THE SURETY.

The surety is a favored debtor. It is said that no rule is better settled.[1] "Where any act has been done by the obligee that may injure the surety the court is very glad to lay hold of it in favor of the surety." [2] "There is no moral obligation on the security beyond or superadded to his legal obligation." [3] But upon what principles of justice is the rule founded? Is it not the usual complex of tradition, psychology, and economics that makes most rules of law easier to state than to explain? Active sympathy may be expected for one who has gratuitously bound himself for the debt or default of another in disregard of the scriptural warning.[4] Antonio is not the only reckless hero that has found a court predisposed to assist him. So also, it may be politic to encourage co-operation in mercantile transactions by reducing to a minimum the risk of the accessory.[5] The doctrine, too, may have been inherited from an earlier state of society where the very harshness of the law of suretyship called for the strictest definition of its limits. All of these elements may and usually do enter in varying proportions into the modern attitude toward one of the oldest relations of the law.

Collateral security, that is a secondary obligation annexed to a contract to guarantee its performance, or the pledging of property to insure the performance of a principal engagement, or to furnish means of indemnity in case of non-performance, is an idea familiar to modern law and was fairly developed in the legal systems of some of the civilized nations of antiquity. But, speaking relatively, it is recent; that is, it is an idea that belongs

[1] State v. Churchill, 48 Ark. 426 (1886); *In re* Sherry, 25 Ch. D. 703 (1884); Brandt on Suretyship (3d Ed.), Sec. 106.

[2] Law v. East India Co., 4 Ves. 824 (1799).

[3] Winston v. Rives, 4 S. & P. (Ala.) 269 (1833); Ratcliffe v. Graves, 1 Vern. 196 (1683); Simpson v. Field, 2 Chan. Ca. 22 (1679).

[4] "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure." Proverbs xi, 15.

[5] "Without these constant acts of mutual kindness and assistance, the course of commerce would be prodigiously impeded and disturbed." Per Kent, C. J., in Ludlow v. Simond, 2 Caines Ca. 1 (1805), at page 58.

to the later growth of any system of law in which it appears. For among primitive peoples there is no credit and each transaction must be final, in form at least. Difficulties would occur chiefly in executing the judgments of the group assembled as a court. The wrongdoer must pay, but present satisfaction is all that the injured person is obliged to take. The delinquent may then do one of three things. He may hand over property in settlement of the liability, perhaps with the privilege of redemption, the forerunner of the modern pledge and mortgage. He may surrender himself and work out the debt in *quasi* servitude. Or, he may surrender to the creditor, a relative or friend, as a provisional satisfaction while he proceeds to acquire the sum directed to be paid, the predecessor of the modern surety or guarantor.[6] Indeed, the surety was in the beginning no more than an animated gage or hostage, as that term is still understood in international law,[7] delivered over to imprisonment, perhaps servitude, but subject to redemption. He frees the debtor, taking his place just as a *res* would.[8] Brissaud, writing of the early middle ages, a time of archaic survivals, describes the position of the surety as follows:

"The creditor kept him near himself, sometimes sequestrated, or even in irons; he was authorized to take vengeance upon him if the debtor did not pay his debt at maturity, just as he would have taken vengeance upon the person of the debtor (it was death, mutilation, slavery for debts). Such a prospect as this must have led the hostage to neglect no means of getting the debtor to free himself of the obligation. Also, thenceforth one can account for two of the most remarkable characteristics of the primitive suretyship: 1st, in giving surety, the debtor frees himself; 2d, the death of the surety destroys the right of the creditor; the fact of being in his hands like a pledge could not be transmitted to the heirs of the hostage. Of course, moreover, the creditor had to feed his hostage, which gave rise to the gibe, 'The banquet of a hostage is a costly banquet.' In order to avoid these expenses, the creditor gave up the person of his hostage, or, rather, did not demand that the

[6] The Pledge-Idea by J. H. Wigmore, 10 Harv. L. Rev. 43 (1897).

[7] Prof. Hershey says the last treaty secured by hostages was that of Aix la Chapelle; 1745. Hershey's International Law 319n. In the present war civilians are constantly held as hostages for the good conduct of their neighbors.

[8] The Pledge Idea, *supra;* Kohler's Philosophy of Law (Amer. Ed.) 158; 2 Pollock & Maitland Hist. 184.

hostage should be handed over to him as soon as the contract was made. He contented himself with the promise that the hostage would present himself as the first summons at the place which was appointed beforehand, or which should be designated afterwards,—a town, a castle, or an inn,—and from which place he was forbidden to depart until the debt should be paid. The laws seldom had to see to the carrying out of this promise, because it was made a point of honor to keep it; and, if necessary, excommunication would have had satisfaction from the recalcitrant hostage (perjury or quasi-perjury) or else he would have been taken by force (intervention of the magistrates). Shutting up in prison was the natural penalty for the infraction of this order; Beaumanoir recommended that one give the hostage who has suffered this punishment better nourishment than is furnished to prisoners for some crime. At the same time, the hostage, and, as a consequence, the debtor, was charged with the expenses occasioned by the sojourn of the former in prison."[9]

For a long time it was the duty of members of the family to act as surety for each other, an outgrowth of the earlier collective liability of the family, and, in the middle ages, according to some customs, the vassal was expected to act as pledge for his lord.[10] Not to protect the surety against liability was a gross breach of faith that in time afforded grounds for rigorous legal proceedings. Modern suretyship like the modern law of collateral security developed through the progress of legal ideas, in proportion as the payment of debts become better assured through the growing power of the state, and the higher ethics of trade relations due to commercial development. The moral emphasis is transferred to the promise, the debtor's liability becomes more and more conspicuous, and the surety is forced into the background, his liability becoming accessory. As to the creditor, the more secure his position becomes, the less inclined he will be to undertake what is in essence a preliminary execution involving onerous duties on his part; self-help becomes a burden

[9] Brissaud's History of French Private Law (Continental Legal History Series) 574, where the authorities will be found collected. Laws of King Aelfred, Sec. 4; Thorpe, 157.

[10] *Coutume de Normandie* (1727) 172; Laws of Gortyn, Sec. 11, 2 Law Quarterly Rev. 150; Brissaud 573. Laws of King Edward, Sec. 9, Thorpe 165; *Judicia Civitatis Lundoniae*, Sec. 2, 3 Thorpe 243; *Leges Henrici Primi*, Sec. 44, Thorpe 544. The Charter of Bristol provided that no burgess should be forced to replevy any one, although dwelling on his land, Borough Customs (S.S.) 101.

when legal protection is at hand. As is well known, the modern mortgagee rarely avails himself of his legal title except as a last resort.

Roman law had a complex but highly developed system of suretyship, the last phase of which is embodied in the legislation of Justinian and survives with comparatively little change in modern Continental codes. This system, the later stages of which can be traced in the legal literature of the Empire, was of slow growth, but its early history is obscure, as is, indeed, the case with most of the law of the Republic. Five forms of this contract are mentioned, namely: *Sponsio, fidepromiso, fidejussio, constitutum,* and *mandatum.*[11] Of these the two first were the most ancient, becoming obsolete under the Empire. A sponsor could intervene only where the parties were Roman citizens, and the obligation was created by stipulation; the formal verbal contract of the ancient civil law, the solemn question and answer (*spondes? spondeo*), the origin of which is uncertain[12] but probably religious in character, representing a kind of self-pledge to the gods.[13] *Fidepromiso* was somewhat later but still very ancient and was used when one of the parties was an alien (*peregrinus*). It too was verbal (*promittis? promitto*). Under neither of these forms was the heir of the surety bound and both were much restricted by early statutes of unknown date. By the *lex Furia* the liability of both sponsors and fidepromissors was limited to two years and each surety was liable only for his

[11] See Gaius (Poste's Ed.) III, 110-127; Inst. Justinian (Moyle's Ed.) III, 20; Dig. 46; Hunter's Roman Law (3d Ed.) 565. There were other forms of suretyship, such as the ancient *praedes* and *vades* connected with litigation whose position is a matter of controversy. Buckland's Elements of Roman Law, 257. So in every case of *correal* or *solidary* obligation in which there was a right of contribution.

[12] Muirhead's Roman Law (3d Ed.) 39.

[13] Sohm's Institutes (3d Ed.) 64. In the note it is said: "*Sponsio* was the name originally given to a contract concluded by a libation, *i. e.,* by a formal self-denunciation, to the following effect: Even as this wine now flows, so may the punishing Gods cause the blood of him to flow who shall be the first to break this covenant." By later law it was immaterial what words were used provided an obligatory consensus was expressed in due form. In the later Empire writing became as a matter of fact a requisite of stipulation, a change due to Greek influence. It was therefore sufficient if a written memorandum (*cautio*) was drawn up attesting that a promise had been made in the form of a stipulation.

proportionate share of the debt secured; the *lex Apuleia* gave an action against the co-sureties by one who had paid more than his share; the *lex Cicereia* required the creditor to inform each surety before he became bound as to the amount of the debt and the number of sureties.[14]

Fidejussio, as a form of suretyship came into use during the later years of the Republic and marks a step in advance. While usually made in the form of a verbal stipulation, it was wider in its operation than the older forms and might be accessory to obligations of every kind, whether contracted *re, verbis, litteris or consensu.*[15] A *fidejussor* bound his heirs, and, as the *lex Furia* did not apply to *fidejussores,* where there were several sureties each was liable for the whole debt, until a rescript of the Emperor Hadrian gave the *beneficium divisionis,* by which a surety sued for the whole debt could claim to have the debt divided proportionately among the solvent sureties.[16] The practice also grew up of inducing the creditor at the time of payment to cede to the paying surety his rights against the debtor, the co-sureties, and any securities he might hold. This practice developed into a rule of law, probably in the first century of the Empire,[17] the payment being treated not as a discharge but as a purchase of the debt. To this *beneficium cedendarum actionum* the surety was entitled before payment, but the *cessio* had to be secured before payment, otherwise the debt was extinguished and could no longer be assigned. Finally, Justinian established the *beneficium ordinis* or *discussionis* (sometimes *excussionis*) which entitled the surety to demand that the creditor should sue the principal debtor before resorting to him, unless the debtor was out of the jurisdiction; in which

[14] There is no certainty about the dates of these *leges.* They are earlier than Sulla. Buckland 258. The dates usually given are *lex Furia,* B. C. 95; *lex Apuleia,* B. C. 390, 230 or 102; *lex Cicereia,* B. C. 173. Hunter, 61.

[15] Just. Inst. III, 20; Gaius Inst. III, 119. The appropriate Latin formula was, *"Idem fide mea esse jubeo,"* but it probably was not insisted on exactly. Sandar's note to Just. Inst., Secs. III, 20, 7.

[16] Gaius, Inst. III, 121; Dig. 46, 1, 26-28.

[17] Moyle's Just. Inst. (5 Ed.) 426 n. Dig. 46, 1, 17, Dig. 46, 1, 36; Dig. 46, 3, 76. Buckland, 259. Independently of this right a *fidejussor* who paid had an *actio mandati* against the debtor.

case unless the surety produced him within a time fixed by the court, he must discharge the obligation.[18]

There were two other modes by which the relation of principal and surety might be produced. First, *Constitutum,* an informal agreement to discharge the debt of another on a fixed day made actionable by the praetor, but limited, before Justinian, to promises relating to *res fungibles.*[19] Second, *Mandatum qualificatum,* that is, where one person (*mandator*) requested another (*mandatarius*) to lend money to a third person, an obligation arose on the part of the first to indemnify the creditor against loss. In most respects a *mandator* stood almost exactly in the place of a *fidejussor* and the two are treated under the same headline in Digest and Code.[20] But there were peculiarities due to the very fact that it was a form of *mandatum* (the nearest approach that Roman law made to the idea of agency in contract) and that the contract which created the surety's liability was wholly distinct from that of the debtor.[21] Under both of these forms of suretyship the *beneficia* already mentioned were allowed.

By the *Senatus-Consultum Velleianum* which was passed about A. D. 46, women were forbidden from acting as sureties or giving their property as security for another.[22] There were however some exceptions to this law and the matter was further regulated by Justinian in a manner that need not be entered into here.

Rome, therefore, had faced the chief problems of suretyship, had stripped the subject of early formalism and has established the doctrines that delimit the topic in Continental Jurisprudence.[23] But immediate progress in this branch of the law,

[18] Nov. 4, 1, modified as to bankers by Nov. 136, 1.

[19] Dig. 13, 5. 1; Dig. 13, 5, 28; Cod. 4, 18, 1; Hunter (3 Ed.) 566.

[20] Dig. 46, 1; Cod. 8, 41.

[21] Sandar's Just. Inst. (9 Ed.) III, 26, 5.

[22] Dig. 16, 1. See also Cod. 4, 29, 22–25; Nov. 134, 8.

[23] 1 Pothier on Obligations (Evans) 294; Vinnius, lib. 3, tit. 21; *Heringius de Fidejussoribus;* Voet, lib. 46, tit. 1; Schuster's German Civil Law 317; German Civil Code, Sec. 965 et seq.; French Civil Code, Sec. 2011 et seq.; Las Siete Partidas, lib. V, tit. 12; Erskine's Principles of the Law of Scotland (21 Ed.) 437; Louisiana Code, Art. 3035 et seq.; Porto Rico Civil Code, Sec. 1723 (Rev. Stat. 4829).

as in others, was retarded by the fall of the Western Empire and the influx of new peoples of varied development but all relatively, less civilized than the conquered provinces. Thenceforth, it is needless to say, the growth of European law was partly through the natural development of native institutions to meet new conditions, and partly through the absorption of Roman law owing to its intrinsic merits and through the overpowering influence of Latin culture upon the mediaeval mind. During all this period suretyship played a most important part and no subject better illustrates the constant shifting of the juridical point of view to meet social and economic changes of which the lawyers and laymen of the time were scarcely conscious. Security, heavily exacted, was the one stabilizing element in a period of lawlessness, making business possible and strengthening the weak arm of justice. Whatever the name, ancient or modern, *fidejussio*,[24] *fiadura*,[25] *garendia*,[26] *plegerie*,[27] or *cautionment*,[28] it was an essential part of the mechanism of mediaeval procedure. Security was taken at every step. Indeed, long after they had ceased to be indispensable John Doe and Richard Roe continued to add their immortal names to an endless series of writs as pledges of prosecution. To a thriving orderly community protection so afforded becomes an irritating formality. But the Continental field is too large for this brief review of accessorial obligations which must presently turn to the common law of England. The variety of customs makes generalizing dangerous, but in the process of growth certain definite, successive stages may be noted. The hostage idea yields to that of the *fidejussor;*

[24] Bracton, II, 122; Cujas, Tom. 4, p. 959.

[25] *Las Siete Partidas,* lib. V, tit. 12.

[26] Du Cange.

[27] Brissaud 571. "In modern times we use the word *pledge* when a thing is given by way of security. But, throughout the middle ages such a thing is a gage, a *vadium*. On the other hand the word *pledge*, which answered for the Anglo-Saxon borh, was reserved for cases in which there was what we now call suretyship. The *plegius* was a surety. Thus, the common formula *pone per vadium et salvos plegios* would, according to the modern use of words, become; "exact a pledge and safe sureties." 2 Pollock & Maitland, 183 note.

[28] French. The person by whom the obligation is given is called caution. In Scotland the contract is called a cautionary obligation and the surety a cautioner. Bell's Dictionary.

physical restraint to pecuniary liability; but the surety is the sponsor for,[29] the representative of the creditor and stands between debtor and creditor.[30] Slowly this primary liability becomes secondary in law as in intention, although not without checks, for the skillful conveyancer will use the joint and several obligation to bind the parties *in solido*.[31] But in the end the undertaking is commonly accessorial, particularly in the large and increasingly important class of mercantile transactions based on mutual credit. Roman law offers to this end its nomenclature and rationale; the law merchant, the cosmopolitan, expansive element, capable of overwhelming local conservatism.

In Saxon and Norman England the surety (*borh, plegius, fidejussor*), is an almost indispensable factor in most legal transactions; men are warned not to buy without pledges or witnesses;[32] everyone must be prepared to furnish security.[33] The customs are sufficiently advanced to regard the surety as a debtor. If one accused runs away,then, says the law of King Ethelred, "let the borh pay to the accuser his ceapgild, and to the lord his wer, who is entitled to his wite."[34] There are grim reminders of the older practice;[35] the laws speak of one who has committed himself

[29] The sponsor in baptism still stands in the place of the child. 2 Phillimore, Ecclesiastical Law (2 Ed.) 488.

[30] In early days the transaction is visualized though the mysterious symbolism of the *festuce* or *vadium*, the wand passed from debtor to creditor and then from creditor to surety. Wigmore, The Pledge Idea, 10 Harv. L. Rev. 321; 2 Pollock & Maitland Hist. 184: Jenks, Law and Politics of the Middle Ages, 266.

[31] "Among the thousands of fair bonds discovered at Ypres there are but few in which debtors are bound only for their own part, and when this is the case the responsibility of each debtor is defined most scrupulously. As a general rule where there is more than one debtor in these bonds the debtors bind themselves *'chascun por le tout,'* and when there were several sureties in the same way each was surety for the whole debt." Mitchell, The Law Merchant, 120.

[32] Laws of King Ethelred, I, 3 (Thorpe 283; Leges Edward's Confessoris, 38 (Thorpe 461); Laws of William the Conqueror, 10 (Thorpe 492); Glanvill X, 3. From borh comes borrow.

[33] Laws of King Edgar, II, 6 (Thorpe 269); Laws of King Ethelred I, 1 (Thorpe 281); *Leges Edwardi Confessoris* 18 (Thorpe 449); Laws of William the Conqueror, 14 (Thorpe 493); *Leges Henrici Primi*, 8, 2 (Thorpe 515); 4 Blackstone 115, frankpledge, 2 Holdsworth's Hist. 92.

[34] Laws of King Ethelred I, 1 (Thorpe 283). See Liber Albus (R.S.) I, 115.

[35] Holme's Common Law 248 et seq.

into the power of another as surety;[36] the Mirror of Justice, if it may be trusted, says that King Knut used to judge mainpernors as though they were principals when the latter did not appear in court, but King Henry I limited this rule to mainpernors who consented to the flight.[37] In 1359 Justice Shard after stating that bail are the prisoner's keepers (*gardeyns*) adds that some say that they shall be hanged (*pend*).[38] Coke hastens to explain that this was spoken *in terrorem;*[39] but the old notion may be traced in the common form of bail bond in felony, binding the bail "body for body," an expression which the books state is not to be taken literally.[40] These, however, are but land-marks; suretyship was a contract when Glanvill wrote, the one important contract not to be classed as a real contract.[41]

Neither Glanvill nor Bracton in their references to suretyship state how the agreement was formed.[42] Their respective accounts of contract are colored by Roman phraseology and have had little influence. Disputes about debts were usually determined in the local courts. No doubt there was a traditional formula, a pledge of faith, a ceremony in the presence of witnesses which was sufficiently familiar to their contemporaries and satisfied the human craving for orderly transactions until the deed was adopted as the formal contract of the law. It is

[36] *Leges Henrici Primi* 89, 3 (Thorpe 598), Laws of King Ine, 62 (Thorpe 143).

[37] Mirror of Justices (S.S.) IV, 16, 2. The Mirror also states, V, 147, "It is an abuse to suppose that the same punishment should be awarded to mainpernors as to the principals who make default, for in some cases the former should only be amerced."

[38] Fitzherbert Abr., Mainprise, 12 (Hil. 33 Edw. III) Mirror of Justices (S.S.) II, 24. By the custom of London mainpernors committed to prison because their principals are not found are to be set at liberty when the principals are arrested. Liber Albus (Riley), 178.

[39] 4 Inst. 178.

[40] Dalton's Justice (1727) 633; Highmore, Bail, 199, 2 Hale P. C. 125; 2 Hawkins P. C., Chap. 15, Sec. 83; Y. B. 21. Hen. VII, 20, pl. 3. In Rex v. Dalton, 2 Stra. 911 (1731) in taking bail for manslaughter Lord Chief Justice Raymond said, "it was a mistake to imagine the bail were to be hanged if the principal ran away—but that the method is to amerce them."

[41] Street, Foundations of Legal Liability, II, 47.

[42] Glanvill, Bk. 10, Ch. v; Bracton, Bk. 3, Ch. 2, Sec. 2; Britton, Bk, 1, Ch. 29, Sec. 4.

clear that a verbal agreement was long sufficient.[43] Indeed, it was not till the reign of Edward III that it was settled finally that the surety's undertaking should be evidenced by a sealed instrument, except where local custom preserved the old law.[44] But long before its supremacy was established the deed was in common use as a safe conveyance. John of Oxford's form book contains an interesting precedent; the obligor, in respect to certain loans which took place in 1274 acknowledges that he is bound to W and that he has "found sureties A, B, C, who have constituted themselves principal debtors along with me for the said monies." [45] This form was subjected to an early test in *Buckland* v. *Leanore*.[46] The plaintiff had entered into an agreement with Peter the Mason that the latter should erect two mills for him within a certain time. The agreement recited that Roger Leanore and three others were added for greater security (*greignour surte*), each of whom made himself severally responsible for performance. Covenant was now brought against Leanore. Leanore's counsel raises the point that his client is not bound. "Cambridge. We ask now for judgment, seeing that you counted that Roger and the others were bound, in which you are not supported by your written agreement, for the writing

[43] 3 Holdsworth's Hist. 321. In somewhat earlier days men will be found offering God as their surety, Laws of King Aelfred, 33, Thorpe 83, 2 Pollock & Maitland 191; *Leges Wallicae*, Lib. II, Ch. 5, Secs. 4, 5 (Wotton 114). Less selfish than the Egyptian practice of pledging a parent's mummy. Herodotus II, 136.

According to the Rye custumal one having no gage or pledge if he be of the franchise, "shall put his faith and truth upon the mayor's mace; but if he be a foreign stranger, he shall put his faith and truth upon the bailiff's rod." Borough customs (S.S.) Vol. I, 97.

[44] Holmes', Common Law, 260-264. In 1314 the point was raised but not pressed, Y. B. 7 Edw. II, f. 242. In 1344 the question was again raised without decision. Y. B. 18 Edw. III, 13, pl. 7. In 1370 in debt on a promise to pay if another did not, the plaintiff took nothing because he did not have a specialty. Y. B. 44 Edw. III, 21, pl. 23. But by the custom of London debt would lie against pledges without specialty. Y. B. 43, Edw. III, 11. pl. 1; Bohun's *Privilegia Londoni* (1723) 77. See also Exeter Custumal, Cap. 30. Borough Customs, 101.

[45] A conveyancer in the Thirteenth Century, Maitland, 7 Law Quarterly Rev. 63.

[46] Eyre of Kent (S.S.) Vol. II, 9 (*circa* 1313-14). See in accord Fitzherbert Abr., Obligacion 16; Perkins Profitable Book 33. Fitzjohn v. Anon, Eyre of Kent (S.S.) Vol. II, 51, is an action of debt against pledges by deed. See also Y. B. 33 Edw. I (Rolls Ed.) 86.

says that 'for further security I add such and such ones', etc. Consequently it is Peter alone who is speaking, and not Roger; and we ask judgment. Spigurnel, J. If a man by a writing confesses himself indebted to us, and the writing goes on to say 'and for further security I procure such a one who binds himself,' and this latter affixes his seal to the writing, how can you argue that he does not say the same thing as the other man says? He affirms it by the fact of affixing his seal; and so you must answer to the deed."

But the conveyancers soon tighten the surety's chain by making him a principal party to the covenant, as may be seen in an action of covenant brought in 1365 against W on a lease to R by which R and W had bound themselves *"et quilibet eorum per se."* Candish argued that the action did not lie against the pledge without showing default by R. To which Belknap replied that by the deed W was a principal. Wichingham, J., declared that in debt against a pledge the default of the principal debtor must be shown, but here there were certain things to be done under the lease that had not been done, that time for performance had passed, and there was nothing further to demand. Whereupon Candish passed on to another point.[47] Once the binding force of the specialty is established, the future of formal contracts of suretyship is readily settled on a basis that affords small opportunity for the presentation of the surety's individual claims. The bond, or bill obligatory as it is sometimes called, becomes the standard form for such an agreement.[48] The substance of the transaction is that surety and debtor are bound as co-principals to equal performance of a joint or joint and several contract; their relations with the creditor are thereafter determined largely by the rigorous rules of the common law pertaining to joint or joint and several

[47] Y. B. 40 Edw. III, 5, pl. 11. See also Y. B. 39 Edw. III, 9, pl. 14.

[48] *"Ad quam quidem solutionem bene et fideliter faciendam, obligamus nos et quemlibet nostrum per se, pro toto et in solido, haeredes, executores, et administratores nostros per praesentes. In cuiue rei testimonium &c."* West's Symboloegraphy (1632) 101. See also *Enchiridion Clericalis,* 71; The Compleat Clark (1664) 303; Y. B. 8 Hen. VI, 35.

obligations, which must still be taken into account in so far as they have not been altered by modern legislation.[49]

Sureties who have discharged the debt, says Glanvill, may have recourse to the principal by action of debt,[50] and this is borne out by Bracton's Note Book where it also appears, in a case reported from Essex in 1223, that the defendant may wage his law.[51] If the surety is wise he obtains a counter-bond of indemnity, as in *Wroteham* v. *Canewold*,[52] a practice still followed by prudent persons. A pledge, however, observes Glanvill, who has been amerced cannot recover from the principal.[53] Indeed it required a clause in Magna Charta[54] to give sureties of the king's debtors the benefit of process to compel reimbursement, a favor not extended to bail in criminal proceedings, since this, in the words of Mr. Justice Bradley, "would relieve them from the motives to exert themselves in securing the appearance of the principal." [55]

[49] See further, as to some incidents of joinder 1 Parsons on Contracts, Ch. 2, Sec. 2. Hening's Cases on Suretyship, Part I, Ch. 1, Sec. 3; Part III, Ch. 1; Spencer on Suretyship, Sec. 199.

[50] Glanvill, Bk. 10, Ch. 5.

[51] Bracton's Note Book, Vol. III, p. 499, pl. 1641. Hugo de Lectona sues Robert de Suttona in debt because Radulfus Bacun loaned money to Robert upon Hugo's pledge and Hugo was distrained to render the same to Radulfus for Robert. Robert comes and defends, denying that Hugo was his pledge or paid anything for him. Therefore it is considered that he defend himself twelve handed and come such a day with his law. See also case pl. 1969 in same volume.

[52] Y. B. 4 Edw. II (S.S.) 147 (1311).

[53] Glanvill, *supra*. Mirror, Bk. 2, Sec. 24 (S.S.), p. 63. But compare select cases on the Law Merchant, Vol. 1, pp. 6, 48.

[54] 9 Hen. III, Chap. 8: "Neither we nor our bailiffs will seize the lands or rents of a debtor for any debt so long as his goods are sufficient to pay the debt nor shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt.. And if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of that which they before paid for him, except that the debtor can show himself to be acquitted against the said sureties." 2 Co. Inst. 20; King v. Bennett, Wightwick 1 (1810); Manning's Exchequer Practice, Chap. IX.

[55] United States v. Ryder, 110 U. S. 729 (1184). An agreement to indemnify bail is contrary to public policy. Consolidated E. & F. Co. v. Musgrave (1900). 1 Ch. 37; Mayne y. Fidelity Co., 8 Pa. D. R. 711 (1899). *Contra* Maloney v. Nelson, 158 N. Y. 351 (1899). In England the parties to such an agreement have been held guilty of conspiracy. King v. Porter (1910) 1 K. B. 369.

There was in the register an ancient writ, expressly intended for the relief of sureties; the writ *de plegiis acquietandis,* by which, as Fitzherbert describes it, the surety who had paid could summon the debtor to acquit him of the sum whereof he had put himself in pledge.[56] If this action had developed further, at least one phase of the history of suretyship would have been different. But the spirit of the age was unfavorable. It was held that when two were jointly and severally bound for the debt of one and the surety was sued and paid the debt, he could not have *de plegiis acquietandis.* For the writ did not lie "without express naming of surety or *fidejussor* in the writing. And here the two obligors are proper debtors by their bonds and not surety the one for the other." [57] Little more is heard of *de plegiis acquietandis* with its latent capacity for developing the surety's equities in a common-law form. Legal ingenuity was directed toward safeguarding the interests of the investor and was not concerned with the legitimate claims of the pledge. As Sir George Cary puts it in a nutshell: "This grew troublesome to the creditor and therefore it fell in use that the pledge should be bound as principal, and so by common law he is chargeable, notwithstanding the sufficiency of the principal."[58] Nor was the surety conceived of as possessing any rights as against his co-sureties. In *Wormleighton and Hunter's Case*[59] the Court of Common Pleas issued a prohibition, forbidding the Court of Requests from proceeding with a bill for contribution by one surety against another, "because by entering into the obligation it became the debt of each of them jointly and

[56] Fitzherbert *Natura Brevium,* 137; *Registrum Brevium,* 158; 2 Co. Inst. 20; Viner's Abr., Pledges (1). See Y. B. 43 Edw. III, 11; Y. B. 48 Edw. III, 29; Coxe v. Thomas, Dyer 257 (1566). Fitzherbert thinks the writ rests on Magna Charta, Ch. 8, *supra,* but this seems improbable as the writ is found in the oldest registers. Maitland, Register of Writs, 2 Anglo Amer. Leg. Hist. 566.

[57] Dyer 370 (1580). *"Ideo &c comment que fuit trove p. verdict qd. querens posuit in pleg. pro def. versus le dette, uncore il ne poit aver judgment."* In time the word surety annexed to the name is merely a statement of the relation of the parties bound *inter se.* Riley v. Jarvis, 46 W. Va. 43 (1896); Attorney Gen. v. Atkinson, 1 Y. & J. 207 (1827).

[58] Anonymous, Cary 12 (1557-1602). In Scott v. Stephenson, 1 Lev. 71 (1662), the writ is mentioned as "perhaps" available. Compare Attorney Gen. v. Resby, Hard. 377 (1664).

[59] Goodbolt 243 (1613).

severally, and the obligee had his election to sue which of them he pleased and take forth execution against him: and the court said, that if one surety should have contribution against the other, it would be a great cause of suits,"—a time-honored judicial phrase for disposing of a troublesome point, for London seems to have had no difficulty in enforcing contribution in the Hustings Court under the ancient custumal of the municipality.[60]

If the terms of the surety's obligation were severe, the law was impartial, at least to the extent of permitting him to stand upon the very letter of his contract. The rule in *Pigot's Case*[61] that a material alteration avoided a deed was extended and applied to the case of sureties upon simple contracts not under seal,[62] establishing the principle that any material variation of the terms of a contract of suretyship without the consent of the surety discharged the latter from liability. Mr. Justice Washington has stated the doctrine succinctly: The surety is not bound by the contract as it is no longer the same but a different contract; in its altered form he is no party to it; it cannot be split into parts so as to be his contract to a certain extent and not for the residue. Neither is it of any consequence that the alteration is trivial, nor even that it is for the advantage of the surety. *Non haec in foedera veni,* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently, and by whatever kind intentions to all parties he may have been actuated.[63] The rule that a binding

[60] Liber Albus, Bk. III, pt. 1 (Riley) 183; Bohun's *Privilegi a Londoni* (1723) 77; Offley and Johnson's Case, 2 Leon. 166 (1584). So where a surety pays, and has no counter-bond, by the custom he may sue the principal, Layer v. Nelson, 1 Vern. 456 (1687).

[61] 11 Co. 26 b (1614). See also Mathewson's Case, 5 Co. 22 b (1596); Bayly v. Carford, March 125 (1641); Seaton v. Henson, 2 Shower 28 (1678); Viner's Abr., Faits (U); Crediton v. Exeter (1905) 2 Ch. 455; Hilliboe v. Warner, 17 N. Dak. 594 (1908).

[62] Master v. Miller, 4 T. R. 320 (1791); Davidson v. Cooper, 11 M. & W. 778 (1843), Aff. 13 M. & W. 343; Wood v. Steele, 6 Wall. 80 (1867); s. c. Ames' Cases on Suretyship 244 and notes.

[63] Miller v. Stewart, 4 Washington C. Ct. 26 (1820), affirmed 9 Wheat. 680 (1824). *Accord,* Walsh v. Bailie, 10 Johns 180 (1813); Witcher v. Hall, 5 B. & C. 269 (1826); Mackay v. Dodge, 5 Ala. 388 (1843); Bethune v. Dozier, 5 Ga. 235 (1851); Gen. Steam Nav. Co. v. Rolt, 6 C. B. N. S. 550 (1859); Stewart v. Brown, 9 Macph. (Ct. of Sess.) 963 (1871); Nesbit

agreement between creditor and primary debtor to give time to the latter, made without the surety's consent, will discharge the surety is a well-known application of the general principle.[64]

While suretyship by specialty was being moulded into the form it was to preserve in all material respects until the present time, a new and informal type of suretyship was developing through the action of assumpsit. As the gist of that action was deceit in breaking a promise on the strength of which the plaintiff had conferred benefit or suffered detriment, it followed that if A sold goods to B on the faith of C's collateral promise to pay if B did not, A might have an action on the case upon C's promise. So it was decided in two well-known cases in the reign of Henry VIII,[65] introducing, as Professor Ames justly remarks, "the whole law of parol guaranty."[66] The development of this doctrine and the effect upon it of the fourth section of the Statute of Frauds has been learnedly discussed elsewhere and need not be gone into here.[67] Aside from the confusion

v. Turner, 155 Pa. 429 (1893); Page v. Krekey, 137 N. Y. 307 (1893); Ziegler v. Hallahan, 131 Fed. 205 (1904); Cosford Union v. P. L., *etc.*, Assn., 103 L. T. 463 (1910).

[64] Nisbet v. Smith, 2 Br. Ch. 579 (1785); Rees v. Berrington, 2 Ves. p. 540 (1795); s. c. Hening's Cases on Suretyship 426 and notes. Halsbury's Laws of Eng., Guarantee, Sec. 1036; Metzger v. Nova R. Co., 214 N. Y. 26 (1915).

[65] Y. B. 12 Hen. VIII, 11, pl. 3; Jordan's Case, Y. B. 27 Hen. VIII, 24, pl. 3; Doctor and Student, II, 24. In the published records of the Borough of Nottingham, Vol. II, p. 173, there is a case of the year 1440, in which Langton complains of Etwall of a plea of deceit in that Etwall undertook for Richard Raven that the latter should work for Langton until he had served to the amount of seven marks paid to Richard by Langton upon the surety of Etwall, which undertaking Richard had broken to the grievous damage and deceit of Langton. Etwall pleads not guilty and they are at issue. Contrast in debt Y. B. 371 Hen. VI, 8, pl. 18.

[66] Ames' History of Assumpsit, 3 Select Essays in Anglo American Legal History 273, reprinted from 2 Harv. L. Rev. 1.

[67] Parol Contracts prior to Assumpsit; Ames, 8 Harv. L. Rev. 252; A New and Old Reading on the Fourth Section of the Statute of Frauds, Hening, 57 U. Pa. L. Rev. 611; Ames' Cases on Suretyship 1; Hening's Cases on Suretyship 112; Brandt on Suretyship, Chap. II; Spencer on Suretyship, Chap. VI; Street's Foundations of Legal Liability, Vol. II, p. 184; Birkmyr v. Darnell, 1 Salk. 27 (1704); Hunt v. Bate, Dyer 272a (1567). In Germany a contract of suretyship must be in writing, Civil Code, Sec. 766. So also in France, if the amount involved exceeds 150 francs, Code Civil, Sec. 1341. In Spain a mercantile guarantee must be in writing, Code of Commerce, Lib. II, Tit. 9. By Dutch law a guarantee may be entered into by a judicial, notarial or private instrument. Van der Linden's Institutes (Morice's Ed. 1914) 139.

that arose from a general misunderstanding of the scope of the action of debt, the problem is fundamentally difficult, depending on close questions of fact and a nice discrimination between an original promise from which another than the promisor may derive a benefit and a promise subsidiary to that of another.

It would be interesting to know what part the common-law courts really played in the evolution of informal suretyships. One may suspect that behind the legal phrasemaking, the struggle for a formula, there was the steady pressure of mercantile expediency. In the Tudor period commerce was expanding and the nation was learning to think commercially, it was but a matter of time until the jurisprudence of the Piepowder Court would be transferred to the King's Bench. No part of the history of English law is more obscure than that connected with the Law Merchant[68] but it is only reasonable to suppose that a constantly increasing number of tradesmen were learning the value of credit and accustoming themselves to the use of the various forms of commercial paper introduced by the merchants who frequented the cosmopolitan markets and fairs. Gerard Malynes, Merchant, says: "If any merchant do passe his word for another, it maketh him, as *fidejussor,* to perform the same, and the act done before is a sufficient good consideration, and they all agree that *bona fides inter mercatores est servanda,* faith or trust is to be kept between merchants, and that also must be done without quillets or titles of the law, to avoid interruption of traffique."[69] The bond may remain the conveyancer's *vade mecum* but a more flexible form of accessorial contract was necessary—indeed inevitable. It is significant that in Modern English law "guarantee" has practically supplanted "suretyship" as the generic term for contracts of an accessory nature.[70] It

[68] Blackburn on Sales, 207.

[69] *Lex Mercatoria,* Chap. X, Of Suretyship and Merchant's Promises. Malynes tells how a friend of his at the fair of Frankfurt had recommended another merchant and had been held liable under the Civil Law as a *mandator.* I Pothier on Obligations (Evans' Ed.) 294. By Roman Dutch Law, "the assurance that a person is an honest and solvent man who will pay, does not in itself amount to a guarantee." Van Der Linden's Institutes (Morice) 139. Bourke v. Buxton, 3 Transvaal 39 (1889). The German Civil Code,

is true American cases frequently draw a distinction between surety and guarantor, the responsibility of the former being primary and direct; that of the latter secondary and collateral, but the words are commonly used as if synonymous and the courts are far from agreement as to the precise criteria for distinguishing the two classes of undertakings, or the consequences of the distinction when made. Where the guaranty is of strict payment or performance it is essentially a suretyship.[71] The distinction does not appear to have been taken elsewhere[72] and even in America there is no magic in the use of one word or the other, the liability depending on the terms of the contract.[73] For most purposes it is sufficient to say, in the words of the Indian Contract Act,[74] a contract of guarantee is a contract to perform the promise or discharge the liability of a third person.

Under so broad a definition, suretyship or guarantee will necessarily include a variety of transactions often with distinctive names. Lord Selborne distinguishes between three kinds of cases: "(1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for

Sec. 778, provides that one who commissions another to give credit to a third party in his own name is liable for the obligation arising from the credit given. Compare as to tortions liability Pasley v. Freeman, 3 T. R. 51 (1789); Lyde v. Barnard, 1 M. & W. 101 (1863); Parsons v. Barclay Co., 103 L. T. 196 (1910).

[70] Fell on Mercantile Guaranties; De Colyar on Guarantees; 15 Halsbury's Laws of England 439; 1 Smith's Mercantile Law (10th Ed.) 567.

[71] Brand on Suretyship, Sec. 2; Spencer on Suretyship, Sec. 3; Hening's Cases, Chap. IV, Sec. 2.

[72] Suretyship from Standpoint of Comparative Jurisprudence, H. A. De Colyar, 6 Journal of Society of Comparative Legislation 46.

[73] Shore v. Lawrence, 68 W. Va. 220 (1910); Hartley S. Co. v. Berg, 48 Pa. Super. Ct. 419 (1911); J. W. Walkins M. Co. v. Loveaday, 186 Ala. 414 (1914).

[74] 1872, Act IX, Chap. 8, Sec. 126.

one and the same debt, the debt being as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid."[75] It must always be remembered that there is a marked difference between the juridic relation of the parties to a formal contract of suretyship or a true mercantile guarantee and that of the parties to other supposedly analogous contracts, such as endorsers of commercial paper, indemnitors, and mortgagors who have sold the equity of redemption.[76] The existence of a primary and secondary liability does not of itself create a suretyship, although it frequently confers a portion at least of the equities which the surety, as will be shown, has definitely acquired. It was for the purpose of obtaining the advantages of such equities that the similarity of such obligations to true suretyship has been pressed on the courts and partially conceded.

The recognition of the surety's equities is but an incident in the story of law reform through the chancery, the earlier chapters of which, owing to the absence of reports, are necessarily obscure.[77] There was pressure for relief before the extent of the chancellor's power was defined. By the time the common-law courts and chancery had established a *modus vivendi* and equity jurisprudence had been systematized these equities were recognized, seemingly without question. To this result the aretology of the clerical chancellors and the rationalism of their lay successors contributed, each in its own way. But the para-

[75] Duncan, Fox & Co., v. North & S. W. Bank, (1880), 6 App. Cas. 1.

[76] Endorsers: Stephens v. Bank, 88 Pa. 157 (1878); Tanner v. Gude, 100 Ga. 457 (1897). Indemnitors: Jones v. Bacon, 145 N. Y. 446 (1895); Harburg I. R. Co. v. Martin (1902), 1 K. B. 778; Tritten's Estate, 238 Pa. 555 (1913); Cotting v. Otis E. Co., 214 Mass. 294 (1913); March v. Fidelity Co., 79 Md. 309 (1894); Champion Co. v. Amer. B. Co., 115 Ky. 863 (1903); Lewis v. U. S. Fidelity & G. Co., 144 Ky. 425 (1911). Mortgagors: Keller v. Ashford, 133 U. S. 610 (1889); Calvo v. Davies, 73 N. Y. 211 (1878); Inglehart v. Crane, 42 Ill. 261 (1866). See also Suretyship at Law Merchant, by Anan Raymond, 30 Harv. L. Rev. 141.

[77] Barbour, Contract in Equity IV, Oxford Studies in Social and Legal Hisory 66; 1 Holdsworth Hist. 242; Kerley's History of Equity, 146; Spence's Eq. 638.

mount factor was the economic and social progress of the country. The day was passing when questions of ultimate right could be disposed of on formal and external grounds alone. The extension of commerce had broadened the science of accounting and developed stricter and more searching theories of accountability.[78] The level of culture attained was out of harmony with the tenacious pedantry which left to chance, that is to the caprice of the creditor, the final and absolute decision as to which of several persons bound for a sum should bear the whole responsibility alone, in defiance of sound principles of morals and jurisprudence which would place the burden on the primary debtor or distribute it among co-obligors equally liable.

The most obvious equity of the surety is to be indemnified or reimbursed for the loss sustained through his principal's default. It has been shown quite conclusively that the contract of indemnity had obtained recognition in chancery in the fifteenth century,[79] and the claim to relief was exceptionally strong where the surety had become bound on the faith of the debtor's promise. The matter could not be put more plainly than in one of these ancient bills where the chancellor is asked to consider, "how that reason and good conscience wold that, sith your seid besecher was for and by the said Thomas Oldebury (the defendant and promisor) put in charge that the same Thomas should him discharge."[80] In *Ford* v. *Stobridge* the plaintiff was bound as surety for the defendant and the debt was recovered from him, "and he having no counter-bond brought his bill to recover the debt and damages against the defendant which was decreed."[81] This right of the surety to be fully indemnified against the loss arising out of his guarantee is admitted universally by European Codes[82] and, in the eighteenth century,

[78] Contribution or subrogation would have meant little in a community that reckoned a man of age who could measure an ell and count up to twelve. Y. B. 12-13 Edw. III (Rolls Series) 236.

[79] Barbour, Contract in Equity, 135. See particularly the case transcribed page 222. Also Y. B. 8 Edw. IV, 4, pl. 11.

[80] Barbour, *supra.*

[81] Nelson 24 (1632); Viner's Abr. Surety (D); Tinsley v. Oliver, 5 Munf. 419 (1817).

[82] French Civil Code, Sec. 2028; German Civil Code, Sec. 775; Spanish

was conceded finally by the common-law courts of England when the surety was permitted to bring an action of assumpsit against the principal as for money paid to his use.[83] The right of the surety is not confined to cases where the creditor has been paid. As soon as a definite sum has become payable the surety may apply to a court of equity for a decree directing the principal to pay the creditor, so that his own liability may be brought to an end. In other words equity will compel the debtor to exonerate his surety.[84] Even on the other side of Westminster Hall it was admitted that "terror of suit, so that he dare not go about his business is a damnification, although he be not arrested or forced by process."[85] But a decree will not be made in respect to future contingent claims that have not matured.[86]

Closely related to the foregoing equities is that of subrogation[87] or substitution. The surety as soon as he has paid the creditor has a right to the benefit of all the securities which the creditor has received from the principal whether known to him or not at the time he became surety.[88] This right is the equiva-

Civil Code, Sec. 1838; Van der Linden's Inst. (Morice) 141; Erskines Principle of Laws of Scotland (21st Ed.) 439; Burge on Suretyship, 357; 1 Pothier, Obligations (Evans' Ed.) 277.

[83] Morrice v. Redwyn, 2 Barnard 26 (1731); Woffington v. Sparks, 2 Ves. Sr. 569 (1754); Decker v. Pope, 1 Selwyn N. P. (13th Ed.) 91 (1757); Taylor v. Mills, Cowp. 525 (1777); Toussaint v. Martinnant, 2 T. R. 100 (1787), at p. 105; Barclay v. Gooch, 2 Esp. 571 (1797); Pownal v. Ferrand, 6 B. & C. 439 (1827).

[84] Barbour, Contract in Equity, *supra;* Gighs v. Welby, 1 Calendars in Chancery CXX, s. c. Ames' Cases on Suretyship 583; Saunders v. Churchill, Toth. 181 (1613); Ranelaugh v. Hayes, 1 Vern. 189 (1683); Nisbet v. Smith, 2 Br. C. C. 578 (1785); Autrobus v. Davidson, 3 Meriv. 569 (1817); Ardesco Oil Co. v. Mining Co., 66 Pa. 375 (1870); Ascherson v. Tredegar D. & W. Co. (1909), 2 Ch. 401; Southwestern S. I. Co. v. Wells, 217 Fed. 294 (1914).

[85] Broughton's Case, 5 Co. 24a (1600). Suit on a counter-bond.

[86] Hughes-Hallet v. Indian M. G. M. Co., (1882), 22 Ch. D. 561; Cotting v. Otis Elevator Co., 214 Mass. 294 (1913).

[87] An English and French term for substitution. Kelham, *subroguer, surroguer,* surrogate. Merlin's Repertoire, Vol. 16, p. 451. Subrogation; 1 Pothier on Obligations (Evans' Ed.) 276; French Civil Code, Secs. 1249-1252.

[88] Morgan v. Seymour, 1 Ch. R. 120 (1637); Doughty's Case, Wightw. 2 (1702); Parsons v. Briddock, 2 Vern. 608 (1708), s. c. 1 Eq. Cas. Abr. 93; Webber's Case, Wightw. 2 (1718); Exp. Crisp, 1 Atk. 133 (1744); Walker v. Preswick, 2 Ves. Sr. 622 (1755); Robinson v. Wilson, 3 Madd. 434 (1814);

lent of the *beneficium cedendarum actionum,* of the Roman law, which has its counterpart in the modern civil codes,[89] and exists, as stated by Lord Eldon, "not by force of the contract; but that equity, upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety."[90] Hence a creditor who surrenders a security thereby reduces his claim *pro tanto* against the surety.[91] In England, after some hesitation, it was settled by Lord Eldon that the principle did not extend to such securities as were *ipso facto,* extinguished in the payment.[92] The opposite view, which has prevailed generally in the United States, is more in accord with the civil law, and the Mercantile Law Amendment Act of 1856 has put an end to Lord Eldon's doctrine in its home jurisdiction.[93] The same principle is applied against co-sureties to the extent of their liability to contribute to the payment of the debt. In *Maure* v. *Harrison,* in 1692, as reported, it is said that a creditor shall have the benefit of collateral security given by the principal to the surety,[94] and this rule is followed in the United States on the theory that securities thus pledged are held in trust for the ultimate payment of the debt as well as the protection of the surety.[95] But this doctrine has not met with approval in the modern English decisions, which limit the

Mayhew v. Crickett, 2 Swanst. 185 (1818); Hayes v. Ward, 4 Johns. Ch. 123 (1819); Hodgson v. Shaw, 3 M. & K. 183 (1834).

[89] French Civil Code, Sec. 2029; German Civil Code, Sec. 774; Erskine's Principles of Law of Scotland (21st Ed.) 439; Van der Linden's Institutes (Morice) 140.

[90] Aldrich v. Cooper, 8 Ves. 382 (1802); Duncan F. & Co. v. Bank (1880), 6 App. Cas. 1.

[91] Pearl v. Deacon, 3 Jurist N. S. 879 (1857), s. c. Ames' Cases 192, and notes; Holland v. Johnson, 51 Ind. 346 (1875), s. c. Hening's Cases 471, and notes.

[92] Copis v. Middleton, T. & R. 224 (1823).

[93] Lidderdale v. Robinson, 12 Wheat. 594 (1827). Croft v. Moore, 9 Watts 451 (1840); Lumpkin v. Mills, 4 Ga. 343 (1848); Townsend v. Whitney, 75 N. Y. 425 (1878); Note 68 L. R. A. 513, 19 & 20 Vict. 297, Sec. 5; *In re* M'Myn, (1886), 33 Ch. D. 575.

[94] 1 Eq. Cas. Abr. 93, pl. 5; Wright v. Morley, 11 Ves. 12 (1804), *semble.*

[95] Moses v. Murgatoyd, 1 Johns. Ch. 119 (1814); Chambers v. Prewitt, 172 Ill. 615 (1898); Keller v. Ashford, 133 U. S. 610 (1889). But the right does not extend to collateral held by a surety from a stranger or a co-surety, unless given in trust for the payment of the debt. Taylor v. Farmers' Bank, 87 Ky. 318 (1888); Hampton v. Phipps, 108 U. S. 260 (1882).

creditor's right to cases where a direct interest can be shown or where both principal and surety are bankrupt.[96]

The surety who has paid more than his share of the common liability is entitled to contribution from his co-sureties, in regard to the excess, in proportion to the amounts in which they are respectively liable, the equity depending not on contract, but upon equality of burden.[97] The principle is accepted in modern Continental jurisprudence[98] and was applied even at common law in certain instances of joint liability, although not in the case of co-sureties.[99] It was said by Sir Lloyd Kenyon in *Lawson* v. *Wright*[100] that it had been established ever since the origin of courts of equity that one surety had a right to call on another for contribution, but there seem to be no reported instances of this prior to the seventeenth century. Several cases appear in the time of Charles I, and from that time the principle may be regarded as settled.[101] Finally, a surety who had paid more than his share was permitted to sue his co-surety in assumpsit for money paid to his use.[102] At law the co-surety

[96] Rowlatt's Principal and Surety, 192; Exp. Waring, 2 G. & J. 404 (1815), s. c. 19 Ves. 345; *In re* Walker (1892), 1 Ch. D. 621. See also Reynolds v. Fetherstonhaugh, (1895), 1 Irish 182; Royal Bank of Scotland v. Commercial Bank, (1882), 7 App. Cas. 366, and article by Mr. William Williams, 1 Harvard L. Rev. 326.

[97] Dering v. Winchelsea, 2 B. & P. 270 (1781); Davis v. Humphreys, 6 M. & W. 153 (1840); Gross v. Davis, 87 Tenn. 226 (1889); Fidelity Co. v. Phillips, 235 Pa. 469 (1912).

[98] Pothier on Obligations (Evans' Ed.) 291; French Civil Code, Sec. 2033; German Civil Code, Secs. 426, 774; Kroon v. Enschede (1909), Transvaal Sup. Ct. 374.

[99] Fitzherbert Nat. Brev. 161; Harbert's Case, 3 Co. 11b. (1584); Viner's Abr. Contribution; Bacon's Abr. Chancery (Average). The custom of London allowed contribution between co-sureties. See note 60, *supra*.

[100] 1 Cox Ch. 275 (1786).

[101] Peter v. Rich, 1 Chan. Rep. 34 (1629-30); Fleetwood v. Charnock, Nelson 10 (1629-30); s. c. Toth, 41; Morgan v. Seymour, 1 Chan. Rep. 120 (1637-38); Swain v. Wall, 1 Chan. Rep. 149 (1642); Hole v. Harrison, Finch 15 (1673); Harrison v. Lane, 5 Leigh 414 (1834). The plaintiff must have paid more than his due proportion of the whole debt. Stirling v. Burdett, (1911), 2 Ch. D. 418. As to exoneration, see Wolmerhausen v. Gullick (1893), 2 Ch. D. 514, and compare Zachry v. Peterson, 171 S. W. 494 (Tex. 1914).

[102] Turner v. Davies, 2 Esp. 479 (1796), *semble;* Cowell v. Edwards, 2 B. & P. 268 (1800); Brown v. Lee, 6 B. & C. 697 (1827); Judah v. Milure, 5 Blackf. (Ind. 1839); Kemp v. Finden, 12 M. & W. 421 (1844); Sloo v. Pool, 15 Ill. 47 (1853).

was liable only for his *pro rata* proportion taking into account the whole number of sureties, whereas in equity the debt was divided among the solvent sureties.[103] But in England, under the Judicature Act of 1873, the distinction is no longer of practical importance, while in the United States there is a tendency to apply the equitable rule in actions at law.[104] However that may be, the jurisdiction by the Court of Chancery remains undisturbed. Indeed the remedy by bill in equity is far more convenient where there are complicated accounts and a large number of persons involved. Under such circumstances the proper course is to sue principal and co-sureties together in chancery and have the rights and liabilities of all worked out in one inquiry.[105]

Two other privileges, as stated above, were conferred upon the surety by the Roman law. First, the benefit of division, which arose where there were several sureties for the same debt and one was sued for the whole. Under such circumstances, on demand of the surety sued, the creditor was bound to divide and apportion his claim among the solvent sureties. The benefit is preserved under modern civil codes but it may be, and in practice frequently is, renounced.[106] Indeed, such a renunciation may be implied from the nature of the undertaking according to the modern view.[107] This doctrine has not been received in England or America. Opposed to the common-law theory of joint and several liability in contract; treated on the con-

[103] 1 Story's Eq., Sec. 496; De Colyar on Guarantees (2d Ed.) 307.

[104] Lowe v. Dixon, (1885), 16 Q. B. D. 455; Van Petter v. Richardson, 68 Mo. 379 (1878); Liddell v. Wiswell, 59 Vt. 365 (1887); Michael v. Albright, 126 Ind. 172 (1890); Smith v. Mason, 44 Neb. 610 (1895).

[105] Hitchman v. Stewart, 3 Drew. 271 (1855); Dysart v. Crow, 170 Mo. 275 (1902); Estate of Koch, 148 Wis. 548 (1912).

[106] French Civil Code, Sec. 2026; Belgian Civil Code, Sec. 2026; Louisiana Civil Code, Sec. 3049; Spanish Civil Code, Sec. 1837; Italian Civil Code, Sec. 1912; Norway, Commercial Laws of the World, Vol. 29, p. 37. Compare Argentine Commercial Code, Sec. 480, no benefit of division for guarantors in commercial matters.

[107] In Bruce v. Lambour, 123 La. 969 (1909), the sureties were jointly and severally bound and the benefit of division was refused under Sec. 2094 of the Code. In Van der Vyver v. DeWayer, 4 Searle (Cape of Good Hope) 27 (1861), it was held that sureties binding themselves as co-principals renounced the *beneficium divisionis* as well as the *beneficium ordinis*. In Erskine's Principles of the Law of Scotland (21st Ed.) 439, it is said: "By

tinent as an artificial survival of the early reception of Roman law; dilatory in its operation, there was no particular advantage to be derived from its introduction into a system that recognized the right of contribution.

A second privilege is the benefit of discussion, recognized in most countries that follow the rules of the civil law, by which the creditor, on demand of the surety and at his expense, is obliged first to proceed to execution against the property of the principal debtor.[108] Upon this benefit there are various restrictions. It does not apply to judicial sureties.[109] It may be renounced and a renunciation is implied when the surety binds himself as a co-debtor.[110] It must be claimed when the surety is first sued and the property available for seizure within the jurisdiction must be indicated.[111] In Scotland the Mercantile Law Amendment Act of 1856 has abolished the benefit of discussion in all cases where it is not expressly provided for.[112]

This privilege also has never been formally recognized by English or American law. To be sure, a contract may stipulate that the principal shall be proceeded against before application is made to the surety.[113] Such is the rationale of that line of

our law all the co-cautioners are usually bound in the same writing; so that there is no place for this benefit." Compare 1 Bell's Commentaries 345. See also 1 Pothier on Obligations (Evans' Ed.) 269; 1 Domat's Civil Law (Strahan, 2nd Ed.) 378.

[108] French Civil Code, Secs. 2021-2024; Louisiana Civil Code, Sec. 3046; German Civil Code, Secs. 771-773; Spanish Civil Code, Secs. 1831-1836; Italian Civil Code, Sec. 1907. Also called *beneficium excussionis* and *beneficium ordinis, supra.*

[109] 1 Pothier on Obligations (Evans' Ed.) 263; French Civil Code, Sec. 2042.

[110] Domat's Civil Law (Strahan, 2nd Ed.) 378; German Civil Code, Sec. 773, (1); French Civil Code, Sec. 2021. In Van der Linden's Institutes (Morice), note, p. 142, it is said that "in modern guarantees this is almost always renounced by saying that the surety binds himself as surety and co-principal debtor." See also Farthing v. Pieters (1912), South Africa, Cape of Good Hope, 215.

[111] French Civil Code, Sec. 2023; Louisiana Civil Code, Sec. 3047; Dwight v. Lenton, 3 Rob. 57 (1842); Hill v. Miller, 7 La. Ann. 623 (1852); Mathews v. Kemp, 27 La. Ann. 203 (1875); Schmidt v. New Orleans, 33 La. Ann. 17 (1881); Ridley v. Anderson (1911), South Africa, Eastern Dist. 13.

[112] 19-20 Vict. C. 60, 68; Erskine's Principles (21st Ed.) 438; Johannesburg v. Stewart, (1909), S. C. H. L. 53.

[113] Holl v. Hadley, 2 Ad. & El. 758 (1835).

American decisions which holds that a guarantee of collectibility implies an effort to collect.[114] Where, however, the undertaking of the surety is absolute, then as soon as the principal is in default the creditor has his remedy against both promisors, or either if the obligation is joint and several; it is unnecessary before proceeding against the surety to sue the principal although solvent;[115] it is unnecessary to resort to the securities received from the principal for the guaranteed debt.[116]

The benefit of discussion is, in fact, an ineffective remedy just described by Chancellor Kent as a dilatory exception useful, indeed, to delay the creditor but incapable of affording affirmative relief to the surety, since the creditor cannot be coerced into proceeding against the debtor. "The law," says Pothier, "having fixed the time in which a creditor may exercise his actions, the surety cannot impose a shorter term upon him than that which the law allows." [117] The equity of exoneration offers adequate means to the surety for extricating himself from his difficulties; under exceptional circumstances chancery may even compel the creditor to resort to the collateral.[118] But, ordinarily, the surety holds the key to his own prison. He can live up to his bargain, pay and obtain subrogation.[119] The effect of the early New York case of *Pain* v. *Packard* [120] is to authorize

[114] Foster v. Barney, 3 Vt. 60 (1830); White v. Case, 13 Wend. 543 (1835); M'Doal v. Yeomans, 8 Watts 361 (1839); Sanford v. Allen, 55 Mass. 473 (1848); Craig v. Parkis, 40 N. Y. 181 (1869); Dutton v. Pyle, 195 Pa. 8 (1900).

[115] Attorney General v. Resby, Hard. 377 (1664); Cutter v. Southern, 1 Wm. Saund. 115 (1667); Ker v. Mitchell, 2 Chitty 487 (1786); Rede v. Farr, 6 M. & S. 121 (1817); Attorney General v. Atkinson, 1 Y. & J. 207 (1827); *In re* Lockey, 1 Phillips 509 (1844); Queen v. Fay, (1878), 4 L. R. Irish 606; Bellows v. Lovell, 22 Mass. 307 (1827); Holcombe v. Fetter, 70 N. J. Eq. 300 (1905).

[116] Y. B. 16 Edw. IV, 9; Day v. Elmore, 4 Wis. 190 (1855); Jones v. Tincher, 15 Ind. 308 (1860); Nat. Bk. of Newburg v. Smith, 66 N. Y. 271 (1876); Bingham v. Mears, 4 N. Dak. 437 (1894).

[117] 1 Pothier on Obligations (Evans' Ed.) 267.

[118] Hayes v. Ward, 4 Johns. Ch. 123 (1819); P. & R. Co. v. Little, 41 N. J. Eq. 519 (1886); St. Croix T. Co. v. Joseph, 142 Wis. 55 (1910).

[119] Brick v. Freehold B. Co., 37 N. J. L. 307 (1875); Morrison v. Bank, 65 N. H. 253 (1889); Davis v. Patrick, 57 Fed. 909 (1893).

[120] 13 Johns. 174 (1815) followed in King v. Baldwin, 17 Johns. 384 (1819) reversing Chancellor Kent in 2 Johns. Ch. The reasoning upon

the surety to notify the creditor to proceed against the principal, and, if he fails to do so, and a loss occurs, the surety is discharged. This innovation is supported by the decisions and statutes of a few states, but the overwhelming weight of authority is against it, as an arbitrary variation of the contract.[121] Certainly the creditor ought not to be compelled to proceed against the principal in relief of the surety unless the latter is prepared to indemnify the creditor against loss, as is the practice in civil-law countries under the benefit of discussion. In reconciling as far as possible the conflicting interests of creditor and surety, care must be taken to do injustice to neither. Gross negligence on the part of the creditor in dealing with collateral security or favoritism toward the debtor at the surety's expense should be punished by placing the loss on him through whose wrongful conduct it was incurred. But in the interest of borrowers even more than of lenders, it must be remembered that the more safely credit can be extended the more easily it will be obtained and that the best foundation for credit is the control of assets easily liquidated. As long as the creditor does not act oppressively, nothing is gained by building up an elaborate technique to hamper him in the order and manner in which he may avail himself of his securities.

In recent years the most interesting questions in the law of suretyship have arisen through the advent of the incorporated surety company. The older law assumed that, as between principal and surety, the obligation was gratuitous, the motive friendship or expectation of reciprocal advantage. In Scotland, the lords of session in 1711 annulled, as *contra bonos mores,* a bond given as compensation to a surety,[122] an old fashioned

which the judgment of Spencer, C. J., rests is that if the duty exists, there is no reason why it may not be enforced by the act of the creditor without the aid of equity. *Accord,* Wetzel v. Sponsler, 18 Pa. 460 (1852); Martin v. Skehan, 2 Colo. 614 (1875); Jackson v. Huey, 10 Lea. 184 (1882); Howle v. Edwards, 97 Ala. 649 (1892); Brandt on Suretyship (3rd Ed.), Sec. 265.

[121] Taylor v. Beck, 13 Ill. 376 (1851); Frye v. Barker, 21 Mass. 382 (1826); Bull v. Allen, 19 Coun. 101 (1848); Thompson v. Bowne, 39 N. J. L. (1876); Harris v. Newell, 42 Wis. 687 (1877), and the many cases cited in Ames' Cases on Suretyship 222; Spencer on Suretyship, Sec. 172.

[122] King v. Ker, 2 Fountainhall's Decisions 631 (1711), s. c. 12 Morrison Dict. 9461.

view, for guarantors were paid with increasing frequency as mercantile transactions assumed a broader scope. Nevertheless, the professional bondsman is to this day viewed with suspicion. While the common-law could not unmake the surety's contract, it could, as has been shown, take account of his disinterestedness by permitting him to stand on the very letter of his agreement; the undertaking of the surety, to use the favorite phrase, being regarded as *strictissimi juris*. The protection, given to the surety under this rule before equity had ameliorated his lot, was very similar to that given to the prisoner through the technical interpretation of indictments before the reform of the criminal law and is unnecessary in the present state of the law; a guaranty, like other contracts, should receive a reasonable construction with a view to ascertaining and carrying into effect the true intention of the parties. The trend of American decisions is to distinguish between individual and corporate suretyship and to deny favors to the latter because the transaction is essentially insurance, undertaken by companies organized to conduct such a business for profit upon terms usually prescribed by themselves.[123] "The rule of strict construction," it is said in a recent case,[124] "is liable at times to work a practical injustice and it ought not to be extended beyond the reason for the rule, particularly when the surety is engaged in the business of becoming surety for pay and presumably for profit." It may be questioned whether compensation is a proper criterion for discriminating between agreements where the *strictissimi juris* rule is sought to be applied. If the contract is based on an elaborate questionnaire and is for all practical purposes an in-

[123] Guaranty Co. v. Pressed Brick Co., 191 U. S. 416 (1903); Young v. American Bonding Co., 228 Pa. 373 (1910); Boppart v. Surety Co., 140 Mo. App. 675 (1909); Champion I. Co. v. Amer. Bonding Co., 115 Ky. 863 (1903); Lesher v. Fidelity Co., 239 Ill. 502 (1909); Whitestown v. Title Guaranty Co., 72 N. Y. Misc. 498 (1911); Atlantic Trust Co. v. Laurinburg, 163 Fed. 690 (1908); Philadelphia v. Fidelity Co., 231 Pa. 208 (1911), s. c. Ann. Cas. (1912) 1085, and note; 64 UNIV. OF PA. L. REV. 200; Spencer on Suretyship, Sec. 93; 32 Cyc. 306. But as to statutory and judicial bonds, see Brandt on Suretyship (3rd Ed.), Sec. 15.

[124] St. John's College v. Aetna Indemnity Co., 201 N. Y. 335 (1911).

surance policy, it should be so treated. But, where the contract of the compensated surety is not essentially different from that of the gratuitous surety, the same rules of interpretation should be applied to both, based on a fair and reasonable construction of their respective obligations. The distinction is, no doubt, in part due to a reluctance to admit that the rule of *strictissimi juris* has little justification in modern law and may prove the entering wedge for its repudiation. Surety companies it is needless to say are a convenience to the public; it is important that they continue sound and that their rates be as moderate as is commensurate with the risk, and the risk will be lessened by a wise, consistent, and uniform administration of the law of guaranty in all cases.

From the dungeon of the kinsman hostage to the well-furnished office of the modern bonding company may appear too long and circuitous an excursion to be condensed into so brief a narrative; perhaps, to the romantically minded it may seem to result in an anti-climax. But the story has a unity of its own with a conclusion of general application, were epilogues the fashion. Here is displayed one small phase of the struggle for co-operation that has characterized human progress. For the liability that falls so heavily on the individual the ancient corrective is sacrifice, the foundation of generous instincts which have permanently influenced ideas of propriety, but amount to no more than a shifting of the burden from one individual to another. The joint pledge of faith marks an advance; taken in concert by the co-promisors, there is identity of risk, but it is coupled with a moral obligation, that in time becomes a legal duty, to equalize the loss or place it where it belongs. Larger enterprises call for greater alliances of adventurers and specialization in the calculation of the hazards; security is obtained through association; the *premium payer* is now the ultimate surety. As the knowledge acquired through these operations becomes more scientific and their management increasingly efficient, group indemnity on a more extended scale may be anticipated. The same tendency is reflected in other branches of the law. Such a result must lead to a revision of much that now seems of im-

portance in the law of suretyship and guaranty, but, happily there will be no dearth of new problems. "The force which is evolving throughout the organized world is a limited force, which is always seeking to transcend itself and always remains inadequate to the work it would fain produce."

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