COLLINS and Others v. PROSSER and Others, Executors of G. S. WEGG, Esq., deceased. — p. 112.

A surety bond by three, for the payment of 1000*l*., worded, "for which payment, to be well and faithfully made, we bind ourselves and *each* of us for himself, for the whole and entire sum of 1000*l*. *each*," is a several and not a joint and several bond, and may be enforced against the obligors severally.

Tearing off the seal of one of the obligors of such a bond does not avoid it as against the others, and if the obligor, against whom it is enforced, is entitled to contribution, it seems his remedy is in equity only.

DEBT on bond, executed by the defendants' testator, in his lifetime, for 1000*l*., as surety for George Boulton Mainwaring, Esq. Defendants craved oyer, and set out the bond, by which, first, G. B. Mainwaring held himself, his heirs, &c., bound in the sum of 12,000*l*., to be paid to the plaintiffs, justices of the peace, for the county of Middlesex, their attorney, executor, and administrators; by which, second, E. Wodehouse, Esq., bound himself to pay to the plaintiffs the sum of 3000*l*.; and by which, third, P. Presland, Samuel Jackson, and William Everett Esqrs., bound themselves and each for himself, and the heirs, &c., of each, to pay the sum of 2000*l*. each to the plaintiffs. The bond then proceeded in the following terms: — "And be it also further known unto all men by these presents, that we, Sir Nathaniel Conant, of, &c., Knt., George Samuel Wegg, of, &c., Esq., and John Weyland, jun., of, &c., Esq., are also

held and firmly bound to the said justices in 1000*l.* each, of like lawful money, to be paid to the said justices, or, &c., for which payment, to be well and faithfully made, we bind ourselves, and each of us for himself, for the whole and entire sum of 1000*l.* each, and the heirs, &c., of us and each of us firmly by these presents, sealed with our seals, dated 1st December, 1814." In executing the bond, only one of the parties had set the sum for which he became bound, opposite his name and seal. Defendants then craved oyer of the condition of the bond, which recited, that the justices of the peace for the county of Middlesex, at the General Quarter Sessions held, by adjournment, for the said county, on the 5th July, 1804, had elected and appointed G. B. Mainwaring, Esq., treasurer and receiver of the county rates and other moneys assessed by virtue of certain acts of parliament therein mentioned, and that by reason of the great increase in the expenditure of the county, the average balances remaining in the hands of the said G. B. M. were necessarily greatly increased, and the said G. B. M., as such treasurer, having, on the day of the date of the bond, exhibited an account of receipts and expenditures on account of the county, and it appearing on the face of the said account, that there was a balance of 9177*l.* due from him to the county, and it being thought proper by the Court, that an adequate security should be given to the county, to the amount, in the whole, of 12,000*l.*; and the obligors in this bond having proposed and agreed to become security for the several sums set to their names respectively, and not further or otherwise, the condition of the obligation was, "that if the said G. B. M., his heirs, &c., did and should well and truly pay, or cause to be paid, all and every such sum and sums of money as should remain in his hands, or be received by him, and for which he had not duly accounted as treasurer as aforesaid, &c., then the said obligation to be void; but if default should be made in any of the premises above mentioned, then to be and remain in full force and virtue." Defendants then pleaded, first, that the bond was not the deed of the testator; second, that after the making of the bond, to wit, on 1st January, 1816, the seal of Sir N. Conant was torn and taken away from the bond, without the privity or consent of the testator, or of defendants as executors, whereby it became void as to the testator, and defendants as executors, concluding to the Court; and third, that the seal of the said Sir N. Conant was torn off and taken away from the bond on the same day and year, with the privity and consent of the plaintiffs, whereby the bond became void as to the testator and defendants as executors, concluding to the country. Replications, similiter to the general issue; and as to the other pleas, that before the seal of Sir N. Conant was torn off and taken away from the bond, to wit, on 22d May, 1820, Francis Const agreed to become, and did become, surety for the said G. B. Mainwaring, in the room of Sir N. Conant, in the said sum of 1000*l.*, wherein the said Sir N. C. was so bound as aforesaid, and thereupon the said F. C., by his bond bearing date the day and year aforesaid, became bound to the plaintiffs in the penal sum of 1000*l.*, the condition of which bond was in all things the same as the condition of the bond in the declaration mentioned, and thereupon the seal of Sir N. C. was torn off and taken away from the bond, in the declaration mentioned, as alleged by defendants; that on the 12th June, 1822, being before the commencement of this suit, Francis Const paid to the plaintiffs the sum of 1000*l.*, in which he was so bound, and thereupon the bond was delivered up to him, concluding to the Court. General

demurrer to the replication to the second and third pleas, and joinder in demurrer.

Littledale, in support of the demurrer, contended, first, that the bond being joint and several, a separate action against Mr. Wegg's executors would not lie; second, that tearing off the seal of Sir N. Conant, cancelled the bond altogether; and third, that the substitution of another obligor in his stead, and payment by that obligor, made no difference. He cited *Winchcomb* v. *Pigot*, 2 Bulstr. 247; *Nicholls* v. *Haywood*, Dyer, 59, pl. 12; *Mitchell* v. *Stockworth*, Owen, 8; *Seaton* v. *Henson*, 2 Lev. 220. S. C. 2 Show. 28; *Mathews's* case and *Watkins's* case, March. 125; 2 Rol. Abr. 414; *Deering* v. *Lord Winchelsea*, 2 Bos. & Pul. 270.

Rogers, contra, cited Sheppard's Touchstone, 375; *Mills* v. *Marshall*, Bridgman, 63; *Mathewson's* case, 5 Rep. 22, b; *Pearsall* v. *Summersett*, 4 Taunt. 593; *Liverpool Water-Works Company* v. *Atkinson*, 6 East, 507; *Payler* v. *Homersham*, 4 M. & S. 423; *Hungate's* case, 5 Rep. 103 a; *Linn* v. *Crosling*, 2 Rol. Abr. 148; Dyer, 19, pl. 114; *Constable* v. *Clobery*, Poph. 161; *Linn* v. *Crosling*, 2 Rol. Abr. 148; *Bayley* v. *Garford*, March. 125; *Seaton* v. *Henson*, 2 Lev. 22. S. C. 2 Show. 28; Bull. N. P. 172; 2 Rol. Abr. 30; *Cowell* v. *Edwards*, 2 Bos. & Pul. 268; *Master* v. *Miller*, 4 T. R. 320; *Argoll* v. *Cheney*, Palmer, 403; *Skip* v. *Huey*, 3 Atk. 91; *Ex parte Gifford*, 6 Ves. 805.

Littledale, in reply, referred to *Slingsby's* case, 5 Rep. 18 b; *Anderson* v. *Martindale*, 1 East, 497; and *Southcote* v. *Hoare*, 3 Taunt. 87.

BAYLEY, J. Whenever parties enter into a joint and several bond for the payment of one entire sum, whatever act discharges any one may discharge them all; but I think no such consequence follows in this case. In the first place, I am perfectly satisfied this is not a joint and several, but a several bond only; and it would be working the greatest possible injustice to give the obligees the option of saying that it was joint and several. It is quite plain from the recital, and from the whole object of the bond, that such was not the intention of any of the parties. The recital shows that Mr. Mainwaring was required to give security to a considerable amount, and that different persons were willing each to give security to a certain extent, and the sums for which they agreed to become security were to be set opposite their respective names. When they came to execute the bond, however, one individual only set the sum opposite his name, and that act shows very clearly (if it were necessary so to do) what was the intention of the parties. Mr. Wegg, Sir Nathaniel Conant, and Mr. Weyland, became bound for 1000*l.* each, in these terms: "for which payment we bind ourselves and each of us for himself, for the whole and entire sum of 1000*l. each.*" By that obligation they might be separately and severally sued upon the bond for 1000*l.* The word "each" has the effect of binding the parties separately, but not jointly. Construing the bond in that view, which is the true meaning of it, then the question is, whether removing the seal of Sir Nathaniel Conant has the effect of cancelling the bond as to all the obligors; for to that extent the argument for the defendants must be carried. I am clearly of opinion that it has not that effect, and if it had, it would come to this, that where there are many different persons willing to join in a surety bond, some for large sums and others for small, the cancellation of it as to one obligor, no matter how small the sum may be, would render the bond void in toto, and thereby release persons who had perhaps bound themselves to pay

several thousand pounds. If we were to hold that to be law, it would be working very great injustice, and acting upon a technical rule, to a most improper extent. It is pressed upon us, that the removal of Sir Nathaniel Conant's seal takes from Mr. Wegg and the other parties the power of calling upon him for contribution. If we could find any legal authority to that effect, we should be bound by it, but no authority being cited, we must exercise our own common sense, and act upon the principles of common honesty, which clearly are against the argument for the defendants. Whether Mr. Wegg's executors would have any remedy against Sir Nathaniel Conant, for contribution, is not properly a question for our consideration. If they have sustained any prejudice by the removal of Sir Nathaniel Conant's seal, they may obtain relief in equity; but I am of opinion that this being a several bond, that act does not avoid the bond, nor afford any answer at law to the present action.

Holroyd, J. I am of opinion that this cannot be considered as a joint and several bond. The word "each," following the words "one thousand pounds," is decisive to show that the several obligors named in that part of the bond are respectively bound to pay that entire sum. The words "we bind ourselves and each of us for himself," would alone make it a several and not a joint bond. I am also of opinion that the removal of Sir Nathaniel Conant's seal has not the effect of avoiding it as to the other parties, because they are severally bound, and each is liable upon his own obligation. Whatever relief Mr. Wegg's executors may be entitled to, in the way of contribution, must be sought in a court of equity; but according to the case of *Cowell* v. *Edwards*, they would be only entitled to an aliquot proportion of the money paid by their testator, regard being had to the number of his co-sureties. Mr. Wegg, however, being separately liable upon this bond, the cancellation of it with respect to Sir Nathaniel Conant, affords no answer in a court of law.

Best, J. It is insisted, first, that this is a joint and several bond, and second, that all the other obligors are discharged by the removal of Sir Nathaniel Conant's seal. Unless the first proposition is made out, the second can have no effect in a court of law. If authorities were necessary upon this point, *Mathewson's* case, Bull. N. P. 172, and Roll. Abr. 30, are decisive to show, that taking off one of the seals of a several bond, does not destroy it, quoad other obligors in a court of law; and no case is cited impugning the authority of these decisions. But it is insisted, that notwithstanding this, the defendants would be entitled to contribution in a court of law. The doctrine of contribution is new in courts of law. *Gould*, J., once said, that in the early part of his life, it was never heard of. But admitting that the courts have, in modern times, entertained this doctrine, it may be questionable whether in this case the defendants would have any remedy for contribution, in a court of law; for in *Cowell* v. *Edwards*, Lord Eldon doubted whether, in complicated cases, an action for contribution could be maintained. That doubt is not only entitled to attention from the great learning of the person who expressed it, but because questions of this nature are more properly within the province of a court of equity, where the judge is unfettered by the distinctions of the common law, and may afford relief to all parties, without their having recourse to actions against each other. Notwithstanding the judgment of Eyre, C. B.

in *Deering* v. *Earl Winchelsea*, in which he refers to common law authorities, I think, in such a case as this, the defendant's remedy, if any where, is in a court of equity, and not at common law. The point for our decision comes back to the question whether this is a joint or several obligation. I am of opinion that it is several only. If it were joint, the removal of the seal would undoubtedly avoid it altogether; but we are to look at the instrument itself, and see whether it bears the construction attempted to be put upon it. If *Slingsby's* case, which has been relied on for the defendants, be law, it does not apply here. This bond begins, continues, and ends with individual and several expressions; the word "each" runs through it: "for which payment, to be well and faithfully made, we bind ourselves and *each* of us for himself." What payment? A payment of 1000*l.* each; the words are, "for the whole and entire sum of 1000*l.* each." The bond is worded with an evident intention to apply severally. It must be taken reddendo singula singulis, and we cannot but construe it according to the letter and spirit, as a separate obligation.

Judgment for the plaintiff.

COLLINS v. EVERETT. — p. 122.

The like judgment was given against this defendant, upon the same bond.