NONCONSENSUAL SUBSURETYSHIP *
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PART TWO

Giving of Judicial Bond with Surety in Substitution for Security—Effect on Original Surety

Let it be supposed that A is surety for P to C, who begins an action against P or against P and A, and by attachment obtains a lien on adequate property of P, and that B aids P in procuring a dissolution of the attachment lien by executing a bond conditioned on payment of any judgment which may be recovered by C; if judgment is so recovered and A pays it, he will be fully subrogated to the right of C against B. A sufficient reason is that as A was inchoately subrogated to the attachment lien he should be likewise subrogated to the rights of C on the bond given in substitution therefor. Furthermore, while A was surety for the original obligation of P and is now surety for the performance of the judgment in which that obligation became merged, and B undertakes suretyship risk for the performance of the same judgment, they are not co-sureties, but B is interposed between P and A, the result being that on paying the judgment B will not be fully or contributively subrogated to the right of C against A.107 The reasons are, first, that by his voluntary intervention B has harmed A to the extent of the amount of the judgment, the property having been equal in value thereto; second, that any other relation would be out of keeping with A's obvious right to be fully subrogated as against B; and, third, that any different result would lead to the creditor's having a power of capricious or collusive action.

If, however, the value of the attached property was less than the amount of the judgment, the question arises whether B should be interposed wholly, or interposed only pro tanto and be accounted a subsurety or at least a co-surety as to the residue. It has been held that he should be wholly inter-

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106. See Hanby's Admr. v. Henritze's Admr., 85 Va. 177, 7 S. E. 204 (1888) (A was surety on the bond of P, an executor; C, a beneficiary, obtained a decree against P for the sale of his land; P purchased the land at the sale; under statutory provision B became his surety for payment of the purchase price one year thence; held that A was subrogated as against B).


It would make no difference if A were a real surety, for example, a grantee, or a mortgagee or other junior incumbrancer. Randall v. Proceeds of the Scranton, 23 F. (2d) 843 (W. D. N. Y. 1927) (P mortgaged a vessel to A; C libelled it for necessary repairs, obtaining a maritime lien superior to the mortgage; P procured release of the vessel by giving bond with B as surety; held that B on paying C was not subrogated as against A). See cases cited note 136, infra.
This result derives support not only from its simplicity but also from the fact that A’s risk was wholly varied by the removal of the urge on P to pay the whole debt and thereby free his property from the attachment lien. It is conceivable, however, that B should be interposed only pro tanto. This conclusion would be upheld by the fact that A was harmed only to that extent, and also by the argument that in the analogous case of a creditor’s voluntary relinquishment of a lien on property of the principal the surety is discharged only to the extent of the value thereof in spite of the variation of his whole risk. Thus the first conclusion accords with the rule wholly interposing a later surety because of his variation of the risk of an earlier surety, and is inconsistent with the result reached when a creditor voluntarily relinquishes security; on the other hand, the very reverse may be said of the second conclusion. This dilemma is largely attributable to the inherent unsoundness of the doctrine of variation of risk and the consequent difficulties in its application.

Another situation arises where C, having gotten a judgment against P or against P and A, his surety, obtains an execution lien on property of P (or an attachment lien thereon before judgment), and to aid P to regain possession of the property B executes a forthcoming bond, conditioned on redelivery of the property at the time and place of sale, or conditioned in the alternative on redelivery of the property or payment of its value. Here also A is surety for B as well as for P, the result being that B will have no recourse against A, and A will be fully subrogated to the right of C against B, which is limited, of course, to the least of three sums, the amount of the judgment, the penalty of the bond, and the value of the property. This is a just consequence, since the execution or attachment lien, to which A was inchoately subrogated, consisted of two elements, possession and power of sale, and, while in most states the right to possession and the

108. March v. Barnet, 121 Cal. 419, 53 Pac. 933 (1898) (value did not appear; apparently regarded as unimportant).
109. 1 BRANDT, Suretyship and Guaranty (3d ed. 1905) § 480; ARNOLD, Suretyship and Guaranty (1927) § 108; 2 WILLISTON, Contracts (1920) § 1232; 3 ANN. Cas. 433.
110. See next sub-topic.
111. If the bond is conditioned in the alternative on redelivery of the property or payment of the amount of the judgment, and the property is worth less than that amount and is not redelivered, a question arises similar to that discussed in a preceding paragraph as to whether B should be interposed wholly or only pro tanto.
112. See Fletcher v. Menken, 37 Ark. 206 (1881) (forthcoming bond given to release property attached on mesne process; held that B cannot require that A’s property be exhausted first).
113. Dunlap v. Foster, 7 Ala. 734 (1845); Dent v. Wait’s Admr., 9 W. Va. 41 (1876). It makes no difference that B was originally co-surety with A; his intervention has made A his surety. Brown v. M’Donald, 8 Yerg. 158 (Tenn. 1835) (alternative decision); Langford’s Ex’r v. Perrin, 5 Leigh 552 (Va. 1834) (reasoning).
115. If in a particular state the execution lien is held to be discharged by the giving of a forthcoming bond, the case resembles that of a bond dissolving an attachment. On the other hand, if levy on adequate property is held to discharge the surety, either directly or because it discharges the principal debt, obviously no question of relating the two sureties can arise. Brown v. M’Donald, 8 Yerg. 158, 160 (Tenn. 1835) (alternative decision); Langford’s Ex’r v. Perrin, 5 Leigh 552 (Va. 1834).
right to sell remain, these rights have become less valuable through the intervention of B, for possession has been given over to P and he may fail, and indeed does fail, to restore it according to law. Furthermore, B is wholly interposed, that is, to the entire extent of his risk, as measured by the value of the property (not exceeding the penal sum of the bond), since the harm to A may be at least as great. If, however, A joins B in the forthcoming bond for the release of adequate property of P, A and B are co-sureties; while A's liability as surety was already fixed, he was fully indemnified by his equity of subrogation in adequate property; 116 they should be accounted co-sureties since they both participated in releasing the property.117

In this connection let it be supposed that P-1 and P-2 are co-principals, that C, the creditor, has obtained judgment and levied on property of P-1 of sufficient value to pay his contributive share, and that B goes surety on the forthcoming bond of P-1. B should be related to P-2 as P-1 is, that is, as co-principal, the result being that B can have no more than contribution from P-2,118 though he is surety for P-1 and could have full recovery from him. Likewise, if S-1, S-2 and S-3 are co-sureties for P, and C, the creditor, having obtained judgment, levies execution on property of S-1 of sufficient worth to pay his contributive share and B becomes surety on the forthcoming bond of S-1, B should be related to S-2 and S-3 as S-1 is, and hence on paying C in full may recover only one-third from each of them, and would be subject to contribute in like ratio to either of them who should pay C in full.119 Also, if S-3 rather than B had gone surety on the forthcoming bond, S-2 should not be in worse position in respect to S-3 than he would have been in if the substitution of bond for security res had not taken place, that is, his ultimate loss should not exceed one-third; hence, if S-3 pays the creditor in full and sues S-2 for contribution on the original bond, the decree should be limited to one-third, notwithstanding insolvency of S-1.120

A situation analogous to that of the forthcoming bond is presented, less frequently now than in the past, when C, the creditor, having begun a civil action against P, or P and A, his surety, procures the arrest of P before or after judgment therein, and B aids P to procure his release by executing a bail bond or entering into a recognizance securing in the alternative the surrender of the body of P or payment of the judgment. Here also B is interposed as surety and A becomes subsurety.121 The reason is that A, it

116. Distinguish Hartwell v. Smith, 15 Ohio St. 200, 204 (1864), cited note 146, infra.
118. Robinson v. Sherman, 2 Gratt. 178 (Va. 1845), holding that B may have full recovery, cannot be sustained and seems to be out of keeping with Preston v. Preston, 4 Gratt. 88 (Va. 1847).
120. Preston v. Preston, 4 Gratt. 88 (Va. 1847).
seems, had been in potential control of the body of P (through his ability to pay C and obtain an assignment of the judgment), and that control was temporarily, and probably finally, lost through the intervention of B; at all events the risk of A was greatly varied by removal of the incentive for P to pay the debt and thus release himself from arrest. Accordingly, if P-1 and P-2 are co-principals, and B goes bail at the request of P-1 to release him from arrest, instead of being surety for P-2 as well as P-1, B is related to P-2 as P-1 is, that is, as co-principal, and hence may not require that P-2 pay more than one-half the judgment.\textsuperscript{122}

\textit{Giving of Judicial Bond with Surety Causing Variation of Risk of Original Surety}

If A is surety for P to C, who begins an action or other legal proceeding against P or P and A, and if B aids P to obtain a stay of proceedings as against himself, either before or after judgment or decree, by executing a bond conditioned on payment of the judgment or decree which has been or may be rendered, it is generally held that B is to be related to A as P is and hence to be interposed between P and A, the result being that A on paying C will be fully subrogated to the right of C against B,\textsuperscript{123} and B, if he pays C, will have neither full nor contributive recourse against A.\textsuperscript{124} The reason generally given is the same as that which supports, though inadequately,\textsuperscript{125} the rule discharging a surety when the creditor binds himself to suspend legal proceedings against the principal or otherwise gives time to him: the principal may become insolvent or more insolvent during the period of delay and

\textit{Contra: Morse v. Williams, 22 Me. 17 (1842) (held that A on paying could recover nothing from B); Creager v. Brengle, 5 Harris & J. 234, 240 (Md. 1821); Holmes v. Day, 108 Mass. 563 (1871) (held that A on paying could recover nothing from B); (1918) 18 Col. L. Rev. 374.}

\textsuperscript{122} Osborn v. Cunningham, 26 N. C. 559 (1839).

\textsuperscript{123} Anderson v. Hendrickson, 1 Neb. (Unoff.) 610, 95 N. W. 844 (1901) (B interposed, although he signed in the fraudulently induced belief that A consented); Denier v. Myers, 20 Ohio St. 376 (1870); Burns v. Huntington Bank, 1 P. & W. 395 (Pa. 1830); Schnitzel's Appeal, 49 Pa. 23 (1865); Moore v. Lassiter, 84 Tenn. 630, 633 (1886), cited note 126, infra. \textit{Contra: Kane v. State, 78 Ind. 103 (1881) (held B fully subrogated); Reissner v. Dessar, 80 Ind. 307 (1881), 110 Ind. 69, 10 N. E. 621 (1887) (on ground that A should have manifested objection to the stay). Compare Kouns v. Bank of Kentucky, 2 B. Mon. 303 (Ky. 1842) (bond conditioned on payment of judgment and given to stay sale after execution; value of property not stated; held, A discharged, but having paid entitled to subrogation); Pott v. Nathans, 1 W. & S. 155 (Pa. 1841) (C agreed, after execution levied, to stay sale and B gave note; \textit{quaere}, whether C agreed with P or B and whether P could have enforced agreement; if so, A discharged).

\textsuperscript{124} Garey v. Trude, 218 Ill. App. 372 (1920); Bohannon v. Combs, 12 B. Mon. 563 (Ky. 1851); Allegheny V. R. R. v. Dickey, 131 Pa. 86, 93, 18 Atl. 1003, 1004 (1890); Chaffin v. Campbell, 4 Sneed 184 (Tenn. 1856); Higgs v. Landrum, 1 Cold. 81 (Tenn. 1850) (B’s claim that A’s property be first exhausted was denied).

\textsuperscript{125} While the writer is convinced of the unsoundness of the doctrine of variation of risk, the authorities at common law are so strong that it must be accepted and applied not only when the creditor brings about the extension but also when, as here, B aids P to effect a stay. As an original question B might well be accounted a subsurety, except when A suffers actual loss as a proximate consequence of B’s intervention. In that case, A would be deemed subsurety \textit{pro tanto}, and perhaps in \textit{toto}.\textsuperscript{126}
thus the surety's risk is increased; true, the principal may become solvent or more solvent and the surety's risk be decreased; nevertheless, the surety's risk is varied, and thus the doctrine becomes applicable. In the situation now being considered, A should not be and is not discharged, for C has not acted, but can be and is placed in the relation of surety to B, the intervener, as well as for P.\textsuperscript{126}

Likewise, if \( S-1 \) and \( S-2 \) are bound to \( C \) as co-sureties and \( C \) obtains judgment against them, and \( S-1 \) alone procures a stay of execution by giving a bond with \( A \) as surety conditioned on payment of the judgment, \( A \) should be related to \( S-2 \), not as surety for him but as co-surety with him;\textsuperscript{127} the reason is that \( A \) varied the risk of \( S-2 \), the maximum damage being the contributive share of \( S-1 \), since that is the amount for which \( S-2 \) might have a judgment or decree against him. A like result would ensue if the case were one of co-principalship in place of co-suretyship.

The principle of variation of risk is held to control even when the intervention of \( B \) consists in his executing an appeal bond, \textit{supersedeas} bond or injunction bond, to aid \( P \) in procuring a stay of execution or other process while prosecuting an appeal, a writ of error, a bill in equity, or other proceeding to review a judgment (or decree), the result being that \( B \) is interposed and \( A \) becomes a subsurety. If the appeal be dismissed or the judgment affirmed, \( A \) on paying \( C \) will have full recourse against \( B \) and \( B \) none against \( A \).\textsuperscript{128} Here the intervention of \( B \) is distinctly more beneficial to \( A \)

\begin{footnotes}
\textsuperscript{126} See Moore v. Lassiter, 84 Tenn. 630, 647 (1886). If \( C \) gives time, but \( A \) is not discharged (for example, because \( C \) reasonably, but mistakenly, believes that \( P \) was surety for \( A \), \( A \) will be subsurety for \( B \), who knows or should have known the truth. See McCormick's Admr. v. Irwin, 35 Pa. 111, 117 (1860).

\textsuperscript{127} See Crow v. Murphy, 12 B. Mon. 444 (Ky. 1851) (but court erroneously reasoned that \( A \) was limited to working out his rights through his principal, \( S-1 \)).

\textsuperscript{128} Holmes v. Hughes, 125 Cal. App. 290, 14 P. (2d) 149 (1932) (P company insured \( A \) against liability; \( C \), the injured person, recovered judgment against \( A \) and thereby obtained a right against \( P \) under the terms of the policy; \( P \) appealed from the judgment without the consent of \( A, B \) company going surety; judgment affirmed; \( B \) paid; held that \( B \) was not subrogated to the judgment against \( A \) ); Garey v. Trude, 218 Ill. App. 372 (1920); Bohannon v. Combs, 12 B. Mon. 563 (Ky. 1851) (injunction bond); Bell v. Greenwood, 229 App. Div. 550, 242 N. Y. Supp. 149 (2d Dept. 1930) (similar to Holmes v. Hughes, \textit{supra}); Briggs v. Hinton, 14 Lea 233 (Tenn. 1884) (judgment against \( P \) and \( A \); appeal bond); Moore v. Lassiter, 84 Tenn. 630, 633 (1886) (judgment against \( P \) and \( A \); appeal bond); Mitchell v. De Witt, 25 Tex. Supp. 180 (1860) (judgment against \( P \) and \( A \); \textit{supersedeas} bond). \textit{Contra}: Quinn v. Alexander, 125 Miss. 660, 88 So. 170 (1921) (B subsurety); see Semmes v. Naylor, 12 Gill & J. 358, 364 (Md. 1842) (A surety for \( P \) on official bond and later on appeal bond; \( B \) surety for \( P \) on injunction bond). And in Smith's Ex'r's v. Anderson, 18 Md. 520 (1862), where \( B \) was also co-surety with \( A \) on the original bond, on paying \( C \) in full \( A \) prayed and received a decree for only one-half from \( B \), and was denied further recovery from \( X \), surety for \( P \) and \( B \) on the \textit{supersedeas} bond, because of the indirect attack on \( B \) which would have resulted. Note (1932) 27 A. L. R. 452, 458.

Nor does the fact that \( P \) was insolvent at the time the appeal bond was given make any difference. National Surety Co. v. White, 21 Ga. App. 471, 94 S. E. 589 (1917), (1917) 18 Col. L. Rev. 374.

In Brown v. Glascock's Admr., 1 Rob. 461 (Va. 1842), \( A \) was surety for \( P \), an administrator, and \( C \), a creditor of the decedent, was granted a decree against \( P \), who appealed with \( B \) as surety; on affirmance \( B \) paid and took an assignment of the decree; \( P \) paid the amount thereof and part of the costs of appeal, although sufficient assets had previously come into his hands to enable him to pay in full. It was held that \( B \) should recover the residue of the costs
than in the situation last discussed. Not only may the stay help \( A \) by enabling \( P \) to rehabilitate his fortunes, but the review of the judgment may result in further advantage to \( A \). Thus, if the original judgment ran only against \( P \), the prosecution of appeal or error may lead to the granting of a new trial, which would do away with the \textit{prima facie} case which the judgment is held in many states to have raised in favor of \( A \); \textsuperscript{120} and the entering of a final judgment in favor of \( P \) or modification of the former judgment in \( P \)’s favor would absolutely conclude \( C \) in a later or pending action brought by him against \( A \) as to all pertinent adjudicated matters of law or fact. Furthermore, if the original judgment ran against \( P \) and \( A \) jointly and \( P \) alone prosecuted appeal or error, the reversal of the judgment and granting of a new trial will inure to the benefit of \( A \), provided that the ground of reversal is pertinent to his liability, and thus \( A \) would have the valuable privilege of relitigating the matter; and, if the reasons for reversal are such as to justify the entering of final judgment in favor of \( P \) or modifying the former judgment in his favor, judgment will be entered or modified in favor of \( A \) as well as \( P \), provided that the reasons are such as to negative or reduce the liability of \( A \).\textsuperscript{130}

\[ \text{from \( A \) on the ground that the risk of \( A \) had not been varied, since his responsibility was not affected by the outcome of the appeal: he was liable to the extent of assets and only so far, and it made no difference to him whether to this creditor, other creditors, legatees or distributees. It seems, however, that the court overlookted the variation of \( A \)’s risk arising from the fact of appeal and stay, with resulting delay in administration and prolonged opportunity to waste assets.} \]

\[ \text{It is conceivable that a larger or otherwise more onerous judgment might be rendered against \( P \) on the new trial and \( A \) be burdened with a \textit{prima facie} case for the recovery of the larger amount instead of being able to confine \( C \) to recovery in the original amount. But this possibility of harm is slight as compared with the probability of benefit.} \]

\[ \text{130. Appeal by the Principal Alone from a Joint Judgment—Effect on the Surety. At common law, a writ of error had to be prosecuted by all the persons against whom the judgment ran, unless the plaintiff in error should employ a proceeding equivalent to summons and sevenerance. Masterson v. Herndon, 10 Wall. 416 (U. S. 1870) [citing Williams v. Bank of United States, 11 Wheat. 414 (U. S. 1826) and Stanley v. Gadsby, 10 Pet. 521 (U. S. 1836)]; Wormley v. Wormley, 207 Ill. 411, 69 N. E. 565 (1904); Bassett v. Loewenstein, 22 R. I. 468, 48 Atl. 589 (1901). This rule has been liberalized by statute in many states; in some of these states one party may prosecute error or an appeal in his own name, in others in the name of all. 10 Ann. Cas. 80 (1908); Sunderland, Cases on Procedure (1924) 933.} \]

If in the particular case the prosecution of error or appeal by a single party is proper, it remains to inquire whether a reversal will inure to the benefit of his co-party. It would seem that the original unity of the judgment loses much of its importance in view of the sevenerance effected by procedure or statute, so that it is possible to reverse the judgment as to the one party and allow it to stand as to the other. Indeed, some courts have taken the position that because of the failure of the co-party to appeal, the judgment against him must stand, unless his right or liability is dependent on the right or liability of the appellant or unless prejudice would result to one or the other. 24 C. J. 1184, 1206; but see 10 Ann. Cas. 80 (1908). But other courts attach little importance to the failure of the co-party to appeal. This is illustrated by certain cases going so far as to hold that if \( P \), a principal, alone appeals from a joint judgment against himself and \( A \), the surety, and it appears that there was reversible error as to \( A \) but none as to \( P \), the judgment will be affirmed against the latter but reversed as to the former. Eddings v. Boner, 1 Ind. Ter. 173 (1897); Ott v. McElveen, 102 Miss. 139, 58 So. 709 (1911) (probably only \( P \) appealed); Hulett v. Nugent, 71 Mo. 131 (1879) (probably only \( P \) appealed); Hadley v. Bernero, 97 Mo. App. 314 (1902); Pacific Express Co. v. Emerson, 101 Mo. App. 62 (1903).

Whether this is a sound position lies outside the field of this discussion. Our immediate concern is with a situation where \( P \), the successful appellant or plaintiff in error, and \( A \) as his co-party, are principal and surety, respectively. If the ground of reversal relates to a defence
There is, of course, much more reason for interposing $B$ when the appeal has the effect of *enlarging* the main risk of the surety, for example, where $A$ is surety for $P$ for the surrender of leased premises at the end of the term and, judgment for such surrender having been given, $P$ appeals with $B$ as surety.\(^{131}\)

If, however, in any of the situations considered in this section, $A$ joins $B$ in executing the bond effecting the stay,\(^{132}\) or otherwise manifests assent to the stay, or if $A$ is adequately indemnified by security,\(^{133}\) $A$ does not become subsurety any more than he would have been discharged if $C$ had voluntarily given time to $P$, but rather $B$ will be accounted a subsurety\(^{134}\) or at least a co-surety. But the mere fact that $A$ procures a stay of proceedings against himself on a joint judgment, $P$ also obtaining a stay with $B$ as his surety, should not exclude $A$ from subsuretyship; for $A$ may well stay proceedings against himself and yet object to $P$ (who should promptly exonerate $A$) doing likewise,\(^{135}\) except to prosecute an appeal or writ of error.

The rules stated in this sub-topic apply as well to cases in which $A$ is a real surety. Thus, let it be supposed that $P$ executes a note and a mortgage of land to $C$ and later conveys the land to $A$ by warranty deed, and $C$ obtains judgment on the note against $P$, who appeals with $B$ as surety on the appeal bond; if on affirmance $B$ pays the judgment, he will not be subrogated to the mortgage even contributively.\(^{136}\)

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\(^{131}\) Opp v. Ward, 125 Ind. 241, 24 N. E. 974 (1890) [holding that $A$ was fully subrogated and distinguishing Kane v. State, 78 Ind. 103 (1881) and Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. 593 (1886)].


\(^{133}\) If, however, $A$ is inadequately indemnified, it seems that he becomes subsurety and, on paying $C$, fully subrogated to the right of $C$ against $B$ on the bond. But $B$ will be ultimately entitled to the security: if he pays $A$, by subrogation to $A$'s security right, and if he pays $C$, by subrogation to $C$'s equity therein. Havens v. Foudry, 4 Metc. 247 (Ky. 1863), contra, seems unsound.


\(^{135}\) Hammock v. Baker, 3 Bush 208 (Ky. 1867) (P "replevied" the judgment, that is, stayed issue of execution, under Ky. Stat. [Carroll, 1930] § 1667 [enacted in 1854]).

\(^{136}\) Garey v. Trude, 218 Ill. App. 372 (1920); Patterson v. Pope, 5 Dana 241 (Ky. 1837) (injunction bond); Barnes v. Mott, 64 N. Y. 397 (1876) (C obtained judgment against
Successive Appeal Bonds and Analogous Cases

Even in the case of successive appeal or supersedeas bonds, by the great weight of authority, $B$, the surety on the second bond, is placed in like relation to $A$, surety on the first, as is the principal and hence is interposed between the principal and $A$. Consequently, if the later appeal is dismissed or the judgment then affirmed, $A$ on paying will have full recourse by subrogation against $B$ and $B$ none against $A$. In support of these results it must be conceded that the risk of $A$, the surety on the first bond, is varied by the intervention of $B$, surety on the second, and it has also been said that the hands of $A$ are tied during the second appeal in that he cannot have exoneration from $P$ or, paying $C$, have reimbursement from $P$. In opposition, it may be forcefully argued that the second appeal affords a substantial chance of reversal and that reversal, even if merely for a new trial, necessarily relieves $A$ from all liability on his undertaking, inasmuch as it was dependent on dismissal of the appeal or final affirmation of the judgment. Hence the chance of benefit to $A$ so far exceeds the possibility of harm that an exception might well have been made to the doctrine of variation of risk and $B$ been accounted a subsurety, or at least a co-surety, except when $A$ has suffered actual damage as a proximate consequence of the stay of execution involved in $B$'s intervention.

A like rule governs when a judicial bond conditioned solely or alternatively on the rendition of a judgment, for example, a bond dissolving an attachment, a forthcoming bond, a bond to stay execution, or an injunction bond, is followed by an appeal or supersedeas bond. $B$, the surety on the later bond, is interposed and $A$, surety on the earlier bond, is a subsurety.

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$(P)$, who conveyed land to $A$ with warranty against the judgment lien; $P$ appealed with $B$ as surety; $C$ released $B$; held that the judgment lien was discharged; Armstrong's Appeal, 5 W. & S. 352 (Pa. 1843) (bond to stay execution of judgment). *Contra:* Pence v. Armstrong, 95 Ind. 191 (1884) (unless the conveyance to $A$ was in terms "subject to" the mortgage). Rodgers v. M'Cluer's Admr., 4 Gratt. 81 (Va. 1847), is not *contra*, if the injunction bond preceded the conveyance in that case.


$(139.)$ Other instances include a bail bond to procure release from arrest under mesne process and a delivery bond given in replevin to obtain possession of property for the plaintiff or retain it for the defendant.

$(140.)$ King v. Hartford Accident & Indemnity Co., 133 Cal. App. 711, 24 P. (2d) 906 (1933) (bond held not entitled to any recourse against $A$); Fidelity & Deposit Co. v. Bowen, 123 Iowa 356, 98 N. W. 897 (1904) (bond dissolving attachment followed by supersedeas bond); Culliford v. Walser, 158 N. Y. 65, 705, 52 N. E. 648, 53 N. E. 1124 (1899) (bail bond followed
Much the same reasons pro and contra are pertinent here as in the case of successive appeal bonds. It is true that, in most instances, by becoming surety A freed from the grasp of the creditor property which otherwise would now be available for payment of the affirmed judgment. But it is held to be decisive that A was under a certain risk when B executed the appeal bond, that is, of being a surety without any recourse to security, and that risk has been varied by B's intervention.

Similarly, if A and B are co-sureties for P on the first bond and B, or B and X, become responsible for P on the later appeal bond, instead of being still ranked as a co-surety with A, B is now related to A as P is, that is, as an interposed surety and hence will be denied contribution from A.

If, however, in any of the situations discussed in this sub-topic, A, the surety on the first bond, is bound by the judgment and joins in the appeal therefrom, B is surety for him as well as for P. Again, if A joins in the later appeal bond or otherwise manifests assent to the appeal, he is not injured, or if he is fully indemnified by security cannot be damaged, and hence in either case will not be accounted a subsurety any more than he would have been discharged under such circumstances if C had voluntarily given time to P; on the contrary B has been held to be subsurety, and properly so, it seems, because A's liability was fixed and matured before B undertook risk, and A was not prejudiced by the appeal but rather stands to gain thereby. But the insolvency of P at the time of the later appeal will not raise an exception to the general rule, just as it would not have prevented the discharge of A had the creditor voluntarily varied his risk.

An interesting case combining principles of this and previous sub-topics is found in Moore v. Lassiter. A joined P as his surety in making a note to C, who obtained judgment against P in a justice's court. P stayed execution with B as his surety. P having defaulted, B obtained a writ of certiorari to bring the case to the circuit court, F becoming his surety on a

by appeal bond; Southwestern Surety Ins. Co. v. King, 68 Okla. 109, 172 Pac. 74 (1918) (A surety on forthcoming bond given by defendant to obtain redelivery of property taken on writ of replevin; B surety on later appeal bond; A held fully subrogated). Notes 6 L. R. A. (N. s.) 1021 (1907); L. R. A. 1918D, 1192; 77 A. L. R. 452, 458 (1932); (1918) 18 Col. L. Rev. 374.

141. There is the difference that, here, the granting of a new trial would expose A to the risk of a larger judgment, but this possibility is of slight weight when compared with probable benefits.

142. In Rosenbaum v. Goodman, 78 Va. 121 (1883), the court regarded this as a sufficient reason for making B the subsurety.


144. Cowan v. Duncan, 1 Meigs 470 (Tenn. 1838) (A denied contribution from B).


146. Day v. McPhee, 41 Colo. 467, 93 Pac. 670 (1908) (A consenting and fully indemnified; B held discharged by subsequent release of A); Hartwell v. Smith, 15 Ohio St. 200, 204 (1864) (A joined with B in appeal bond); see Dillon v. Scofield, 11 Neb. 419, 422, 9 N. W. 554, 555 (1881) (A assenting).


148. 84 Tenn. 630 (1886).
supersedeas bond; judgment having been there rendered against B, he appealed to the Supreme Court with G surety on his appeal bond; there judgment was rendered against B, F and G. F paid in full. It was held that F was entitled to a decree of full subrogation as against G but to no recourse against A. The decree accords with the rules of this and preceding sub-topics. First, because of his intervention and variation of A's risk, B was related to A as P was, and hence was principal as to A.140 Second, by going on the supersedeas bond of B, F removed pressure from B, the new principal though probably not from P, the older principal, thus varying the risk of A, and hence was interposed between B and A, so that on paying C he would have no recourse against A. Third, by going on the final appeal bond, G varied the risk of F, the result being that G was interposed between B and F and F was fully subrogated as against G.150

Relation between Original Surety and Surety Undertaking Risk after Principal's Default

It is doubtless true that the mere fact that surety B undertakes risk after surety A does is not inconsistent with co-suretyship.151 But it is generally held that if A undertakes risk before, and B after, the principal is in default, B is surety for A as well as for P, if there is no sufficiently manifested agreement between them to the contrary and no special equitable reason leading to a different result.152 The reason may be that the principal's default portends immediate and ultimate loss to A, and hence that B's assumption of risk is virtually in behalf of A, though not at his request. Thus, if A is already bound as maker for P to C and P defaults, and thereafter for a consideration B signs as maker the same note or a separate note, or joins

140. See sub-topic supra, discussing variation of surety's risk by giving judicial bond.

150. See treatment of successive appeal bonds in this sub-topic. The fact that the Supreme Court was empowered by statute to render judgment against F, the surety on the prior supersedeas bond, was held not to connote that he was an appellant or that B was his agent in making the appeal.

151. Farmers Nat. Bank v. Teeters, 31 Ohio St. 36 (1876) (no intervening default appeared). Contra: United States F. & G. Co. v. Yeilding Bros. Stores, 225 Ala. 307, 143 So. 176 (1932) (A surety on construction bond and B on guaranty, both becoming simultaneously bound to M for materials furnished; erroneously held that for certain reasons A and B could not be co-sureties and hence B must be a subsurety). See McMahan v. Geiger, 73 Mo. 145, 150 (1880) (not contra): B received no consideration and became bound to C only by consenting to a judgment and hence after P's default.

152. Instances of such special reasons to the contrary are found in the preceding sub-topics treating of the giving of a judicial bond in substitution for security or in variation of the original surety's risk, and successive appeal bonds.

153. In that case the authorities are in conflict whether A is discharged by the alteration. It is true that the alteration is neither prejudicial nor beneficial to A, since, if legal effect be given to it, A's position would be none the worse and, under the rule of this sub-topic, none the better; nevertheless, the alteration is material, because A, or P and A, would be bound jointly or jointly and severally with B to C and hence differently bound to C. Therefore, the question of A's discharge turns on whether a non-fraudulent, material alteration is fatal, and on that point the authorities have been in conflict before and after the Negotiable Instruments Law § 124. Note (1925) 44 A. L. R. 1244, 1246. 3 Williston, Contracts (1920) § 1904.
A, or P and A, in signing a renewal note, B will be surety for A as well as P; so also, if A was an indorser instead of maker, provided of course that C has duly presented the instrument and given notice of dishonor to him. Likewise where A is already bound on a bond conditioned on faithful or other performance by P and P misappropriates funds or otherwise defaults, and afterwards B becomes bound as surety for P to C, for example, by executing another bond, or by giving a promissory note, B is accounted a surety for A. But if A and B both undertake risk after P's misappropriation or other default, they are ranked as co-sureties.

The rule of this sub-topic is all the more applicable if at the time B incurs risk, not only is P in default, but there has been an adjudication of the liability of P, or of A, or of both; or if the assumption of risk by B results in a probability of benefit to A as, for example, in some cases of successive judicial bonds, or if A requests B to become surety.

Of course, a sufficient, independent reason for making B a subsurety exists when there is an understanding between him and either P or C that he shall be surety for both P and A, for example, where A is already bound with P as a joint or joint and several maker of an overdue note or obligor in a defaulted bond, and for a consideration B indorses the note or guarantees payment of the note or bond; or where A and B are successive parties to a negotiable instrument, for instance, where A is already bound as drawer and for a consideration B later indorses the overdue instrument.

Breach of Duty of Sheriff or Constable—Relation between Original Surety and Official Surety—Position of Indemnitor

Where there is a breach of the duty of a sheriff or constable consisting in a failure properly to levy an attachment or execution or to effect a sale thereunder or make return thereof, or in releasing property levied on without taking a bond, or in releasing a person arrested without bail or recognizance being given, a question frequently arises concerning the relations inter se of four persons: D, the judgment debtor; A, his surety; O, the officer; and P,
his surety. In the first place, the judgment debtor and the officer generally stand in the relation of principal and surety, respectively.\(^{162}\) The judgment debtor was already under an absolute, matured obligation, and the liability which the officer incurred to the judgment creditor arose solely out of a duty owed to him and not because of any harm or injury done to the judgment debtor; on the contrary, in many instances the debtor gains by the sheriff’s fault or default. It follows that the relation of the judgment debtor and the surety on the official bond of the officer is also that of principal and surety, respectively;\(^{163}\) no other relation could be created without working circuity of action and also improper indirect attack on the officer.

Furthermore, as between the officer and the original surety, the relation should be that of principal and surety, respectively. There is no escape from this conclusion if the officer’s fault or default constituted a direct actionable wrong to the original surety\(^{164}\) as well as to the judgment creditor, or if the officer is liable to the original surety by the provisions of his bond or by force of statute;\(^{165}\) for no other relation would be consistent with the surety’s right of action against the officer. Hence the officer will not be subrogated to the creditor’s right against the original surety,\(^{166}\) but rather the last named will be subrogated as against the officer.\(^{167}\) The officer should generally be wholly interposed between \(D\) and \(A\), that is, to the full extent of his liability; for that is usually measured by the damage actually resulting from his fault or default, notwithstanding a \textit{prima facie} presumption that the damage is equal to the amount of the judgment.\(^{168}\)

\(^{162}\) Bittick v. Wilkins, 7 Heisk. 307 (Tenn. 1872); Sayles v. Taylor, 36 Tex. 307 (1871).

\(^{163}\) See Saint v. Ledyard & Co., 14 Ala. 244, 246 (1848); Note (1907) 14 L. R. A. (N. S.) 155.

\(^{164}\) It was so held in Rowe v. Williams, 7 B. Mon. 202 (Ky. 1846) (judgment creditor caused execution to be issued; first, the sheriff failed to levy it seasonably although the judgment debtor had ample property which he removed from the state; second, the sheriff levied execution on other adequate property but, without taking a forthcoming bond, surrendered it to the debtor who removed it from the state; the original surety recovered in an action on the case).

\(^{165}\) Commonwealth v. Straton, 7 J. J. Marsh. 90 (Ky. 1831) (“any person injured by a breach of the condition of his [the sheriff’s] bond may prosecute a suit thereon”; held, that \(A\) was “injured” and could recover damages on the bond against \(O\) and \(B\) ); Staton v. Commonwealth, 2 Dana 397 (Ky. 1834) (same, measure of damages being fair value of the property levied on under junior execution).

\(^{166}\) Hill v. Sewell, 27 Ark. 15 (1871) (\(D\) had ample property; \(O\) failed to levy; \(O\) paid \(C\); held he was not subrogated as against \(A\) ); Miller v. Dyer, 1 Duv. 263 (Ky. 1864).


\(^{168}\) Sometimes, however, by force of statute the officer’s failure to make return renders him and his surety liable in the amount of the judgment irrespective of damage done. Here also simplicity and the variation of \(A\)’s risk would probably lead to the entire interposition of \(B\), although interposition \textit{pro tanto} would not be unreasonable.
Lastly, the relation between the two sureties, $B$ and $A$, seems to be that of principal and surety, respectively.\footnote{169. Bank of Pennsylvania v. Pottius, 10 Watts 148 (Pa. 1840) (A recognized as having redress against $B$ on the official bond, and also through subrogation to the right of $C$ thereon). And see Stout v. Dilts, 1 South. 218 (N. J. 1818) ($A$ may have been surety for $D$ or co-principal with $D$). \textit{Contra:} O'Hara v. Schwab, 26 La. Ann. 78 (1874) ($A$ not subrogated as against either $O$ or $B$); see Dillon v. Cook, 5 Smedes & M. 773 (Miss. 1846).}

This must be their relation if $B$ is liable to $A$ on the bond of the officer; such liability may well be predicated on the ground that the fault or default of the officer has caused damage to $A$ in respect to his inchoate equitable interest in the judgment and any execution levied thereon. But even though no such direct liability of $B$ to $A$ is recognized, it seems that in equity and good conscience $B$ should bear the ultimate loss and hence be accounted a principal for $A$. It is true that they are alike in that (1) each has undertaken risk for a principal, and each principal has defaulted; (2) neither was the cause of his principal's default; and (3) neither is confined to claiming subrogation through his principal but either may claim through $C$, the creditor. Nevertheless, it is clear that if $A$ had paid $C$ promptly and taken an assignment of the judgment and if execution had then issued at $A$'s instance instead of $C$'s, $B$ would have been liable to $A$ for $O$'s default by the terms of the official bond. It seems that it should make no difference that $A$'s payment followed the issue of execution and the officer's default; for $A$'s inability or even unwillingness to pay promptly should not militate against him, since the delay did not harm $B$; nor should $A$ be placed in worse position because $C$ elected to proceed first against $D$'s property rather than against $A$.

In the cases thus far treated it is immaterial whether $A$, the original surety, was under personal risk, for example, because of making or indorsing a note for $D$, or by being bound for him on a forfeited stay, forthcoming or injunction bond, or was under real risk through being a junior incumbrancer of land on which $C$'s judgment was the senior lien.\footnote{170. Sherman's Admr. v. Shaver, 75 Va. 1 (1880) (execution levied on adequate personality which deputy sheriff permitted $D$ to retain and $D$ disposed of).}

In the latter case $B$ should be subrogated as against $D$ but not as against $A$, that is, to the judgment lien of $C$ but in subordination to that of $A$.

The official surety is, however, generally subrogated to the rights of recourse of his principal, the officer; for example, on a note (with or without surety) illegally accepted by the officer in payment for property sold.\footnote{171. Sweet v. Jeffries, 48 Mo. 279 (1871).} Likewise, if the fault or default was that of $Q$, a deputy, and $B$, the surety for $O$, the officer, compensates $C$, he will be subrogated to the rights of recourse of

\begin{itemize}
  \item $A$ could not be regarded as a surety for $B$, because they were not under simultaneous risks: $A$ was discharged by the payment made by $D$, and $B$'s liability did not arise until the misappropriation.
\end{itemize}
NONCONSENSUAL SUBSURETYSHIP

O, not only against Q \textsuperscript{172} and in security given to Q by D,\textsuperscript{173} but also against N, surety on a bond given by Q to O for his exoneration.\textsuperscript{174} Moreover, if O compensates C and N compensates O, N will be subrogated to any rights of recourse which O, his creditor, may have against other persons, for example, against D.

A quite different situation is present when the officer, O, or his deputy, Q, acting by direction of the creditor, levies execution or attachment on specifically designated property which turns out to belong to X, rather than to D, the judgment debtor. Clearly the officer (or his deputy, as the case may be) and the creditor have committed a tort in seizing the property of X, and by the better view O, the officer, and B, the surety on his official bond, are liable thereon to X, as being a person damaged by the official conduct of O or Q.\textsuperscript{175} Hence it is possible to have four persons bound to the tortfeasor, so that it becomes necessary to relate them as considerations of equity and good conscience require. Obviously, C, the creditor, at whose behest and for whose benefit the levy was made, is to be accounted the principal as to all the others.\textsuperscript{176} As between O and Q, the latter, who lacked the approval of the former and was the actor in committing the tort, is to be accounted the principal, and the former, who was liable merely by operation of law, the surety. Furthermore, B, the surety of O, is to be ranked as surety not only for him but necessarily for Q, the principal of O, and for C, the principal of Q. Consequently the order of suretyship and hence that of ultimate liability is C, Q, O and B, the result being that none of the four may have recourse against those who follow him and any one is fully subrogated to the rights of the tortfeasor against all who precede him.

Two other persons may be involved: M, surety on an indemnity bond given by C to O, the officer; and N, surety on the bond of Q, a deputy, given to O. Usually neither M nor N is directly obligated to X, the tortfeasor. It is to be observed, however, that if the obligation of either M or N is for the exoneration of O and not merely for his reimbursement, X is entitled thereto under the principle that an obligee is equitably entitled to an asset held by a surety for his exoneration, whether given by the principal or another person and whether it consists in property or in obligation. Now

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\textsuperscript{172} Blalock v. Peake, 3 Jones Eq. 323 (N. C. 1857).

\textsuperscript{173} Blalock v. Peake, 3 Jones Eq. 323 (N. C. 1857), cited note 172, supra (deputy sheriff released debtor from arrest without taking bail bond but later received security from him for indemnity).

\textsuperscript{174} Brinson v. Thomas, 2 Jones Eq. 414 (N. C. 1856) (bond securing O against liability for deputy's default; misappropriation of money collected); see Briggs v. Hinton, 14 Lea 233, 241 (Tenn. 1884) (bond conditioned on faithful performance by Q); Nebergall v. Tyree, 2 W. Va. 474 (1868) (B and O sureties for O, N surety for Q). Murfree, Sheriffs (2d ed. 1890) § 910; Sheldon, Subrogation (2d ed. 1893) § 90.

\textsuperscript{175} People v. Schuyler, 4 N. Y. 173 (1850).

\textsuperscript{176} Skiff v. Cross, 21 Iowa 459 (1866) (B held subrogated to right of X against C). And see Myer Bros. Drug Co. v. Davis, 68 Ark. 112, 56 S. W. 788 (1900) (B held subrogated to O's right on note given to him by C, who purchased the property at execution sale).
let it be supposed that it was O, the officer, who levied on the property of X and that B, his surety, compensates X. B may have reimbursement from O and he in turn from M, surety on the indemnity bond given by C. The question then arises how, if at all, B may reach M if O is insolvent. If the bond is interpreted to give O a right of exoneration against M, B may reach M by subrogation, not only through X, the tortfeasor, but also through O in spite of the latter's insolvency; for a surety is subrogated to the rights of recourse of his principal and O's right against M is for relief from all liability proximately resulting from the levy, including liability to B, and requires for its fulfillment either that M pay B or put O in funds to be so used; since fulfillment necessarily redounds to the benefit of B, the right of exoneration is a valuable right for him to be subrogated to. Moreover, by the better view, an undertaking to "save harmless" or even to "indemnify" is to be interpreted as one to save O from incurring loss as well as to compensate him for incurred loss, and hence is one of exoneration as well as reimbursement.\textsuperscript{77} Thus, a way is open for B to reach M.\textsuperscript{78}

Again, suppose that it was Q, the deputy, who levied execution on property specifically designated by C, and that N is surety on the bond of Q to O, and M on a bond of exoneration given to Q by C. If the officer compensates X, the tortfeasor, and in turn recovers from N, the latter will be effectively subrogated to the rights of exoneration of Q, his principal, against C and M.

Likewise, if an officer or his deputy in disregard of a senior execution levies a junior execution on property of the judgment debtor, relying on a bond with or without surety given to him by the junior creditor for his exoneration, the surety for the officer or deputy is subrogated to his rights on that bond.\textsuperscript{79}

\textit{Relation between Surety for Tax Collector and Delinquent Tax-Payer}

If the collector is so remiss in his duty of collecting taxes that he and his surety become liable to the state (or municipality) for the amount of the taxes, a delinquent tax-payer and the collector are placed in the relation of principal and surety, respectively,\textsuperscript{80} for much the same reasons as justify a like relation between a sheriff (or constable) and a judgment debtor.\textsuperscript{81} It follows that the relation of principal and surety exists between the delinquent

\textsuperscript{77} For a conflict of authority on the meaning of the word "indemnify" or the words "security against loss" in the case of a mortgage given by principal to surety, see \textit{Campbell, Cases on Suretyship} (1931) 214 n. 2.

\textsuperscript{78} Dine v. Donnelly, 134 Ky. 776, 786, 791, 121 S. W. 685, 688, 690 (1909); People v. Schuyler, 4 N. Y. 173, 183 (1850) (arguendo).

\textsuperscript{79} Philbrick v. Shaw, 61 N. H. 356 (1881) (bond to save deputy harmless; senior creditor had recovered from sheriff and he from deputy's surety).

\textsuperscript{80} Prather v. Johnson, 3 Harris & J. 487 (Md. 1814).

\textsuperscript{81} See last sub-topic.
tax-payer and the collector's surety, respectively,\(^{182}\) for any other relation might lead to circuity of action and to improper indirect attack on the collector.

Relation between Surety for Fiduciary and a Third Person Who Participates in a Breach of Fiduciary Duty with Knowledge or Notice Thereof or without Giving Value

Obviously, if the participating third person, \(X\), knows or suspects that the fiduciary, \(P\), is violating or intends to violate his fiduciary duty to \(C\), then \(X\) and \(S\), the surety for the fiduciary, should be related as principal and surety, respectively; for \(X\) participates in the principal's breach and does so in bad faith, and hence not only comes under immediate liability to \(C\) but should be placed in such relation with \(S\) that he incurs ultimate liability. Thus, on paying \(C\), \(S\) is equitably entitled as against \(P\) or \(X\) to \(C\)'s interest in the \(res\) in respect to which \(P\) violated his fiduciary duty, or its traceable product.\(^{184}\) This interest of \(C\) may consist in legal or equitable title to the original \(res\), or at his election, in equitable title to or an equitable lien on its traceable product.\(^{183}\) Furthermore, as surety for \(X\), \(S\) is subrogated to any right in personam which \(C\) has against \(X\) because of the latter's tortious participation in the transaction involving the \(res\) or its product, whether it be a right to damages or to an accounting for proceeds.\(^{185}\) And the results are no different when \(X\) acts with constructive notice of \(P\)'s breach of fiduciary duty,\(^{187}\) whether that notice be absolute, as when \(X\) is required in effect to

\(\text{\textsuperscript{182}}\) Livingston v. Anderson, 80 Ga. 175, 5 S. E. 48 (1888) (under GA. CODE (1882) §§2176, 2177). But see Jones v. Gibson, 82 Ky. 561 (1885) (surety refused relief on the ground that the legislature contemplated summary action by the collector as the only means of enforcing payment); Note (1907) 14 L. R. A. (N. S.) 155, 156.


\(\text{\textsuperscript{184}}\) Guthrie v. Ensign, 36 Idaho 673, 687, 213 Pac. 354, 357 (1923); Farmers and Traders' Bank v. Fidelity & Deposit Co., 108 Ky. 384, 56 S. W. 671 (1900); Kennedy v. Pickens, 3 Ired. Eq. 147, 149 (N. C. 1843); Skipwith v. Hurt, 94 Tex. 322, 60 S. W. 423 (1901); Bacon v. Wright, 52 S. W. (2d) 1111 (Tex. Civ. App. 1932); 13 ANN. Cas. 429.

\(\text{\textsuperscript{185}}\) See Scott, The Right to Follow Money Wrongfully Mingled With Other Money (1913) 37 HARV. L. REV. 125.

\(\text{\textsuperscript{186}}\) American Surety Co. v. Vann, 135 Ark. 291, 205 S. W. 646 (1918); Davidson v. Chrisp, stated in Adams v. Geaves, 10 Lea 367, 374 (Tenn. 1882) (S given exoneration against \(X\)) ; Anderson v. Walker, 93 Tex. 119, 130, 53 S. W. 821, 825 (1899); Stokes v. Little, 65 Ill. App. 255, 259 (1895); see Fidelity Co. v. Jordan, 134 N. C. 236, 242, 46 S. E. 496, 498 (1904).

So also when \(P\), though dealing properly with the \(res\), receives a personal profit from \(X\) with his knowledge. American Bonding Co. v. National Mechanics Bank, 97 Md. 598, 55 Atl. 395 (1903).

\(\text{\textsuperscript{187}}\) So, if \(P\) is violating not only his fiduciary duty but also some special limitation of authority and \(X\) has knowledge or constructive notice of the latter. Richfield Nat. Bank v. American Surety Co., 39 F. (2d) 387 (C. C. A. 8th, 1930) (depositary bank issued cashier's checks to treasurer of school district as such on warrants not signed according to instructions; \(S\) held subrogated as against bank; alternative decision); Fidelity & Deposit Co. v. Farmers' Bank, 44 F. (2d) 11, 16 (C. C. A. 8th, 1930) (depositary bank paid out funds without warrant required by law); American Nat. Bank v. Fidelity & Deposit Co., 129 Ga. 126, 58 S. E. 867 (1907) (depositary bank paid out funds without countersignature or notation required by order appointing receiver); Fidelity & Deposit Co. v. Queens County Trust Co., 226 N. Y.
ascertain the truth at his peril, or qualified, as when he is merely subjected to the burden of reasonable inquiry and fails to sustain the burden. The same principles of constructive notice which adversely affect X in respect to the res, or its product, and subject him to personal liability to C, also require that he be a principal in relation to S. Consequently, S is equitably entitled to C's interest in the res or its traceable product, and is also subrogated to any right in personam for damages or an accounting which C may have against X because of the latter's dealing with the res or its product. It makes no difference that S is a compensated surety company.

It is submitted that the principles above considered are generally applicable even when the duty which P violates is not of a fiduciary character. On paying C the surety should be subrogated not only to the interest of C in the res and its product but also to any right in personam which C has against X. Two illustrations may be given: (1) When S is surety for P to C in a

225, 123 N. E. 370 (1919) (depository bank of trustee in bankruptcy held to have constructive notice of general orders in bankruptcy requiring checks of trustee to be countersigned by an officer of court, and S held subrogated as against bank); Browne v. Fidelity & Deposit Co., 98 Tex. 55, 80 S. W. 593 (1904) (guardian selling one note to X, and surrendering another to Y at a discount, without order of court as required by statute; held S subrogated to rights of new guardian to recover amount of first note from X and residue of second note from Y); Forest County v. Poppy, 193 Wis. 274, 213 N. W. 676 (1927).

188. The rules of constructive notice, governing transactions in money, negotiable instruments, non-negotiable instruments, chattels, etc., are further discussed in the next sub-topic. For an excellent treatment of the subject see Scott, Participation in a Breach of Trust (1921) 34 Harv. L. Rev. 454.

189. United States F. & G. Co. v. Union Bank & Trust Co., 228 Fed. 448, 452 (C. C. A. 8th, 1915); Fidelity & Deposit Co. v. Farmers' Bank, 44 F. (2d) 11 (C. C. A. 8th, 1930) (S was surety for P, county treasurer, who deposited county funds in X bank in his name as treasurer; X received one check in payment of P's own debt with knowledge of misappropriation; held that X was put on inquiry as to subsequent misappropriations of P effectuated by means of checks drawn on said account and deposited in his personal account, and checks drawn on said account payable to and in aid of a friend and a non-depository bank; Bischoff v. Yorkville Bank, 218 N. Y. 105, 112 N. E. 759 (1916) followed; held, S subrogated to the county's right against X); Boone County Bank v. Byrum, 68 Ark. 71, 74, 56 S. W. 532, 533 (1900); Carroll County Bank v. Rhodes, 69 Ark. 43, 48, 63 S. W. 68, 70 (1900) (S surety for P, tax collector; X bank knew that P was depositing tax funds; P was indebted to X with Y as surety; P paid debt by drawing check payable to Y who surrendered it to X; held X had constructive notice of misappropriation, and that S was subrogated as against Y); Hill v. Fleming, 128 Ky. 201, 107 S. W. 764 (1908) (S held subrogated to C's right in bank account into which X had converted check received by him from P with constructive notice); Bunting v. Ricks, 2 Dev. & B. Eq. 130 (N. C. 1838) (X put on inquiry as to continuance of equitable interest of C in promissory note); Fox v. Alexander, 1 Ired. Eq. 340 (N. C. 1841); Northern Trust Co. v. First Nat. Bank, 25 N. D. 74, 140 N. W. 705 (1913); Rham v. Lewis, 13 Rich. Eq. 269, 336 (S. C. 1867); Brovan v. Kyle, 166 Wis. 347, 165 N. W. 382 (1917).

190. Taylor v. Harris' Adm'r, 164 Ky. 654, 673, 176 S. W. 168, 176 (1915) (surety given exoneration against X); Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414 (1887); United States F. & G. Co. v. Citizens State Bank, 36 N. D. 16, 161 N. W. 562 (1917) (guardian paying trust money in discharge of his own debt to X, who was held to be put on inquiry as to whether estate was in truth equally indebted to guardian); Rham v. Lewis, 13 Rich. Eq. 269, 336 (S. C. 1867); Dobbins v. Carroll, 137 Tenn. 133, 192 S. W. 166 (1917); Hall v. Windsor Sav. Bank, 97 Vt. 125, 124 Atl. 593 (1924); Pinckard v. Woods, 8 Gratt. 140 (Va. 1851) (administrator sold assets and took bond payable to "P, administrator"; X purchased bond at discount knowing that debts were incomconsiderable; held that X had constructive notice of improprity of sale; and that S was subrogated to C's right for an accounting).

title bond and \( P \) conveys or mortgages the land to \( X \), which takes it with knowledge or constructive notice of the interest of \( C \).\(^{192} \) (2) When \( C \), a creditor of \( P \), has a security right in land or chattels owned by \( P \) and also the obligation of \( P \) not to transfer the res until the debt is paid, \( S \) being surety for the obligation as well as the debt, and \( P \) transfers the res to \( X \), who has knowledge or constructive notice of breach of the obligation.\(^{193} \)

Like rules govern a situation in which \( X \) gives no value for the res or its product, for example, (1) when \( X \) receives it by way of gift from \( P \); (2) when it is used by \( P \) for the gratuitous improvement of the property of \( X \);\(^{194} \) or (3) when \( X \), being the wife of \( P \), by operation of statute acquires or would otherwise acquire, alone or with him, a homestead interest in the res or its product or an exemption from levy of execution thereon. In such cases \( S \), the surety, is subrogated to the title or lien of \( C \), although \( X \) had no knowledge or constructive notice of \( P \)'s breach of fiduciary duty. In the third example the legal or equitable title or lien of \( C \) to which \( S \) is subrogated excludes or precedes any homestead interest of \( P \),\(^{195} \) or of \( P \) and his wife \( X \), and is not affected by the exemption from execution;\(^{196} \) and while

\(^{192}\) Cf. Fraser v. Fleming, 190 Mich. 238, 157 N. W. 269 (1916) (\( S \) held to be subrogated to \( C \)'s equitable interest in the land; \( X \), mortgagee, had constructive notice from possession of \( C \)).

\(^{193}\) Martin v. Federal Surety Co., 58 F. (2d) 70 (C. C. A. 8th, 1932); National Surety Co. v. Webster Lumber Co., 187 Minn. 50, 244 N. W. 290 (1932). In both of these cases \( S \), surety to the state for full performance on the part of \( P \), who was operating under a timber permit, was held to be subrogated to the cause of action of the state against \( X \) for the conversion of certain ties. In violation of a statutory duty \( P \) had sold the ties to \( X \) without having fully paid for them. \( X \) was put on reasonable inquiry by certain informative marks placed on the ties and such inquiry would have disclosed that they had been made from timber cut under a certain state permit and that they had not been fully paid for (2 Williston, Sales [2d ed. 1924] § 621), and hence that they were being sold in violation of statute. The question was not whether \( S \) was subrogated as against \( X \) to the legal title retained by the state by way of security; \( S \) would clearly have been so subrogated without resort to any doctrine of constructive notice; the security title reserved in the state, to which \( S \) had been inchoately subrogated from the beginning, would have sufficed (1 id. § 324; see also Fields v. Sherrill, 18 Kan. 365 [1877]; Campbell, op. cit. supra note 177, at 90, 92, n. 1). But rather the question was whether \( S \) was subrogated to the cause of action of the state against \( X \) for the conversion involved in the sale of the ties before payment; as between \( S \), although he had voluntarily undertaken responsibility for such a wrong, and \( X \), who had participated therein with constructive notice, it was properly held that they were to be placed in the position of surety and principal, respectively, and that \( S \) should be subrogated accordingly.

\(^{194}\) Reaves v. Coffman, 87 Ark. 60, 112 S. W. 194 (1908) (\( S \) held subrogated to the lien of \( C \) on property of \( X \) so improved).

\(^{195}\) Rice v. Rice, 108 Ill. 199 (1883) (subrogation to ratable interest); Pierce v. Holzer, 65 Mich. 263, 32 N. W. 431 (1889) (subrogation to lien).

\(^{196}\) It is to be observed that \( C \) has equitable title to the homestead of \( P \) and his wife, \( X \), wholly purchased with funds misappropriated by \( P \) (Preston v. Moore, 133 Tenn. 247, 180 S. W. 320 [1915]) or a ratable interest in a homestead partly purchased with such funds and partly with funds belonging to \( P \) (see Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861 [1912]); or, at his election, an equitable lien on a homestead so purchased from misappropriated funds in whole or in part, and in part (Thompson v. Hartline, 105 Ala. 263, 15 So. 711 [1894]; Kemp v. Enemark, 194 Cal. 748, 230 Pac. 441 [1924] [fraud; homestead the ultimate produce of misappropriated funds]). Similarly, \( C \) has an equitable lien on the homestead of \( P \) or \( X \) for the amount of misappropriated funds expended by him in improving the same (Jones v. Carpenter, 90 Fla. 407, 106 So. 127 [1925], 43 A. L. R. 1415 [1926]), and on any proceeds of the sale thereof (Smith v. Green, 243 S. W. 1006 [Tex. Civ. App. 1922]). Moreover, \( C \) is subrogated to the lien of a preexisting mortgage on the homestead of \( P \) and \( X \) paid off with misappropriated funds (Shinn v. Macpherson, 58 Cal. 596 [1881]). See Note (1926) 43 A. L. R. 1415, 1446.
X should have a lien for the amount of her separate funds, if any, expended without knowledge or constructive notice in improving a homestead so acquired, her lien would be junior to the lien of C. 197

An interesting hypothetical case suggests itself in this connection. S was surety for the faithful performance of the duties of P, trustee for C: P wrongfully assigned a certificate of railroad stock to X in payment of his own debt, X having knowledge or constructive notice of the breach of trust. C received from S $1,000, the constant value of the railroad stock. It was later discovered by C and S that previously thereto X had exchanged the railroad stock for motor stock and had sold the latter for $2,000. Who is entitled to the profit on the motor stock? Obviously X must disgorge the entire proceeds, $2,000; the policy of deterrence so requires; moreover, X was speculating at the risk of another person. The question then arises whether S shall receive the entire amount, or only $1,000, the residue going to C. $1,000 will make S whole; on the other hand the previous payment of $1,000 made C whole. S may assert that he bore the risk of insolvency of P and X and of the wasting or depreciation of the stocks; but C may answer that the ultimate risk lay on him, since the loss would have fallen on him if in addition S became insolvent; to this answer S may justly reply that in fact he remained solvent and hence, as events turned out, the risk lay upon him and he is entitled to all the profit. It is submitted that S is so entitled. 198

Of course if P's breach of fiduciary duty consists in transferring to X money or a negotiable instrument which legally or equitably belongs to C, and X receives it in good faith without knowledge or constructive notice and in discharge of a debt or other obligation due to him from P, then neither C, nor S through subrogation, may recover the res or its value from X, who is a holder in due course. 199 If in addition S-2 is surety for the debt or obligation of P to X, it is submitted that C, 200 and hence S on paying C, 201 is equitably entitled to the right of X against S-2, a right which X no longer needs. 202


198. See CAMPBELL, op. cit. supra note 177, at 152, 153.

199. The result will be the same if P lends C's money to X, who subsequently discharges the debt by payment of money or transfer of property to P, and who is without knowledge or constructive notice of the misappropriation. It is true that the debt was held in constructive trust for C, but, X being discharged in equity as well as at law, C has no right against him to which S can be subrogated. Brown v. Houck, 41 Hun 16 (N. Y. 1886).


202. Obviously, however, if the law of the state refuses to recognize that X gave value, then C (or S on paying C) may have recovery from X and hence will not be equitably entitled to X's right against S-2, since X will have need of it for his own protection. Fidelity & Deposit Co. v. Gill, 116 Va. 86, 93, 81 S. E. 39, 42 (1914) (rested on the sufficient ground that the obligations of S and S-2 ran to different obligees). See Boaz v. Ferrell, 152 S. W. 200, 201 (Tex. Civ. App. 1912).
The first question is one between C and S-2, that is, whether in equity X's right shall remain extinguished in ease of S-2 or be saved and passed to C. It seems that the latter is the better result; it is supported by analogies and by the following reasons: (1) The payment was made with funds belonging to C and not to P. (2) It does not appear that the position of S-2 became any the worse because of the payment. (3) S-2 is not entitled to the protection accorded to one participating in a transaction for value. In the first place, while X gave value in that a person in his situation would probably rely on the payment and refrain from taking effective steps against the person from whom he received it, the very same reasons require that in the case discussed in Newell v. Hadley it was held that the creditor, X, was entitled to retain the payment received because he received it in good faith for value and without notice; hence he had no further need of rights against the defrauded creditor against the legal discharge of the surety, a volunteer. Otherwise, if S suffered a resulting change or difference of position, Reints & DeBuhr v. Uhlenhopp, 149 Iowa 284, 128 N. W. 400 (1910), limiting Kirby v. Landis, 54 Iowa 150, 6 N. W. 173 (1880). In the second place, even though S-2 had

203. (1) In Hubbard v. Hart, 71 Iowa 668, 33 N. W. 233 (1887), CAMPBELL, op. cit. supra note 177, at 416, 417, n. 1, S was bound on a joint or joint and several note with and for P to C, and C was induced by the fraud of P to surrender the note to him; in an action on the note judgment was given for C against S, and properly so, because equity will relieve the defrauded creditor against the legal discharge of the surety, a volunteer. Otherwise, if S suffered a resulting change or difference of position. Reints & DeBuhr v. Uhlenhopp, 149 Iowa 284, 128 N. W. 400 (1910), limiting Kirby v. Landis, 54 Iowa 150, 6 N. W. 173 (1880).

204. Therein is the case to be distinguished from United States v. Brent, 236 Fed. 771 (W. D. S. C. 1916) (non-preferential payment out of funds of principal applied to account for which S-2 was surety; held that S's surety for another account, could not complain).

205. The result will be different if in the particular case it is proved that S-2 knew of the payment, and in reliance thereon irremediably changed his position or refrained from taking effective action against P which he could and would otherwise have taken and cannot now take.

known of the settlement, so that his position was probably the worse because of it, still it was $X$ and not $S-2$ who was the recipient in the transaction of payment.

The second question is whether $S$, on making good $P$'s violation of duty to $C$, should be subrogated to $C$'s recourse against $S-2$; this question is one essentially between $S$ and $S-2$, and must be answered in the affirmative since $S-2$ did not participate in a transaction for value. This conclusion merely involves an extension of the doctrine hereinbefore stated that a surety for a defaulting principal is subrogated to the creditor's rights in the res or its product as against a transferee thereof without value. There $C$ has, let us say, an equitable right against $X$, the transferee, and also a right against $S$, and $S$ and $X$ are held to be related as surety and principal, respectively, because, although $S$ willingly undertook risk, $X$ gave no value in receiving the legal title. Here $C$ has an equitable right against $S-2$, and also a right against $S$, and $S$ and $S-2$ should be related as surety and principal, respectively, because, while $S$ willingly incurred responsibility for the very misappropriation which occurred, $S-2$ gave no value for the legal discharge from his previously matured liability.

Relation between the Surety for a Fiduciary and a Third Person Who Carelessly Participates in a Breach of Fiduciary Duty

By the weight of authority, $S$, the surety for the fiduciary, and $X$, a careless participant in the breach of fiduciary duty, are related as surety and

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141; Note [1913] 26 Harv. L. Rev. 634). See Voss v. Chamberlain, 139 Iowa 569, 117 N. W. 269, 19 L. R. A. (n. s.) 107 (1908); Metropolitan Trust Co. v. Federal Trust Co., 232 Mass. 363, 122 N. E. 433 (1919). 207. The writer is inclined to the view that, in the absence of proof of actual change or difference of position, the possibility or even probability thereof will not suffice to protect a person unless it results from a transaction in which he, or someone representing him, takes part; for such protection would rest on the commercial interest in the security of transactions and should extend only to "value" transactions, that is, certain classes of transactions in which the law has determined that there is a sufficiently probable change or difference of position, for example, satisfaction or security of an antecedent obligation.

Much the same question was involved in Brown v. Southwestern Farm Mortgage Co., 112 Kan. 192, 195, 210 Pac. 658, 659 (1922), and London Banking Co., Ltd. v. London and River Plate Bank, Ltd., 21 Q. B. D. 535 (1888). In each case a wrongdoing agent abstracted negotiable or semi-negotiable securities belonging to $X$ from a place of safe keeping, negotiated them to $C$, a bona fide purchaser, procured their return from him, and wrongly placed them in the original repository; in each case, it seems, the securities were later seen there by $X$, who was thereby prevented from discovering the truth and probably from taking effective action against the wrongdoer. In the Brown case $C$ prevailed; in the London Banking Company case $X$ prevailed. Independently of doubt as to the revesting of legal title in $X$, and also of the possibility of imputing the knowledge of his agent to $X$, the writer is inclined to favor the Brown case because no actual change or difference of position on the part of $X$ appeared and he did not participate in a "value" transaction. See Note (1923) 36 Harv. L. Rev. 848. Authorities are collected in Scott, Cases on Trusts (2d ed. 1931) 723, 727, n. 1, and in Langmaid, Quasi-Contract—Change of Position by Receipt of Money in Satisfaction of Pre-existing Obligation (1933) 21 Calif. L. Rev. 311, 341. Contrast Thorndike v. Hunt, 3 De G. & J. 563 (Ch. 1859); Taylor v. Blakelock, 32 Ch. D. 560 (1886); Colonial Bank v. Hepworth, 36 Ch. D. 36 (1887) (misappropriated stock borrowed from bona fide purchaser by wrongdoer and registered by him in name of $X$, who later received dividend from corporation), which were all cases of transfer of the legal title to securities, or its equivalent, in discharge of an antecedent obligation to make reparation.
principal, respectively, the result being that the former on compensating C, the beneficiary, is subrogated to any right which he may have against X, and X is denied any subrogation to C’s right against S. It is immaterial that X gives value and is without knowledge or constructive notice of the breach. The result is sound. It is true that S deliberately undertook the risk of a breach of fiduciary duty on the part of P, the principal, and it may be for compensation. X, however, carelessly participated in the breach and, while he is being held to an objective standard, that is what is done in the cases of qualified constructive notice treated under the last sub-topic, wherein if X has knowledge or notice of certain indicative facts he is subjected to the burden of reasonable inquiry as to the existence of the indicated facts. If the subject matter involved is money or a negotiable instrument, in which classes of property there is a strong commercial interest favoring free marketability, the field of constructive notice is limited; only a few indicative facts or groups of facts are held to impose the burden of inquiry; but in such cases the failure of X to sustain the burden results in his being liable to C and unfavorably related with S. When the subject matter consists in some other form of property, for example, a chattel or a non-negotiable chose in action, the scope of constructive notice is much wider; knowledge of any reasonably indicative fact or group of facts results in imposing the burden of reasonable inquiry as to the existence of the indicated fact or facts. Here again failure to meet the burden subjects X not only to liability to C but also to adverse relation with S. It is submitted that the law is justified in taking the further position that carelessness on the part of X without contributing carelessness on the part of S places X in unfavorable relation with S. Thus, X is subjected to the objective standard of

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208. Martin v. Federal Surety Co., 58 F. (2d) 79, 86 (C. C. A. 8th, 1932) ("it is not necessary that such negligence be culpable or gross"); Cooper, Myers & Co. v. Smith, 139 Minn. 382, 166 N. W. 504 (1918); CAMPBELL, op. cit. supra note 177, at 101 (S held subrogated as against negligent X bank purchasing warrant with payee's name forged); Rivers v. Liberty Nat. Bank, 135 S. C. 107, 133 S. E. 210 (1926) (P, bookkeeper, had authority to deposit checks payable to order of C to latter's credit in X bank; X carelessly paid cash to P for some checks indorsed by P as agent "for deposit to credit of C in X bank", for others indorsed by "P, Agent" in blank and for one after suspicion aroused; held S subrogated as against X; and see Standard Steam Co. v. Corn Exchange Bank, 220 N. Y. 478, 116 N. E. 386 (1917), L. R. A. 1918 B, 576 (1918)). Notes (1907) 14 L. R. A. (N. S.) 155; 46 id. 557.

209. In some cases both negligence and constructive notice are found to be present, the result being that the court treats either as fatal to X. Martin v. Federal Surety Co., 58 F. (2d) 79, 86 (C. C. A. 8th, 1932).

210. See CAMPBELL, CASES ON BILLS AND NOTES (1928) 524-567.

211. It is to be observed that in not a few situations, e. g., conversion, liability to C ensues irrespective of knowledge or constructive notice on the part of X.

212. 2 WILLISTON, CONTRACTS (1920) § 621.

213. Here again it is to be observed that X may be liable to C irrespective of lack of care, e. g., in the case of conversion, or when a depositary bank fails to discharge its obligation to C because the check it has paid has been forged or altered.
reasonable conduct in respect to ascertaining initial facts as well as inquiring concerning the existence of ultimate facts indicated thereby.

It has been held that S is surety for X even when the latter was careful, gave value and had neither knowledge nor constructive notice. This seems an erroneous decision; for S deliberately undertook the risk of P's wrongful act, and while X participated therein he was not at fault. By the better view and by the weight of authority, S is not subrogated as against X, but on the contrary X should be accounted surety for S and subrogated or even exonerated accordingly. Thus the line of demarcation is soundly drawn between care and absence of care on the part of X.

In not a few states, by its terms or by statutory provision, the undertaking of a surety for a public officer benefits any person who is injured by the official misconduct (or default) of P. While such a "beneficiary" provision might conceivably have been interpreted as protecting a private person only when the state or municipal subdivision suffers no harm, courts have usually interpreted it as giving rights to injured persons generally, even though the state or municipal subdivision itself has been injured and has a cause of action against the surety. The question remains whether a third person who is at fault is excluded from the benefit of the provision either by interpretation or on grounds of policy. It is clear that X is so excluded, at least on the latter ground, if he knowingly participates in P's breach of duty. But it would seem that carelessness should not be fatal; the ques-

214. National Surety Co. v. National City Bank, 184 App. Div. 771, 172 N. Y. Supp. 413 (1st Dep't 1918) (S held subrogated to C's deposit credit as against bank paying money on forged indorsement).

215. National Surety Co. v. Arosin, 198 Fed. 505 (C. C. A. 8th, 1912); New York Title & Mortgage Co. v. First Nat. Bank, 51 F. (2d) 485 (C. C. A. 8th, 1931) (title company held not subrogated as against careful depository bank paying out money on forged indorsement); American Surety Co. v. Lewis State Bank, 58 F. (2d) 559, 561 (C. C. A. 5th, 1932) (carelessness not shown; S not subrogated); Baker v. American Surety Co., 181 Iowa 634, 159 N. W. 1044 (1917) (carelessness not shown; S not subrogated); Louisville Trust Co. v. Royal Indemnity Co., 230 Ky. 482, 20 S. W. (2d) 71 (1929), 43 HARV. L. REV. 500 ("P, Agent", indorsed checks so payable to X bank and received credit on private deposit account; later checked against account for own purposes but not for advantage of bank; held that it was a hard doctrine that made X liable to C [minority view], and therefore S should not be subrogated as against X; no negligence shown, and extreme doctrine of constructive notice not applied against X); Northern Trust Co. v. Consolidated Elev. Co., 146 Minn. 132, 171 N. W. 265, 4 A. L. R. 518 (1919) (S denied subrogation against converter of grain; no constructive notice; and no carelessness shown); American Bonding Co. v. State Sav. Bank, 47 Mont. 332, 133 Pac. 367, 46 L. R. A. (n. s.) 527 (1913) (clerk of court drew false, non-negotiable jurors' certificates in favor of fictitious payees and, it seems, indorsed them accordingly; the certificates were purchased by the X bank and collected by it from the county treasurer, apparently without knowledge, notice or negligence; held that S was not subrogated to the right of the county, if any, against X for money paid under mistake; alternative decision; in truth, it seems that the county had no right against X, infra, note 228).

216. See American Surety Co. v. Lewis State Bank, 58 F. (2d) 559, 561 (C. C. A. 5th, 1932).


218. Or, it seems, if he suspects P's breach of duty and refrains from making reasonable inquiry.
tion is not whether $S$ is under tort liability to $X$, but whether he is bound to $X$ because of his contractual undertaking. Carelessness on the part of $C$, to whom the undertaking runs, would not exclude $C$ from a contractual right thereon; no more should it exclude the beneficiary from such a right. Furthermore, the writer is inclined to the opinion that constructive notice on the part of $X$ would not be fatal; it is a subjective mental state which should deprive him of a contractual right intentionally undertaken by $S$, rather than the requirements of an objective standard. If then in a particular case $X$ comes within the favor of such a provision, he must be accounted a surety for $S$. Conceivably, $C$ might strike either; if he should strike $X$ the latter could hold $S$ on the bond; and if $C$ should strike $S$, and $S$ were subrogated to $C$'s right against $X$, the last-named could hold $S$ on the bond in whole or part, unless the maximum amount thereof were exhausted by $C$'s recovery thereon. In other words, $S$ and $X$ must be placed in the relation of principal and surety, respectively, to avoid placing in $C$ the power of capricious or collusive action (if the loss be large enough to exhaust the bond) and to avoid circuity of suit (if the loss be not so large).

The much-discussed case of *National Surety Co. v. State Savings Bank* raises interesting questions. The $S$ company was surety for $P$, county auditor, to the $C$ county. The statutes of Minnesota provided that an action could be brought against the county auditor and his sureties for the use of any person injured by his misconduct in office. $D$, deputy auditor, drew spurious, nonnegotiable refunding orders on the county treasurer in favor of other persons, had them authenticated by the county commissioners, executed assignments thereon in the names of such payees, and sold them to the $X$ bank, which later obtained payment from the county treasurer in good faith and without knowledge of the wrongdoing. The county recovered judgment against $P$ and $S$ in *Board of County Commissioners v. Sullivan*. Having compensated the county, the $S$ company filed its bill alleging the facts above stated and praying subrogation to the rights of the county against the $X$ bank. From an order sustaining a demurrer, $S$ appealed. The order was reversed (per Adams, J.; Sanborn, J., concurring, and Hook, J., dissenting),

219. Williams v. Lyman, 88 Fed. 237 (C. C. A. 8th, 1898) (holding that carelessness of $C$ and his failure to perform a duty owed to a third person will not bar him).

220. *Contra*: Dobbins v. Carroll, 137 Tenn. 133, 139, 192 S. W. 166, 168 (1917). It is to be observed that the situation under discussion differs much from other instances in which constructive notice is fatal to $X$; for example, where $X$ is held liable for dealing with the property of $C$, and also denied equitable relief by way of subrogation against $S$.


224. 89 Minn. 68, 93 N. W. 1056 (1903).
the court in effect holding that the bill stated facts entitling S to subrogation. The case raises several questions: (1) Were the auditor and his surety liable on the bond for the official misconduct of the deputy? It was so held in Board of County Commissioners v. Sullivan, on the ground that the official acts of the deputy must be regarded as acts of the auditor, since the latter had the power of appointing, controlling, and dismissing the former.225 (2) Is the formation of such a spurious document in the accomplishment of his own fraudulent design "misconduct in office" on the part of an officer or his deputy? This question was also answered in the affirmative in the Sullivan case, since the act of the deputy was done by color of his office, that is, by his taking advantage of the opportunities thereof.226 (3) Was the payment of the orders by the county treasurer the proximate consequence of the "official misconduct"? It was soundly so held in the Sullivan case; and so recognized in National Surety Co. v. State Savings Bank, on the ground that such payment was the foreseeable consequence of the drawing of the orders. (4) Was the purchase of the orders by the X bank a proximate consequence of the "official misconduct"? Adams, J. (Sanborn, J., concurring), answered that question in the negative, his reasoning being that the circumstances were such that the bank should reasonably have suspected the fraud and inquired concerning the validity of the orders, and hence (a) that the purchase was not foreseeable and therefore not the proximate consequence of the drawing of the orders but rather of the intervening nonofficial fraudulent representation of D, and (b) that the X bank had constructive notice of the wrongful conduct of D. Consequently, the court held that the X bank had acquired no right against the county on the orders, that the payment made by the county was rescindable for mutual mistake, and that S incurred no liability to the bank under the statute, but was subrogated to the quasi-contractual right of the county against the bank.

The case later coming on for trial, further facts appeared from an agreed statement, namely, that there had been a prior practice of such purchases, and that the treasurer had noted on the orders that there were no funds to the credit of the particular account and that the orders would be paid as soon as there was money available for that purpose. The trial court rendered a decree in favor of the X bank, and this decree was affirmed by the Circuit Court of Appeals in National Surety Co. v. Arosin,227 on the ground that the bank did not have constructive notice and was not negligent. On such findings of fact, the later decision was clearly sound: (1) Aside from the statute, considerations of equity and good conscience required that the X

226. For the conflicting views on whether a distinction should be made between virtue and color of office, see 46 C. J. 1069; MECHEM, PUBLIC OFFICERS (1890) §§ 283, 284.
227. 198 Fed. 605, 609 (C. C. A. 8th, 1912).
Another phase of this litigation is presented by the report of National Surety Co. v. Arosin. A, the county treasurer, had also honored false re-demption warrants drawn on him by D, the deputy auditor, payable to other persons, indorsed by D in their names and presented by him directly to A, who paid the amounts sometimes in cash and at other times by checks, payable to the order of such persons and drawn on the Z depositary bank; D indorsed the names of such persons on the checks and received payment from the Z bank. A and Z acted without knowledge, constructive notice or carelessness. S compensated the C county. It was properly held that S was not subrogated to any right of C against A or against S-2, his surety; nor to the right of C against the Z bank. On the contrary, had it paid C, the Z bank would have been surety for the S company and subrogated as against it, as would A have been, if he had been liable to and had paid C; for, unlike A, S-2 and Z, S had deliberately undertaken risk in respect to the honesty of P and hence of D, his deputy.

But suppose that A had known of or suspected the wrongdoing of D; S would have been related to him as surety and subrogated accordingly; considerations of equity and good conscience would so require; nor could A invoke a "beneficiary" statute. If A were merely negligent, the "equities" would still favor S except for a "beneficiary" statute, which would clearly turn the relation against the latter; for mere negligence would not deprive A of the favor of the statute either on grounds of interpretation or policy. 229 Thus, in American Surety Co. v. Robinson, 230 A, commissioner for the county of C, carelessly signed orders in blank for P, the county treasurer, to fill in; P made them payable to "F", indorsed that name on them, abstracted their amounts from the county treasury and used the orders as vouchers; S, surety for P, compensated C. It was held that if C had recovered from A

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228. There was also present the preliminary question of whether the X bank was under liability to the county. The orders were signed by the deputy auditor and authenticated by the board of county commissioners; hence, it seems, they were not payable to the deputy under a fictitious name. Had he alone executed the orders, his intention would have determined the identity of the payee; and he would have intended that he should control and assign the orders and hence that he himself should be the payee under a fictitious designation; the result would have been that the X bank, taking the orders under a genuine assignment, would have purchased for value a potentiality of payment and could have retained the payment which was eventually received in good faith and without knowledge or notice. See People v. Swift, 96 Cal. 165, 31 Pac. 16 (1892) (fraudulent procurement of promise to convey); Fidelity Mutual Life Ins. Co. v. Clark, 203 U. S. 64 (1905) (life insurance policy, condition not fulfilled); Merchants’ Ins. Co. v. Abbott, 131 Mass. 397 (1881) (fire insurance company, fraudulent loss and proof of loss); Springs v. Hanover Nat. Bank, 209 N. Y. 224, 103 N. E. 156 (1913), 52 L. R. A. (N. S.) 241 (1914), Campbell, op. cit. supra note 200, at 925 (draft with forged document of title attached). In that case the X bank would not have been liable to the county and no relation of suretyship could exist between it and the surety company.

229. American Bonding Co. v. Welts, 193 Fed. 978 (C. C. A. 9th, 1912) (beneficiary statute; allegation of carelessness on part of a county treasurer; demurrer; held S not subrogated as against treasurer).

230. 53 F. (2d) 22 (C. C. A. 5th, 1931).
the latter could have held S on the treasurer's bond, and hence S must be
denied subrogation against A.\textsuperscript{231} It seems to have been overlooked that the
commissioner must have given an official bond and that the Georgia statutes
made every official bond obligatory on the principal and sureties for the
benefit of every person injured by the wrongful act or neglectful perform-
ance of duties of the principal.\textsuperscript{232} Hence, according to the language of the
statute, while P and S were liable to A and his surety, S-2, for P's dishonest
conduct, A and S-2 were both liable to S for A's neglectful conduct.\textsuperscript{233} It
is submitted, therefore, that the "beneficiary" statute must be disregarded
in fixing the relation in such a case. The results are that S should be surety
for dishonest P and neglectful A, and S-2 surety for A and P, and S and
S-2 co-sureties with each other.\textsuperscript{234}

Relation between an Employer (or Public Officer) Without Fault and the
Surety for a Defaulting Employee (or Deputy)

In United States Fidelity & Guaranty Co. v. Citizens' National Bank\textsuperscript{235}
a surety company was obligated on the bond of P, a county treasurer. P
first embezzled $7,000. A, cashier of the X bank, a designated depositary,
in required monthly reports made to the county finance board, overstated
the amount of the balance of P with a view to enabling him to conceal the
shortage. A eventually refused to continue the falsification of reports.
Thereafter P embezzled $18,000 and concealed all his misappropriations by
"kiting" checks. The surety company paid $25,000 to the county. It was
held that the falsification of reports by the cashier proximately resulted in
the treasurer's misappropriation of $18,000, so that a cause of action for that
sum accrued to the county against the bank, and that the surety company
was subrogated thereto. Clearly, the conniving cashier and the innocent
surety company should be related as principal and surety, respectively, and

\textsuperscript{232} GA. CODE ANN. (Michie, 1926) § 291.
\textsuperscript{233} By the better view, causal connection was not broken by the intervention of the
criminal act of P; A may fairly be said to have "invited" the criminal act in that his conduct
suggested it to P. Hence it would seem that the statute did not give rise to either form of
liability. It could hardly give rise to one and not the other. If it gave rise to both, then the
person first struck by C could start a train of liability that would end only on exhaustion of
the maximum amount of a bond.
\textsuperscript{234} It seems that American Bonding Co. v. Welts, 193 Fed. 978 (C. C. A. 9th, 1912), is
open to like criticism. There the county auditor resorted to the practice of drawing false
warrants which were eventually paid by the county treasurer; the county commissioners
failed in their duty to examine the warrants carefully on return by the treasurer and so stop
the practice. S was held not to be subrogated at all as against the commissioners, witholding
a general statute like that of Georgia going to "wrongful acts or defaults". The
court reasoned that the intervention of the criminal act of the auditor broke the causal con-
nection between the commissioners' default and the loss suffered by C and eventually by S.
The soundness of the reasoning and result may well be doubted. See Critten v. Chemical
Nat. Bank, 171 N. Y. 219, 63 N. E. 969 (1902); Campbell, op. cit supra note 200, at 919;
Notes L. R. A. 1913D, 741, 750, 752; (1921) 15 A. L. R. 159, 168, 170; (1924) 28 A. L. R. 1435, 1438;
(1930) 67 A. L. R. 1121.
\textsuperscript{235} 13 F. (2d) 213 (D. N. M. 1924).
the same was held as to the relation between the bank and the surety company, and properly so. It is true that the surety company assumed the risk of the dishonesty of the treasurer voluntarily and for compensation, and the liability of the bank was thrust upon it without bad faith or carelessness on its part and solely on grounds of respondeat superior or of non-delegable statutory duty. Nevertheless, the element of control which the bank had over its employee sufficed to turn the relation against it.

Likewise, in Seward v. National Surety Co., a surety company was bound on the bond of a postmaster and also on the bond of a subordinate, both bonds running to the United States. The subordinate misappropriated funds; the surety company compensated the United States and brought an action against the postmaster. It was given full recovery without any deduction by way of legal or equitable set-off. This seems a sound result. It is true that the surety company undertook two obligations to the United States. Nevertheless, as to the bond of the postmaster, it was clearly his surety and entitled to reimbursement; and in respect to its liability to the United States on the bond of the subordinate it was also nonconsensual surety for the postmaster, because, while its liability thereon was voluntarily assumed for compensation and the liability of the postmaster to the United States was imposed without his fault, the postmaster was in control of his subordinate.

Relation between Voluntary Surety and Surety Incurring Risk through Wrongful Conduct of the Principal

Let it be supposed that S is already bound as surety for P to C, and P, having in his possession a negotiable instrument, wrongfully negotiates it by way of security to C, who takes it in due course. If the negotiation is in wrong of M, the maker (or drawer or acceptor), he has unwillingly become a personal surety for P, and, if in wrong of O, a legal or equitable owner, the latter has against his will become a real surety for P. While both S and M (or O) are sureties for P they should be related to each other as principal and surety, respectively; for S deliberately undertook his risk, whereas the risk of M (or O) was thrust upon him. Moreover, there has been no 236. 120 Ohio St. 47, 165 N. E. 537 (1929); 1 Campbell, op. cit. supra note 177, at 203. 237. The opposite conclusion is reached if the bond of the subordinate runs to the employer or officer, as in Fidelity & Deposit Co. v. Cowan, 184 Ark. 75, 41 S. W. (2d) 748 (1931). 238. Compare the relation between insurer and tortfeasor without fault, which, in the absence of statutory provision to the contrary, is properly held to be that of surety and principal, respectively. Crissey Lumber Co. v. Denver & R. G. R. R., 17 Colo. App. 275, 299, 66 Pac. 670, 677 (1902); Hart v. Western R. R. Corp., 54 Mass. 99 (1847). 239. Likewise, if one surety deliberately undertakes risk and the risk of the other, either real or personal, is imposed on him by statute without his fault, they are related as principal and surety, respectively. Knoll v. Marshall County, 114 Iowa 647, 87 N. W. 657 (1901) (surety on liquor dealer's bond held not subrogated to county's statutory lien on premises leased to dealer); Elder v. Commonwealth, 55 Pa. 485 (1867) (county under statutory liability for default of county treasurer held subrogated to right of state against treasurer's surety).
actual or probable change or difference of position on the part of S. Consequently, \( M \) (or \( O \)) should be fully subrogated to \( C \)'s right against \( S \), and \( S \) be denied any subrogation against either of them. It is not always true, however, that the victim of \( P \)'s wrongful negotiation is allowed protection at the expense of one who voluntarily undertakes responsibility as surety for \( P \). It makes a difference if the latter *undertook his risk* in actual or probable reliance on \( P \)'s apparently valid rights on the instrument. Thus, if \( S \) indorses a negotiable instrument as surety for \( P \), the payee, and so enables him to negotiate it by way of sale or security to \( H \), a holder in due course, and if \( S \) does so without knowledge or constructive notice that another person, \( O \), has the legal or equitable title thereto, or that \( M \), the maker (drawer, acceptor or prior indorser), has a defence thereto, then instead of any of these persons being subrogated to the right of \( H \) against \( S \), the last named on taking up the instrument from \( H \) is entitled to retain it as against \( O \) and to recover thereon against \( M \).

Another situation is that in which two persons, \( A \) and \( B \), willing to be sureties for \( P \), become bound as such to \( C \), \( A \) without being wronged and \( B \) through wrong done to him by \( P \) or some other person, for example, fraud, duress or diversion of an instrument from its intended use. The wrong worked by a third person on \( B \) should not deprive \( A \), if innocent, of the normal advantages of any understanding as to their relation which he has with \( B \) or with the creditor or principal (see appropriate sub-topic, supra), or exclude him from the recourse which he would otherwise have as a subsequent party on a negotiable instrument (see appropriate sub-topic, supra). In most other situations, however, \( B \) may well be placed in the relation of surety for \( A \), since while both willed to become surety \( B \) became bound under improper conditions.

**Relation between the Recipient of Payment of a Forged or Altered Check and a Negligent Depositor in the Drawee Bank**

By the great weight of authority, a depositor owes to the bank a duty of taking care to verify returned checks, balanced pass books and statements of account, in respect to the genuineness of his purported signature.

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240. Dawson v. Prince, 2 De G. & J. 41 (Ch. 1857). Otherwise, if \( C \) or \( S \) had knowledge of the ownership of \( O \) or, having constructive notice thereof, failed to sustain the burden of inquiry. Chicago Title & Trust Co. v. Brugger, 196 Ill. 96, 63 N. E. 637 (1902); Bunting v. Ricks, 2 Dev. & Bat. Eq. 130, 134 (N. C. 1838).


242. 3 WILLISTON, CONTRACTS (1920) § 1518.


and alterations in amount\textsuperscript{243} or the name of the payee,\textsuperscript{246} and to notify the bank of irregularities discovered thereby.\textsuperscript{247} Several situations suggest themselves:

(1) $W$ altered the amount or the name of the payee in a negotiable check drawn by $D$, without its having been delivered to the originally named payee,\textsuperscript{248} and negotiated it to $H$, a careful purchaser in due course, who procured payment from $E$, the drawee bank. At the customary time $E$ returned the check as a voucher to $D$ along with a statement of his account; $D$ negligently failed to discover the alteration and notify $E$. $W$ continued his course of wrongdoing, other checks being similarly altered, negotiated and collected. As to the first check, according to many authorities, $D$’s neglect validated the charge against his account, regardless of any actual prejudice to the $E$ bank.\textsuperscript{249} Now the latter already had a quasi-contractual right against $H$ for money paid under essential error.\textsuperscript{250} It no longer needs this right; for it has come to be in the ultimate position it expected to be in: its charge against the account of $D$ is now valid.\textsuperscript{251} Nevertheless, the $E$ bank may well be allowed to retain and enforce this original right against $H$ for the benefit of $D$,\textsuperscript{252} giving the latter credit with the proceeds of recovery; or $D$ may compel an assignment of the right in equity. The reason why $D$ is preferred over $H$ is that the loss originally fell on $H$, who parted with his money to the wrongdoer, and it should not be shifted merely because $D$ violated his duty to $E$ by failing to discover and disclose the alteration. On the other hand, if $D$’s careless conduct resulted in $E$’s not notifying $H$ (as

\textsuperscript{245} Critten v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969 (1902); Campbell, \textit{op. cit. supra} note 200, at 919.

\textsuperscript{246} Union Tool Co. v. Farmers Nat. Bank, 192 Cal. 40, 47, 218 Pac. 424, 427 (1923).

\textsuperscript{247} Notes L. R. A. 1915D, 741; (1921) 15 A. L. R. 159; (1924) 28 A. L. R. 1435; (1930) 67 A. L. R. 1121.

\textsuperscript{248} The wrongdoer is often an employee of the depositor.

\textsuperscript{249} This is the rule in the federal courts, and in those of Massachusetts and Pennsylvania. Notes L. R. A. 1915D, 741; (1921) 15 A. L. R. 159; (1924) 28 A. L. R. 1435; (1930) 67 A. L. R. 1121; 3 Williston, \textit{Contracts} (1920) §1863. The writer finds it difficult to sustain the rule in that form: the doctrines of ratification, adoption, and estoppel are not properly applicable; nor should the mere possibility of prejudice to the $E$ bank suffice. Only actual prejudice should give to $E$ a cause of action in tort against $D$ or prevent the latter from rescinding the account stated because of essential error. New York and other states so hold. Critten v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969 (1902). Hence in New York, since $E$ has an effective remedy against $H$ (United States M. & T. Co. v. Liberty Nat. Bank, 112 Misc. 149, 184 N. Y. Supp. 32 [Sup. Ct. 1920], aff’d, 195 App. Div. 890, 185 N. Y. Supp. 957 [1921]), it cannot properly maintain its charge against the account of $D$. Kearney v. Metropolitan Trust Co., 110 App. Div. 238, 397, 97 N. Y. Supp. 274, 277 (1st Dep’t 1905) (forged indorsement; alternative decision), aff’d, 186 N. Y. 612, 204 N. E. 1108 (1930); American Exchange Nat. Bank v. Yorkville Bank, 122 Misc. 616, 624, 204 N. Y. Supp. 621, 629 (Sup. Ct. 1924) (forged indorsement; alternative decision). Consequently, $E$ having but one string to his bow, our present problem does not arise.


\textsuperscript{251} Moreover, $E$ is immune from all tort liability: no right on the instrument had arisen in the payee.

prudence would have required) and in H's actually (not merely possibly) failing to take effective steps against W which he could have then taken but cannot now take,\(^{253}\) it would seem that the quasi-contractual right of E should be extinguished in ease of H.\(^{254}\) If D's credit balance was adequate, it is difficult to find a relation of principal and surety between H and D in either case, because D was not under obligation; he merely suffered loss in the discharge *pro tanto* of his credit balance. If, however, the check over-drew D's account, then D later became obligated to E, and should be accounted a surety in the first case and principal in the second.

As to the checks negotiated and collected after D's breach of the duty of verification and notice, each payment made by E to H, whether recoverable or not, constituted loss,\(^{255}\) which, being caused to E by the negligence of D, justified the former in charging the account of the latter. In addition, the usual requisites for quasi-contractual recovery by E from H are present. Here again the question is whether D shall be preferred over H. Shall the quasi-contractual right be denied in ease of H or shall it be raised and enforced for the benefit of D? The latter solution has been approved\(^{256}\) because of absence of any duty of care owed by D to H.\(^{257}\) The writer prefers the former solution. Not only did H purchase the checks carefully and in due course, but he got payment of them in good faith and without notice. Marketability of negotiable instruments in general will be promoted if such purchasers are assured that they may retain payments. The law should give effect to this commercial interest and deny quasi-contractual recovery when no undue hardship will be worked on others, for example, a negligent drawee claiming recovery in his own behalf,\(^{258}\) or, as here, a negligent drawer in whose behalf recovery is being sought.\(^{259}\)

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253. By the law of many states, though probably not by the better view, change or difference of position on the part of the defendant will not defeat quasi-contractual recovery for money paid under mistake unless the plaintiff made the payment carelessly. Woodward, *op. cit. supra* note 250, § 25. In a jurisdiction taking the opposite position, the present problem would drop out, for the drawee bank would have but one string to its bow, that is, to charge the account of the depositor.

254. The contrary conclusion might reasonably be reached, however, on the ground that the duty of D ran only to E and not to H.


256. Sprague v. West Hudson County Trust Co., 92 N. J. Eq. 639, 114 Atl. 344, 17 A. L. R. 956 (1921) (carelessness of drawer in failing to prevent a succession of forged indorsements); see Critten v. Chemical Nat. Bank, 171 N. Y. 219, 229, 63 N. E. 969, 972 (1902) (*arguendo*). In the latter case, however, the court seems to have overlooked the fact that E had been negligent in paying the check in question, one for $622 (see 60 App. Div. 241, 243. 70 N. Y. Supp. 246, 248 [1st Dep't 1901]).


259. This solution is not predicated on a duty of care or on proximate causation. The same commercial interest is present in the cases of forged drawing, forged indorsement, and alteration. In the latter two situations, the law cannot give effect to it without working injustice to a careful drawee. It can and does do so, however, in the case of forged drawing,
(2) Similar questions leading to similar answers arise in the case of forgery of the indorsement of the payee or a special indorsee, if D, the depositor, fails in his duty to the E bank, for example, by neglecting to notify E promptly after discovering the forgery, or by being otherwise guilty of careless conduct. A similar situation may arise in England, where, by virtue of the Bills of Exchange Act, section 60, and an earlier statute, a banker, E, paying a check carrying a forged indorsement, may nevertheless charge the account of D, the drawer. If the check is stolen from D by W and sold by the latter under forged indorsement to X, a bona fide purchaser, and collected from E, who charges the account of D, the last named may have quasi-contractual recovery from X. 

(3) Forgery of the signature of D, the depositor, usually does not raise our present problem, because the rule of Price v. Neal protects H, a careful holder in due course, against quasi-contractual recovery by E. If H had purchased the check after maturity, he would seem not to be within the favor of that rule, and if D were careless in verification or notice our present problem would be raised and should be solved along lines suggested in paragraph (1) of this sub-topic. If, however, H was careless in taking the instrument, E acquired a right of quasi-contractual recovery against and hence the rule of Price v. Neal, 3 Burr. 1354 (K. B. 1762), 1 Campbell, op. cit. supra note 200, at 884. See the opinion of Mitchell, J., in Germania Bank v. Boutell, 60 Minn. 189, 192, 62 N. W. 327, 328 (1895); Woodward, op. cit. supra note 250, § 87.

260. But see Sprague v. West Hudson County Trust Co., 92 N. J. Eq. 639, 114 Atl. 344 (1921).


By the great weight of authority the depositor is normally under no duty to take care to verify the signatures of payee and special indorsees. See Notes L. R. A. 1915D, 741, 748; (1920) 15 A. L. R. 159, 160; (1924) 28 A. L. R. 1435, 1437; (1930) 67 A. L. R. 1121, 1125.


264. Vinden v. Hughes, [1905] 1 K. B. 795. This sound result may well be placed on the ground that the loss first fell on X through his dealing with the wrongdoer and that as previously it could not be finally shifted by collection to E, no more may it be so shifted to D since the statute.


266. The writer believes that the rules on negotiable instruments relating to overdue paper are not to be rested on the theory of constructive notice, but on the cogent reasoning advanced by Jeffrey, C., in Hobart M. Cable Co. v. Bruce, 135 Okla. 170, 174, 274 Pac. 665, 668 (1929): "The overdue character of an instrument, otherwise negotiable, strictly speaking, does not, in fact, impart notice to the purchaser of an infirmity in the instrument or defect in the transferror's title. Where overdue paper is purchased, the law does not create any defenses in favor of the maker by reason of it having been so purchased, but merely permits such defenses as existed against the original holder, to be made against the purchaser."

267. Pa. Stat. Ann. (Purdon, 1930) tit. 56, § 29 (which has been held not repealed by N. I. L. § 62), abrogates the rule of Price v. Neal. Here also our present problem springs up and should be solved in the same way as in paragraph (1) supra.
him and should be allowed to enforce it in ease of D. The loss should rest on H on whom it first fell; the subsequent omission of D, even though it should result in H's actually failing to take helpful action against W, is not sufficient to justify shifting the loss to D.

(4) A casualty company, which has agreed to indemnify E, the drawee bank, against forgery or alteration, should on doing so be subrogated to the rights of E against D, the careless depositor. It should even be subrogated to such rights as E has against H, a careful bona fide purchaser who collected the check. Denial of subrogation makes for higher premiums; the banking community should not bear that burden. Moreover, the incidence of loss rested on H; there is no reason why he should be in better case through the accident of insurance. In brief, the casualty company is nonconsensual surety for D and for H, as well as for the wrongdoer.

Relation between a Surety for a Fiscal Officer and a Surety for a Depositary Bank

Let it be supposed that S is surety for T, treasurer of C county, that S-2 is surety to C for B, a depositary bank, and that the bank fails. Two situations may be assumed:

(1) When the deposits of T are in accordance with law either because no restriction exists or because they are within the restriction. In many states T is under an absolute duty to C to account for and pay over the public funds entrusted to him. Even so, he is clearly surety for the bank, though the relation is nonconsensual. Furthermore, T is to be accounted a surety for S-2, not because a surety is necessarily to be placed in a position like that of his immediate principal, but on a comparison of the risks of T and S-2: the latter deliberately undertook risk for performance by the bank, whereas the responsibility of the former for such performance arose solely as a consequence of his office. It follows that S is surety not only for the treasurer but also for the bank and S-2. Consequently, the order of suretyship and hence of ultimate liability is: B (principal), S-2, T and S.
(2) When some of the deposits made by T are lawful, and others are unlawful, for example, as being in excess of a prescribed limit. (a) As to the lawful part of the deposit-credit, the order of suretyship and of ultimate liability should be that stated in the preceding paragraph: B, S-2, T, S. (b) As to the excessive or otherwise unlawful part, a preliminary question is whether such part falls within the condition of the bond executed by B and S-2. If it does not, it is obvious that in respect thereto S-2 is under no risk and hence not in relation with T or S; consequently, as to such unlawful part, T or S has no right of recourse, subrogational or otherwise, entire or contributive, against S-2, and S-2 having paid the lawful part to C may freely claim such portion of the dividend received by the county from the assets of the insolvent bank as proceeds from that part, leaving to T or S, who paid the unlawful part, the portion of the dividend proceeding therefrom. On the other hand, if all the deposits, lawful and unlawful, fall within the condition of his bond, so that S-2 is responsible to the county for the whole up to the penal sum of the bond, then more difficult questions arise as to the relations of the parties in respect to the unlawful part. In the first place, the relation of surety and principal exists between T and B, respectively; though they are in pari delicto, the illegality merely concerns the county in the exercise of its fiscal functions; nor is the treasurer acting for his own advantage; consequently, T's illegality is not so serious or culpable as to exclude him from relationship with and recourse against B, who had control over the deposited funds, or to justify reposing in C the power of accidental, capricious or collusive imposition of loss. Secondly, it seems that the relation between T and S-2, surety for B, should be that of principal and surety, respectively. It is true that S-2 deliberately undertook risk for repayment of the whole deposit; but he had no control whatever over the deposits, whereas T made the unlawful ones and so exposed them to the risk of improper keeping or investing on the part of the bank. Thirdly,


A fortiori, the results will be the same if S-2 is responsible only for the lawful deposits, and T (or S his surety) only for the unlawful deposits; for each is responsible for a different principal performance and therefore they cannot be in relation inter se. City of Ortonville v. Hahn, 181 Minn. 271, 232 N. W. 320 (1930) (responsibility of T and S so fixed by statute). Cf. Assets Realization Co. v. American Bonding Co., 88 Ohio St. 216, 102 N. E. 719 (1913).

274. Sioux County v. National Surety Co., 276 U. S. 238 (1928) (rev'g, National Surety Co. v. Lyons, 16 F. [2d] 688 [C. C. A. 8th, 1926]; following interpretation of Nebraska statute by Supreme Court of Nebraska); Scotts Bluff County v. First Nat. Bank, 115 Neb. 273, 212 N. W. 617 (1927) (deposit illegal in that it exceeded one-half of the capital stock of the bank).


277. Of course, if the depositary bond runs to T in his personal capacity, or in his personal and representative capacities, then T, and hence S, must be accounted a surety for S-2
the relation between S and S-2 is to be determined.\textsuperscript{278} The question cannot be solved merely by identifying each surety with his immediate principal; no agency relation is present. Considerations of justice must govern. S-2 willingly undertook risk for repayment of the whole deposit-credit on the part of B, the bank, and it failed to do so. On the other hand, S voluntarily undertook risk for due performance on the part of T, the treasurer; T violated his duty in depositing certain funds, exposed them to the very danger which the legislature intended to avoid, and thus contributed to the county's loss;\textsuperscript{279} and neither surety had control over making, keeping or investing the deposits. Hence the writer finds it difficult to prefer one surety over the other; they might well be related as co-sureties in respect to the unlawful part of the deposit. It has been held, however, that S is surety for S-2 as to the unlawful as well as the lawful part of the deposit-credit on the ground that the bank was the "proximate cause" of the loss and hence it must fall on the bank's surety.\textsuperscript{280} Again, in \textit{Etna Casualty & Surety Co. v. Maywood},\textsuperscript{281} S-2 was surety to the village of C on a depositary bond for $30,000, and S on an official bond for $75,000; the amount of the deposit-credit when the bank failed was $63,000; the bank was about to pay a dividend of 50 per cent. S-2 paid C $30,000; neither T nor S had paid anything. Although S-2 was under real risk in respect to its junior interest in the dividend, it was nevertheless decided that S-2 could not compel C to recover from S, or, it seems, S to pay C by way of exoneration of S-2.\textsuperscript{283}

\textbf{Conclusion}

This article has dealt with many varieties of cases in which two or more persons are bound to a creditor as sureties, either real or personal, consensual as well as for B, unless T's participation in the illegality is so culpable as to exclude him from the benefit of the contract. National Surety Co. v. Salt Lake County, 5 F. (2d) 34, 37 (C. C. A. 8th, 1925) (T innocent).

\textsuperscript{278} S is consensual surety for T and nonconsensual surety for B; S-2 is consensual surety for B and nonconsensual surety for T. They are therefore sureties for the same principals (see United States F. & G. Co. v. Title G. & S. Co., 200 Fed. 443, 449 [D. C. Md. 1912]); nevertheless, their relation \textit{inter se} remains to be determined.

\textsuperscript{279} It can hardly be contended that the intervention of the bank's control severed the causal connection between the treasurer's act and the county's loss. Otherwise, the surety would not be responsible to the county for the treasurer's violation of duty, as he clearly is even aside from an absolute duty to pay over funds.

\textsuperscript{280} United States F. & G. Co. v. Title G. & S. Co., 200 Fed. 443 (D. C. Md. 1912) (alternative decision); in which case the penalty of the bond of B and S-2 was large enough to embrace the whole unpaid deposit-credit, and S-2 having paid the whole was denied any subrogation against S, full or contributive.

\textsuperscript{281} 262 Ill. App. 206 (1931).

\textsuperscript{282} S-2 was surety for the \textit{whole} deposit-credit, and hence would not be effectively subrogated to the dividend thereon until C should be made whole. Maryland Casualty Co. v. Fouts, 11 F. (2d) 71 (C. C. A. 4th, 1926); Zimmerman, Comr. of Banking v. Chelsea Sav. Bank, 161 Mich. 691, 125 N. W. 424 (1910); Knaffl v. Knoxville Banking & Trust Co., 133 Tenn. 655, 182 S. W. 232 (1916), disapproving \textit{Ex parte} Rushforth, 10 Ves. 409 (Ch. 1804).

or nonconsensual, in respect to the same principal performance. It is obviously necessary for the law to fix the relation between such persons in order that the ultimate incidence of loss should be governed by considerations of justice rather than by accidental or capricious action on the part of the creditor or by his collusion with one of the sureties. Each sub-topic has presented certain situations, which are governed by one or more considerations of "equity and good conscience." Among many such considerations which may be enumerated are the prevention of circuity of action or improper indirect attack; accomplishment of the actual or normal understanding of one of the sureties without doing violence to such expectations of the other; causation of the loss; representation of a certain relation or empowering a principal to make such representation; participation in the release of security or variation of risk; knowledge, notice or carelessness; receipt of a benefit without rendering value; power of control; undertaking risk under improper inducement; normal reliance on a prior transaction or prior matured obligation; the commercial interest in the marketability of negotiable instruments; the comparison of risks voluntarily and involuntarily incurred; and the imposition of the expense of insurance on the appropriate group in the business community.