NONCONSENSUAL SUBSURETYSHIP

Morton C. Campbell †

PART ONE

The term subsuretyship may properly be used to denote a situation in which one person, A, is surety for another, P, and a third person, B, is surety for both. P is the principal, A the surety, and B the subsurety. If there is mutual agreement, expressed or implied, between A and B concerning their relation, this agreement controls and their relation is consensual. If they have entered into no such agreement, or no such agreement sufficiently manifested, their relation arises by operation of law; it is nonconsensual. It makes no difference that each willingly undertook risk, personal or real, to the creditor or obligee, or that each has unwillingly incurred such risk, or that one has willingly and the other unwillingly incurred risk. In all these situations the relation between A and B is nonconsensual, since it does not rest on mutual consent.

The cases generally fall within three broad categories. In the first A is admittedly surety for P, and B for A; it is demonstrable that by operation of law B is surety for P. The consequence is that a relation of subsuretyship exists, although not supported by any agreement between A and B. In the second category A and B are admittedly sureties for P; it is often difficult to determine what relation the law creates between the two; if one is made surety for the other rather than with the other, nonconsensual subsuretyship exists among the three. Most instances of nonconsensual subsuretyship fall within this category. In the third, while A and B have undertaken risk for different principals, that is, for P-1 and P-2, respectively, the situation may be such that by operation of law A is surety for P-2 as well as P-1, and B for P-1 as well as P-2, the result being that each is surety for both principals. A and B may be made co-sureties. On the other hand, considerations of equity and good conscience may require that B be surety for A, in which case nonconsensual subsuretyship is present, P-1 and P-2 being principals, A surety, and B subsurety.

(1) Relation Between Surety for a Surety and the Latter's Principal

A surety for a surety is necessarily surety for the latter's principal. Thus, if A is surety for P to C and if for a consideration B gives his note to C to secure performance on the part of A, or becomes bail for A in a civil

† A.B., 1896, LL. D., 1923, Washington and Jefferson College; LL. B., 1900, S. J. D., 1915, Harvard University; Professor of Law, Harvard University; editor of CASES ON MORTGAGES (1925); CASES ON BILLS AND NOTES (1928); CASES ON SURETYSHIP (1931).
action 1 or his surety on a forthcoming bond 2 or an appeal bond, 3 or mortgagtes his land or other property to secure performance by A, B is surety for P as well as for A and the situation is one of subsuretyship, notwithstanding the absence of any consent thereto or knowledge thereof on the part of P. The reasons are: (1) that some relation must be established between B and P in order that the ultimate incidence of loss will not be left to accident, or to caprice or collusion on the part of C; and (2) that, of the conceivable ways in which the law may relate B and P, that is, as co-principals, principal and surety, and surety and principal, respectively, the last is the only tenable one. It merely gives to B, if he pays C, recourse against P through subrogation to the right of C, when B could at least attack P indirectly by striking A and so throwing him against P. Moreover, the other two suggested relations are untenable because if C should recover from P the latter would have redress from B in whole or in part, B from A, and A from P—a process involving not only circuity of action or suit but also improper indirect attack by P on A. 4

For like reasons, if B is surety for A to C, and P later becomes principal for A, for example, by agreeing with A for a consideration to assume the obligation of A to C, so that P becomes bound to C as creditor-beneficiary, B is surety for P as well as for A and the situation is one of subsuretyship, with the result that, as in the case last discussed, B is subrogated to the rights of C against P as well as against A, and P is not subrogated either fully or contributively to the rights of C against A or against B. 5 If in addition S undertakes an obligation to A as surety for the performance of P's agreement, the order of ultimate liability will be P, S, A and B; so also, if there is some other reason in equity and good conscience why the loss resulting from P's nonperformance should ultimately fall on S rather than on A; for example, when the undertaking of S, while running to C, is, by interpretation 6 or statutory provision, for the benefit of A as well as C; or when S and A (or B) so expressly or impliedly agree. 7

1. Goddard v. Whyte, 2 Giff. 449 (Ch. 1860) (B subrogated to mortgage held by C on property of P).
4. See Campbell, Protection Against Indirect Attack, HARVARD LEGAL ESSAYS (1934) 3.
6. Aetna Casualty & Surety Co. v. Equitable Surety Co., 145 Minn. 326, 177 N. W. 137 (1920) (B and X were sureties, respectively, on bonds given to the state by A, a holder of a timber-cutting permit, and by P, his assignee; the assignee defaulted in payment). There is doubt in the writer's mind as to whether the latter bond should be so interpreted; it ran to and was exacted by the state. The decision can be better sustained on other reasoning: the intervention of S brought about the assignment and so resulted in a variation of the risk of B; while A participated in the assignment and hence might be held to be merely a co-surety for P, B did not consent to the assignment and so should be regarded as surety for S.
7. Bender v. George, 92 Pa. 36, 39 (1879) (B procured the assignment of a lease to P with S as surety).
Again, on similar reasoning, a surety for a sheriff (or a constable) is necessarily surety for a deputy sheriff, a judgment creditor, or a judgment debtor who is related to the sheriff as a principal; and a surety for a tax collector is also surety for a delinquent tax-payer, if the last named is principal in respect to the collector.

It follows that the subsurety, B, is not restricted to claiming through A the latter's rights of recourse against P but is fully subrogated to the rights of C against P or in his property, and may enforce those rights notwithstanding any defence or set-off which P might have asserted against A. It is to be observed that P is placed in no worse position than if B had not become surety.

On the other hand, if A is surety for P to C and C receives the bond or note of A, for the performance of which B is surety, in full satisfaction of the principal debt and not in conditional payment thereof or by way of security therefor, B is not subrogated to the former rights of C against P or in his property. B was never a surety for P, since they were not simultaneously bound to C; nor can he be accounted the payer of C, since it is A who must be so regarded inasmuch as he is bound first or last on the substituted bond or note. At most, therefore, B is remitted to attack through A, the result being that he is subject to a defence or set-off available to P against A.

(II) Relation between Sureties for the Same Principal Performance in the Absence of Agreement Inter Se

In the absence of agreement expressed or implied between two or more sureties for the same principal performance, or, it seems, in the case of such an agreement insufficiently manifested, the law creates such relation between them as justice requires. Such cases mostly fall within three classes: Class I, in which the sureties respectively have had consistent understandings with the creditor or principal as to the relation of the sureties inter se; Class II, in which the sureties have not had understandings with the creditor or prin-

8. See infra appropriate sub-topic, part two.
9. See infra appropriate sub-topic, part two.
10. Leake v. Ferguson, 2 Gratt. 419, 434 (Va. 1846) (subsurety subrogated to judgment lien of C on realty of P conveyed by him to G).
11. Lill v. Gleason, 92 Kan. 754, 142 Pac. 287 (1914); Campbell, Cases on Bills and Notes (1928) 785 (defence of rescission). Contra: Putnam v. Tash, 78 Mass. 121 (1858) (failure of consideration). In Ursini v. Piazza, 101 Conn. 736, 127 Atl. 350 (1925), set-off was allowed, but the plaintiff erroneously limited his claim to "subrogation" to the right of A.
12. But if P acquired a defence against A (e. g., because of funds prematurely received by the latter from the former in payment or exoneration), and B thereafter became bound as surety before default, it is submitted that B would not be surety for A, but rather P and B would be sureties for A and co-sureties with each other.
14. It was recognized in Elwood v. Deifendorf, 5 Barb. 398, 413 (N. Y. 1848), that B, surety for A for the amount of the debt and certain costs, would be entitled to A's rights against P therefor.
15. New York State Bank v. Fletcher, 5 Wend. 85 (N. Y. 1830) (defence of payment).
principal; and Class III, in which they have had inconsistent understandings with creditor or principal.

Class I: Consistent Understandings between the Respective Sureties and the Creditor or Principal

If $A$ has an understanding with $C$, the creditor, or $P$, the principal, or with both, merely that he shall be surety for $P$ (and all the more if the understanding be that he shall be a surety interposed between $P$ and $B$), and $B$ has an understanding with $C$ or $P$ that he shall be surety for both $P$ and $A$, the law relates $A$ and $B$ as surety and subsurety, respectively. Thus legal effect is given to the understanding of $B$ and no violence is done to that of $A$. Such understandings may be written or oral.

In the leading case of Craythorne v. Swinburne, the understandings of the sureties were indicated by the form of the respective bonds, $A$ having joined with $P$ in a bond to $C$ conditioned on a certain payment and $B$, apparently without the knowledge of $P$ or $A$, having executed a bond to $C$ conditioned on payment "by $P$ and $A$, or either of them." Thus it appeared that $A$ willingly undertook risk as surety for $P$, but $B$ as surety for $P$ and $A$. They were held to be related accordingly, and hence $A$ failed in a suit for contribution brought against $B$.

So also, when such understandings exist between the respective sureties and the principal, the relation is that of surety and subsurety, the result being that the subsurety, if he pays the creditor, will be entitled to full recovery

---

16. An understanding with any other party to the transaction, e. g., a third surety, should be equally effective.

17. And so, it seems, if for $P$ and a surety whose identity is not then disclosed or determined.

18. 14 Ves. 160 (Ch. 1807).
from the surety 20 and the surety, if he pays the creditor, will have no recourse against the subsurety. 21

If P, the principal, and A and B, his sureties, join in making a note to C, their signatures appearing in that order, and that of B being accompanied by the word “surety,” or the like, the import is merely that B is surety for P, 22 but if by the words “surety for the above,” or equivalent language, it is prima facie imported that B is surety for both the preceding parties. 25

Properly included in Class I are those cases of successive accommodating parties to negotiable instruments in which the obligation of B, one of the accommodating parties, to the creditor, is conditioned on nonpayment by A, the other accommodating party. Such an obligation imports an understanding between B and the creditor that B shall be surety for A and, in the absence of an inconsistent understanding between A and the creditor or the principal, the relation of surety and subsurety is created between A and B, respectively. Consequently, on taking up the bill from the creditor, B may recover thereon in full from A, and A on taking up the bill is denied even contributive recovery from B. Accordingly, it is generally held that B, an accommodating indorser-payee or subsequent indorser, may recover in full on the bill or note from A, an accommodating acceptor or maker, 24 and A will be denied even contributive recovery from B. 25 The result would be no different if, instead of his indorsement being regular in form as it was in the situation last discussed, B had not been within the tenor of the instrument and hence his indorsement had been irregular. 26 Likewise, if B is an accommodating drawer and A the accommodating acceptor of a bill, B may


21. Hunt v. Chambliss, 15 Miss. 532, 539, 543 (1846) (A and B signed as sureties; B had oral agreement of subsuretyship with principal); Oldham v. Broom, 28 Ohio St. 41, 53 (1875); see Paul v. Berry, 78 Ill. 158 (1875). Contra: Norton v. Coons, 3 Denio 130 (N. Y. 1846), aff’d, 6 N. Y. 33 (1851); but see Barry v. Ransom, 12 N. Y. 462, 467 (1855).

22. Baldwin v. Fleming, 90 Ind. 177, 180 (1883); M’Gee v. Prouty, 50 Mass. 547 (1845); Robison v. Lyle, 10 Barb. 513 (N. Y. 1851).


25. Armstrong v. Harshman, 61 Ind. 52 (1878) (blank for payee filled with name of B after A had signed as co-maker with the principal and B had indorsed his name); Mulecare v. Welch, 160 Mass. 58, 35 N. E. 97 (1893); Hillegas v. Stephenson, 75 Mo. 118 (1881); Smith v. Smith, 16 N. C. 173 (1828); Dawson v. Pettway, 20 N. C. 396 (1839). But see Slaymaker v. Gundaeker, 10 S. & R. 75, 81 (Pa. 1823); Reynolds v. Wheeler, 10 C. B. (n. s.) 561 (1861) (first surety was acceptor of original bill and drawer of renewal bill; second surety was indorser of both; held first surety entitled to contribution).

26. Hamilton v. Johnston, 83 Ill. 39 (1876); Cox v. Hagan, 125 Va. 656, 668, 100 S. E. 666, 669 (1919) (decided under Negotiable Instruments Law § 68). Before the Negotiable Instruments Law a different result would have been reached in Massachusetts or any other state in which the irregular indorser of a note was bound as co-maker, for there A and B would have been co-makers and prima facie co-sureties.
have full recovery from $A$ and $A$ will have none from $B$.\textsuperscript{27} In all these situations, the fact that $B$'s signature preceded that of $A$, in point of time or position, does not prevent $B$ from being subsurety.\textsuperscript{28}

It should make no difference that the principal first procured the signature of $A$ by fraud, and having later gotten the signature of $B$ without fraud negotiated the instrument to the creditor, a holder in due course. Even here $A$ is surety and $B$ subsurety, inasmuch as $B$ incurred liability to $C$ relying on the prior signature of $A$ in good faith and without notice of the fraud; hence on taking up the instrument $B$ succeeds to the effective right of the creditor against $A$.\textsuperscript{29}

A variation of the cases thus far discussed in this section occurs when $B$ already has effective rights against $P$ as principal and $A$ as surety, and transfers those rights with assumption of liability to $C$. Here also the situation is one of subsuretyship; no injustice is being done to $A$, since he willingly assumed responsibility for $P$; and justice to $B$ requires that on making $C$ whole he be placed in no worse position than he formerly occupied, and so have a right for full recovery against $A$ as well as against $P$. This is obviously true when $B$ is payee or indorsee of a negotiable instrument and transfers it with guaranty or by indorsement,\textsuperscript{30} and also in a case like Darrah v. Osborne,\textsuperscript{31} in which, $M$ being indebted to $B$ and $B$ to $C$, $B$ procured from $M$ a note jointly made by him and $A$ as his surety payable to $C$, and later delivered it to $C$, himself signing the note as joint maker at $C$'s request. It was held that $B$ was entitled to full reimbursement from $A$, and properly so, since $B$, as "remitter," already had substantial rights against $A$ and $M$.\textsuperscript{32}

There may be consistent agreements making for co-suretyship as well as for subsuretyship. Thus, if $A$ has an understanding with the creditor or principal that he shall be surety with $B$, and $B$ that he shall be surety with $A$, the relation of co-suretyship results.\textsuperscript{33}

It should be borne in mind that this rule pertaining to negotiable instruments has no application when there is a sufficiently manifested agreement between the sureties, oral or written, expressed or implied in fact, fixing a

\textsuperscript{27} See Barnet v. Young, 29 Ohio St. 7, 11 (1875), distinguishing Douglas v. Waddle, 1 Ohio 413 (1824), a case of successive indorsers.

\textsuperscript{28} Barnet v. Young, 29 Ohio St. 7 (1875).

\textsuperscript{29} It was so held in Reinhart v. Schall, 69 Md. 352, 16 Atl. 126 (1888) ($A$ was the defrauded accommodation maker; $P$, the defrauding principal, was the indorsing payee; and $B$ the subsequent indorser. $B$'s case was strengthened by the fact that $P$ represented to $B$ that the paper was business paper, so that $B$ justifiably believed that he was surety for $P$ and the latter for $A$).


\textsuperscript{31} 7 N. J. L. 71 (1823).

\textsuperscript{32} For the rights of a remitter, see Moore, The Right of the Remitter of a Bill or Note (1920) 20 Col. L. Rev. 749, 751, 753; Beutel, Rights of Remitters and Other Owners Not Within the Tenor of Negotiable Instruments (1928) 12 Minn. L. Rev. 584.

\textsuperscript{33} Hagerthy v. Phillips, 83 Me. 336, 22 Atl. 223 (1891) (previous agreement by each with principal to sign original note as surety if the others would, nothing being said about order of signing).
different relation between them. By virtue of such an agreement $A$ and $B$ may be co-sureties, or $B$ may be surety and $A$ subsurety.

Class II. No Understanding with Principal or Creditor

If each of the sureties intends that he shall be surety but does not contemplate that there is or shall be another surety, or though so contemplating has no understanding expressed or implied in fact with the principal or creditor as to what the relation between himself and the other surety shall be, the relation created by the law is that of co-suretyship. So also, if one of the sureties does not so contemplate and the other though so contemplating has no such understanding, the relation is that of co-suretyship.

Class II. No Understanding with Principal or Creditor—(A) The Problem Presented by Successive Parties to Negotiable Instruments

The question now arises whether the fact that the sureties are several and successive parties to a negotiable instrument constitutes an exception to the general rule of co-suretyship just stated, so that the first surety is surety for the principal, and the second is subsurety. The English cases answer this question in the negative. Most American cases answer it in the affirmative.

One reason frequently given for the American view is that such accommodating parties normally intend that the order of liability inter se shall be the same as if they were successive parties to "business" paper, and that the law relates them accordingly in the absence of agreement between them to the contrary. Obviously, it is difficult to demonstrate that the parties normally have that intention. Furthermore, the reason is of limited application; it stops short of the cases in which any of the sureties is an irregular...

34. Schlosburg v. Tanenbaum, 38 Ga. App. 641, 144 S. E. 804 (1928); Denton v. Lytle, 4 Bush 597 (Ky. 1869) (inference of co-suretyship regarded as arising from the fact that each eventually paid one-half to the creditor); Gillam v. Walker, 189 N. C. 189, 126 S. E. 424 (1923); Marquardt’s Estate, 251 Pa. 73, 95 Atl. 917 (1915) (notes made by $A$, and indorsed by $B$, payee, and by $C$, $D$, and $E$, all directors of principal corporation, in pursuance of mutual agreement to indorse); Arto v. Jester, 274 S. W. 984 (Tex. Civ. App. 1925) (continuing agreement of co-suretyship governing renewal note); and see Exum v. Mayfield, 297 S. W. 607 (Tex. Civ. App. 1927).

35. Martin v. Marshall, 60 Vt. 321, 13 Atl. 420 (1888) ($A$ signed first at the request of and for the benefit of $B$, who was obligated to the principal to procure discount of the note; inference of agreement by $B$ to indemnify $A$); Handsaker v. Pedersen, 71 Wash. 218, 223, 128 Pac. 230, 232 (1912). See Ehret v. Basso, 4 N. J. Misc. 69, 131 Atl. 677 (1926).

36. 21 R. C. L. 1132; 10 Am. St. Rep. 639; 2 WILLISTON, CONTRACTS (1920) § 1277. A leading case is Deering v. Winchelsea, 2 B. & P. 270 (1787), in which the sureties were bound on separate bonds for faithful accounting of the principal; it was held that the plaintiff surety was entitled to contributory exoneration.


39. Cases cited passim in this and the following sub-topics.
NONCONSENSUAL SUBSURETYSHIP

indorser, for not being within the tenor he could not be a "business" indorser, that is, an indorser by way of transfer. A second reason, of general application, is that the first surety normally signs on the faith of the principal's signature and hence relying on having recourse against him only, while the second signs on the faith of both the former signatures and hence in reliance on full recourse against the first surety as well as the principal. Whether originally sureties did usually so rely is more or less conjectural, but in the many states in which it has been received the American rule is so well known that such reliance is now doubtless the normal course and hence continuance of the rule and its recognition by Section 68 of the Uniform Negotiable Instruments Law is abundantly justified.

Of these two reasons the second is the more general and seemingly the more cogent. It follows necessarily that the order of signatures in point of time is controlling as between the sureties. Section 68 of the Negotiable Instruments Law so provides in the case of successive indorsements. Indeed, even though the first reason be preferred, order in time may well be regarded as determinative between the sureties, just as it would be in the case of regular, transferring indorsements. Order in point of position is important, however, as affording a presumption of corresponding order in time, which presumption may be rebutted by written or oral evidence.

The American rule has application only to cases in which the sureties are severally bound to the creditor. Hence the preliminary inquiry is whether they are so bound. For, if jointly or jointly and severally bound, they stand in the relation of co-sureties, in the absence of a sufficiently manifested agreement between them to the contrary. Thus, if M makes a note payable to the order of A and B, and they indorse their names on it for the accommodation of M, who negotiates it to H, one is constrained to infer that A and B indorse jointly, since otherwise the creditor would not be brought within the tenor of the instrument, and hence in the absence of a sufficiently manifested agreement between them to the contrary they are co-sureties, whatever may be the order of their signatures in time or in position on the instrument. On the other hand, if M makes a note payable to the order of A, and A and then B indorse their names on it, it is inferable

40. 2 Williston, Contracts (1920) § 1262. Contra: 2 Randolph, Commercial Paper (2d ed. 1899) § 740.
43. Prestenbach v. Mansur, 14 La. App. 429, 125 So. 310, 129 So. 445 (1930). See also next sub-topic, paragraph (5) (a) and (b).
that $A$ and $B$ indorse severally, since a joint indorsement would be inartistic and perhaps insufficient to change the tenor. Both these indorsements of $A$ and $B$ are regular in form since that of $A$, the payee, preceded that of $B$; hence, under the American view, there being no agreement to the contrary between them, they occupy the relation of surety and subsurety, respectively, so that on taking up the bill from the holder $B$, or his transferee, may recover in full in an action thereon against $A$.\footnote{Shaw v. Knox, 98 Mass. 214 (1867). See next sub-topic, paragraph (3).}

If, however, $A$, $B$, and also $C$ had in turn indorsed their names in the case last considered, while one is led to infer that $A$ indorsed severally,\footnote{Wolf v. Hostetter, 182 Pa. 292, 37 Atl. 988 (1897) (holding that on taking up the note $C$ could not maintain an action against $A$ and $B$ jointly).} he might well doubt whether $B$ and $C$ intended to be bound to the creditor jointly, jointly and severally, or only severally. The law solves the difficulty by binding them severally, in the absence of sufficiently manifested intention to be bound in either of the other ways, and thus brings the rule of subsuretyship into operation.\footnote{Lewis v. Monahan, 173 Mass. 122, 53 N. E. 150 (1899).}

Likewise, if $M$ makes a note payable to the order of $H$, and $A$ and $B$ indorse their names on it before delivery to $H$, it is often a difficult question of fact whether $A$ and $B$ indorse jointly, jointly and severally, or merely severally. Here again the law intervenes and binds them severally,\footnote{Porter v. Huie, 94 Ark. 333, 126 S. W. 1069, 28 L. R. A. (N. S.) 1039 (1910).} but not when there is a sufficiently manifested intention to the contrary.\footnote{Hurlbut v. Quigley, 180 Cal. 265, 180 Pac. 613 (1919), 7 CALIF. L. REV. 343.}

\underline{Class II. No Understanding with Creditor or Principal—(B) Application of the American Rule Governing Successive Parties to Negotiable Instruments}

In applying the American rule, several classes of cases are encountered:

(1) Where $A$ is acceptor of a bill and $B$ the drawer, indorsing payee or subsequent indorser, the situation is \textit{prima facie} one of subsuretyship; likewise when $A$ is maker of a note and $B$ indorsing payee or subsequent indorser. These cases are more properly and more fully treated as instances of Class I, \textit{supra}.

(2) Where $A$ is drawer of a bill and $B$ is the indorsing payee or a subsequent indorser, both signing for the accommodation of another party (usually the acceptor), $A$ is surety and $B$ subsurety,\footnote{McCune v. Belt, 38 Mo. 281 [1866]; \textit{held}, that $B$ was entitled to recover in full against $A$ on the bill)} in the absence of a sufficiently manifested agreement between them to the contrary. It is to be observed that this situation is not governed by Section 68 of the Negotiable Instruments Law.

47. Wolf v. Hostetter, 182 Pa. 292, 37 Atl. 988 (1897) (holding that on taking up the note $C$ could not maintain an action against $A$ and $B$ jointly).
51. McCune v. Belt, 45 Mo. 174 (1869) (order of signatures in point of time not stated, McCune v. Belt, 38 Mo. 281 [1866]; \textit{held}, that $B$ was entitled to recover in full against $A$ on the bill); Denton v. Lytle, 4 Bush 597, 599 (Ky. 1869).
(3) Where \( A \) is an indorsing payee and \( B \) a subsequent indorser, both signing for the accommodation of a principal, for example, the maker, drawer or acceptor, who negotiates the instrument to the creditor, the indorsements of \( A \) and \( B \) are regular in form, since \( A \) and \( B \) are within the tenor and their indorsements would be sufficient to effect a transfer of rights as well as to impose obligations; they are not, however, regular in substance, because in truth \( A \) and \( B \) have no rights and no intention of transferring rights. By the American rule, both at common law and under Section 68 of the Negotiable Instruments Law, \( A \) is surety and \( B \) subsurety, in the absence of a sufficiently manifested agreement between them to the contrary; consequently, on taking up the instrument \( B \) succeeds to the holder's rights under the law merchant \(^{52} \) and he or his subsequent transferee may recover from \( A \) in full \(^{53} \) in an action brought on the instrument, \(^{54} \) and \( A \) on taking up the instrument has no right against \( B \) even for contribution. \(^{55} \) For like reasons, if a blank indorsement of the payee is followed by indorsements of the names of \( A \) and \( B \), who sign for the accommodation of another party, for example, the maker, drawer, acceptor, indorsing payee, or a subsequent indorser, \(^{56} \) the indorsements of \( A \) and \( B \) are regular in form, though not in substance. Here also by the American rule, there being no agreement between them to the contrary, \( A \) is surety and \( B \) subsurety, both at common law \(^{57} \) and under Section 68 of the Negotiable Instruments Law. \(^{58} \)

In both of these situations the accommodating indorsers are under precisely similar obligations to the creditor, that is, to pay the creditor if the

---

\(^{52} \) Negotiable Instruments Law § 121, providing for the remission of a party secondarily liable to former rights, does not by the better view exclude succession to rights of the holder. Chafee, The Reacquisition of a Negotiable Instrument by a Prior Party (1921) 21 Col. L. Rev. 538.


\(^{54} \) Most of the cases cited in the preceding footnote so hold.


Moreover, if the holder materially alters the indorsement of \( A \), e. g., by addition of the words "without recourse", or if \( A \) does so with the consent of the holder, \( B \) is discharged. See Freile v. Rudiger, 89 N. J. Eq. 91, 94, 104 Atl. 142, 144 (1917), modified on other grounds in 90 N. J. Eq. 248, 253, 106 Atl. 410, 411 (1919).

\(^{56} \) Church v. Barlow, 26 Mass. 547 (1830).

\(^{57} \) Church v. Barlow, 26 Mass. 547 (1830) ; Lewis v. Monahan, 173 Mass. 122, 53 N. E. 150 (1899).

\(^{58} \) Gambrell v. McKeen, 28 Ariz. 427, 432, 237 Pac. 196, 198 (1925).
maker of the note or drawee of the bill does not pay, provided, of course, that the diligence required by the law merchant is used. So were the indorser and drawer in paragraph (2) of this sub-topic. Hence the rule of subsuretyship cannot be predicated on any difference between their obligations to the creditor, as it could in Class I. It must be supported on the reasoning set forth in the last sub-topic.

(4) Where A and B were both irregular indorsers, there was great diversity of decision at common law as to the capacity in which they were bound to the creditor. The typical case of irregular indorsement was that in which A and B were not themselves within the tenor of a note, and hence could not have been owners and transferors thereof, but merely signed their names on it before effective delivery thereof to the creditor with the intention of being bound to him. (a) In many states, including Massachusetts, Maryland and Ohio, A and B were held, at least prima facie, to be bound as joint or joint and several makers with the person who signed the note as maker," and who was usually the principal. Hence, in such jurisdictions A and B were prima facie co-sureties. (b) In many other states, including New York, Oregon and Pennsylvania, A and B were held to be bound to the creditor as indorsers. In such states, there was a conflict of authority as to whether the American rule as to successive parties should be applied. Here the second, though not the first of the two reasons, set forth in the last sub-topic, is pertinent, and it would seem that the rule of subsuretyship, once received, might well have been extended to cover this situation as well as indorsements regular in form. (c) In Illinois, A and B were held to be bound to the creditor prima facie as guarantors, and, since a guaranty is not an obligation of the law merchant, the American rule would seem to have been inapplicable. Under Sections 63 and 64 of the Negotiable Instruments Law, A and B are bound to the creditor as indorsers, and by virtue of Section 68 "as respects one another are liable prima facie in the

59. 1 Ames, Cases on Bills and Notes (1894) 269 n. 1; 1 Daniel, Negotiable Instruments (6th ed. 1913) § 713a; 2 Randolph, op. cit. supra note 40, §§ 831-833.
61. 1 Ames, loc. cit. supra note 59; 1 Daniel, op. cit. supra note 59, §§ 713d, 713e; 2 Randolph, op. cit. supra note 40, § 837.
63. 1 Ames, loc. cit. supra note 59; 2 Randolph, op. cit. supra note 40, § 838.
64. See Golsen v. Brand, 75 Ill. 148 (1874). Contra: Phillips v. Plato, 42 Hun 189 (N. Y. 1886) (two judges reasoning that a guaranty in writing on a negotiable instrument is to be likened to an indorsement, so that the case is similar to one of successive indorsements).
NONCONSENSUAL SUBSURETYSHIP

order in which they indorse,” the result being that B is surety for A as well as for the principal.65

(5) When A is an irregular indorser and is legally bound to the creditor as indorser, and B is a regular indorser, subsequent to A in time and position, both indorsing for the accommodation of a principal, B is surety for A as well as for the principal.66

Certain situations remain to be considered in which the order of indorsements in point of position on the instrument does not correspond with the order in time:

(a) If M made a note payable to the order of A, and B first indorsed it, and thereafter A indorsed his name above that of B, both indorsing for the accommodation of M, there were cases before the Negotiable Instruments Law holding that A was prima facie liable to B. Now B did not impliedly stipulate that A should sign above his name, because, while it was contemplated that A would sign somewhere (since otherwise the creditor would not fall within the tenor), still he might sign below the name of B instead of above it. Hence it became important to determine in what capacity B was bound to the creditor. The Massachusetts court, recognizing that its doctrine of co-makership was contrary to intention, and being reluctant to extend it to this situation, chose to look at the sequence of indorsements as they appeared on the instrument at the time of delivery and so was able to bind A as first indorser and B as second, both indorsements being regular in form;67 hence A was prima facie liable to B.68 Under Section 68 of the

67. Stimson v. Silloway, 79 Mass. 405 (1860), in which case, in an action brought by the creditor against B, judgment for the latter was affirmed on the ground that he was bound as indorser and therefore entitled to diligence.
68. Powers v. Eastman, 79 Mass. 405 (1850); Clapp v. Rice, 79 Mass. 403 (1859). And see Lewis v. Monahan, 173 Mass. 122, 53 N. E. 150 (1899). Likewise, in a jurisdiction following the New York view that such an indorser could be bound only as a second indorser regular in form, a court would naturally be willing to disregard order in time and be content with an indorsement of A appearing on the instrument before or even after that of B. Cogswell v. Hayden, 5 Ore. 22 (1873) (citing Bacon v. Burnham, 37 N. Y. 614 [1868], a very different case, however).
Negotiable Instruments Law, A and B are *prima facie* liable between themselves in the order of their indorsements in point of time, so that A on proving that he indorsed last would be entitled to full recovery from B. This seems a proper result, since under Sections 63 and 64 an irregular indorser is bound as indorser and directly to the creditor and thus the dilemmas arising from the earlier Massachusetts and New York rules are avoided.

(b) If M made a note payable to the order of A and A first indorsed it, and thereafter B indorsed it but placed his name above that of A, it was said that in Massachusetts the sequence of indorsements as they appeared on the instrument would control, so that B would be an irregular indorser and bound as co-maker, and hence *prima facie* liable to A. Of course, under Section 68 of the Negotiable Instruments Law, indorsers being *prima facie* liable among themselves in the order in which they sign, B would be surety for A as well as for the principal.

Class III. *Inconsistent Understandings between the Respective Sureties and the Creditor or Principal*

If A first signs and parts with the instrument, having an understanding with P, the principal, that he shall be co-surety with B or with some person then undisclosed or undetermined, and B thereafter signs the instrument stipulating with P that he shall be surety for both, the relation of sub-suretyship is created in accordance with the understanding of B. The reason is not that A by so signing and parting with the instrument represents that he and P are co-principals, for the fact that two persons are joint or joint and several promisors does not import co-principalship. Nor is the

Of course, different results were attained in Massachusetts in a case where A indorsed the instrument for the accommodation of M, the maker, before its effective delivery to B, the payee, who subsequently indorsed it for discount by placing his signature above that of A. A was bound as co-maker to B and his transferee (Pearson v. Stoddard, 75 Mass. 199 [1857]), and on taking up the note B was remitted to his former rights and entitled to full recovery against A (Brown v. Butler, 99 Mass. 179 [1868]).

This proposition is recognized in Wittemann v. Sands, 238 N. Y. 434, 144 N. E. 671, 37 A. L. R. 1222 (1924), although the decision was that the relation was one of co-suretyship because of extrinsic agreement to that effect.


71. This would seem to be an unfortunate conclusion since it bound B in a capacity never contemplated, and deprived him of diligence before MASS. PUB. STAT. c. 67, § 15.

72. The fact that A required P to procure the signature of B, or was assured by him that this would be done, indicates that A stipulated for co-suretyship at least; A would generally have no other interest in the matter.

73. It would seem that an understanding with C, the creditor, or any other participating party, would be equally effective.

74. Bobbitt v. Shryer, 79 Ind. 513, 517 (1880) (P represented to B that he and A were co-principals); Huffman v. Manley, 83 W. Va. 503, 98 S. E. 613 (1919) (P represented that he and A were co-principals). Also, other authorities cited passim in this sub-topic. Contra: Crouse v. Wagner, 41 Ohio St. 470 (1885); Notes (1894) 21 L. R. A. 247; (1930) 65 A. L. R. 823. A fortiori, the understanding of B will govern if A had reason to know or expect it. Wells v. Miller, 66 N. Y. 255 (1876).

75. Suretyship of one for the other is at least equally probable. Distinguish a case of joint or joint and several obligors who are sureties for the same principal; co-suretyship is then imported, for such is the normal situation.
reason that \( A \) has caused \( P \) to represent to \( B \) that \( A \) is co-principal with \( P \) or that he consents to be a surety interposed between \( P \) and \( B \),\(^76\) but rather that he has placed it in the power of \( P \) to make an effective expressed or implied representation of such import; for \( B \) is naturally thrown off his guard by the conjuncture of the representation of \( P \) with the signature of \( A \) appearing on the instrument and thus acts reasonably in believing and relying on the representation.\(^77\) This is much the same reasoning as sustains the well-established rule which would bind \( A \) to \( C \), the creditor, even in the case of a nonnegotiable instrument, although \( P \) should forge the signature of \( B \).\(^78\) It follows that \( B \) may be subsurety even though he was informed extrinsically that \( A \) signed as surety for \( P \),\(^79\) or even though "surety" accompanied the signature of \( A \).\(^80\)

In like manner and for a like reason, if \( A \) signs having an understanding with \( P \) that he shall be surety for \( B \), and \( B \) thereafter signs with the stipulation that he shall be co-surety with \( A \) or surety for \( A \), that stipulation controls the relation between them.\(^81\)

Of course, if \( B \) has knowledge or notice thereof, the understanding of \( A \) will control their relation.\(^82\) Thus, if \( A \) indorses a note reading, "We, \( P \) and \( B \), promise" etc., and \( B \) subsequently signs it as co-maker, the form of the note and indorsement gives him constructive notice of \( A \)'s understanding that he would be surety for \( B \), and that understanding will determine their relation.\(^83\) Likewise, in *McCollum v. Boughton* \(^84\) \( A \) had executed a

---

It must be conceded, however, that in some cases courts have proceeded on the ground of a representation of co-principalship, e. g., Keith v. Goodwin, 31 Vt. 268, 275 (1858); Bobbitt v. Shryer, 70 Ind. 513, 517 (1880); McMahan v. Geiger, 73 Mo. 145, 150 (1880).

Of course, if \( A \) signs a negotiable note payable to \( P \) for the latter's accommodation, and \( B \) later signs as co-maker relying on \( P \)'s statement that the note was given for consideration and that \( B \)'s signature is to aid \( P \) in negotiating it, \( A \) will be estopped to deny the import of the note that he was already obligated to \( P \) and will be refused contribution. Melms v. Werdehoff, 14 Wis. 18 (1861).

Furthermore, it cannot be justly claimed that \( A \) should be interposed because he could have protected himself by taking the unusual precaution of signing as "surety with \( B \)" or "surety with all later signers"; nor because \( A \) assumed more risk than \( B \) in that \( A \) trusted to the assurance of \( P \) that he would get the signature of \( B \) and have a consistent understanding with him, whereas \( B \) trusted only to the word of \( P \) that he had a consistent understanding with \( A \); for \( A \)'s trust as to \( B \)'s signature was fulfilled.

77. See Huffman v. Manley, 83 W. Va. 503, 58 S. E. 613 (1919).
78. Note (1900) 49 L. R. A. 315; Ames, *Cases on Suretyship* (1901) 311, n. 6; Campbell, *Cases on Suretyship* (1931) 346, n. 2.
80. Adams v. Flanagan, 36 Vt. 400 (1863). While the word "surety" refutes co-principalship, it imports nothing as to the expected relation between \( A \) and \( B \).
82. Paul v. Berry, 78 Ill. 158 (1875) (\( B \) subsequently ratified his purported signature with knowledge that \( A \) had signed on the assurance that \( B \) was principal); Moynihan v. McKeon, 16 Misc. 343, 346, 38 N. Y. Supp. 61, 64 (Sup. Ct. 1896). And even though \( B \) merely has reason to know of \( A \)'s understanding, it seems that \( B \)'s position should be no better than that of co-surety.
83. \( B \) should be concluded by the import of the indorsement as much as a *bona fide* purchaser would be.
84. 132 Mo. 601, 620, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 481 (1896).
deed of trust of her land reciting that it secured a note made by P and B and providing for release on payment of the note and for foreclosure on nonpayment; P, the principal and the husband of A, showed the deed of trust to B, who signed the note as co-maker relying on the assurance of P that he should have recourse to the deed of trust. B bought the land at foreclosure sale. In an action of ejectment brought by B against A, judgment was given for A, it being held in effect that A was real surety for B, and properly so, for the deed of trust imported that A was undertaking risk in respect to her land in behalf of B as well as P, and B was concluded by the terms of the deed.

The last case calls attention to the fact that the general rules of this sub-topic should also apply when A and B sign different instruments, provided that the one signed by A is shown to B, who executes the other in reliance on it.

In most of the cases falling within this sub-topic, A and B are joint or joint and several promisors. Sometimes, however, they are respectively successive parties to a negotiable instrument. If the obligation of B is conditioned on nonperformance by A, the instrument imports an understanding had by B that he shall be surety for A, which will fortify a like extrinsic understanding or will suffice for subsuretyship even in the absence thereof. A different situation is presented, however, when the obligation of B is not so conditioned, for example, when they are successive indorsers and hence are each obligated to pay if the maker or drawee does not pay. Of course, if B has an extrinsic understanding of subsuretyship, its effect is not lessened by the form of the instrument; on the other hand, if B had no such extrinsic understanding, it is submitted that the form of the instrument is not sufficient to make him a subsurety, although there are authorities to the contrary. The reasoning of the present sub-topic stops far short of that result, for it rests on the facts of representation to and reliance of B in the particular case. Nor can one apply the reasoning hereinbefore set forth in the sub-topic relating to successive parties on negotiable instruments. The law need not and should not give effect to the normal expectation of succes-

85. The majority of the court recognized this fact (three judges dissenting), and reasoned that it alone fixed the relation between A and B, and that no parol understanding could have legal effect on the relation in view of the statute permitting a married woman to charge her property only by deed.

86. It seems that it is not enough that P tells B that he had such an instrument and that A consents, etc. True, P could and would have produced the instrument on call of B. But reliance of B on the wholly oral assurances of P would be unreasonable and unjustified. At all events, B should be concluded by the import of the first instrument, whether he saw it or not.


NONCONSENSUAL SUBSURETYSHIP

sive parties when either has stipulated for a different relation. Indeed, it seems that their relation should be determined by the understanding had by A, whether it be of co-suretyship or subsuretyship. Thus justice is done to A without apparent injustice to B.

III. Controlling Agreement between the Sureties

In all the situations discussed under Class II of the previous sub-topic (where there is no understanding with the principal or creditor), an agreement between the two sureties will control their relation and rights of recourse inter se, for example, an agreement of co-suretyship, or to contribute in equal or other specified shares. This proposition received almost universal acceptance at common law and is incorporated in Section 68 of the Negotiable Instruments Law as far as successive indorsements are concerned. The agreement may be oral. The parol evidence rule is not violated inasmuch as the instrument integrates the undertakings of the sureties to the creditor rather than any understanding between the sureties themselves. Nor is the Statute of Frauds applicable since the oral promise of one surety to the other for contributory or even full reimbursement may be legitimately used to fix the relation between them, the result being that the action may be properly rested on the relational right arising by operation of law.

90. The agreement may be expressed, or implied from conduct or circumstances.

---

90. See many authorities cited passim, and in particular the following authorities appropriate to the various paragraphs of sub-topic (II), Class (II) (B), supra p. 334.

(3) Blumberg v. Speilberger, 209 Ala. 272, 96 So. 191 (1923); Gambrell v. McLean, 28 Ariz. 427, 237 Pac. 196 (1925); Trego v. Estate of Cunningham, 267 Ill. 367, 105 N. E. 50 (1915); Shea v. Vahey, 215 Mass. 80, 102 N. E. 119 (1913) (four sureties; agreement of one to contribute one-third); Quackenboss v. Harbaugh, 298 Mo. 240, 249 S. W. 940 (1923); National Newark Banking Co. v. Sweeney, 88 N. J. L. 140, 96 Atl. 86 (1915). Certain New Jersey decisions to the contrary, now abrogated by the Negotiable Instruments Law, are collected in Wilson v. Hendee, 74 N. J. L. 640, 645, 65 Atl. 413, 415 (1907).

(4) Quackenboss v. Harbaugh, 298 Mo. 240, 249 S. W. 940 (1923) (agreement of co-suretyship); Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413 (1907) (agreement that B should indemnify A).


In Wittemann v. Sands, 238 N. Y. 434, 441, 144 N. E. 671, 673 (1924), A was an irregular indorser and B a later payee-indorser, both for the accommodation of another; it was held that on taking up the instrument B should be confined to contribution from A since there were circumstances from which an agreement of contribution should be implied. The court reasoned that §§ 64 and 68 of the Negotiable Instruments Law governed; that § 68 expressly permitted proof of an agreement negativing subsuretyship and that § 64 (I) must receive a like interpretation although the language is that, "if the instrument is payable to the order of a third person," the irregular indorser "is liable to the payee and to all subsequent parties".

cumstances. The burden of establishing a controlling agreement between the sureties rests on the surety who asserts it.

A few situations deserve special treatment:

(1) If all the sureties are shareholders of the principal corporation, or perhaps if all are directors, their common benefit or responsibility indicates an agreement to contribute or to be co-sureties, or at least to be jointly bound so that co-suretyship ensues *prima facie*. The inference is sufficiently strong not only to make the evidence competent, but also to justify submission of the question of such agreement to the jury and to sustain a finding thereof, and by some authorities even to make out a *prima facie* case of such agreement. Contribution is usually in equal shares without regard to the respective holdings of stock, unless there was an agreement for a different ratio.

(2) A present or past mutual agreement between A and B to be or to become sureties for the principal, as distinguished from agreements to that effect between the respective sureties and the creditor or principal, would seem normally to import an understanding of co-suretyship and even to raise a *prima facie* presumption to that effect.

92. This proposition is sustained by the great weight of authority. Cases cited *passim*; Note (1921) 11 A. L. R. 1332. There are a few cases *contra*, *e. g.*, *In re McCord*, 174 Fed. 72 (S. D. N. Y. 1909); and see *Johnson v. Crane*, 16 N. H. 68, 74 (1844) (now overruled on this point by *Paul v. Rider*, 58 N. H. 119 [1877]).

93. Hagerthy v. Phillips, 83 Me. 336, 22 Atl. 223 (1891) ("the burden of proof lies heavily upon the plaintiff", the person asserting the agreement); *Freile v. Rudiger*, 89 N. J. 72 (1898) (sureties signing on same occasion) ; *Logan v. Ogden*, 101 Tenn. 489, 53 (1898) (sureties signing on same occasion) ; *Gambrell v. McKean*, 142 Ark. 96, 75 S. W. 940 (1909) ; and see *Johnson v. Crane*, 16 N. H. 68, 74 (1844) (now overruled *passim*; *Marquardt's Estate*, 251 Pa. 73, 95 Atl. 917 (1915) (notes made by A, indorsed by B, payee, and also by C, D, and E, all being directors, in pursuance of mutual agreement thus to become sureties). *Note* (1921) 11 A. L. R. 1332.


96. *See Paul v. Rider*, 58 N. H. 119 (1877), in which case evidence that A and B indorsed for the accommodation of their sons, who were partners, was held competent as tending to show an agreement of co-suretyship between A and B because of their common interest.


NONCONSENSUAL SUBSURETYSHIP

(3) In the case of renewal notes, the sequence of the undertakings of the sureties on the last renewal is determinative. Of course, the order of undertakings on a prior instrument, or an understanding between the sureties in respect to a prior instrument, is admissible in evidence as tending to show that the same relation was intended to exist at the time of the last renewal. But the mere fact that in a series of renewal notes $A$ and $B$ signed in varying order in time and position, or either, has been held not to import co-suretyship, the reason given being that the change in order may reasonably be attributed to a refusal on the part of $B$ otherwise to renew the note. On the other hand, such variation in order might well be thought to indicate an indifference to be accounted for only by a continuing mutual agreement of co-suretyship.

(4) The fact that $A$ and $B$ each subsequently paid or agreed to pay one-half of the amount of the instrument to the creditor has been held to import prima facie an original agreement to contribute.

(5) The fact that $B$ signed with knowledge that the creditor had refused to accept an instrument bearing the signatures only of the principal and $A$ has been held to indicate that $B$ intended to be surety for both.

Note: The second part of Professor Campbell's article will appear in the February issue of the Review.