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Principal and Surety by Implication of Law

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the demurrer to the declaration for nonjoinder be sustained and that the trial court transfer the case to the chancery docket under the statute with leave to make the other promisee a party defendant. *Vinson v. Home Insurance Co.*

It was the general rule at common law that all joint promisees, if living, must join in the action, otherwise the non-joinder would be fatal. Early, however, it was recognized, as an exception, that if one party refused to join in the action, the other parties could use the recalcitrant party's name to prosecute the suit upon indemnifying him against costs. The obvious purpose of this exception was to prevent one joint promisee from capriciously defeating the action of all parties. If the court in the instant case had invoked this doctrine, the plaintiff would have had an adequate remedy at law by using the credit company's name after indemnifying it against costs. This being so, there would be no ground for equitable jurisdiction, and the party would have to pursue his legal remedy.

B. D. T.

**Principal and Surety by Implication of Law.** — *P* seeks recovery from *D* by notice of motion for judgment to recover the amount of a judgment paid by her upon a negotiable promissory note on which she was an accommodation indorser. *D* had wrongfully pledged the note as collateral to secure a note given by it to *X*. *X* was a holder in due course and *P* was forced to pay this note. *P* seeks to recover under the provisions of our statute giving a surety the right to proceed by notice of motion for judgment.

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2. 16 S. E. (2d) 924 (*W. Va.* 1941).
4. Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 So. 48 (1908); Bolton v. Cuthbert, 132 Ala. 403, 31 So. 358 (1902); Harris v. Swanson Bros., 62 Ala. 289 (1878); Wright v. McLemore, 10 Yerg. 234 (Tenn. 1887); see also 1 Bates, Pleading, Practice, Parties (2d ed. 1908) 65-66; 47 C. J. § 127 (4), p. 62, n. 4; 2 Page, Contracts (1909) § 1143; Stephens, Pleading (2d ed. 1901) § 31, p. 57.

1. *W. Va. Code* (Michie, 1937) c. 45, art. 1, § 4, provides that any person liable as bail, surety, guarantor or indorser, or any sheriff liable for not taking sufficient bail, or heir, or personal representative of any so liable upon the payment of judgment rendered on account of such liability may proceed by motion against any person against whom a right of action exists for the amount paid.
RECENT CASE COMMENTS

P admits that there was no express suretyship, but bases her claim to recover on implied suretyship. D demurred on the ground that the statute is limited to express suretyship arrangements. Judgment for P. Affirmed. Held, that P may proceed under the statute because “an accommodation indorser of a note pledged as collateral security has the rights of a surety.” Hunter v. Monroe Lumber Co. 2

The relationship of principal and surety is ordinarily created by an express contract of suretyship. 3 The relation of an accommodation indorser to the party accommodated is that of a surety. 4 Such an indorser, on the payment of the obligation, is entitled to maintain an action under our statute to recover from the accommodated party. 5 There is, however, a form of suretyship known as “involuntary suretyship.” 6 For instance, where a mortgagor conveys the mortgaged property to a grantee who assumes the mortgage debt, the grantee thereby becomes the principal debtor and the mortgagor becomes a surety for the payment of the mortgage debt. 7 This relation arises by implication from the circumstances without reference to any express contract. 8

The instant case is another example of an “involuntary suretyship” or a suretyship by implication of law. A “surety” is any person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person, who ought to have made payment or performed the obligation before the surety was compelled to do so. 9 P in the instant case comes well within this definition. Although the result of the principal case is clearly right, the court seems in error in the language used. The court states that “an accommodation indorser of a note pledged as col-

2 16 S. E. (2d) 618 (W. Va. 1941).
3 BRANDT, SURETYSHIP & GUARANTY (1905) § 1.
4 Miller v. Miller, 8 W. Va. 542 (1875); Teter v. Teter, 65 W. Va. 167, 63 S. E. 967 (1909).
7 Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411 (1894); Johnson v. Young, Carson & Bryant, 20 W. Va. 614 (1882) (if P and S, as partners, are indebted to C, and S withdraws from the partnership, P agreeing to pay all the partnership debts, S then becomes surety for this amount); Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979 (1901) (lessee by assignment of his lease becomes a surety to the landlord that his principal, the subtenant, will pay the rent thereafter accruing.
8 Remage v. Marple, 76 W. Va. 379, 85 S. E. 663 (1915).
lateral security has the rights of a surety.” The court does not make clear against whom the indorser has the rights of a surety. The statement is true enough in respect to his rights against the party accommodated, but normally it is not true as to his rights against a subsequent indorser. If the language of the court were taken in its literal sense we would reach this anomalous result: \( A \) gives his note to \( B \) with \( S \) as an accommodation indorser. \( B \) borrows money from \( X \) and indorses \( A \)’s note to \( X \) as collateral security. On maturity \( X \) collects from \( S \). By the language of this case \( S \) now has rights against \( B \), when we started out with \( B \) having rights against \( S \). It seems clear that \( S \)’s rights would be only against \( A \). This result would also run afoul of the rule of the negotiable instruments law which declares that no prior indorser can hold a subsequent indorser liable on his indorsement.\(^{10}\) It seems as if the court inadvertently omitted the word “wrongfully”, and the statement should be made to read, “an accommodation indorser of a note \textit{wrongfully} pledged as collateral security has the rights of a surety against the party who made the wrongful pledge.” In fact, both the accommodation indorser and the maker in such a case would have a right of reimbursement against the wrongdoer.\(^{11}\)

The majority of the courts have held that statutes such as the one in the instant case have no application to implied suretyship.\(^{12}\) The broad language of our statute, however, that “the provisions of this section are cumulative and are intended to protect the rights of any person secondarily liable” would seem to justify the court’s position.\(^{13}\)

P. W. H.

\(^{10}\) W. Va. Code (Michie, 1937) c. 46, art. 3, § 20.

\(^{11}\) Restatement, Restitution (1937) § 151.

\(^{12}\) Ross v. Jones, 22 Wall. 576 (U. S. 1874); Crawford v. Turnbaugh, 86 Ohio St. 43, 98 N. E. 858 (1912); Bates v. Branch Bank at Mobile, 2 Ala. 689 (1841); Harvey v. Bacon, 9 Yerg. 308 (Tenn. 1836); Payne v. Webster, 19 Ill. 102 (1857); Fish v. Glover, 154 Ill. 86, 39 N. E. 1081 (1894); Rice v. Dorrian, 57 Ark. 341, 22 S. W. 213 (1893); Clark v. Barrett, 19 Mo. 39 (1855).

\(^{13}\) Also see Weimer, Wright & Watkins v. Talbot, 56 W. Va. 257, 49 S. E. 372 (1904) (“the purpose of this section is to afford a surety having a right of action a summary remedy for the amount paid by him.”)