

THE MISSOURI RULE ON THE VALIDITY OF THE ORAL PROMISE OF ONE CO-SURETY TO INDEMNIFY ANOTHER

Following an early Supreme Court case, it has constantly been held in Missouri that the oral promise of a co-surety to save another harmless on default of the principal is a promise to answer for the debt or default of a third person and hence unenforceable under the fifth section of the Statute of Frauds. This view has been strictly adhered to although the prevailing law in the United States has been to the contrary.

The leading Missouri case is *Bissig v. Britton*,¹ which was decided in 1875 by Justice Wagner after some hesitation and little examination of the law. The facts were, briefly, these: The defendant, as surety, signed a replevin bond executed by one John Wisner. In order to make it good, he requested the plaintiff to sign it also, promising him immunity from any loss arising therefrom. The plaintiff relied upon the promise of the defendant and signed the bond, acting solely upon that consideration and agreement. Wisner, then, replevined certain goods from a fourth party, but after execution had been levied, retained the goods.

He refused to return the property and the plaintiff was sued upon the bond and judgment rendered. He then brought suit against the defendant upon his parol promise and the defendant pleaded the fifth section of the Statute of Frauds.

The Justice stated in his opinion that "there is some plausibility in the argument, that where a request is made by one person to another, to sign an instrument as surety for the benefit of a third party, and at the same time the person agrees to indemnify and save the surety harmless, and the surety becomes bound with that understanding, that it is an original promise founded upon a sufficient consideration." But after such an excellent statement of the law, he delves into the musty depths of the English law to draw forth the conclusion that where the plaintiff is a surety there is an implied liability of the third party (the principal) to reimburse him for any damages sustained by reason thereof. The promise of the defendant to save him harmless is therefore collateral to the third party's liability and for that reason it is a promise to answer for the debt or default of a third party and under the operation of the Statute of Frauds.

He cites *Winckworth v. Mills*,² in which the plaintiff was the in-

1. 59 Mo. 204.

2. 2 Esp. N. P. 483.

dorsee of a note payable to the defendant. The defendant at maturity requested the plaintiff to collect the note from the principal, which the plaintiff did at great expense to himself, and then sued the defendant on his promise of indemnity. The defendant's promise was held to be collateral and hence he was not liable. The promise is more clearly collateral in this case than was the promise in *Bissig v. Britton*, for here the defendant literally says, "If you can't collect from the principal, I will pay you."

But this case was overruled in *Thomas v. Cook*,³ which states the law as it is most generally in America today. It was, however, overturned in *Green v. Gresswell*.⁴ *Green v. Gresswell* has ever since been the law of England, but United States law is contrary.

The overwhelming weight of authority is to the effect that a promise by a surety to indemnify a co-surety, or an agreement that the co-surety shall be responsible only for a certain proportion of any loss sustained, is not a promise to answer for the debt or default of another and need therefore not be in writing.⁵

One of the early American cases to lay the foundation for the national law on this subject is *Sanders v. Gillespie*.⁶ The facts in the case, while not identical to those in *Bissig v. Britton*, are so similar in relation as to leave little room for differentiation. Here the plaintiff was the first indorser on a note and the defendant was the second. The defendant promised, but not in writing, to deliver certain goods to the plaintiff when he paid the note at maturity on default of the principal, but after the plaintiff had suffered a loss by reason of his making good the note, the defendant pleaded the fifth section of the Statute of Frauds.

The Justice stated in his opinion that the promise of the defendant was not collateral, but original. For, he points out, the plaintiff, in consideration of the defendant's promise, assumed as an additional obligation, the share for which the defendant would be liable in an action for contribution, a more onerous duty, which could be measured pecuniarily. The defendant received as his consideration from the plaintiff, the release from liability to the obligee of the note.

The decision was in direct antithesis to the earlier English cases, and, if we may believe Justice Wagner, not in accordance to the English law as it is today. But it is logically apparent that the conclusion of the New York justice can be reached without the cir-

3. 8 Barn. and Cr. 728.

4. 10 Ad. and El. 453.

5. 1 A. L. R. 388.

6. 59 N. Y. 250 (1874).

cumlocutory deductions of the Justice Wagner. Is it not unreasonable to trace the defendant's liability by first deducing that the primary obligation is upon the principal to indemnify the plaintiff for his loss, thus making the defendant's liability secondary to the principal's and collateral? Surely, if the defendant had such a relation in mind the argument would be just. But when the defendant makes his oral promise, he says "I will pay you, if you make good the amount of this note." He knows that the plaintiff will not conceive of his being secondarily liable, for the defendant's promise is made in the event that the possibility of the principal's solvency is past. He therefore says he will be primarily liable if the plaintiff assumes a given responsibility.

The leading Massachusetts case in point is *Weeks v. Parsons*,⁷ In this case the directors of a corporation, who indorsed corporate notes, agreed that their liability was to be joint, not several. Of course, this meant that on consideration of their mutual signatures, they mutually agreed to save each other harmless from other than his pro rata liability. It was held to be an original promise and not a collateral undertaking.

Then in *Potter v. Brown*,⁸ an additional support for the American doctrine is found. One of a number of sureties agreed to become the co-signor of a note in consideration of the signature of another. The Statute of Frauds did not rule here. And in *Cortelyou v. Hoagland*,⁹ the directors of a corporation induced another to sign as surety on consideration of their saving him harmless. In both cases the law is well stated to be that such obligation is an original undertaking and not collateral.

Missouri has not, however, gone out of line in cases of contracts to indemnify other than those of co-sureties. In *Rubey Trust Co. v. Weidner*,¹⁰ it was rightly held that the promise by one to a bank to stand personally liable for checks drawn by him as treasurer of an organization, although in parol, was binding as an original undertaking.

And in *Boone County Lumber Co. v. Niedermeyer*,¹¹ the defendant promised to pay the plaintiff a bill owed him by another, if he would furnish the third party with goods, and it was held also to be an original undertaking.

Although in these cases the agreements of the defendants to save

7. 176 Mass. 570 (1900).

8. 85 Mich. 274 (1877).

9. 40 N. J. Eq. 1.

10. 174 Mo. App. 692.

11. 174 Mo. App. 180 (1915)

the plaintiff harmless on default of a third party are apparently no more original undertakings than the parol promise of a co-surety to indemnify, the courts have arrived at a correct decision, while in the others they have failed.

Despite the contrariety of the prevailing American rule, Missouri has constantly adhered to the original construction of the law as set out by Justice Wagner in *Bissig v. Britton*. It has been affirmed in one case,¹² approved in another,¹³ and followed in two more.¹⁴ Had the courts followed the construction which the honorable justice said is "plausible," Missouri would today be in accordance with the law of the nation.

SYLVAN AGATSTEIN.

12. 142 Mo. 301.

13. 1 Mo. App. 376.

14. 25 Mo. App. 574; 87 Mo. App. 528.