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RIGHTS OF SURETIES INTER SESE.

It is proposed to discuss one of the questions growing out of the relation of suretyship, viz. : When will one surety upon a written obligation be held to be a co-surety with, or a surety for, another surety ?

In the first place it is important to determine what parties to a written instrument are to be regarded as sureties as between themselves, and when they are to be regarded so. There seems to be a tendency in some recent cases to establish the doctrine that when all the parties to a note or other obligation, whose liability is secondary to that of the real principal, have signed before delivery, and in order to give the maker or obligor credit with the payee or obligee, they are all, as between themselves, to be regarded as co-sureties, whatever may be their relation to the holder : *Reynolds v. Wheeler*, 10 C. B. (N. S.) 561 ; *Wright v. Garlinghouse*, 26 N. Y. 539-45 ; *Pitkin v. Flanagan*, 23 Vt. 160. In the case last cited this doctrine was applied to accommodation endorsers in a very able opinion by REDFIELD, J. But upon this particular point the weight of American authority is at present, very decidedly the other way : *McDonald v. McGruder*, 3 Pet. 477 ; *Brown v. Mott*, 7 Johns. 361 ; *Kirschner v. Conklin*, ante 471.

The cases in which the question suggested in the commencement of this article may arise may be conveniently classified as follows :

*First.* Those in which the sureties are bound by separate instruments or obligations.

*Second.* Those in which they are bound by one instrument or obligation, and the question turns upon the construction of it.

*Third.* Those in which the question arises upon parol or verbal testimony.

It is well settled that different sureties occupy towards each other the relation of co-sureties, though they may have become bound by different instruments, at different times and without the knowledge of each other, provided that the obligations into which they enter are for the same engagement and for the same principal, and it does not appear that one obligation was intended to be secondary or collateral to the others: 1 Story Eq. J. § 498; *Burge Suretyship* 385-6; *Armitage v. Pulver*, 37 N. Y. 494; *Warner v. Morrison*, 3 Allen 566; *Commonwealth v. Cox's Adm'r.*, 12 Cas. 442; *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. 100; s. c. 2 B. & P. 270; *Harris v. Ferguson*, 2 Bailey 397; *Breckenridge v. Taylor*, 5 Dana 112. In cases where the obligations are for different amounts, contribution will be enforced among the co-sureties in the proportion of the penalties of the several obligations: *Bell v. Jasper*, 2 Ired. Eq. 597; *Dering v. Winchelsea*. When it is evident that the obligation signed by one surety is secondary or collateral to that signed by another, the relation of co-suretyship does not exist between them; at any rate it does not exist so as to enable the latter to compel contribution from the former. There are several cases illustrating this principle. In *Craythorne v. Swinburne*, 14 Ves. 160, A. as principal and B. as surety, executed a bond in order to procure a loan. The security not being deemed sufficient, C. executed a separate bond conditioned to be void on payment of the first. It was decided that B. could not compel contribution from C. Though evidence of C.'s declarations at the time of signing, tending to show that he signed as surety for, and not as co-surety with B., were admitted, it was expressly held that, even without such evidence, the (second) bond upon the face of it makes him (C.) surety only for the principal and the other surety: Page 170. In *Longley v. Griiggs*, 10 Pick. 121, a note was executed by A. as principal, and by B. and C. as sureties. On the back of the note was the following endorsement signed by D.: "I consider myself holden as guarantee for this note." It was held that B. and C. could not compel D. to contribute. In *Keith v. Goodwin*, 31 Vt. 268, s. c. Redfield & Bigelow L. C. on Bills, &c., 697, a note, payable to the Vermont Bank, or order, was signed on the face by defendant and six others, all signing without any addition designating who were principals and who were sureties, though it ap-

peared by the evidence that defendant was in fact a surety. Upon the note was the following guaranty signed by plaintiff and five others: "For value received we guaranty the payment of the above note." It was held that the plaintiff was a surety for defendants jointly and not jointly with them, and might recover what he had been compelled to pay. To the same effect are *Harrison v. Lane*, 5 Leigh 414; *Harris v. Warner*, 13 Wend. 400; *Stout v. Vause*, 1 Rob. Virginia 169; *Field v. Pelot*, 1 McMullan Eq. 370; *Coope v. Twynman*, 1 T. & Rus. 426. In such a case it is clear that the first set of sureties could not have compelled contribution from the second set, even though the latter may have known at the time of signing that the former signers were sureties, as was the fact in the cases of *Craythorne v. Swinburne*, and *Longley v. Griggs*. In determining whether the second set of sureties could hold the first set liable to them as principals, so as to recover the whole amount paid, the court in *Keith v. Goodwin* had occasion to decide upon other important questions which will be noticed presently.

In the second class of cases, where the sureties are bound by one instrument or obligation, the question may have to be determined by the form and construction of the instrument itself. Suppose, for example, a note signed by A. as principal and B. as surety, to be afterwards signed by C., who adds to his signature, "surety for the above," or some other equivalent expression: what is the effect of such addition? It is well settled that a surety may limit *his own* liability as he pleases. Independent of parol evidence making it necessary to apply a different rule, it is well settled that in the case supposed, B. could not compel contribution from C.: *Harris v. Warner*, 13 Wend. 400. Otherwise if C. had added to his signature simply the word "surety:" *Warner v. Price*, 3 Wend. 397; *Sisson v. Barrett*, 2 Comst. 406.

Nor could C. in the case supposed hold B. liable as a principal and so recover of him full indemnity: *Warner v. Price*; *Whitehouse v. Hanson*, 42 N. H. 9. There are also numerous dicta to the effect that in such case C. could not even compel contribution from B.: *Harris v. Warner*; *Whitehouse v. Hanson*; *Norton v. Coons*, 3 Den. 130. But upon this point there is no direct decision of which the writer is aware.

The third class of cases, by far the most difficult to be reconciled, are those in which the question under discussion arises upon parol

evidence. As between the parties liable upon a note or other obligation, neither the form of it, nor the position of their names, nor the *prima facie* character in which they sign, concludes them from showing by parol evidence their actual relation to each other. The most frequent and interesting cases are those in which it has been sought to raise by parol evidence, an equitable estoppel, so as in effect to make one surety a principal as to another surety. Suppose, for example, a note signed by A. as principal and by B. as surety, but without anything on the face of the note indicating that B. is in fact a surety, to be afterwards signed by C. who at the time of signing believed B. to be a principal and signed with the intention of being bound as surety for both A. and B. Such facts being proved, what is the legal consequence? Upon this question the authorities are conflicting. On one side it may be said that as the first surety held himself out to the last as a principal he ought to be concluded from denying that he is such in any controversy between them. It was so held in *Melms v. Werdehoff*, 14 Wis. 18, and in *Keith v. Goodwin*, 31 Vt. 268.

On the other hand it may be said that one who in fact signs a note as surety does not hold himself out as principal by merely omitting to designate himself as surety upon the note itself; or at any rate that he does not so hold himself out to any one but the payee. It is as usual for sureties to sign without, as it is to sign with, an addition designating that they are sureties. The last surety is presumed to know this, and also to know the rule that all sureties for the same debt are, in the absence of evidence to the contrary, to be deemed co-sureties, whether they so intended or not, or whether they signed with each other's knowledge or not. He can easily ascertain by inquiry who is the real principal; or else he can sign as "surety for the above," or in some other way indicating that he intends to make his liability secondary to that of all the preceding parties. Again it is a fundamental rule that a surety is never liable except according to the legal effect of the contract signed by him. It is equally well settled that no one can acquire the rights of a surety against another without the latter's consent. While it may be presumed, or at any rate inferred from slight circumstances, that the real principal upon a note or other obligation for the payment of money, consents to the procuring of a surety for him, no such presumption can be indulged against a surety. The latter is not benefited by consideration moving to the principal;

and while it may be to his advantage to have a co-surety, it is of no advantage to him to have some one sign as surety for him. Indeed according to the doctrine of equitable estoppel as at present understood, it is difficult to see how, in the case supposed, B. by merely omitting to designate himself as surety upon the note, could be held to be estopped to deny that he signed as principal, in a controversy with C. To constitute such an estoppel it should appear that B. fraudulently intended, or at any rate might and ought to have foreseen, not only that he would be regarded as a principal, but that some third person would or might thereby be induced to sign the note as surety for him. The most recent and best considered decisions show a very decided inclination of the courts to restrict rather than to enlarge the doctrine of equitable estoppel; and it cannot in the opinion of the writer, consistently with these decisions, be applied in the case supposed.

Opposed to the cases of *Melms v. Werdehoff* and *Keith v. Goodwin*, is the recent case of *Whitehouse v. Hanson*, 42 N. H. 9. That was an action of *assumpsit* for money paid by plaintiff Whitehouse for defendants Hanson and Trickey. The note in suit was payable to the Saving Bank or order, signed by Moses Place, John P. Hanson, John Trickey, N. V. Whitehouse surety & Thomas Stackpole surety. It appeared that Place was the real principal, all the others being in fact sureties. Plaintiff testified that "when he signed the note Place asked him to sign the note as surety for himself, Trickey and Hanson, whose names were on the note as principals. He delayed signing till afternoon, in order to ascertain Trickey's ability; ascertained that Trickey was responsible, and told Place if he would get another good man on the note he would sign it, and named Stackpole. He signed, adding surety to his name. He did not know that Hanson and Trickey were sureties or he would not have signed. He did not know the purpose of procuring the money." This evidence was objected to, but the objection was overruled. There was some other testimony to the same effect.—Trickey testified that, "he signed the note as surety for Place, had none of the money nor any benefit of it. Place asked him to sign with Hanson, Whitehouse and himself. Place and Hanson signed before he did. He had paid one-fourth of the debt and costs."—Hanson testified that "he signed the note at the request of Place and as his surety, Place saying that Trickey and Whitehouse would also sign it. He paid one-fourth of the note."

Upon these facts the court, in a very elaborate opinion, reviewing many authorities, held that Whitehouse was a co-surety with, and not a surety for Hanson and Trickey. To the same effect are the cases of *Norton v. Coons*, 3 Den. 130, s. c. 2 Seld. 33; *McGee v. Prouty*, 9 Met. 547.

Supposing that there is nothing upon the face of the note or other obligation indicating, or from which it may be presumed on the ground of estoppel or otherwise, that one of the sureties signed as surety for and not as co-surety with the other sureties, still that fact may nevertheless be shown by parol evidence. If there was an express agreement between the sureties to this effect, there is no question but that it may be so proved: *Barry v. Ransom*, 12 N. Y. (2 Kern.) 462; *Batson v. King*, 4 H. & N. 739.

Beyond this the decisions are conflicting and impossible to be reconciled, especially upon the question of the effect of the declarations of the sureties at the time of signing. Starting with the presumption that in the absence of evidence to the contrary all the sureties are, as to each other, held to be co-sureties, it is clear that the burden of proof rests upon the party alleging the contrary. If there was a mutual agreement to the contrary between the sureties (not between one of the sureties and the principal or some other person) it may of course be proved by parol testimony; but such testimony must be competent for that purpose. In connection with other testimony, the declarations of one of the sureties at the time of signing to the effect that he signs as surety for and not as co-surety with the prior sureties, may be admissible as part of the *res gestæ*, going to show a mutual agreement express or implied, or to show, where that is held material, that he supposed the prior sureties to be principals. But it is difficult to perceive upon what principle such declarations, not assented to by the prior sureties nor even communicated to them, can affect them. Such declarations may indeed show the intention of the party making them, but that intention, whether expressed or locked in his own breast, does not supply the mutual assent necessary to a binding agreement, without which no one of the sureties can shift from himself to the others the burden which the law imposes upon all of them equally.

Nevertheless there are decisions and dicta contrary to these views. Evidence of declarations was admitted in *Craythorne v. Swinburne*, 14 Ves. 160. But, as has been seen, it was not neces-

sary in that case to pass upon the competency or effect of such evidence: Such declarations were held admissible in *Keith v. Goodwin*, 31 Vt. 268. But if the other points decided in that case were well taken, what is there said as to the effect of such declarations was a mere dictum; and if the other points were not well taken the case cannot be supported even upon such declarations. Evidence of such declarations was admitted also in the case of *Bowser v. Rendell*, 31 Ind. 128. In that case a note payable to and at a certain bank was signed by A. as principal and by B. as surety, and delivered to C., the real payee, who, in order to induce the bank to discount it, signed his own name to it, nominally as a maker. Parol evidence was admitted of C.'s declarations at the time of signing that he did so as surety for and not as co-surety with B. It is clear that, without such declarations, while A. B. and C. were all liable as principals to the bank, yet A. and B. were both liable as principals to C. The case last cited was decided upon the authority of *Robinson v. Lyle*, 10 Barb. 512, which, if good law, is directly in point. But that case was decided before and is directly opposed to the later New York case of *Norton v. Coons*, 3 Den. 130; s. c. 2 Seld. 33. The recent case of *Adams v. Flanagan*, 36 Vt. 400, goes still farther. That was a suit by William Adams against H. C. and H. B. Flanagan, for contribution for money paid upon a promissory note payable to the Commercial Bank and signed as follows: Ed. Mills, A. Boynton, William Adams, *surety*, H. C. & H. B. Flanagan, *surety*. The defence was that the defendants were not co-sureties with plaintiff but were sureties, if sureties at all, for Boynton and plaintiff. The plaintiff testified that on the occasion of his signing the note, Mills (the principal) told him, in the absence of the defendants, that the defendants had agreed to sign as sureties on the note if he (the plaintiff) would; and that he would not have signed the note unless he had understood that the defendants would also sign it. On the other hand the defendants' testimony tended to show that they refused to sign the note as co-sureties with the plaintiff and Boynton; but at the request of Mills consented to sign it as sureties for Adams and Boynton after *he* and *they* had signed it; that upon this understanding Mills signed it and went to Adams and Boynton and procured their signatures; that they intrusted the note thus signed to Mills; that he presented it to defendants so signed, and they then signed it in the presence of Mills and of one Chittenden, an attorney of the payee, with the distinct and

express agreement previously stated and then repeated, that they signed as sureties for Adams and Boynton, and not as co-sureties with them; that they affixed only the word "surety" to their names, and not the words "surety for Boynton and Adams," because Chittenden told them that the legal effect of signing after the others and adding the word "surety" only, would be to make them sureties for and not with them. Upon these facts the court held that the action could not be maintained, disapproving *Norton v. Coons*, and approving *Keith v. Goodwin*. From a note by the reporter at the beginning of the volume, page v., it appears that POLAND, C. J., and PECK, J., dissented from the opinion of the court. That case cannot be supported on the ground that the Flanagans signed supposing Adams to be a principal, because the note on its face showed Adams to be a surety. It must be supported, if at all, solely upon the ground that the declarations of the Flanagans at the time of signing were binding upon Adams. But if their declarations were binding upon him, it is difficult to see why *his* declarations were not binding upon *them*. If this case is generally recognised as good law, it must not only overturn the rules heretofore recognised governing the right of contribution between sureties, but must also establish the novel theory that one man may bind another by simple declarations of which the latter may have been entirely ignorant. It is in direct conflict with the earlier Vermont case of *Flint v. Day*, 9 Vt. 345, and also with the cases, already cited, of *Whitehouse v. Hanson*, 42 N. H. 9; *Norton v. Coons*, 3 Den. 130; s. c. 2 Seld. 33, and *McGee v. Prouty*, 9 Metc. 547.

In concluding our remarks upon the competency and effect of parol evidence we may notice a very common statement, that where one surety signs at the request of another such request is of itself sufficient to show that, as between themselves, the former is a surety for, and not a co-surety with, the latter: *Turner v. Davies*, 2 Esp. 478; *Apgar v. Heiler*, 4 Zab. 812; *Daniel v. Ballard*, 2 Dana 296; *Thomas v. Cook*, 8 B. & C. 728. In the case of *Pitts v. Bougdon*, 1 Comst. 352, it was said in reference to commercial paper that the adoption of this rule has been regretted by judges in England and in this country, and that the rule was not to be extended. There appears to be no sensible reason for it; and it is wholly repudiated and shown never to have rested on a sound basis, in the recent case of *Bagott v. Mullen*, 32 Ind. 332.

D. W. HOWE.