

on its express guarantee of prior endorsements. The court said that subrogation would be allowed as long as the conduct of the insurer and the insured has not been such as to make the granting of relief unconscionable. The decision, in parting from the majority view, emphasizes the legal liability of the bank to the payee, and permits recovery without regard to comparative equities. In a 1957 decision,¹⁸ the New Hampshire court allowed an insurer to recover from a collecting bank on the ground that the unauthorized payment by the bank caused its equities to be inferior to those of the insurer. The facts of that case are not materially distinguishable from those in other cases holding that an unauthorized payment by a bank is *not* enough to cause its equities to be inferior. The New Hampshire court ruled that the defendant bank was liable for conversion by virtue of a statute,¹⁹ and stated further that the defendant was not found negligent or liable apart from said statute. It appears that the court based its equitable finding on legal considerations and therefore found liability to the insurer more in accordance with principles of law than with principles of equity. In *Aetna*, the decision was based on strict legal principles as well as on equitable principles which tends to indicate a strong willingness to allow absolute subrogation to the rights of the insured. Since there is no serious departure of results under legal principles from objectives of equity and good conscience, it is submitted that a subrogee should stand on the same footing as the subrogor, as was stated by the New Jersey court.²⁰

C. RONALD RUBLEY

Partnership—Existing Liability of Retired Partner—Effect of Indemnification Agreement.—*White v. Brown*.¹—White, one of three partners, retired from a partnership under an indemnification agreement with the continuing partners. Three months later the creditor-appellee was notified of both White's withdrawal and the indemnification agreement. A short time thereafter the creditor accepted from the continuing partners twelve promissory notes, each payable monthly for the principal sum of \$2000 with interest at six per cent. These notes were accepted on a debt of \$20,659.27 which was incurred by the partnership prior to White's retirement. The continuing partners then became insolvent and the creditor sought payment of the debt from White. The District Court directed a verdict for the creditor.

The retired partner appealed the decision, contending that the evidence was sufficient to submit to the jury on the issue of an implied release agreement. The appellant also maintained that from the evidence presented a suretyship relation could have been inferred, and that the retired partner as surety was discharged from liability on the debt when time for payment was extended. The Court of Appeals for the District of Columbia reversed

¹⁸ *Security Fence Co. v. Manchester Fed. Sav. & Loan Ass'n*, 101 N.H. 190, 136 A.2d 910 (1957).

¹⁹ N.H. Rev. Stat. Ann. ch. 337, §§ 21, 23 (1955).

²⁰ *Standard Acc. Ins. Co. v. Pellecchia*, supra note 9.

¹ 292 F.2d 725 (D.C. Cir. 1961).

CASE NOTES

the lower court. HELD: A jury question was presented as to the release agreement, and a suretyship and discharge from liability can be inferred to the extent that prejudice can be shown.

The existing liability of a partner cannot be discharged by his retirement under an indemnification agreement with the continuing partners. But to what extent a creditor's rights are affected by his knowledge of such agreement and/or by his subsequent dealings with the continuing partners presents a different issue. In years past the authorities split in their answers.² Today the Uniform Partnership Act (UPA) provides an answer in the thirty-eight states which have adopted it.³

Even though the District of Columbia is not one of these thirty-eight jurisdictions, the court in this case accepted the answer provided by the UPA; however, it did so with qualification. In addition to the court's refusal to adopt fully the solution of the UPA, the sharp dissenting opinion of Judge Washington and the commercial significance of the issues involved, necessitate not only a reappraisal of section thirty-six of the UPA but of the historical alternatives as well.

The appellee contended that, even if an agreement to release the retired partner and accept in lieu the liability of the continuing partners could have been inferred, it should not be held binding due to the lack of consideration. It was specifically argued that the case of *Regester v. Dodge*,⁴ relied upon by the appellant, is distinguishable in that the creditor there dealt with a partnership not previously liable on the debt. The creditor's acceptance of their liability in lieu of that of the old firm clearly established a novation. It is to be noted that the continuing partners in this case promised to do only what they were already bound to do.

The court apparently hurried over the consideration issue. This may be justified in that the continuing partners promised to pay not only the amount of the original obligation with six percent interest, but an additional \$4000.00, thereby supplying the requisite consideration.⁵ Justified or not, a closer examination of the opinion reveals that the court did not pass on the issue at all but rather relied upon the theory of a release without con-

² 10 Colum. L. Rev. 550 (1910); see *Dean & Co. v. Collins*, 15 N.D. 535, 108 N.W. 242 (1906) (annotated at 9 L.R.A.(n.s.) 49); see *Crane, Partnership* § 79, at 417-28 (2d ed. 1952).

³ For list of states see 7 Uniform Laws Ann. p. xv (Table III).

⁴ 6 Fed. 6 (E.D.N.Y. 1881).

⁵ See Restatement, Contracts § 76(c) (1932), illustration 7. Consideration has been found where there was a new and separate promise to pay what one was already obligated to pay as a joint obligation because the new and separate promise subjected the new obligor to an individual suit and judgment in which he was deprived of his defense of non-joinder of a joint obligor. 1 Corbin, Contracts § 143, at 452-53 (1950); *Lyth v. Ault & Wood*, 7 Exch. 669, 155 Eng. Rep. 1117 (1852). In most states joint obligations are declared to be joint and several thereby reducing the importance of the non-joinder cases. See *Presbrey v. Thomas*, 1 App. D.C. 171 (1893). Under the UPA, partners are jointly liable on contractual debts and obligations of the partnership. This joint liability is a substantive provision, thereby leaving it to the particular adopting state to apply its procedural rules through its own statutory or case declaration of several liability. See UPA § 15 and the Commissioner's Note thereafter. In *Ludington v. Bell*, 77 N.Y. 138 (1879), the receipt of a partner's individual obligation was sufficient consideration for a return promise because as the court said:

sideration.⁶ The social, economic, moral or legal benefits that accrue from such a radical departure from one of the basic principles of the law of contracts are not evident. Especially obscure are the benefits derived in this case where it was conceded that the retired partner suffered no loss due to reliance upon the creditor's alleged release agreement or his conduct in general.

The cases relied upon by the majority as support for the theory of "waiver" are not in point. They support only the propositions that from conduct and circumstances an intention to release one from liability may be inferred,⁷ that a novation requires consideration,⁸ and that a partnership agreement may be rescinded by the mutual consent of the partners.⁹ No case can be found which expressly holds that one may waive such a substantial right without either estoppel,¹⁰ consideration,¹¹ or the existence of a suretyship relation.

Suretyship usually arises from express agreement.¹² It has been held, however, that when a retired partner withdraws from a firm and the remaining partners assume all existing liabilities, the principal-surety relation extends beyond the immediate parties to any creditor who has notice of the circumstances.¹³ Consequently, any action by the creditor which would

An individual obligation may be higher security than that of a co-partnership, and a debt due from partners may not always be as substantial and safe as a debt against one of them; for such co-partnership debt must first be collected out of the co-partnership assets and not out of the individual property of the several partners, until these are exhausted; and then only after individual debts are fully paid.

Id. at 603.

⁶ *White v. Brown*, supra note 1, at 727. UPA § 36(2):

A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

This section taken literally applies to instances where consideration or estoppel might be absent.

⁷ *Regester v. Dodge*, supra note 4; *LeGault v. Lewis-Zimmerman*, 28 Wyo. 474, 206 Pac. 157 (1922).

See *White v. Brown*, supra note 1, at 730, where Judge Washington suggests that no less than an express release should be required because of the fact that it is a natural and commercially accepted practice to look in the first instance to those who are currently operating the partnership for payment and perhaps even contract for an extension of time before seeking satisfaction from a retired partner.

⁸ See *International Harvester Co. v. Layton*, 148 Ark. 156, 229 S.W. 22 (1921), which also turned on the fact that the liability there was incurred after the dissolution of the firm.

⁹ *LeGault v. Lewis-Zimmerman*, supra note 7.

¹⁰ *Henry v. Seiberling Rubber Co.*, 265 Ky. 241, 96 S.W.2d 590 (1936). The UPA was adopted in Kentucky in 1954 (Ky. Rev. Stat. Ann. § 362.150 to 362.360 (1955)).

¹¹ *Charleston Lumber Co. v. Friedman*, 64 W.Va. 151, 61 S.E. 815 (1908). The UPA was adopted in West Virginia in 1953; see W.Va. Code Ann. §§ 4658(1) to 4658(45) (1955).

¹² Restatement, Security § 83(a) (1941).

¹³ *Smith v. Shelden*, 35 Mich. 42 (1876); *Preston v. Garrad*, 120 Ga. 689, 48 S.E. 118 (1904); *Colgrove v. Tallman*, 67 N.Y. 95 (1876); cf. *Swire v. Redman & Holt*,

ordinarily discharge a surety would now discharge the retired partner.¹⁴ The court in this case adopted a modified theory of suretyship by operation of law¹⁵ and concluded that the retired partner could have been discharged when the promissory notes extending the time for payment were issued,¹⁶ if prejudice could be shown.

It is clear that the creditor who had originally contracted with the partners on the basis of their joint and several liability is now compelled to respect one of his former joint obligors as a surety and necessarily accord to him rights never contemplated at the time of the original contract. In essence, the creditor's rights have been diminished by the unilateral action of his debtors. It is difficult to see why the mere notice of an indemnification agreement should effectuate such basic changes in one's rights when he has not given his consent. It would not suffice to say that the notice alone does not diminish the creditor's rights, in that subsequent action by the creditor is necessary in order to discharge his debtor's liability. This is a post facto argument, for if suretyship were not already deemed to be present the subsequent conduct of the creditor would not have any discharge effect. Furthermore, the fact that the court modified the theory to one of "compensated suretyship"¹⁷ does not remove the objection. The court said:

On his retirement he could not fairly be said to have acquired the status of a gratuitous surety, that is, one who obligingly lends his credit to another; so to consider the matter would be to dis-

[1876] 1 Q.B. 536; *A. F. Shapleigh Hardware Co. v. Wells*, 90 Tex. 110, 37 S.W. 411 (1896); *McAreavy v. Magirl*, 123 Iowa 605, 99 N.W. 193 (1904); see *Rawson v. Taylor*, 30 Ohio St. 389 (1876), for an excellent discussion on the merits of the opposing view. It is to be noted that the UPA which impliedly adopts the suretyship rule in § 36(3) was adopted in Ohio in 1949 and hence overrules the *Rawson* case. See Ohio Rev. Code Ann. §§ 1775.01-1775.42 (Baldwin 1961).

¹⁴ *Smith v. Sheldon*, *Preston v. Garrad*, *Colgrove v. Tallman*, supra note 13.

¹⁵ *White v. Brown*, supra note 1, at 728.

¹⁶ It is a well-established principle of suretyship law that an extension of time discharges a surety because it increases the possibility that he will be denied full indemnification from the principal. See Restatement, Security § 129(1) (1941). That there must be consideration for the extension see *Eureka Stone Co. v. First Christian Church of Ft. Smith*, 86 Ark. 212, 110 S.W. 1042 (1908); *People's State Bank of Wellsville v. Dryden*, 91 Kan. 216, 137 Pac. 928 (1914); *Atlantic Trust & Deposit Co. v. Union Trust & Title Corp.*, 110 Va. 286, 67 S.E. 182 (1909). Most courts have held that acceptance of promissory notes at a lower rate of interest than provided for by the original agreement also constitutes an extension of time because the debtor relinquishes his right to pay and stop the running of interest. See *Burack v. Mayers*, 121 N.J. Eq. 135, 187 Atl. 767 (1936); *Benson v. Phipps*, 87 Tex. 578, 29 S.W. 1061 (1895); *Nelson v. Flagg*, 18 Wash. 39, 50 Pac. 571 (1897). Cf. *Harburg v. Kumpf*, 151 Mo. 16, 52 S.W. 19 (1899); *Monroe County Sav. Bank v. Baker*, 147 Misc. 522, 264 N.Y. Supp. 101 (Sup. Ct. 1933); *Wilson v. Powers*, 130 Mass. 127 (1881).

¹⁷ A gratuitous surety is one who voluntarily lends his credit to another without compensation. A compensated surety is one who is in the business of credit lending. See Restatement, Security § 82(i) (1941). A mere extension of time releases a gratuitous surety, prejudice being presumed. The discharge of a compensated surety requires proof of actual prejudice. Restatement, Security § 129(2) (1941). See *Guaranty Co. v. Pressed Brick Co.*, 191 U.S. 416 (1903); *In re Tabasinky's Estate*, 228 Ia. 1102, 293 N.W. 578 (1940); *Fred Christensen, Inc. v. Hansen Constr. Co.*, 142 Ore. 549, 21 P.2d 195 (1933); *City of Philadelphia, ex rel. Thompson v. Fidelity & Deposit Co. of Maryland*, 231 Pa. 208, 80 Atl. 62 (1911).

regard entirely the fact that before his retirement the partnership relation had imposed upon appellant a primary obligation.¹⁸

This supposed equitable consideration was enough to convince the court to call into play the peculiar status of a compensated surety which itself was a product of equitable considerations. The court did not mention that even though the status of a compensated suretyship relation reduces the otherwise severe impact that would be imposed upon the creditor's rights if a gratuitous suretyship were involved, the fact nevertheless remains that the creditor's rights have been unilaterally diminished.

The UPA has codified the principles of release without consideration¹⁹ and gratuitous suretyship by operation of law.²⁰ It is submitted that both principles are undesirable in legal theory and in practical effect. It is unfortunate that the court in this case adopted the former principle and modified the latter, not only because of the inherent inequity in the doctrine, but also because there existed no compelling statutory or case precedent²¹ in the jurisdiction.

EDWARD B. GINN

Sales—Unfair Competition—Equitable Servitudes on Chattels.—*Independent News Co. v. Williams*.¹—Plaintiff, Independent News Co. (Independent), is a large scale distributor of comics; plaintiff, National Comics Publications Inc., is a publisher of comic books under some forty-five different titles; plaintiff, Superman, Inc., owns the copyright and trademarks covering the various titles and characters appearing in the comic books. They brought an action for a preliminary injunction against a secondhand periodical dealer (Williams) to prevent his selling cover-removed² comics purchased by him from waste paper dealers. Williams purchased them from certain wholesalers who were contractually bound to plaintiff, Independent, to sell the cover-removed comics as waste paper only. The contracts between

¹⁸ *White v. Brown*, supra note 1, at 728.

¹⁹ See UPA § 36(2) cited in note 6 supra.

²⁰ UPA § 36(3):

Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

²¹ *White v. Brown*, supra note 1.

¹ 293 F.2d 510 (3d Cir. 1961).

² It must be emphasized that there is a vital difference between a cover-removed periodical and a secondhand periodical. A secondhand periodical is one which has been placed on the market and sold. It subsequently, through one channel or another, finds its way into the hands of a secondhand magazine dealer who may have collected it himself from a reader or acquired it by purchase from some other collector. A cover-removed periodical represents one which has had its cover removed by a Wholesaler who had returned such cover to the Distributor for full credit. The remains of such a periodical represents the subject matter of this lawsuit.

Brief for Appellant, pp. 3-4.