CHAPTER 47

Suretyship

I. Survey

1. The Object of the Rule

PAST and existing legal systems provide for various types of contracts in which a person promises either to perform another person's duty in case of noncompliance, or to indemnify the creditor therefor. The basic types of suretyship and guaranty at common law are impregnated by this contrast. But a rich variety of forms has overgrown the historic dualism. In civil law, the present representative types of transactions have developed from the late Roman categories from which, however, they differ. They include suretyship (fideiussio)—with certain aspects of common law guaranty—; mandate of credit (mandatum qualificatum); guaranty (different from the common law institution of the same name); and assumption of subsidiary liability as codebtor. The differences in the various kinds of promises reach from formalities to defenses and enforcement.

The terminology varies greatly in covering this wide and


On the modern "compensated surety" (Restatement of Security § 82 comment i), see for the United States: G. W. Crist, Corporate Suretyship (1939); for Switzerland and Germany: Raffaeb, "Die Solidarbürgschaft im Bankverkehr," Gmürl's Abh. (N. F.) No. 73 (1932).
practically important ground. Also, its external boundaries are not delimited on the same lines. The Restatement of the Law of Security, after thoughtful exploration of the diverse terms used in American legal language, decided to embrace the entire doctrine under the name of suretyship and to use guaranty as a synonym. This all-comprehensive concept is defined as:

“The relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform.” (§ 82)

Such broad terms are particularly suitable to conflicts law. For it seems to be agreed that conflicts rules do not discriminate among all the possible kinds of such promises. ² Far from any characterization according to the law of the forum, the terms suretyship, cautionnement, Bürgschaft, fiança, are used to cover every contract creating a personal obligation to the creditor, securing his claim against another person.

The Restatement of Security (§ 83) includes, in addition to contracts with the creditor whereby the obligor directly intends to become a surety, other transactions having similar results. These situations and the various cases in which persons are treated by law as if they were sureties, may be passed over here.

2. Independence of the Rule

It was once assumed³ that because a surety’s obligation is “accessory” to the principal debt, that is, depends on its validity and extent, it is necessarily subject to the same law.

² LETZGUS, supra n. 1, 842; EHRENZWEIG, Conflict 520; Restatement (Second), Tent. Draft No. 6 (1960) 130.
³ BOUHIER, Observations sur la coutume du Duché de Bourgogne (1742) ch. 21, 413 § 197, citing a decision of the Parliament of Toulouse of 1655.
The only English leading case, seemingly still in authority, is definitely to this effect, and so are possibly a few American decisions. Some modern writers believe in this view.

The contrary opinion is undoubtedly correct. Quite as a surety or a guarantor is bound by his own agreement with the creditor, as distinguished from the undertaking giving rise to the obligation of the principal debtor, suretyship is governed by its own law independently, in principle, from that controlling the main debt. This theory is firmly maintained by consistent doctrine in Germany and other countries, and is dominant in the civil law literature. Story and Wharton thought along the same lines. The American decisions, in great majority though usually without express mention, are consonant when they apply the law of the place where the contract of suretyship is made, or that of the place where this contract, distinguished from the principal debt, is performable.

5 United States: Cases cited by BATIFFOL 424 n. 1.
Also in Germany: RG. (Feb. 11, 1896) 7 Zint.R. (1897) 262.
6 Italy: G. Fiore § 1240; DE AMICIS, I contratti accessorii (1909) 46, cited by Fedozzi-Cereti 760.
Eventually to a similar effect, GUTZWILLER, 6 Z. ausl. PR. (1932) 98.
7 RG. (May 23, 1883) 9 RGZ. 185, 187; (April 23, 1903) 54 RGZ. 311, Clunet 1905, 1950; and many other decisions in constant practice. The literature is unanimous to the same effect, see e.g., NEUMEYER, IPR. 30; LETZGUS, supra n. 1, 839; LEWALD 257; NUSSBAUM, D. IPR. 267; RAAPE, IPR. (ed. 5) 525; KEGEL, Kom. (ed. 9) 574 n. 242 before art. 7 EG. BGB.
8 Austria: OGH. (June 11, 1929) Clunet 1930, 749.
France: The literature in the absence of cases, cf. 3 Répert. 165 No. 10; BATIFFOL, Traité (ed. 3) 677 § 625; Note (FRANCESCAKIS) Revue Crit. 1958, 133, 139.
Switzerland: BG. (July 18, 1927) 53 BGE. II 347, Clunet 1928, 508 and passim; 2 MEILL 42; 2 SCHNITZER (ed. 4) 744.
9 See, in addition to the citations in n. 8, e.g., JITTER 459; 3 Fiore § 1237; Fedozzi-Cereti 760; BATIFFOL 423 § 521.
10 STORY 360 § 267; 2 WHARTON 934 § 427.
11 See in particular, Cowles v. Townsend and Milliken (1860) 37 Ala. 77; Tolman v. Reed (1897) 115 Mich. 71, 72 N. W. 1104; Compagnie Générale de Fourrures v. Simon Herzig & Sons Co. (1915) 89 Misc. 573, 153 N. Y. Supp. 717. The new Restatement mentions expressly that the suretyship and
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The principle was adequately formulated by Zitelmann: The law governing suretyship determines the extent to which the liability of the surety depends on the validity and content of the liability of the principal debtor. Aiming at the same idea, the Reichsgericht has often used the succinct but inaccurate formula, that the law of the principal debt decides what the surety owes, whereas the law of the suretyship indicates whether he owes. In fact, the contrast is not between existence and extent of the obligation, but is presented by the difference in the scope of the two obligations.

Illustrations. (i) Campbell Renfroe, in delegating his paternal powers to a trustee, delivered a note to him for the support of his children, and Gates signed the note as surety. All this happened in Georgia, the law of which was applied by the Louisiana court. Gates, who had paid the note to the trustee without being sued, was unable to recover from the debtor or his cosurety, either as surety or as holder of the note. The surety obligation did not exist because the debt was void.

(ii) A creditor in France agreed with the debtor that the sum due should be paid in pounds sterling instead of francs. The French Court of Cassation held that the modification of currency was not a novation discharging the surety (C. C. article 1271 No. 1), but neither did it bind the surety to pay otherwise than in francs. Both points pertain to the law of suretyship.

(iii) Where someone wrongly believed himself to be a surety and paid the true creditor, the question was from

the main contract may be governed by different laws; Restatement (Second), Tent. Draft No. 6 (1960) 130.

12 ZITELMANN 388.

13 RG. (April 23, 1903) 54 RGZ. 311, 315; (Jan. 21, 1926) IPRspr. 1929 No. 30. Various criticism has been addressed to this formulation by 2 FRANKENSTEIN 348 n. 79; NUSSBAUM, D. IPR. 268 (but see BATIFFOL 425 § 524); and especially RILLING, supra n. 1, 13 ff.

14 Gates v. Renfroe (1852) 7 La. Ann. 569. In Louisiana C. C. § 3025 (now § 3056) cited by the court, the surety is said to have no recourse against the principal debtor, if he pays without being sued and without informing the principal; but this is expressly subordinated to the condition that the debt did not exist at the time of the payment.

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whom he might recover. The Swiss Federal Tribunal held that in the first place the creditor was unduly enriched and owed restitution. But if an action against the creditor were barred by limitation or waived by the surety, he was entitled to compensation from the debtor, who had been eventually discharged of his obligation.\(^{16}\) This interesting theory of unjust enrichment presupposes a relation based on an invalid suretyship and another resulting from discharge of the principal debt. Thus two laws may have to be ascertained, both distinguishable from that governing the principal debt.

Yet, while the law need not necessarily be the same for the debt and its guaranty, it is a reasonable wish that it should be identical as often as possible. The problem of establishing the adequate local connection for suretyship is similar to that arising with respect to a contract to sell an immovable, for which situs is not a compulsory but a desirable contact.

II. Contacts

1. United States

Apart from old cases applying the law of the forum,\(^{17}\) the courts in this country have generally adhered either to the law of the place of contracting\(^{18}\) or to the law of the place of performance.\(^{19}\) But, as usual, these are merely the labels.

The largest group of decisions is characterized by the essential role of the creditor's domicil. The surety may have had his residence in the same jurisdiction\(^{20}\) or the written guaranty may have been mailed to the creditor and

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\(^{16}\) Swiss BG. (Oct. 17, 1944) 70 BGE. II 271, 34 Praxis No. 33.


\(^{18}\) 2 WHARTON § 4275; BATIFFOL 423 § 522.

\(^{19}\) BATIFFOL 423 n. 6.

accepted by him, \(2^{1}\) thereby localizing the making of the contract; or performance by the surety allegedly was due at the creditor's place so as to call for the law of the place of performance. \(2^{2}\) A characteristic category was presented by the customary official surety bonds delivered to the federal government as security for the service of employees; they were localized at the seat of the government in Washington, D. C. \(2^{3}\)

Ordinarily, the law applied also governed the principal debt. \(2^{4}\) The courts sometimes stress this fact, \(2^{5}\) although at other times they do not mention it.

Another notable situation may be mentioned, although some writers minimize its importance. \(2^{6}\) Where a guaranty is written on the instrument embodying the principal debt, courts are probably inclined to let both be controlled by one law. \(2^{7}\) In one case, it was expressly declared immaterial that the surety signed the note of the debtor at a different place. \(2^{8}\) When a financial operation was negotiated in New York, the main contract executed in Nebraska, and the guaranty appended in Illinois, the gambling statute of Illi-

\(2^{1}\) E.g., Watkins Co. v. Daniel (1934) 228 Ala. 399, 153 So. 771.

\(2^{4}\) See the collection of cases by BATIFFOL 424 n. 1.
\(2^{5}\) E.g., RILLING, supra n. 1, 95 before n. 2.
\(2^{8}\) Pugh v. Cameron's Adm'r (1877) 11 W. Va. 523.
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nois was eliminated. In twin cases, the wives of two brothers and debtors, domiciled in Michigan, signed mortgage guaranties for property in Ohio. One note was signed by one defendant when she was temporarily there with her husband in the bank office; the other note was signed at home. But in both cases the contracting was held to have occurred in Ohio.

The bulk of the decisions may be summarized, notwithstanding their varying formal terms, to the effect that contracts of guaranty or suretyship are preferably subjected to the law of the principal debt, especially when the latter is governed by the law of the domicil of the creditor.

2. Other Countries

Apart from the abandoned test of nationality of the surety, most Continental opinions have been divided between the domiciliary law of the surety and the law of the place of his performance. The law of the place of contracting which is provided in so many laws as a general rule, does not appear often in practice.

29 Richter v. Frank (C. C. N. D. Ill. 1890) 41 Fed. 859.
30a To the same effect, the Restatement (Second), Tent. Draft No. 6 (1960) § 346j., and with certain qualifications EHRENZWEIG, Conflict 522.


31 ZITELMANN 366; 2 FRANKENSTEIN 123 ff., 349.
32 3 Fiore § 1243 (but see § 1238 for lex fori); Jitta 495; 2 Bar 24; NEUMEYER, IPR. 27; WALKER 496; 3 ROLIN § 1412.

Denmark: Copenhagen (Feb. 2, 1885) Clunet 1887, 223.
Germany: Decisions of the temporary sixth senate of the RG., see (Oct. 12, 1905) 61 RGZ. 343.
Switzerland: See n. 35.

33 Germany: RG. (Oct. 4, 1894) 34 RGZ. 16 and constant practice; see list of decisions, LETZGUS, supra n. 1, 837, 840; LEwald §§ 314-317; RAAPE, IPR. (ed. 5) 525.

34 Italian writers mention Disp. Prel. C. C. (1865) art. 9 par. 2; (1942) art. 25. For an interesting case illustrating the application of art. 25, see Cass. (Oct. 4, 1954) Clunet 1956, 1000.
The law of the domicil of the surety has been justified by the Swiss Federal Tribunal as suitable to the nature of his unilateral and onerous obligation, because such an obligor ought to be considered bound to a minimum, i.e., to not more than his own law indicates. Where a guaranty is given for consideration, such as by a bank in the course of its business, the circumstances and particularly the connection with the entire financial arrangement are decisive.

The comprehensive treatment in the German cases assumes that suretyship is governed by the law of the place of its performance, but since according to the general German principle the surety like any debtor owes performance at his domicil, the result is regularly the same as in the view mentioned above.

Through this emphasis on the domicil of the person giving the guaranty, it happens more often and more strikingly than in other systems that principal debt and guaranty are controlled by different laws.

**Illustration.** In a case where creditor, debtor and a surety lived in Luxembourg, the Reichsgericht did not doubt that all their relationships were governed by the law of Luxembourg (substantially French law). This included the question whether the surety was to be subrogated by payment to the creditor’s rights. But at the time of the original transaction, the wife of the debtor assumed (1) cosuretyship with the surety to the creditor and (2) countersecurity to the surety. She expressed both these obligations simply by signing the loan instrument “as cosurety and countersurety” (als Mitbürge und Rückbürge). When the surety later sued the woman, the Reichsgericht determined the recovery under German law because the woman had always lived in Germany and therefore had to pay there.

This surprising conflicts decision could have been avoided

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35 53 BGE. II 344, 347; 61 id. II 181; 63 id. II 308; 67 id. II 215, 220.
37 Cf. Nussbaum, D. IPR. 268 n. 2.
38 RG. (Oct. 12, 1905) 61 RGZ. 343, 16 Z.int.R. (1906) 324.
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by presuming a unitary law. The practical result may be strange. Supposing the first surety paid and was subrogated, according to his own law, to the creditor, the cosurety, reimbursing him partially, may not be subrogated under his law. The debtor would be discharged to such extent, contrary to the law governing debt and suretyship.

3. Conclusion

Although the legal situation of an accessory codebtor may be independently defined in conflicts law, in most cases it would be desirable to subordinate it to the law of the principal debt. More recently, study of the American decisions has suggested to Batiffol a general presumption in favor of this law.

At least, in the spirit of the American decisions, we may propose such extension when no counterindicia appear in the individual cases, in the following situations:

(a) Where surety and principal enter into obligation, by signing the same instrument, or otherwise in common;

(b) Where the principal debt is governed by the law of the creditor’s domicil; and we may add as a suggestion—

(c) Where an accessory debtor intervened upon agreement with the principal debtor, to the knowledge of the creditor.

Finally, it may be assumed that, likewise as in the United States, bonds required by a state to secure the fidelity or

38a In recent cases the courts have availed themselves of such presumption; see AG. Bremen (Nov. 22, 1952) IPRspr. 1950-51 No. 17; OLG. Hamm (June 6, 1957) IPRspr. 1956-57 No. 27.

39 Fedozzi-Ceretti 761; Lewald 258 advocates the law of the principal debtor’s domicil. See Cass. (Sept. 12, 1957) Rivista 1958, 251 for a case where, in the opinion of the Italian Supreme Court, the provision of Disp. Prel. C. C. (1942) art. 25 thwarted the desirable result: an obligation created in Switzerland between an Italian creditor and a Swiss debtor was secured by the guaranty of a second Italian; Swiss law as the lex loci contractus governed the principal debt, whereas Italian law was applicable to the guaranty as the national law of both parties to this contract.

40 Batiffol 424 § 523.
aptitude of its servants or compliance with the laws of the state by a foreign corporation are exclusively subject to the law of that state as are the principal obligations.\textsuperscript{41}

III. Scope of the Rule

Apart from formalities\textsuperscript{42} and capacity,\textsuperscript{43} presenting the usual problems, the validity, effects, and extinction of guaranty or suretyship are controlled by the governing law.\textsuperscript{44} Some particulars have been elaborated and may be mentioned. We should also notice some intricate questions connected with the fact that statutory regulations of collateral obligations usually include the use of defenses belonging to the principal debtor and the recourse against the latter. Apparently a part of the law of suretyship, these provisions go substantially beyond its primary scope.

1. Extent of Liability

The law of the guaranty or suretyship, as said before, determines the extent to which the legal effect of the principal debt influences the liability of the obligor. It decides whether an obligor accedes to the debt merely to the extent of the debtor's liability, or more independently, either as a subsidiary or as an original promisor. Sued by the obligee, the promisor may (like a typical guarantor) or may not (like an ordinary surety) be entitled to object that the

\textsuperscript{41} See for the United States, \textit{supra} n. 23, and the observations by 2 MEILI 44.
\textsuperscript{42} United States: Allshouse v. Ramsay (1841) 6 Whart. (Pa.) 331; Halloran v. Schmidt Brewing Co. (1917) 137 Minn. 141, 162 N. Y. 1082.
Germany: 9 RGZ. 176; 61 id. 343.
On intricate special problems \textit{cf.} MANNL, II Z. ausl. PR. (1937) 802.
\textsuperscript{44} United States: See lists of cases in 50 C. J. 14. Cf. 72 C. J. S. 317 and Restatement (Second), Tent. Draft No. 6 (1960) \S 346); but see EHRENZWEIG, Conflict 521 f.
Germany: LETZGUS, \textit{supra} n. 1, 844.
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creditor should have first attempted enforcement against the principal debtor (*beneficium excussionis personalis*), that he indulged in neglect, or that he failed to give notice or written notice of the debtor's default to the defendant, according to the contract made between the parties and the law governing it.\(^{45}\) For it has been universally recognized since Story\(^{46}\) that it is a substantive, not a procedural, question whether the creditor may sue the principal and surety jointly or severally and whether he has to comply with a prescribed order of suits. Obviously, it is the contract between creditor and surety, rather than the contract between creditor and debtor, that decides whether the surety bears an absolute or conditional liability.

If the burden of proof regarding the diligence of the obligee is regulated in the law of guaranty, this provision is also binding. On the same theory, the law of suretyship determines whether the surety may assert against the creditor the defenses of the principal.\(^{47}\)

This is obvious but for one point, viz., the faculty of the surety to set off a counterclaim belonging to the principal debtor. Under the prevailing opinion in the United States, a surety sued alone by the creditor is not entitled to such setoff except in certain cases,\(^{48}\) although contrary statutes exist. Analogous differences are found in Europe. Like the American reasoning that the setoff claim of the debtor can-

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\(^{45}\) United States: Walker v. Forbes (1857) 31 Ala. 9: guaranty in Louisiana, defense of failure of due diligence dismissed; Toomer v. Dickerson (1867) 37 Ga. 428: presumably South Carolina contract, promisee lost a pledge of slaves by negligent failure to register them in Georgia, the court regards the enforcement against the surety as remedy; Johnson v. Charles D. Norton Co. (C. C. A. 6th 1908) 159 Fed. 361, 363: guaranty executed in Ohio but centered in Pennsylvania whose law decides whether it is conditional on pursuing the principle to insolvency.

Denmark: Landesoverret Copenhagen (Feb. 2, 1885) Clunet 1887, 223.

Germany: 9 RGZ. 185, 188; 10 id. 282; 54 id. 15; 54 id. 311, 314.

\(^{46}\) Howard v. Fletcher (1879) 59 N. H. 151; Story § 322 b; Rolin, 3 Principes §§ 1410, 1417; 2 Bar 109.

\(^{47}\) Germany: RG. (July 6, 1910) 74 RGZ. 46.

\(^{48}\) Note, 46 Yale L. J. (1937) 833, 842.
not be brought to final decision without his consent, the German Code is motivated by the consideration that a surety may not use another's right without his consent. If the contract of suretyship is under ordinary American law, "setoff" is undoubtedly excluded. But can it be considered to be permitted to a surety bound under French law according to the French Code when the principal debt follows American law? The difficulty is twofold. One involves the disposition over the debtor's ownership of a claim. It is scarcely possible to leave this question to the law governing the suretyship; it rather belongs to the law controlling the relationship surety–principal. The other difficulty arises on the fundamental theoretical problem which law or laws have to be consulted for permitting setoff between persons not identical with the original parties to a claim. This problem of setoff is discussed further in Chapter 51 on setoff.

2. Paying Surety as Assignee

According to Roman law and a series of codes, a surety is entitled to require, as a condition of his payment to the creditor, that the latter assign him the principal debt, commonly with the securities attached to it (beneficium cedendarum actionum). In common law as well as in the French law which is followed by practically all modern codes, the debt is transferred to the paying surety by operation of law (subrogation).

Either effect of the payment, tending towards a succession to the creditor's claim rather than its discharge, pertains

49 Restatement of Security § 133 comment b.
50 BGB. § 768; Swiss C. Obl. art. 502 (as amended 1941). The surety may, however, suspend payment, at least if the creditor can compensate against the debtor. See RG. (June 16, 1932) 137 RGZ. 34.
51 C. C. art. 1294 par. 1.
Italy: C. C. (1865) art. 1290 par. 1, (1942) art. 1247 par. 1.
Spain: C. C. art. 1197, etc.
52 For civil law, see BIASIO, Der Übergang der Gläubigerrechte auf den Bürgen und dessen Regressrechte, Gmürs Abh. (N. F.) No. 211 (1944).
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to the law governing the suretyship. German decisions are precise on this point.\(^{53}\) But doubt arises when such a subrogation is not simultaneously supported by the law of the principal debt. This problem must be referred to the doctrine of legal assignment.\(^{54}\)

3. Termination

Extinction of the principal debt, for instance, by setoff or release,\(^{55}\) or a bar of limitation on the principal debt, as a defense for the surety,\(^{56}\) affects the latter's obligation in correspondence with the law governing the debt.

Moreover, of course, suretyship has its own limitation of action.\(^{57}\)

4. Retribution and Exoneration

When a surety, after payment to the creditor but without obtaining from him subrogation or assignment, seeks to recover from the principal debtor, it seems logical that this is not part of the law governing suretyship.\(^{57a}\) His claim to be discharged after the principal obligation has matured is on the same footing. Ordinarily there is a contract between

\(^{53}\) Germany: RG. (April 23, 1903) 54 RGZ. 311, 316, Clunet 1905, 1050; and constant practice. On related German and Swiss decisions, see infra p. 447 and n. 3.

\(^{54}\) Infra pp. 447-450.


That discharge of the principal by federal bankruptcy proceedings does not extend to the surety either under federal or Louisiana surety law, was stated in Serra & Hijo v. Hoffman & Co. (1878) 30 La. Ann. 67, and with respect to a Norwegian bankruptcy and a German surety in OLG. Hamburg (Feb. 12, 1903) 6 ROLG. 365.

\(^{56}\) RG. (July 6, 1910) 74 RGZ. 46: the surety liable under German law may invoke the limitation having run for the principal under French law.

\(^{57}\) OLG. Karlsruhe (Nov. 10, 1927) IPRspr. 1928 No. 32.

\(^{57a}\) See RAAPF, IPR. (ed. 5) 525, giving an example of a case where the relationship between the surety and the principal debtor is governed by a law different from the law governing the contracts between either one of them and the creditor. On the other hand, see AG. Bremen (Nov. 22, 1951) IPRspr. 1950-51 No. 17 and KESEL, Kom. (ed. 9) 574 note 244 before art. 7 EG. BGB.
the debtor and surety such as agency or partnership. How- 
ever, it would often be desirable to have the same law gov- 
ern the recovery as that under which the surety must pay. 
An example of how such a result may be reached was set a 
century ago.

Illustration. Thomas, a resident of Kentucky, brought an 
alleged slave to Louisiana and there authorized Beckman 
to sell the slave with guaranty of title. This the latter did 
der under his own guaranty, but the purchaser was evicted by 
a suit for freedom and had to pay 450 dollars for services 
of the illegally detained person; Beckman was bound to 
make restitution under Louisiana law, including the dam- 
ages. Thomas was held liable to Beckman to the same ex- 
tent, notwithstanding a limitation of liability under the law 
of Kentucky, which was the law of the forum, Thomas “hav- 
ing sanctioned the contract, as made.”

If the surety intervenes as a voluntary agent, he may sue 
in quasi contract (negotiorum gestio or unjust enrichment), 
Security Restatement § 104 (2). Under which law he may 
do so will be mentioned in the next chapter.

IV. Plurality of Sureties

1. Law Common to Cosureties

Where several obligors contract by common contract, 
they are ordinarily liable under the law of the principal 
debt. Furthermore the law defining their liability to the 
obligee is generally extended to their internal relationship. 
Both propositions are not necessary but convenient, and 
evidently favored by the courts in the case of cosureties.

Illustrations. (i) The Alexandria Railroad advanced 
money for construction of a road in Louisiana, whereas its 
partner, the Kansas City Railroad also of Louisiana, proc- 
cured an agreement from their members to indemnify the 
Alexandria if the Kansas failed to pay. Although all the

58 Thomas v. Beckman (1840) 1 B. Mon. (40 Ky.) 29.
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signers of the guaranty were residents of Kansas, the forum, their liability was determined under the law of Louisiana, "where the delinquency indemnified against was to occur and did occur." 59

(ii) Where three guarantors signed a bond jointly and severally for a bank in Laurel, Mississippi, in agreement with the cashier, to secure loans made by that bank to a Mississippi company, the Louisiana court applied Mississippi law to determine rights and duties among the co-guarantors, without further investigation. 60

(iii) A resident of Winnipeg, Manitoba, signed jointly with others a written guaranty, dated and apparently executed in Minnesota, to secure a credit given by a Minneapolis bank to a corporation doing business there. The bank released one guarantor after partial payment. The Manitoba court decided according to Minnesota law and contrary to its own law that even in the case of joint obligors release of one of them did not discharge the others. 61

The German Supreme Court has taken an identical attitude to the effect that when the cosureties are bound under one law to the creditor, they are presumed to be bound under the same law as to contribution among themselves. 62

2. Different Laws

Codebtors in the absence of a common source of obligation, are considered to be subject each to his own law. 63 According to this principle, the situation of cosureties may become complicated.

59 Alexandria, Arcadia & Fort Smith R. R. Co. v. Johnson (1900) 61 Kan. 417, 59 Pac. 1063, 1064. Cynically, one might note that in this manner the residents of the forum were spared the common law liability in solidum.

60 Fox v. Corry (1921) 149 La. 445, 89 So. 410.


62 RG. (May 13, 1929) IPRspr. 1929 No. 3; KEGEL, Kom. (ed. 9) 574 n. 244 before art. 7 EG. BGB.

63 PARMELE in 2 Wharton 930 A; 2 ZITELMANN 389; SCHOENENBERGER-JAEGGI No. 372.
In the relation to the creditor, this principle leads to a different treatment of the cosureties.

Illustration. The Swedish Supreme Court had to decide the extent of liability of two cosureties, one domiciled in Sweden and one in Germany. Determining the applicable law according to the places of performance and identifying them with the domicils of the debtors, the court held the Swedish cosurety liable for a part and the German liable jointly and severally for the entire debt. 64

This method of measuring each codebt under its separate law has been declared to be consistent and natural. 65

If this may be taken as the correct view, what is the law controlling contribution by cosureties if they are not connected by agreement among themselves? A German court resorted to the law of the place where the duty of contribution should be fulfilled. 66 The solution may depend on the conflicts rule suitable to extracontractual legal obligations.

V. Currency Restrictions

Can a surety avail himself of the defense that legal or factual impossibility of payment has been caused by currency restrictions applying either to him or to the principal? The question has come up repeatedly and the answer lies, apart from stringent public policy, in the dominant role of the law governing the debt, 67 which in the case of a surety means the law governing suretysip as an independent contract.

64 See Söderquist, Revue 1923, 465.
65 3 Fiore § 1243; 2 Meili 43; 2 Frankenstein 349 n. 86. Likewise, as it seems, RG. (Dec. 6, 1884) 1 Bolze No. 88, cited in the literature, not available here.
66 OLG. Hamburg (May 5, 1933) IPRspr. 1933 No. 17.
In Frew v. Scoular (1917) 101 Neb. 131, 162 N. W. 496, one cosurety seems to have been subject to Scottish law, while the court had no opportunity to say whether the other, the defendant, was under Nebraska law. The Scottish limitation of action had not run its 40 years when the Scottish cosurety paid the local creditor; the Nebraska court applied the domestic statute of limitation but assumed that its 5-year period began only with the payment.
67 Supra p. 48.
Correctly, therefore, the Austrian Supreme Court has decided for an Austrian surety against the Belgian creditor on the ground of the restrictions in the German law of Devisen because the suretyship was contracted along with the principal debt under German law. The same court likewise followed the principle when it did not allow a suretyship obligation governed by Austrian law to be affected by the German restrictions excusing the German debtor.

The Swiss Federal Court forcefully sustained this solution, explaining that the faculty of a surety to use the defenses of the principal debtor is limited to normal excuses and does not extend to the abnormal interference of a foreign state in political and economic emergency. Even though a German debtor were discharged under the German currency laws, a Swiss surety would be liable according to the law of his Swiss place of performance. This court, moreover, in pursuance of its absolute public policy rejecting any resort to foreign measures of economic warfare, enforced claims against a surety even when his obligation was governed by German law. In view of repeated criticism, more recently the court seems to reserve an ultimate formulation. It distinguished the case of a discharge obtained by the Italian principal debtor in the clearing procedure operated between Italy and Belgium in accordance with a treaty. Since credit in these proceedings is considered full payment, the Swiss surety was entitled to avail himself of the defense.

68 Austria: OGH. (April 24, 1936) 18 SZ. 211 No. 72.
69 Austria: OGH. (Sept. 5, 1934) 16 SZ. 447 No. 162.
70 Switzerland: See the discussion in BG. (Sept. 21, 1937) 63 BGE. II 303, 311 ff.
71 BG. (Sept. 18, 1934) 60 BGE. II 294, 304 ff.
72 BG. (Sept. 18, 1934) 60 BGE. II 294, 311 ff.; (June 19, 1935) 61 BGE. II 181, Revue 1936, 692, S. 1936, 415.
73 BG. (Sept. 21, 1937) 63 BGE. II 303, 311.
74 Ibid.