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# Joint Control by the Surety: A Virginia Statute and Its Common Law Ancestry

D. Orville Lahy

It happened in Texas, but it could just as well have been Virginia. At the June 1934 term of the County Court of Anderson County, Texas, there was offered for probate the holographic will of Herman Oberweiss. The testator and his several brothers had settled in Texas after emigrating from their native Germany, and without benefit of much education Herman Oberweiss had been able to accumulate considerable wealth during his lifetime. Although the will provided that his wife should receive substantially the entire estate, a significant clause in the Oberweiss testamentary document was fashioned in these words:

> "I want it that mine brother Adolph be my *executer* and *i* want it that the Judge should please make Adolph plenty bond put up and watch him like hell. Adolph is a good *bisness* man but only a dumpph would trust him with a busted pfennig."

What provisions of the law would enable a court to make Adolph "plenty bond put up" when he qualified as executor of his brother's estate, and how would it be legally possible to "watch him like hell" in keeping with the testator's express mandate?

If the will of Herman Oberweiss had been admitted to probate in Virginia, the court could require Adolph to provide a surety bond in a penalty at least equal to the full value of the testator's personal estate, and if the estate included real property which Adolph was authorized to sell or on which he was to receive rents and profits, the court could require of him a bond equal to the full value not only of the personal estate but also of the real estate, rents and profits. Va. Code Ann. §64-116 (1950). It seems obvious, therefore, that in Virginia Adolph could be required to "plenty bond put up" when he qualified as executor of Herman's estate. However, "to watch him like hell" in his administration of the estate is a function that would necessarily have to be performed, if at all, by Adolph's surety and not by the court. Indeed, this function under the English common law in the form of joint control by the surety was quite impossible on the ground that it was contrary to public policy long established in the administration of estates.

Such bonds as would be required of Adolph are, in ever-increasing numbers, provided by one of the many corporate surety companies duly licensed to transact the business of corporate suretyship within the state. Less frequently, but more often than the average lawyer might think, the corporate surety executes its bond on the condition that it will exercise joint control along with the fiduciary over either the corpus of the estate, the income of the estate, or both. In Virginia, such a condition is legally enforceable and the actual joint control is legally possible. The statutory justification for joint control by the surety is contained in §38.1-645 of the Virginia Code (1950), a section of the statutory laws of Virginia that is buried deep in the insurance statutes and is somewhat difficult to locate because of a rather awkward method of indexing. It is this statute, enacted into law by the General Assembly of Virginia in 1942, that would enable the surety on Adolph's bond to "watch him like hell" and thus fulfill the testator's obvious intent. Why is there such a statute? What is its historical background in the common law?

Joint control by the surety had its judicial introduction in England in August, 1820, when Richard White was appointed by the English High Court of Chancery as receiver of the estate of John Salway, a requirement of his appointment being that two sureties execute bond in his behalf in the amount of eight thousand pounds, conditioned upon his faithful performance of duty as receiver. Subsequent to his qualification, White enlisted the aid of Frances Jenks Burlton and William Adams and prevailed upon them to become individual co-sureties on his bond. They consented, but subject only to an agreement that was hitherto unknown and singularly unique. This agreement, to which White became a party, was to the effect that one Anderson, a business partner of co-surety Adams, should have the incoming estate funds paid over to him to be deposited in a designated bank (Prodgers and Company, bankers) in the names of the sureties, Adams and Burlton, and that no money should be withdrawn from this account except by drafts written by Anderson and signed by White, as receiver. The bond was executed and White proceeded with the receivership duties of the Salway estate. There followed the financial panic of 1824-1826 during which Prodgers and Company (bankers) became bankrupt in December, 1824, with loss of considerable Salway estate funds. A new receivership account was then opened in the names of Adams and Burlton (sureties) with Coleman and Morris (bankers), subject to the same joint control exercised by Anderson, not himself a surety for White (receiver), but a business partner of Adams (co-surety). This bank (Coleman and Morris) failed in April 1826, with further loss to the Salway estate. Thereupon, the executors of the Salway estate brought suit, the object of their petition in Chancery being to charge White as receiver, and his sureties (Adams and Burlton), with the loss occasioned by the successive failure of two banks, with whom the receivership funds had been deposited. Their grounds for complaint were founded on an alleged breach of duty by the receiver, that he had dealt improperly with the estate money by putting it under the control of other persons. *Salway* v. *Salway,* 4 Russ. Ch. 60, 38 Eng. Rep. 727 (1820).

The Master of the Rolls, Sir John Leach, wrote an admirable opinion in that case which, had it not been reversed on appeal, might have charted an entirely opposite course for the next hundred year's history of joint control by the surety. The Master reasoned that if White, as receiver, had so placed the receivership funds under the control of other persons in a manner exposing those funds to loss or prejudice by the conduct of such other persons, he and his sureties might be held responsible for the loss. However, he continued, the Salway funds were never under the sole control of Adams and Burlton, sureties, nor were they exposed to loss or prejudice by being deposited in their names. Since the bankers could pay drafts only when signed by the receiver, White, the funds could not be applied by the sureties to any foreign purposes, nor could said funds have been deemed the property of the sureties in the event of their own insolvency. Sir John concluded that the precautions used were intended to secure the application of the funds by White to receivership purposes only and as such were beneficial and not injurious to the trust estate. Thus the Master of the Rolls found the receiver and his sureties not liable for the loss of estate funds sustained through the failure of two bank depositories.

A petition of appeal from the decision of the Master of the Rolls was then presented to the High Court of Chancery by the Salway estate executors and came on for hearing on February 8, 1831 before Lord Chancellor Brougham. The sole issue was whether or not the receiver himself, and in default by him, his sureties, should be made liable for the receivership funds lost through the consecutive failure of two banking institutions. The Lord Chancellor reached his decision and delivered the opinion the following day, February 9, 1831, from which degree of haste a lack of thoughtful consideration seems more than obvious. Indeed, when endeavoring to sustain his reversal of the Master of the Rolls on later final appeal before the House of Lords, Lord Chancellor Brougham made the astute observation that his opinion below was affected by the pressure of business at the time, resulting in his inability to adopt a plan he always pursued—that of writing his judgments at length. *White* v. *Baugh,* 3 Cl. and F. 44, 6 Eng. Rep. 1354 (1835). It was unfortunate that a hurried and ill-considered conclusion hastily prepared during a twenty-four hour interval without due deliberation should destroy, by the application of legal precedent for the next century, a unique arrangment by which a surety could promote fulfillment of his principal's obligation and at the same time protect himself from the hazardous perils of his undertaking.

The Lord Chancellor's opinion observed that considerable argument had been raised touching on the conduct of the receiver as to the balances of the receivership funds, the length of time these funds were allowed to remain on deposit, the slowness with which the receiver paid them over into court, the making of his yearly accounts, his withdrawals from the estate of very substantial sums over and above the necessary outlay, the receipt of funds without placing them on deposit in the receivership balances, and the fact that even though White did account once a year for the funds, the mere act of accounting did not exonerate him from liability for loss. Touching on the arrangement in question, Lord Chancellor Brougham pointed out that if a receiver puts a fund out of his own control so that other persons shall be able to deal with it, the receiver thereby guarantees the solvency of those persons and becomes answerable for any loss that may ensue; however good the intention, the parting with control to the extent of giving that control to another, is enough to make him a guarantor of the fund. On the basis of this reasoning, Lord Chancellor Brougham reversed the judgment of the Master of the Rolls, holding the receiver and his sureties liable for the loss of the Salway estate funds occasioned by bank failures.

The final appeal of the Salway estate case was heard during the 1835 session of the House of Lords and is reported as *White* v. *Baugh,* 3 Cl. and F. 44, 6 Eng. Rep. 1354, (1835), a familiar citation that appeared periodically for almost a hundred years whenever joint control of trust estates came up for judicial review. One surety, Adams, was then deceased and receiver White, surety Burlton, and Adams' executor were the appellants; the respondents were Baugh and one Beale, as executors of the estate of Richard Salway. Counsel for the receiver and his sureties founded their arguments on the basic underlying principles of joint control, also pointing out that the decision in the High Court of Chancery extended further than the principle of any former decision wherein if a receiver deals honestly with the funds entrusted to him, as a prudent man would deal with his own funds, he should not be charged with loss beyond his own fault; that a receiver had always been treated by the courts the same as any other trustee or agent; that it was necessary for the money to be deposited in banks for safe custody and neither the receiver nor his sureties applied any part of the funds to other than receivership purposes; and, that the joint control arrangement did not give any advantage to the receiver, nor to his sureties, beyond that of enabling the sureties to prevent the receiver from improperly dealing with the trust monies.

The respondents merely echoed the Lord Chancellor's overnight opinion below: that the arrangement deprived the receiver of the control which he should have had over the fund entrusted to his care; that the receiver did not treat the trust funds as he would have treated his own funds; and, that no prudent man would leave funds so completely under the control of a stranger that withdrawal was impossible without that stranger's consent.

The English appellate procedure permitted the Lord Chancellor to appear before the House of Lords and justify his own conclusions in the court below. Obviously faced with the problem of supporting his fortuitous and momentary opinion reversing the Master of the Rolls, Lord Chancellor Brougham waxed long and eloquent before the House. After stating the principal issue to be whether or not the joint control arrangement made the receiver and his sureties answerable for the loss of receivership funds caused by the bank insolvencies without regard for liability as to the amount of the balance in each bank when it failed, and without any other neglect or fault on the part of the receiver, he undertook to establish that it was clearly the duty of the receiver as an officer of the court to keep in his own hands the sole control over the funds. It was admitted, the Lord Chancellor continued, that the receiver would be an absolute insurer of the funds if he had parted altogether with control over them, and it made no difference that instead of entirely parting with control he gave veto power over all of his dealings to a stranger, a business partner of one of the sureties, who was unknown to the court and over whom the court had no control. Thereafter, Lord Chancellor Brougham introduced numerous imaginary possibilities that have been subsequently cited as inherent evils of the joint control arrangement: the distance between the bank depositories and the place of business or residence of the sureties' joint control agent, the inability of the receiver to obtain the joint control agent's quick consent to withdrawal when there is a run on the bank, and the possible illness or other disability of said agent to act, as well as his refusal or unwillingness to act. The latter "unwillingness to act" led to the Chancellor's remote speculation that the joint control agent could prevent the receiver from joining a run on the bank to withdraw the trust funds before its closing, presupposing that the sureties or their agent had designated their own personal bank as part of the original agreement, that their interest in said bank was more than superficial, that they could court the favor of their own bankers at the risk of the trust estate, that any run on such a bank would endanger their own safety in it, and that by exercising their veto power over the receiver's withdrawal they could deter the bank's failure by leaving the receivership assets in jeopardy. Even that part of the arrangement whereby the receivership's deposit was in the joint names of the sureties led to the conjecture that the sureties could pense of the trust estate.

After thus directing the attention of the House of Lords to the fact that the arrangement included bank deposits of the receivership funds in the joint names of the sureties, the Lord Chancellor proceeded to emphasize that this amounted to a deposit of the trust funds as collateral security for the protection of the sureties. The court has a right, he explained, to security quite independent of the receivership and not security out of the estate itself. The receiver, he continued, ought to be a person so honest and of such a character for honesty as to obtain surety without any such contrivance. No one would find it hard to obtain surety if the surety is given control over the funds, and a knave might become a receiver and obtain sureties on such terms, because he puts into his sureties' hands the power of preventing the money from going out of his own. It is enough to say that the court might believe that a surety had become bound for the good conduct of another when he had, in fact, given no such pledge nor incurred any risk whatever. This is a deception upon the court, he said, which is induced to believe that a receiver's honesty has been vouched for, when it has not.

Lord Chancellor Brougham's concluding remarks before the House of Lords illustrate the persuasive nature of his argumentative technique. His summarization placed decisive significance on the following:

> 1. That the receiver, White, had deprived himself of the power of obeying any order that the court might make respecting the trust fund;
> 2. That it is far more safe that trust funds not be hazarded at all, than they be hazarded and the principal and his surety resorted to in case of loss, on the analogy that any man had much rather that his money be kept away from fire than to be told that in case of it being burned, he may resort to the guarantee or the liability of a man who is "sporting" with it;
> 3. That while this arrangement was advantageous to the receiver in the same degree in which it was detrimental to the estate, there was "no kind of necessity" for the arrangement at all; and
> 4. That it makes no difference that the veto power and joint control are not proved to have occasioned the loss because where a receiver wholly parts with control of the fund, he becomes answerable for the loss whether it arises from that cause or not.

The Lord Chancellor's advocacy in the defense of his own opinion below is probably one of the great classics of English legal history. Its effect on the House of Lords was magnetic.

The decision in the case of *White* v. *Baugh* of 1835 in the House of Lords was rendered by Lord Lyndhurst. Although it seems obvious that their Lordships were carried away by the eloquence of Lord Chancellor Brougham, Lord Lyndhurst's conclusions introduced the new and additional concept of "irregularity" as the basis for affirming the judgment of the High Court of Chancery. It would appear that Lord Lyndhurst was adversely impressed by what he termed the "entirely irregular" arrangement of "improper dealing with the fund by giving sureties control" over it, with that control "exercised by the hands of a stranger". He pointed out that a receiver can not be relieved from liability unless his conduct has been strictly "regular", whether the loss was occasioned by the "irregularity" of the conduct or not. The depositing of the receivership money in the bankers' hands subject to this control, which the receiver had no right to give to other parties, was an "irregular" proceeding as a result of which the receiver is not entitled to the indulgence of the court and the sureties must make good the loss. Considering the opinion of Lord Lyndhurst in retrospect, it would seem that he seized upon the terms "irregular" and "irregularity" as a rather fragile means of support for sustaining Lord Chancellor Brougham's spectacular defense of his own hurried conclusions in the court below. Entirely oblivious to the perils of the sureties' undertaking, and giving no consideration to the learned views of Sir John Leach as Master of the Rolls on the original trial of the case, Lord Lyndhurst confused an arrangement that was new, singular, and unique, with one that was "irregular" in the sense that it coincided with all of the dire speculations put forth by the persuasiveness of the Lord Chancellor. How could an arrangement for joint control by the sureties be measured by the ambiguous terms "regular" or "irregular" when there was then existing no known yard-stick either in the law of suretyship or trusts upon which such a dividing line could be drawn? It is significant that the later citations to *White* v. *Baugh* all point to the partisan arguments of Lord Chancellor Brougham against the joint control arrangement, but treat with silence the indecisive reasoning of Lord Lyndhurst upon which the holding was based. That the captivating oratory of the Lord Chancellor as an adherent of his own lower court opinion should so becloud the conclusion of the House of Lords was indeed a most unfortunate outcome, a consequence that was to harass sureties and multiply the perils of their undertakings for almost a century thereafter.

The English cases of *Salway* v. *Salway, supra,* and *White* v. *Baugh, supra,* became landmarks in the law governing the judicial treatment of joint control by a surety. The common law doctrine was established by these cases and is perhaps the same today except in those jurisdictions such as Virginia where statutory enactments have justified the over-ruled 1827 opinion of the Master of the Rolls. Thereafter, courts in the United States grasped a firm hold on Lord Chancellor Broughan's compelling dissertations in the House of Lords, gave his reasoning the "public policy" label, and announced repeatedly that joint control by the surety was contrary to public policy.

From the *White* v. *Baugh* decision of the English House of Lords in 1835 until the Georgia opinion of *Fidelity and Deposit Co.* v. *Butler,* 130 Ga. 225, 60 S. E. 851, 16 L.R.A. (N.S.) 994 (1908), there was not a single case involving joint control by the surety in the sense of an arrangement as it has come to be known in present day practice. However, the courts in widely scattered American jurisdictions were building up a body of common law doctrine in a variety of adjacent factual situations, with a few decisions favorable to joint control by the surety but many of them otherwise. Sureties in most of these cases sought exclusive possession of the trust assets by way of pledge rather than under a mere joint control arrangement with the trustee. The skeleton of *White* v. *Baugh* was in every judicial closet, and Lord Chancellor Brougham's imaginary concepts took on a broader and broader scope. The excellent reasoning of the Master of the Rolls in the first Salway decision became obscured by Lord Chancellor Brougham's hastily-drawn appellate opinion in the High Court of Chancery and completely obliterated by the Lord Chancellor's eloquence in the House of Lords. The equivocal reasoning as to the "regularity" and "irregularity" of the arrangement by Lord Lyndhurst was utterly effaced during the passage of time by the same preponderant arguments of the Lord Chancellor, with the extra-ordinary result that the many later citations to *White* v. *Baugh* quote the impellant language of the latter's disquisition and omit entirely the abstruse opinion of the House of Lords. The Lord Chancellor's coinage of the phrase "veto power", with all of its evil connotations symbolic of authoritative prohibition, was to reverberate for the next hundred years whenever a surety for a fiduciary sought to minimize the perils of his relationship by a joint control arrangement.

The dominant fact underlying every joint control arrangement from *White* v. *Baugh* to the present day is the existence of doubt as to the fiduciary's reputation and character, his possible inability to fulfill the obligation, and his probable lack of financial responsibility to account for any loss that may be incurred by the trust estate. All too frequently the courts designate their appointees to positions of trust without thorough investigation of the persons so designated, thereby shifting the burden of their own responsibility to the shoulders of the surety. Inability to secure surety informs the court of its mistake, and a new appointment follows. However, numerous instances of doubtful qualification proceed onward through estate administration and subsequent loss, grave testimonials to the misguided confidence of the surety. Joint control arrangements are often the decisive element governing whether or not the fiduciary of questionable competence obtains surety. Successful conclusion of those estates without loss are more often than not the direct result of the surety's guiding hand exercised through the medium of joint control.

It seems obvious that the co-sureties in *White* v. *Baugh* were not entirely satisfied as to the ability and integrity of the proposed receiver and entered their contract of suretyship with some hesitance and misgivings. Their unique joint control arrangement is adequate evidence of the doubtful qualifications of their principal. That their concern was not without foundation became obvious some eleven years later when the claims against the sureties came on for appellate hearing before the High Court of Chancery. There had been; the Lord Chancellor wrote in his opinion, "a good deal of argument" touching the conduct of the receiver in respect to the balances of funds in his possession, the long delay with which he paid them into court, the fact that he drew from the estate "very considerable sums over and above the necessary outlay" and appeared to have "sometimes received other monies without putting them into the estate". The fact that the receiver's mishandling of the funds might have been the proximate cause of the loss to the Salway estate, rather than bank depository insolvency, was sufficient justification by itself for the joint control arrangement.

Subsequent American cases where joint control or comparable arrangements were made by the surety indicate in retrospect the fiduciary's uncertain attributes which prompted the stipulation. The reasonable anticipation of the principal's insolvency, *Poultney* v. *Randall,* 22 N.Y. Super. (9 Bosw.) 232 (1862) or bankruptcy, *Forsyth* v. *Woods,* 11 Wall. (78 U.S.) 484, 20 L. ed. 207, (1870) would seem to be ample cause for a surety to invoke a joint control requirement. Even the known fact of the principal being heavily in debt is currently thought to be sufficient cause for the surety to seek some means of protection. *Lee* v. *Lee,* 67 Ala. 406 (1880). Sureties have long been wary of their loss potential when their fiduciary is on the distaff side, more often than not totally unfamiliar with business affairs in general and estate administration in particular. An early Georgia case is typical of a situation which usually prompts the modern surety company to seek joint control before executing its bond.

A female guardian wished to bring suit in behalf of herself and her children on a life insurance policy covering her late husband. When question arose as to her ability to give surety as guardian for her children (as it most always does), an arrangement was made with a surety whereby the funds, when and if collected, were to be invested in bonds and those bonds deposited with the surety as collateral security. Her attorneys collected the insurance proceeds, but before the bonds could be purchased, the bank in which the money was deposited failed. She thereupon brought suit against her attorneys who had arranged for the surety pursuant to the collateral security agreement. The trend in judicial thinking in favor of the surety was illustrated by the court's observation that the contract to deposit the bonds with the surety was neither illegal nor contrary to public policy. In distinguishing the case from *Salway* v. *Salway, supra, White* v. *Baugh, supra,* and *Forsyth* v. *Woods, supra,* the court said that this arrangement did not contemplate that the guardianship funds were to pass into the hands of the surety for his use or control, nor did it deprive the guardian of control; that only the investment securities were to be deposited with the surety, not to be used by him but kept simply as a guarantee that they would not be misused by the guardian. The plan was laudable, the court concluded, and would have afforded double protection for the wards had the bank failure not intervened; the surety could not have used the bonds because they would not have been registered in his name, and the guardian could not have wasted or squandered them because they were guarded by the surety. *Rogers* v. *Hopkins and Green,* 70 Ga. 454 (1883). This refreshing opinion was one of the earliest to construe such an arrangement in the surety's favor.

The great majority of instances where joint control by the surety has prevented loss of the trust funds by a fiduciary of questionable character and doubtful repute never reach the stage of legal dispute and appellate court review, and are thus unavailable for purposes of justifying the value of the arrangement. The files of modern corporate surety companies are replete with cases showing that joint control was the prime factor in the prevention of loss. Doubtless there are many similar joint control arrangements by personal or accommodation sureties which fulfilled the same worthy intent. A few cases which did reach appellate litigation are deserving of note.

The State Treasurer of Illinois, in consideration of certain banking officers becoming surety on his official bond, agreed to deposit the public funds charged to his custody in their banks for his and their joint benefit, even though such an arrangement was in possible conflict with an Illinois statute. Subsequently the State Treasurer defaulted causing tremendous loss of state funds. After payment of the loss by the sureties, they sought recovery against the insolvent estate of their deceased principal. The court denied the sureties their right of indemnification on the grounds that joint control of the public funds was illegal consideration for the suretyship contract. *Ramsay's Estate* v. *Whitbeck,* 183 Ill. 550, 56 N.E. 322 (1900).

Guardianship estates frequently disclose misapplication or misappropriation of trust funds, the reasons for which usually compel sureties to require joint control. Inherent incapacity, sometimes even the possibility of sheer dishonesty, are the underlying causes which promote prior joint control arrangements before the surety undertakes its guaranty of the faithful performance obligation. The arrangement, however successful in the control of trust disbursements, sometimes fails in its purpose because the funds never actually come under the surety's control. For example, where a guardian deposits receipts in his own personal account and then dissipates the money, without any deposits or withdrawals into and from the guardianship account over which the surety has joint control, the arrangement has there failed to protect the surety from loss. *U. S. F. & G.* v. *Mississippi Valley Trust Co.,* 153 S.W. (2d) 752 (1941). Other recent guardianship cases with joint control by the surety similarly show that joint control cannot unfailingly prevent defalcation by an incompetent guardian whose appointment should never have been effected by the court. *Lloyds Ins. Co. of America* v. *Moberly,* 231 Mo. App. 920, 82 S.W. (2d) 139, (1935); *Wilbur* v. *Ford,* 89 F. Supp. 407 (1950).

One very significent fact in the *White* v. *Baugh* case may have been controlling in the establishment of a misguided precedent in the common law. The person who actually exercised the joint control was himself not a surety for the receiver, but an agent of the sureties, a third person who was, as Lord Chancellor Brougham so forcefully emphasized, an absolute stranger to the court. That he was a business partner of one of the co-sureties was inconsequential in so far as the legal relationships were concerned since he was still beyond the jurisdiction of the court. Had either or both of the sureties themselves exercised the joint control, it is quite possible to speculate that there would have been no *White* v. *Baugh* doctrine, no long series of cases extending over a period of a hundred years or more, and no statutes enacted to relieve sureties of that ancient common law precedent.

It has long been established in the law of trusts, that a trustee may employ agents for various purposes, but that any attempt to delegate or surrender the trustee's discretionary duties to an agent amounts to a wrongful act. Where a loss follows such a delegation to an agent, notwithstanding good faith and reasonable care, the trustee is held to be an absolute insurer of the loss. Thus where a private trustee surrenders management of the trust to a corporate trust company without authorization to do so by the court, the private trustee becomes a guarantor for any loss whatever, regardless of whether or not the agent's acts were the proximate cause. *Meck* v. *Behrens,* 141 Wash. 676, 252 Pac. 91, 50 A.L.R. 207 (1927).

It is indeed curious that not a single case involving joint control by an agent of the surety appears in the English and American reports after the *White* v. *Baugh* decision of 1835. Although cited so frequently as common law precedent, it was rare that any court undertook to distinguish the fact of joint control by a surety's agent as distinctly different from similar control in the hands of the surety. Of course, modern joint control by corporate surety companies is exercised entirely through their agents, but the doctrine of *White* v. *Baugh* seems never to have arisen to promote its defeat on the agency grounds. It is, of course, obvious that unless exercised through agents, the whole program of joint control in corporate suretyship would be a practical impossibility.

The "veto power" by which Lord Chancellor Brougham stigmatized the sureties' joint control in *White* v. *Baugh* came down through the pathways of judicial history as an ignominious arrangement contradicting the very foundations of public policy. Countersignature of drafts was then uncommon, if not unknown, and any such an arrangement seemed utterly repugnant to his Lordship. Subsequent American jurists overlooked the vast developments in commerical procedure since the time of *White* v. *Baugh,* among which the practice of countersignature was a major step forward. In 1898 the United States Supreme Court adopted the rule requiring trustees in bankruptcy to deposit estate funds in an approved depository subject to the countersignature of the court or its referee. *General Orders in Bankruptcy, Rule XXIX* (1898). Modern business corporations have, since the turn of the century, established countersignature as standard internal procedure for the disbursement of funds. The same dual control is extended to the deposit or withdrawal of securities, and other modern accounting methods require as many types of restraint on the handling of cash and securities as the ingenuity of auditors can devise. Although it is often said that our jurisprudence keeps pace with the times, taking note of past experience and present custom in the light of changing conditions, the progress of commercial enterprise became lost in the fog of the *White* v. *Baugh* doctrine in its application to trust administration. The predominating influence of *stare decisis* and the reluctance of the courts to change what they believed to be a matter of public policy left the process of joint control by the surety in the doldrums of judicial antiquity, subject only to whatever statutory modifications the various legislatures might see fit to enact.

The tendency to hold that joint control of trust funds by the surety is both illegal and contrary to public policy, thereby finding the trustee and surety jointly and severally liable for any loss of funds regardless of fault, is no better illustrated than by the famous case of *Fidelity and Deposit Co.* v. *Butler, supra.* in 1908. Until statutes amended the *White* v. *Baugh* doctrine in a particular jurisdiction, the case was cited by every court considering the problem of joint control or any of its analogous arrangements. When a guardian of minor children was appointed and gave surety, it was agreed with the surety that the estate funds would be deposited in a specified bank approved by the surety and that no part of the funds should be withdrawn without joint signatures of the guardian and the surety. This arrangement was consummated with the full knowledge and agreement of the chosen bank. When the bank closed its doors, the guardian filed his claim with the bank's receiver who paid out liquidating dividends direct to the guardian without the surety's countersignatures. The guardian dissipated these dividends, claim was made against the surety, reduced to judgment, and paid. The surety then brought suit against the bank's receiver for breach of the bank's duty under the joint control agreement, seeking recovery of the loss. There was judgment against the surety in favor of the bank's receiver in the trial court and the surety appealed. The appellate opinion put the "contrary to public policy" label on the joint control arrangement.

The court traced the long history of the subject starting with the Salway estate cases and *White* v. *Baugh,* pointing out that there the fiduciary was a receiver, an official of the court; that the deposits were in the sole name of the sureties; and that the person there exercising the control was not a surety but a stranger to the receivership. However, acknowledging these differences from the instant case, the court found the same reasoning applicable and cited with approval many of the earlier American cases even though none of them were exactly in point. Its garbled interpretation of the joint control arrangement led it to emphasize that the law does not provide for turning over control of the estate to the surety in order to "idemnify" the surety against loss out of the assets of the estate. Thus retreating behind the nostalgic words of Lord Chancellor Brougham, the court found that such a veto power in the surety was contrary to public policy.

This was one of the earliest cases where joint control had been perfected by a corporate surety company and the court stressed its inability to find the arrangement legal for corporate sureties but contrary to public policy as to individual citizens who become personal sureties. Commenting that care and caution must be used in the interpretation of any contract as against public policy, it observed that such joint control agreements might possibly be needed for protection of estate beneficiaries against knaves who would, as fiduciaries, plunder the weak and helpless. But, the court concluded, such safeguards as joint control by the surety remained for the legislatures, not the courts, to establish. Three years later the Supreme Court of California reached the same conclusion on somewhat similar facts, also suggesting legislative relief. *In re Wood's Estate,* 159 Cal. 466, 114 Pac. 992, 36 L.R.A. (N.S.)252 (1911).

It is interesting to compare four different decisions handed down within the span of four years by the Supreme Court of one state, Alabama, more than a decade before joint control became established public policy by act of its legislature.

The first case in 1932 involved a guardianship, joint control by the surety and subsequent failure of the bank depository. An added fact gave support to the *White* v. *Baugh* doctrine in that the estate funds were continued on deposit in the bank which later failed, over the repeated protest of the guardian, because the surety's joint control representative had refused to permit prior transfer of the funds to a larger city bank. *Bates* v. *Jones,* 224 Ala. 82, 139 So. 242 (1932). The surety, through its own stupidity, had thus in this case by its own act encouraged the court to cite Lord Chancellor Brougham's original doctrine (as well as all the subsequent cases over the period of a hundred years), and to glorify the wisdom of that rule. Three years later in 1935 the same court decided two cases exactly opposite, in favor of the surety. In one of these concerning a guardianship, joint control by the surety, and bank failure, its majority and minority opinions both dealt entirely with probate procedure and remained quite silent as to the joint control arrangement and applicable public policy. *Maryland Casualty Co.* v. *Holmes,* 230 Ala. 332, 160 So. 178 (1935). The third case involving the administrator of a decedent's estate with the surety's joint control and later bank failure, cited the 1932 case and all of the prior judicial precedent, yet concluded that "so long as the surety keeps aloof from the conduct of the trust whose faithful administration he has guaranteed, and seeks no profit from it to himself, he may stand on the letter of his bond and escape liability according to its tenor." *Boutwell* v. *Drinkard,* 230 Ala. 212, 160 So. 349 (1935). Yet, the following year, the same court reversed itself again, holding an administrator and his surety equally liable for bank failure loss because of the joint control agreement. *Ex parte Moore,* 164 So. 210, also *Moore* v. *Easlinger,* 232 Ala. 251, 167 So. 328 (1936).

What was the result where there was an agreement for joint control by the surety but the joint control had neither been perfected nor exercised? This interesting sidelight came up where an administrator was appointed and gave bond, signing the surety company's application in which he covenanted and agreed to the exercise of joint control. No fulfillment of the joint control agreement had been reached when the bank failed with substantial loss to the estate. Relying on the unperfected joint control agreement, the heirs of the estate sought to charge the administrator and his surety with the banking loss under the doctrine of *White* v. *Baugh.* The court's conclusion was obviously projected from its dislike for the plaintiff's century-old argument. Finding it unnecessary to determine the correctness of that rule, it held that the surety had waived its right to joint control for which it had contracted, and that the mere existence of the agreement with joint control never exercised or availed by the surety, could have no effect to render the principal and his surety liable as guarantors or absolute insurers. Obviously, the bare agreement for joint control, per se, was not contrary to public policy. *Jones* v. *O'Brien,* 58 S. D. 213, 235 N. W. 654 (1931).

The unhappy status of joint control and public policy prior to statutory reversal of the *White* v. *Baugh* doctrine was perhaps best expressed by Judge Chittenden in an opinion of the Probate Court of Lucas County, Ohio, in 1936. *In re Guardianship of George J. Coddington,* 5 Ohio Opin. 593 (1936). The Veteran's Administration had brought an action against the guardian of an incompetent, seeking to charge the guardian as guarantor and hold him liable for the loss of estate funds which were on deposit when the bank depository closed its doors. Joint control had been arranged and exercised by a corporate surety. The undisputed facts found by the court were that the funds had been properly deposited to the credit of the guardian, that the surety in no way had control over the estate administration, and that neither the guardian nor his surety were remotely responsible for the loss. Yet, after expressing its keen disapproval for the existing law which had been blindly followed for a century, the court found itself regretfully bound by the weight of authority, and held for the plaintiffs. The opinion, notwithstanding its adverse holding, contained a gem of modern judicial thinking:

> Although the doctrine of *White* v. *Baugh* has been uniformly followed in the United States, the wisdom of the application of this arbitrary rule, over one hundred years old, to the modern practice of surety companies in requiring joint control over bank deposits, may be seriously questioned. The use of surety companies as surety on fiduciary bonds is highly desirable and it is the common practice for such companies to require joint control. Such control in no way operates as control over or direction of the administration of the trust. . . . Inexperienced persons are entitled to be appointed as fiduciaries of estates. The whole purpose of the law is to safeguard trust funds. Such joint control over bank deposits only affords an additional safeguard over those funds.

The court had obviously been influenced by a well-known text (2 Woerner, *American Law of Administration* 853, 3d ed., 1923.) and its own lengthy review of the American cases all adhesively following the English common law rule. The court's conclusion was a mandate to the Ohio legislature:

> . . . In view of the manifest advantage derived from the practice of joint control over bank accounts, we urge that this subject be given legislative attention.

A few states had enacted statutes late in the nineteenth century, among them being Kentucky where an early 1893 legislative act established joint control as legally permissive. The Kentucky provision was then amended and strengthened in 1922 in which context arose the strange and involved case of *Foley's Administrator* v. *Robertson's Guardian*, 215 Ky. 647, 286 S.W. 851 (1926). Looking back at the case, it stands out as a masterpiece of legal blunder. Apparently so overcome by the *White* v. *Baugh* doctrine and the precedent it established for all the subsequent American cases, counsel and court alike completely overlooked their own Kentucky statute which lay hidden away in the state code waiting to be tapped for its authoritative value. Indeed, the acme of judicial stupidity (or perhaps sheer laziness) appears in the court's observation that there was "no joint control statute in Kentucky."

A guardian of minor children had substituted surety, from personal to corporate, with the prior personal surety discharged. Both the prior personal surety and the successor corporate surety exercised joint control pursuant to agreement with the guardian. Coincident with the substitution of surety, the guardianship funds were transferred to a new bank whose cashier was joint control agent for the new corporate surety. Disaster then overtook the guardianship: the guardian was removed from office for cause, the bank building burned down from which conflagration its insolvency was disclosed, the remaining guardianship assets in the bank were lost, the bank's cashier who was the surety company's joint control agent was convicted for embezzlement of the bank's assets and sentenced to the penitentiary, and the ex-guardian died insolvent. The action was brought by the newly appointed guardian against the insolvent estate of the deceased ex-guardian, his substituted corporate surety, and his prior personal surety. The court, obviously enchanted by the facts, seized upon the surety's joint control as the most simple avenue upon which to approach the only remaining source of replenishment for the estate—the resources of the sureties. Its opinion had the familiar *White* v. *Baugh* touch:

> The knot presented by this record may be easily untied if we first loosen it by determining the effect of the sureties' joint control on the respective obligations to the estate beneficiaries. *There is no joint control statute in Kentucky.* Thus if the guardian by private arrangement yields in any measure to any one his sole control of such estate, he becomes an absolute insurer of the estate assets. (Emphasis added.)

Then, after citations to *White* v. *Baugh* and many of the leading American cases following its doctrine, the court concluded:

> Further, the fiduciary should at all times have it within

> his power and discretion to immediately withdraw the assets of the estate from the depository without the possibility of any veto power being exercised upon such action on his part and without the necessity of undergoing the delay which may be caused by his effort to secure the assent of the surety. . . . In this case the assets of the estate were withdrawn from a bank then solvent and still solvent, and placed in an insolvent bank under the joint control of the surety whose agent later turned out to be a defaulter.

It was clear that the deceased ex-guardian, although insolvent upon his death, had not defaulted; yet his surety was charged with the loss. While the surety's agent had indeed embezzled from the bank depository, he had not defaulted as to the guardianship and the loss should have been absorbed by the bank through and under its own surety bond on the cashier, and not by the guardian's surety. The "lost" Kentucky statute dating back to 1893, which would have changed the whole complexion of this case if it had been introduced, read in part as follows:

> And in case where any such [surety] company may be accepted as such surety, it shall be lawful for the court or officer taking the bond, or for any officer or fiduciary for whom the said company shall become surety, to place any bonds, stocks, securities or valuables in the custody of such company for safe keeping. *Kentucky Revised Statutes, Amended 1922, §687.*

Thirteen years later when another Kentucky plaintiff sought to rely on this case, the statute was removed from the closet in favor of the surety and the court then made the rudimentary observation that the Foley case might have been decided differently if this statute had been cited to the court. *Fidelity and Casualty Co. v. Pippin,* 124 S.W. 2d 62 (1939). The change in public policy in Kentucky was a long time in transit, even by way of statute.

If it can be said that public policy is reflected by legislative performance, the adverse public policy surrounding joint control by the surety has been reversed to a large extent in the United States. The earliest statute seems to have been enacted in Maryland in 1798, but at the turn of the succeeding century only several of the states (New York in 1885, Michigan in 1895, New Jersey in 1902) had made any effort to abrogate the ancient common law doctrine of *White* v. *Baugh.* About 1936 the Committee on Fidelity and Surety Law of the Insurance Section, American Bar Association, after a study of joint control by the surety in trust estates, recommended the adoption of a uniform joint control statute in every state. The model act which they suggested was clear and concise, reading as follows:

> It shall be lawful for any party of whom a bond, undertaking or other obligation is required, to agree with his surety or sureties for the deposit of any or all moneys and assets for which he and his surety or sureties are or may be held responsible, with a bank, savings bank, safe-deposit or trust company, authorized by law to do business as such, or with other depository approved by the court or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money or assets or any part thereof, without the written consent of such surety or sureties, or an order of court, or a judge thereof made on such notice to such surety or sureties as such court or judge may direct; provided, however, that such agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the said bond.

This act was intended to constitute an affirmative declaration of public policy, to preserve the exclusive jurisdiction of the court over the disposition of trust and estate funds, and to relieve joint control sureties for fiduciaries from the perils of bank depository failure. By its enactment into statute, the "contrary to public policy" argument becomes a relic of the era in which the *White* v *Baugh* doctrine was born; by its provision that the court may order withdrawal of the funds without the surety's consent (on mere discretionary notice to the surety) the court's power to regulate trust and estate activities is not impaired; and, by its closing phrase confining the liability of both principal and surety strictly within the terms of the suretyship instrument, joint control cannot be made the basis for establishing "liability without fault" leading to responsibility for loss from bank failures and other such disconnected contingencies of trust and estate administration.

The model act has now become statutory law in twenty states (including Virginia) and substantially similar statutes are in force in about thirteen other states The abbreviated joint control statute of Delaware and the ambiguous statute intended to serve the same purpose in Illinois, will undoubtedly require judicial clarification at some future date, unless improved by amendment or re-enactment. New Jersey's statute of 1902 is of early vintage and might well be modernized in keeping with the suggested uniform law. Three states (Kansas, North Carolina, and Vermont) have no joint control statutes as such, but certain provisions of their codified laws indicate that public policy now favors joint control by the surety. In North Carolina, judicial interpretation has already affirmed this possibility. *Pierce* v. *Pierce,* (97 N.C. 348, 148 S.E. 438 (1929), *Leonard* v. *York,* 202 N.C. 704, 163 S.E. 878 (1932). In Minnesota, the District of Columbia, and Hawaii, existing statutory law is silent as to joint control by a surety but contains provisions by which a surety might be legally enabled to exercise joint control without too serious a contravention of public policy. Only in West Virgina does a statute, and there by implication only, prohibit a surety company from exercising joint control. The remaining seven states and territories have neither positive law nor case precedent, and it remains to be determined whether or not they will adhere to the *White* v. *Baugh* doctrine or join the modern trend.

There has not been very extensive litigation under any of these joint control statutes and comparatively few decisions appear in the reports. The earliest such case determined that the Michigan statute of 1895 was not appliable to joint control over public funds by a surety for a public official. *Steel* v. *Auditor General,* 111 Mich. 381 (1896). The same Michigan statute later was the obvious medium of relief for a surety whose guardian had lost his estate's funds by failure of the bank depository. *In re French's Estate,* 267 Mich. 168 (1934). An early New York case, involving testamentary trustees, examined the court's jurisdiction to order a disbursement of funds under the surety's joint control (an aspect specifically contained in the Virgina act), and held that under the New York joint control statute it could do so providing due notice was given to the surety. *In re Chesterman's* Estate, 75 App. Div. 573, 78 N.Y. Supp. 345 (1902). The joint control statute in California has also passed judicial review with results quite favorable to its validity. *In re Estate of Alea K. Ounjuian,* 4 Calif. (2d) 659, 52 P. (2d) 220, 102 A.L.R. 1106 (1935).

The laws of three states (North Carolina, Kansas, and Vermont) do not in positive terms vitiate the early common law doctrine. However, those states as part of their regulatory law for corporate surety companies, fix a maximum amount of liability a surety company may expose itself to on any single bond of suretyship. The statutes in each of these three states then permit that limitation to be exceeded where the surety company exercises joint control on a fiduciary's surety bond, under certain prescribed conditions and further limitations. Although there have been no cases in Kansas or Vermont, the statute in North Carolina has twice been judicially construed in a way that would indicate that joint control by the surety in North Carolina is now established public policy. Where guardianship funds under the surety's joint control were lost by bank failure, North Carolina's highest court concluded without mention of the existing statute, that the principal and surety were not liable for the loss so long as the guardian exercised good faith and due diligence in the handling of the estate. *Pierce* v. *Pierce, supra.* Three years later the same court pronounced this statute to be a rescission of the common law doctrine by act of the state's general assembly. *Leonard* v. *York, supra.*

Where there has been no case precedent established with respect to joint control in a particular state and a statute is then enacted, does the statute as enacted in Virginia reverse existing public policy against joint control, or does it affirm what may be termed a prior public policy favoring such an arrangement between fiduciary and surety? The most recent case dealing with the surety's joint control raised this question. *Wilbur* v. *Ford,* 89 F. Supp. 407 (1950). It was a suit against guardian and surety for alleged misappropriations by the guardian. The guardianship arose in the state of Maine but was in the Massachusetts federal court on diversity of citizenship. By a motion for summary judgment against the surety on the grounds that its exercise of joint control of the funds in the hands of the guardian made it a joint tort-feasor, the plaintiff sought to recover only from the surety. Both Maine and Massachusetts had joint control statutes but there were no prior cases favoring or rejecting the common law doctrine in either state. The court denied the motion with this reasoning:

> Plaintiff's argument requires that there be a law which holds a surety liable as a joint tort-feasor solely as the result of exercising joint control with the guardian, regardless of the surety's lack of knowledge of or benefit from the guardian's defalcation. There is no such law in Maine . . . (citing the Maine and Massachusetts joint control statutes) . . . Before the Maine statute which explictly legalized joint control entered into by guardians and sureties, there existed no common law in Maine on the question. On these facts, the common law of Maine must be presumed the same as that of Masachusetts, the state of the forum. There being no judicial decision in Massachusetts prior to the statute, our holding is that the common law in Massachusetts is the same as stated in the statute. . . . Therefore, there is no law according to which plaintiff can recover direct from the surety under the facts in this case.

Thus, if the common law without case precedent is the same as later codified by joint control statute, the earlier common law doctrine has finally vanished from the forum of American jurisprudence. This case could well be the foundation of a new precedent for joint control in a few states and the District of Columbia still lacking affirmative joint control legislation.

The Virginia joint control statute, Va. Code Ann. §38.1-645 (1950), therefore marks a significant development in the administration of trusts and estates. Without Virgina case precedent prior to its enactment, it is quite impossible to determine whether it affirms or repudiates the common law of Virginia applicable to joint control by the surety. However, it does affirmatively extinguish the English common law doctrine *White* v. *Baugh* and places the Virgina law on a par with the majority of the American states. Although it has not yet been subjected to judicial application or construction, there is every reason to believe that it will meet the test, if and when it comes, and that it will be construed the same as its companion statutes have been construed in other states. It is this statute which would enable the surety on the bond of Adolph Oberweiss, executor, to fulfill the mandate of his testator; it is within the scope of this statute, had the will of Herman Oberweiss been admitted to probate in Virginia, that the court would have been enabled to order joint control by the surety, thus making it possible to "watch him like hell" as the testator had directed and intended when he designated his brother Adolph as his executor.