afternoon of March 14, 1984. Although, under the terms of the aforesaid Order, we would have the right to take the deposition in Louisville, it was our thought that Lexington would be the least inconvenient location to all concerned. If Mr. Lester will agree, we will arrange for a room and a reporter.

MIDDLETON & REUTLINGER

Page 2
Hon. G. Wix Unthank
February 27, 1984

Thanking you for your attention to this matter and
for your accomodation of counsel on January 25, 1984, we
remain,

Yours respectfully,

MIDDLETON & REUTLINGER

By: 

OGB/kss

cc: Herman W. Lester, Esq.
Pamela T. Robinette, Esq.

Although approximately two years had elapsed between appointment of administrator and filing of equitable suit against him for settlement of estate, there was no showing of unreasonable delay on the part of the administrator and the major portion of the assets had been distributed so the action was fruitless and wholly unnecessary and chancellor correctly denied the claim of plaintiff for expenses of prosecuting the action. *Johnson v. Ducobu* (1953), 258 S. W. (2d) 509.

Where no benefit is shown either to the estate or beneficiaries, no allowance of costs, attorney fees or expenses should be made unless there appears some good reason for filing the suit. *Johnson v. Ducobu* (1953), 258 S. W. (2d) 509.

11. Persons Who May Sue.

Only the persons named in the statute may sue. *Pepper v. Pepper* (1907), 30 K. L. R. 460, 98 S. W. 1039. See *Burley Tobacco Co. v. Vest* (1915), 165 Ky. 762, 178 S. W. 1102.

12. Motion for Allowance of Fees.

A motion for allowance of fees need not contain averments such as would be

necessary in a petition, nor is it necessary to allow such time for response as is usual in actions. *Greenway v. Irvine's Exr.* (1930), 234 Ky. 597, 28 S. W. (2d) 760.

13. Fees Payable When Funds Received.

An attorney suing to establish fund out of which school district would pay its bondholders could not recover his entire fee before his clients were entitled to a recovery, even though he had made available the fund out of which they were to be paid in the future, when the bonds were due, for, in the absence of a contract, he had no right to expect his fee to be paid out of any money except that which had actually been recovered for distribution to his clients. *Howell v. Highland Cemetery Co.* (1944), 297 Ky. 659, 181 S. W. (2d) 44.

14. Costs.

If plaintiff who sued as next friend was entitled to an attorney's fee, then he was also entitled to have the other costs paid by the estate as expressly provided in this section. *Crutcher v. Elliston's Exrs.* (1945), 299 Ky. 613, 186 S. W. (2d) 644.

DECISIONS UNDER PRIOR LAW

ANALYSIS

1. Settlement of estates.
2. Benefit to others interested.
3. Unsuccessful party.

1. Settlement of Estates.

One who was entitled to and successfully did surcharge the settlement of a fiduciary was entitled to his counsel fees. *Thirlwell's Admr. v. Campbell* (1875), 74 Ky. (11 Bush) 163. See *Taylor v. Minor* (1890), 90 Ky. 544, 12 K. L. R. 479, 14 S. W. 544.

One entitled to sue for the settlement of an estate was entitled to counsel fees. *Taylor v. Minor* (1890), 90 Ky. 544, 12 K. L. R. 479, 14 S. W. 544.

2. Benefit to Others Interested.

One having a common interest who successfully prosecuted a suit for the joint benefit of himself and others having a common interest was entitled, upon notice and motion made prior to distribution, to charge his counsel fees against the general fund except as against parties who had employed their own counsel or who opposed the relief sought by him. *Thirlwell's Admr. v. Campbell* (1875), 74 Ky. (11 Bush) 163.

412.080. Action by surety who pays, against principal—Against co-surety.—If a surety pays any part of a debt or liability for which he is bound as surety, he may recover the amount, with interest from time of

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payment, from the principal by action at law or by motion, after ten (10) days' notice in writing. He may also sue a cosurety, separately or as a joint defendant with the principal, in such proceeding, and in like manner recover judgment against him, separately or jointly, at the same time, for his proper part of the debt or liability so paid, as if the sureties were the sole obligors. If one or more of several cosureties is insolvent, or resides out of the state, the recovery against the solvent and resident sureties shall also be for a proper part of the share of liability pertaining to the insolvent or nonresident surety. If the surety afterwards makes further payment on the debt or liability, he may again have like remedy therefor. But nothing in this section shall preclude the party sued from making any defense that might have been made against the original demand, unless the payment was made after and in consequence of a judgment in an action of which he had notice. (4665.)

Cited: Sparkman's Guardian v. Huff (1936), 266 Ky. 183, 98 S. W. (2d) 484.

NOTES TO DECISIONS

ANALYSIS

1. Purpose
2. Reimbursement from principal.
3. Contribution from cosureties.
4. —Insolvency of principal.
5. —Payment as prerequisite.
6. —Different instruments.
7. —Amount.
8. —Statute of limitations.

1. Purpose.

This section was intended to enlarge the common-law doctrines of contribution. *Sanders & Walker v. Herndon* (1906), 122 Ky. 760, 29 K. L. R. 322, 93 S. W. 14, 121 Am. St. 493, 5 L. R. A. (n. s.) 1072.

2. Reimbursement from Principal.

The right to reimbursement is barred in five years in the absence of a prior assignment of or subrogation to the creditors' rights. *Duke v. Pigman* (1901), 110 Ky. 756, 23 K. L. R. 209, 62 S. W. 867. See *Patton's Exr. v. Smith* (1908), 130 Ky. 819, 114 S. W. 315; *Fidelity & Deposit Co. v. Sousley* (1912), 151 Ky. 39, 151 S. W. 353.

As between principal and sureties, the principal alone is bound for the whole of it. *Sanders & Walker v. Herndon* (1906), 122 Ky. 760, 29 K. L. R. 322, 93 S. W. 14, 121 Am. St. 493, 5 L. R. A. (n. s.) 1072.

A surety paying a judgment may proceed against his principal by motion even though the judgment has not been assigned to him. *Davis v. Kinnard* (1937), 271 Ky. 428, 112 S. W. (2d) 412.

This section limits the surety's right of recovery to the amount paid by him in satisfaction of the principal's obligation, even where the surety takes an assignment of the obligation and sues the principal thereon. *Napier v. Duff* (1939), 281 Ky. 779, 136 S. W. (2d) 1083.

Where insolvent bank applied surety's deposit to pay note of principal, surety's right of indemnity extended only to the actual value of the deposit so applied, as determined by the percentage paid by the bank in liquidating dividends to its depositors, and not the face amount of the note. *Napier v. Duff* (1939), 281 Ky. 779, 136 S. W. (2d) 1083.

A surety who has been compelled by judgment to pay his principal's obligation has the right to obtain a judgment against principal by a motion after due service of process. *Grubbs v. Slater* (1953), 266 S. W. (2d) 85.

Where principal merely objected to the filing of an unverified motion by surety for a judgment against principal in an action by creditor against principal and surety wherein surety had been compelled to pay principal's debt instead of requesting a rule to require proper verification of the pleading, his failure to require verification waived any complaint he might have had and the failure to verify did not render the filing invalid. *Grubbs v. Slater* (1953), 266 S. W. (2d) 85.

Where a litigant pays an adverse judgment, he does not thereby impair his right to appeal, nor may a surety be required to elect between an appeal and the enforcement of any derivative right he may have against the principal; thus, where surety has paid the recovery rendered against him and then under this section has recovered such sum from the principal, he may still appeal the adverse judgment. *Moss v. Smith* (1962), 361 S. W. (2d) 511.

Sureties on employer's self-insurer's bond who had paid claims under workmen's compensation law in full was entitled to subrogate to rights of claimants against estate of insolvent employer. *Non-Marine Underwriters v.*

for the care of the incompetent brothers existed in that deed. The Bruces, also Gilreath heirs, built a new home on the land and cared for the charges until 1957, at which time they claimed the charges became unmanageable, necessitating turning them over to the county authorities.

Appellants filed an action in the McCreary Circuit Court alleging the land could not be divided without materially impairing its value, and seeking a sale and distribution of the proceeds. Appellees countered by alleging they were the owners of the land by virtue of the 1952 deed from Anna Ivey, or in the alternative that the land was divisible and that portion on which they erected improvements should be partitioned to them. The circuit court found that, because of the partial failure of consideration in the deed from the Gilreath heirs to Anna Ivey, the effect of Anna's 1952 deed to Alonzo and Sula Bruce was a conveyance of her undivided interest only; that the parties to the suit were co-owners, and the appellees in good faith erected the improvements on the property. It was further found that the property could not be divided without materially impairing its value; that appellees should have partitioned to them the land upon which the improvements were erected and one acre around the improvements; and that the remaining 23 acres be sold and the proceeds divided among the other heirs.

[1,2] The circuit court apparently employed the most equitable solution available under the circumstances. The parties could not have been restored to their former positions; hence the court properly refused to cancel the deed. *Sanders v. Needy*, Ky., 363 S.W.2d 114 (1962). The finding that the Bruces as co-owners with the other heirs did in good faith erect the improvements was amply supported by the record. The other owners sat by and made no objection to the improvements placed on the property and they are now estopped from making any complaint. *Stepp v. Leslie*, Ky., 263 S.W.2d 122 (1953).

[3] In *Newsome v. Johnson*, Ky., 255 S.W.2d 33 (1953), we said:

" * * * Since *Conner v. Cox*, 22 S.W. 605, 15 Ky. Law Rep. 140, down through *Corbin v. Corbin*, 296 Ky. 276, 176 S.W. 2d 691, we have held that where one joint owner's interest could be allotted to him without impairing the value of other joint interests, partition should be made to him and the remainder sold for division of proceeds among numerous joint owners with small interests. * * * "

[4] The judgment of the circuit court conforms precisely with this principle and is proper.

The judgment is affirmed.

All concur.



NON-MARINE UNDERWRITERS AT
LLOYD'S LONDON, Appellant,

v.

CARRS FORK COAL COMPANY et al.,
Appellees.

Court of Appeals of Kentucky.

Dec. 15, 1967.

Proceeding on claim for reimbursement by sureties of self-insurer's workmen's compensation bonds against employer which had been placed in receivership. The Circuit Court of Perry County, Don A. Ward, J., denied that sureties were entitled to any priority status and the sureties appealed. The Court of Appeals, Milliken, J., held that where employer was placed in receivership and sureties on employer's self-insurer's bonds were required to discharge certain outstanding workmen's compensation claims against employer, sureties were subrogated to the compensation

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claims and were entitled to the same preference or priority as was allowed by law for any unpaid wages for labor.

Reversed.

1. Principal and Surety ⇨174

A surety has right to indemnity from principal. KRS 412.080.

2. Subrogation ⇨23(1)

At common law, one who is compelled to pay the debt of another is entitled to be substituted to the rights of the creditor.

3. Principal and Surety ⇨182

A surety who pays the debt of his principal will be subrogated to all the securities, liens and equities, rights, remedies and priorities held by the creditor against the principal, and entitled to enforce them against the latter in court of equity or of equitable jurisdiction. KRS 412.080.

4. Workmen's Compensation ⇨1098

Where workmen's compensation claimant has been paid his claim in full, statutory provision against assignability of compensation is not applicable. KRS 342.180.

5. Subrogation ⇨23(1)

Where employer was placed in receivership and sureties on employer's self-insurer's bonds were required to discharge certain outstanding workmen's compensation claims against employer, sureties were subrogated to the compensation claims and were entitled to the same preference or priority as was allowed by law for any unpaid wages for labor. KRS 342.175, 342.180, 376.170.

Armer H. Mahan, Louisville, for appellant.

H. Garland Wells, H. Hoover Haynes, Hazard, for appellees.

MILLIKEN, Judge.

Appellants were sureties on self-insurer's bonds of a Kentucky employer, Carrs Fork Coal Company. The employer was placed in receivership and at that time there were outstanding obligations of the employer to some of its employees and dependents of deceased employees for benefits under the Workmen's Compensation Act. In discharge of their legal obligations, as sureties on the self-insurer's bonds of the insolvent employer, the appellants paid the compensation claims.

In the trial court, entitlement to any priority status has been denied the sureties, that court holding, in effect, that the sureties were entitled to reimbursement from the general assets of the Carrs Fork Coal Company as indemnitees only and on a level with common creditors, rather than as preferred creditors as subrogees of the compensation claims paid as surety for the employer.

[1-3] Both from the standpoint of the common law and the statutes, a surety has a right to indemnity from a principal. KRS 412.080 provides:

"If a surety pays any part of a debt or liability for which he is bound as surety, he may recover the amount * * * from the principal."

Consequently the question is not whether the surety can recover at all, but whether he can do so by being subrogated to the claim right of a compensation creditor of the principal after the surety has satisfied, on behalf of the principal, the compensation claim of the creditor. In an early case, *Lewis' Administrator v. United States Fidelity and Guaranty Company*, 144 Ky. 425, 138 S.W. 305, at p. 306 (1911) the court stated:

"At common law, it is well settled that one who is compelled to pay the debt of another is entitled to be substituted to the rights of the creditor. * * *

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The general rule is that a surety who pays the debt of his principal will be subrogated to all the securities, liens and equities, rights, remedies and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction."

A more recent case, *Payne v. Standard Accident Insurance Company, Ky.*, 259 S.W.2d 491 (1952) states as dictum that:

"It is recognized that the payment of an obligation by a surety ordinarily entitles him to subrogation to all of the rights, remedies and equities of the obligee."

Language to this effect is also found in *National Surety Corporation v. First National Bank*, 278 Ky. 273, 128 S.W.2d 766, p. 769 (1939).

The trial court held that KRS 342.180 barred Non-Marine from succeeding to any of the priority rights the workmen's compensation claimants might have had against the Carrs Fork Coal Company by virtue of KRS 342.175 which gives them preferred claims.

KRS 342.175 states that:

"All rights of compensation granted by this chapter shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor." (KRS 376.170, priority for wages.)

KRS 342.180 reads:

"No claim for compensation under this chapter shall be assignable; and all compensation and claims therefor shall be exempt from all claims of creditors."

[4] Counsel for Non-Marine argues that the purpose of KRS 342.180 was "to protect the claimant from his own improvidence", thereby further insuring the ef-

fectiveness of workmen's compensation as social legislation, and he points to the fact that the statute exempts all compensation and claims from claimant's creditors. He contends that where the claimant has been paid his claim in full, the provision against assignability has no application. We think counsel is correct in his contention.

[5] We conclude, therefore, that appellants are subrogees of claims which "have the same preference or priority * * * as is allowed by law for any unpaid wages for labor". The losing party here would have been in the same position if the wage claims had been paid directly from the assets of the company in the first place.

The judgment is reversed

All concur.



The KENTUCKY TRUST COMPANY,
Executor, etc., Appellant,

v.

DEPARTMENT OF REVENUE, Common-
wealth of Kentucky, Appellee.

Court of Appeals of Kentucky.

Dec. 15, 1967.

Appeal by trust company from an adverse judgment of the Circuit Court, Franklin County, Henry Meigs, J., affirming an order of the State Tax Commission imposing an inheritance tax on proceeds of a life insurance policy held in trust subject to a power of appointment. The Court of Appeals, Clay, C., held that power of appointment granted to decedent's beneficiary was simply a beneficial interest in insurance proceeds and was not carved out of estate of decedent and had no significance or value apart from property to which it attached, so that insurance proceeds

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JUDGE: This is set for PC this Friday. Defendant has moved for continuance. For grounds, he states that settlement negotiations are under way. There is no objection by plaintiff, but then, we just got this motion today. There is a proposed order attached. Let me know if you want to deny the motion.

dwt

If you wish to grant the motion, we ought to prepare one of our own cuz Δ's doesn't set this for any definite date.

Mary look at this!

SET FOR PRELIMINARY CONFERENCE AT PIKEVILLE JUDGE UNTHAN
DATE February 19, 1982 AT 9:00 A.M.

PIKEVILLE CIVIL ACTION NO. 78-122

FIDELITY & DEPOSIT COMPANY
OF MARYLAND

Middleton, Reutlinger & Baird
501 South Second Street
Louisville, KY 40202

Stratton, May & Hays
P. O Box 851
Pikeville, KY 41501

VS:

I vs: D. HUNTER and
G. H. HUNTER d/b/a G. H. HUNTER
COMPANY
L. D. HUNTER
G. H. HUNTER
AMMA HUNTER
CORA FRANCES HUNTER

Michael R. Tilley
David Stosberg
601 West Main Street
Louisville, KY 40202

FILED

PROCEEDINGS

5/24/78	#1	COMPLAINT
11/4/81	#5	AMENDED COMPLAINT
12/11/81	#7	LETTER from Sec. of State
	#8	LETTER from Sec. of State
1/5/82	#9	ANSWER of deft to amended complaint
2/4/82	#11	PRELIMINARY MEMORANDUM of plff
2/8/82	#12	PRE-CONFERENCE MEMORANDUM of plff, Fidelity & Deposit Co.
2/16/82	#13	MOTION of deft, G. H. Hunter for con- tinuance of prelim. conf. set for 2/19/82.

*Overruled motion for Continuance
Struck answer for failure to
comply w/ p/c orders and to
appear for p/c hearing*