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Contractual Joint Rights and Duties in Kentucky and the Restatement

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CONTRACTUAL JOINT RIGHTS AND DUTIES
IN KENTUCKY AND THE RESTATEMENT

Whether at common law several obligors under the same instrument are bound jointly or severally, or jointly and severally, and whether a claim is owned by promisees jointly or severally, is a matter of intention to be determined largely by the language used and the nature of the duty or duties owed. Thus in the case of warranties and subscriptions where each warrants for his own share or promises to pay a certain portion of a named sum, the obligations are several only.¹

1. Survivorship
(a) Joint Obligees.

Professor Williston has shown that the law of joint rights and duties is derived from the law of joint tenancy in real property.² Thus where one joint obligee died the sole right of action passed to the survivor.³ An early statute in Kentucky⁴ provided that on the death of one joint tenant his interest shall pass to his representative the same as if the deceased and the survivor had been tenants in common. This statute applies to the ownership of joint obligations and the survivor must account to the representative of the deceased after collection for the proportionate share of the deceased as if he were a trustee, though he under the earlier⁵ law must sue alone. In Carneal's Heirs v. Day⁶ it was

¹Evans v. Sanders, 10 B. Mon. 291 (Ky. 1850). In some cases the parties have all signed a single obligation describing themselves as "trustee" "directors" etc., and the issue is whether they are liable only as representatives, or are jointly and severally personally liable. Whitney v. Sudduth, 4 Metc. 297 (1853); Ferguson v. True and Walker, 3 Bush 255 (1867); Pack v. White, 78 Ky. 243 (1880); McKensey v. Edwards, 83 Ky. 272 (1889). In Trask v. Roberts, 1 B. Mon. 201 (1841) all but one of such signers were made defendants. See Restatement Sec. 112, 115.
²1 Williston on Contracts, Sec. 318.
³Brown v. King and Vance, 1 Bibb. 462 (1809); Morrison v. Winn, Hardin 488 (1808). Such a right passes to the surviving partner; McCullum v. Rigg, 3 A. K. Marsh, 259 (1821).
⁴Act of 1796-7 Sec. 2; 1 Bradford's Statutes 241; Morehead and Brown Statute Law of Kentucky p. 313 (1834); Gillin v. Pence, 4 T. B. Mon. 304 (1827). See also supplementary act of 1825, ib. p. 90.
⁵See cases in note 3 supra. Cf. Restatement Sec. 132.
⁶Litt. Sel. Cas. 492 (1821).
declared that survivorship had been destroyed by a statute in
Virginia in 1786 (before the separation of Kentucky from Vir-
ginia), and that that statute had been later re-enacted in Ken-
tucky. The court held that the personal representative of a
deceased co-obligee was not a necessary party to the action either
at law or in equity, and that the survivor is a trustee *quodam
modo*. But the personal representative was regarded not an
improper party. In *Perry & Minor v. Perry* however, (decided
after the code was adopted in 1851) it was held that no longer
could the survivor sue alone, but the representative must join in
the action; and this result was necessitated by the "real party in
interest" provision of the Civil Code. A partnership interest
was said to be joint and all living partners must join in the
action.

(b) *Joint Obligors.*

Prior to the statute permitting joinder of the representative
with the survivor it was held that the surviving obligor must be
sued alone by the obligee without joinder of the personal repre-
sentative of the deceased co-obligor and this was true though the
estate of deceased is by statute liable for a proportionate share.
The liability of the representative became a several liability and
required a separate suit by the obligee. The *rationale* of this
view was expressed in *Clark's Exrs. v. Parish's Exrs.* as follows:
Suppose the action were one of debt, then, against the adminis-
trator one should declare in the *detinet* but one should declare in
the *debet et detinet* against the survivor. Also the general issue
would not be the same for the two defendants. One should plead
*non debet* and the other *non detinet*. Hence, the representative
must be sued separately, and the two actions may be brought
concurrently. By statute now all joint obligations are the joint
and several obligations of each obligor and all or any may be

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Sec. 18.

*Jarman v. Howard*, 3 A. K. Marsh. 383 (1820); Restatement Sec.

129.

*Clark's Exrs. v. Parish's Exrs.*, 1 Bibb. 547 (1899); *Brown v.

King and Vance*, *supra* n. 3. See Kentucky Civil Code Sec. 27. See
Restatement Secs. 125, 126.

*Head's Admrs. v. Oliver*, 1 A. Marsh. 254 (1818). This was be-
fore the enactment of the Civil Code Sec. 27, old sec. 39.

*Supra* n. 10.
sued at the option of the obligee\textsuperscript{13} and the representative of the deceased obligor may be joined with the survivor.

2. \textbf{A Party is Both Promisor and Promisee in the Same Contract.}

Several instances have arisen in Kentucky where the obligor or one of several co-obligors was also obligee or one of several co-obligees. Since a man cannot be a debtor to himself, the problem was, how is the transaction to be regarded? X (who is to be the party that is both obligor and obligee) can not be plaintiff and at the same time be defendant.\textsuperscript{14} On the other hand, at common law all co-obligees should join in an action and all co-obligors should be made defendants. It was also argued that a discharge of one co-obligor worked a discharge of all the rest. The court observed that the appointment of a co-obligor as executor of a deceased obligee would discharge the claim; and that marriage is a release of the obligation previously existing between the parties to it, but it was declared that these illustrations were not parallel to the situation here arising.

The following were possible results:

i. The contract might fail entirely because a party can not have a claim against himself. The alleged obligation purports to be joint and against all obligors as well as in favor of all obligees. Since none other than a wholly joint obligation was contemplated but in the form it appeared it was invalid, no obligation was ever created.\textsuperscript{15}

ii. An action might be brought in the name of all promisees against all the named promisors. Thereafter,

(a) X might be entirely eliminated both as plaintiff and as defendant.\textsuperscript{16}

\textsuperscript{13} \textit{Waits v. McClure}, 10 Bush 763 (1874).

\textsuperscript{14} See Clark on Code Pleading (1928) p. 135.

\textsuperscript{15} Cf. \textit{Allin v. Shadburne’s Representatives}, 1 Dana 68 (1833). This is not unlike the argument used with respect to the creation or the extinguishment of a trust. If the same person is made both trustee and beneficiary no trust is created. If, however, after a valid trust has been created, the beneficiary should later become trustee, equity may in a proper case preserve the trust by preventing a merger. See Evans, “The Termination of Trusts,” 37 Yale L. Jour. 1070, 1093-1094, 1102 (1928).

\textsuperscript{16} \textit{Quisenberry v. Artis}, 1 Duv. 30 (1863) (action at law on a note. This was after the enactment of the Code of Civil Procedure).
(b) There might be an abatement as to X in his capacity as obligee or he might fail to join as plaintiff because when the ambiguity in the instrument was explained it appeared that X has no interest as promisee. If the interest in the obligation was necessarily several though joint in form, it was declared that there was no difficulty about joint covenantees suing severally. There seems to have been some evidence in one case that the court clerk had inserted the name of one obligor in a bond, as obligee, by mistake.

(c) There might be an abatement as to X in his capacity as co-obligor where the ambiguity when shown and explained indicated that X was a surety. He might thereafter proceed against his co-obligor who was his principal.

iii. Assume that as to the co-promisors the obligation was joint. In form also it was joint as to the co-promisees but in reality there was no community of interest among them. Each might then have a several action. In Daniel v. Crooks, a bill in equity was brought by a co-promisee on the theory that there was no adequate remedy at law. The plaintiff assumed that at law all co-promisees must be named as plaintiffs and all co-promisors as defendants. Since there was an identity between two of the defendants with the two co-promisors, it was also assumed that a demurrer to the declaration would be sustained. The promise was made by two stockholders in a bank, to all the stockholders including themselves, to pay all the debts of the bank and redeem at a named price all the stock. It was held that the rights of the promisees were several and there was a complete remedy at law.

iv. Conversely, the interest of the co-promisees might be in fact joint but the obligation of the co-promisors though joint in form might be actually several. This several liability might result from the statute.

v. An obligation might be signed by a partnership in favor of a member of the firm. In one case an action at law was sustained by one as promisee against the other only, as a pro-

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17 Cecil v. Laughlin, 4 B. Mon. 30 (1843) (covenant).
18 Debard v. Crow, 7 J. J. Marsh. 7 (1831).
19 3 Dana 64 (1835). See Restatement Sec. 128 (1).
20 Allin v. Shadburne’s Representatives, supra n. 15. Cf. Morrison v. Winn, supra n. 3.
21 Morrison v. Winn, supra n. 3. A partnership obligation is joint. See Head’s Admr. v. Oliver, supra n. 11.
In Simrall v. O'Bannons however, where the action was in equity, it was said that a partner could not thus sue a partner at law, and that equity would make a decree with respect to the rights of the promisee on the note only after there had been an adjudication of the partnership affairs.

3. JOINDER OF PARTIES.

In harmony with the Restatement rule, Kentucky held prior to the Code that if only some of the joint obligors were joined as defendants, judgment must go against them unless they pleaded that fact in abatement. A demurrer or a motion in arrest of judgment should be overruled if it be for more defect of parties defendant. If the obligation were both joint and several, distinct actions might be brought concurrently. Where both joint obligors had been served with summons but only one entered a plea, it has been held that at common law plaintiff cannot dismiss the action as to the one only who did not plead, and prosecute the action against the other. But if some of the co-obligor-defendants were infants or under any other personal disability preventing them from binding themselves, as to such the action might be dismissed and might be prosecuted against the others. Later by statute all obligations which at common law were joint, became both joint and several, and it became possible to sue one or some or all.

Prior to the Code, if there were a defect of parties plaintiff, advantage of it could be taken by demurrer or by motion to nonsuit, because the right, as in the case of a promise made to two executors, was joint and not joint and several, and a declaration in the name of one if the proof showed an obligation running to both, was a variance which was fatal. It was held that plaintiff

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22 Morrison v. Stockwell's Admr., 9 Dana 172 (1839).
23 7 B. Mon. 608 (1847).
24 Sec. 117.
25 Allin v. Lucket, 3 J. J. Marsh. 164 (1830); Tharp v. Farquar, 45 Ky. 3 (1845).
27 Burks v. Pointer, 1 B. Mon. 65 (1840); Restatement Sec. 118.
28 Erwin v. Devine, 2 T. B. Mon. 124 (1825); McHilton et al v. Commonwealth, 5 J. J. Marsh. 592 (1821); Eitleedge v. Bowman, 28 Ky. 593 (1831); Restatement Sec. 118 (e).
29 Waits v. McClure, supra n. 13. See Kentucky Codes of Practice by Johnson, Harlan and Stevenson (1854) Sec. 39.
30 Allen v. Luckett, supra n. 25; Restatement Sec. 129. Now under Sec. 92 (4) of the Code special demurrer is the proper procedure.
must stand by the theory of his pleading and might be non-suited unless he amended, because plaintiff had to prove the identical contract sued upon in order that it might be a bar to another action.

Where several persons sign the same instrument, each binding himself for a fixed sum, the obligation is several. Suit at common law must be several in such cases, and not joint. By statute in Kentucky parties severally liable upon the same contract, etc., may all or any of them, or the representatives of such as may have died, be included in the same action at the plaintiff's option. On the other hand, where the interest appears in form to be joint, (that is, where several interests are evidenced by the same instrument) but in fact is several, the various co-promisess cannot join in a single action apart from an authorizing statute. Thus, where a railroad company contracts by a single instrument to carry the horses of various owners and the horses are injured in a wreck, these owners must sue separately, as their interests are separate. The court held that the real party in interest statute made this result necessary. So too, the contract of a railroad company to carry various persons in a special car and to hold the train for them for a given time at a named place, gives a several interest to the various promisees, and they must sue

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32 Wilde & Co. v. Haycraft, 2 Duval 309 (1865); Restatement Sec. 113.

33 McBean v. Todd, 2 Bibb 320 (1811).

34 Hastings Industrial Co. v. Jones, 167 Ky. 714 (1916); Kentucky Livestock Breeders Assn. v. Miller, 119 Ky. 393 (1905); Sec. 26 Civil Code of Kentucky, old Sec. 38.

35 Baughman v. L. & N. Ry. Co., 94 Ky. 150, 31 S. W. 757 (1893). The railroad company had contracted with one W who was agent for the several owners to whom the horses belonged. The court said (a) W could not have sued; (b) the owners need not all have sued together nor could they have sued together. The reason given is that the "real party in interest" statute is in the way. It is not clear why W could not have sued, since at common law the agent in whose name the contract was made could sue on it. (See Mechem "Agency" Sec. 2022). The same is true under the interpretation of the "real party in interest" statute (Clark on Code Pleading page 128). Section 21 of the Kentucky Code provided that the "real party in interest" statute should not prevent an action by a person "in whose name a contract has been made for the benefit of another." The conclusion that the owners need not sue together was correct, but that they must sue separately is an open question. (Clark on Code Pleading 253); Restatement Sec. 123 (1).
separately for a breach of the contract.\textsuperscript{38} In such cases a release by one promisee cannot release the entire obligation.\textsuperscript{37} But the interest of the various promisees cannot be both joint and several. If by its nature the interest is joint but the promise is in the alternative, it is a joint interest, and at common law all the co-promissee must join.\textsuperscript{38} In \textit{Scott v. Colmesnik}\textsuperscript{39} the obligee sued defendant on what appeared on the face of the instrument to be the sole obligation of the defendant. After judgment plaintiff discovered that there had been a dormant partner whom he had overlooked and he proceeded by bill in equity against the partner. The latter urged that by the judgment against his partner he had been released. It was held that such an obligation, though joint at law, was joint and several in equity;\textsuperscript{40} that plaintiff had sued on a sole obligation only, without knowledge that it was not what it appeared to be, and could still have an action in equity on the obligation as though it were several. Conversely, where one makes what appears to be a joint promise for himself and another without the authority of the other, he becomes liable as if he alone in form had assumed the obligation.\textsuperscript{41}

In \textit{Garth v. Davis}\textsuperscript{42} A and B each severally purchased certain lots at auction, the terms of sale providing for partial deferred payments. Prior to such purchase A and B had entered into an oral agreement with each other by which they were to become partners in the real estate business, and these purchases were to be within the proposed business. The contract with each as signed by the auctioneer was in form several. A joint deed was tendered which they refused to accept, and the seller refused to tender several conveyances and brought an action for specific performance. The seller obtained a decree in his favor. Here were contracts in form several, but they were treated as creating a joint right,\textsuperscript{43} and are presumably several under the statute only at the option of the obligee.

\textsuperscript{38} \textit{Southern Railroad Co. v. Marshall}, 111 Ky. 560 (1901); Restatement Sec. 128 (1).
\textsuperscript{37} \textit{Blakey v. Blakey}, 2 Dana 460 (1834).
\textsuperscript{39} \textit{Burks v. Pointer}, supra n. 27; Restatement Sec. 129.
\textsuperscript{40} J. J. Marsh, 416 (1832).
\textsuperscript{41} See J. Williston on Contracts, Sec. 344.
\textsuperscript{43} Ky. Law Rep. 505 (1905).
\textsuperscript{43} See Clark, Code Pleading (1928) 306, 325 (top); Mechem on Partnership (2nd ed. 1920) secs. 289, 292; 1 Mechem on Agency (2nd ed. 1914) secs. 182, 183.
4. RELEASE AND ASSIGNMENT

(a) Release.

In *Fox v. Hudson's Exr.*, one obligor in consideration of the assignment of his property, was released. An accord and satisfaction was reached and reservation was made of the claim against X, the co-obligor. It was held that X also was released.

It is the general rule that a release by one co-obligee binds his fellow; but if their interests are several though joint in form, a release by one co-obligee does not bind his fellow. A covenant not to "levy, exact or collect" a certain judgment from one of two judgment debtors is not a release in Kentucky. Nor is an endorsement on a note made by a co-obligee in favor of one co-obligor: "It is understood that B is only security of the within note in case of failure of A" (the principal), a release. So it was observed that a covenant not to sue a several obligor for a limited time or never to sue a joint-obligor, was not to be construed as a release.

Suppose A, B and C indorse jointly a negotiable instrument which the maker later dishonors; the holder thereupon gives notice to one of them, but not to the others. Since the others are released, is there any effect to be given to the notice to the one? Kentucky holds that he is bound, and that the only way he can have the right of contribution is himself to give the notice to the co-indorsers. Of course, there is no way by which

*On assignment generally in Kentucky, see 13 Ky. L. Jour. 242 (1930).*

[150 Ky. 115, 150 S. W. 49 (1912); Restatement Sec. 120.]

[Allin v. Shadburne's Representatives, supra n. 15; Clark v. Parish, supra n. 10; Restatement Sec. 130 (a).]

[Blakey v. Blakey, supra n. 37. (It was also held that if only two are named as obligors in the body of the bond, but the bond is signed by three, all three are joint obligors.) See Restatement Sec. 123.]

[Mason v. Jouett's Admr., 2 Dana 107 (1834); Restatement Sec. 121 (2).]

[Lane and Taylor v. Owings, 3 Bibb. 247 (1813).]

[Williams v. Paintsville National Bank, 143 Ky. 781, 137 S. W. 555, Ann. Cas. 1912D 350 (1911); Doherty v. First National Bank of Louisville, 170 Ky. 810, 186 S. W. 137 (1916). This result is required by Section 63 of the Negotiable Instruments Law as to "joint payees or joint indorsees who indorse" for the statute says they "are deemed to indorse jointly and severally." In both of the Kentucky cases supra the indorsers were payees, but the language in the cases makes no requirement that they be such. The reason for such a view has been pointed out in *Case v. McKinnis*, 106 Or. 71, 213 Pac. 422 (1923) and Brannan has more recently pointed out that the basis for such a view has now been removed in Kentucky. Brannan's Negotiable Instru-
he can certainly inform himself whether notice has been sent to
the others, and to be obliged to inquire puts as much of a burden
upon him as is the burden to give the notice.

(b) Assignment by the Obligee to a Co-obligor.

In Kouns v. Bank of Kentucky 50 B was surety for A on a
bond payable to C and judgment had been rendered against the
two. A's property was levied on and he replevied it, giving K
as surety on the replevin bond. B paid the original debt there-
after, and took an assignment of the judgment against A and
himself. B, acting through C, proceeded to sue on the replevin
bond signed by K as surety for A. The defense of K was that
B, having been discharged from liability in the original judg-
ment by his settlement with C, A was discharged. If A was dis-
charged there was no longer any validity to the replevin bond.

Another question arose as to the effect of the giving of a replevin
bond by A in which B did not concur. The acceptance of the
bond was held to be a release of B and the original judgment
obligation was now merged into this new obligation, but that
there was nothing to prevent B (since he apprehended though
mistakenly, his own continuing liability on the judgment) from
purchasing the judgment without releasing the co-obligor. It
may be said therefore, that payment by the surety of a joint
judgment against himself and his principal may have the effect
of an assignment of the claim to the paying co-obligor together
with such additional security as the obligee may have had—a
case of subrogation.

ments Law (4th Ed.) 629, 689. The Negotiable Instruments Law how-
ever, provides notice to one partner is notice to the firm (Sec. 99)
and the Kentucky Court had so held prior to the adoption of the
Statute. Hays v. Citizens Saving Bank, 101 Ky. 201, 40 S. W. 573
(1897); Restatement Sec. 116.

50 2 B. Mon. 303 (1842). Kentucky once followed the practice of
permitting the judgment debtor to “replevy the execution.” See
Jackson v. Speed, 3 J. J. Marsh 56 (1829); Caldwell v. Cook, 5 Litt.
180 (1824); Crawford v. Duncan, 7 Ky. Law Rep. 134 (1855); Coburn
v. Currens, 64 Ky. 242 (1866); Gibson v. Pew, 2 J. J. Marsh. 222 (1830);
Millar v. Field, 3 A. K. Marsh. 194 (1820); Anderson v. Bradford, 5 J.
J. Marsh. 69 (1830); Snavely v. Armundt, 105 Ky. 317, 49 S. W. 10 (1899).
In Williamson v. Ringold, 4 Cranch 39 (U. S. C. C. for D. C. 1830) the
court said: “The motion for a return upon the ground that goods in
the custody of the law are not to be replevied is, in effect, a motion to
quash the replevin; for if the return should be ordered it should be
without bond; and such an order would be of course, if the plaintiff
in replevin were the debtor, in the writ of fieri facias, for the law in
that respect is well settled in this country and in England.” Such
practice is no longer followed. See Carroll's Civil Code of Kentucky
(1927) Sec. 1815.
In whatever way we may regard the alleged merger of the judgment obligation in the replevin bond, it seems clear that payment of the judgment by a surety entitles him to recover the entire obligation from his principal. The obligation of the principal to the surety (after the latter has paid) is a different one from the joint obligation of principal and surety to the original creditor. The taking of an assignment from the obligee has the appearance of keeping alive the original obligation of the non-paying co-obligor for the benefit of the paying co-obligor-assignee.

Professor Williston suggests\(^5\) that if the paying co-obligor is a surety, equity should keep alive the obligation of the non-paying co-obligor, subrogating the surety to the advantages of the obligee. When there has been any pledge by way of collateral or otherwise, there is an obvious advantage in this way of proceeding. If there were no such security given by the principal, it seems difficult to see why the surety co-obligor who pays should have any other right than that of indemnification. There are however, three situations; (a) as above, a surety-co-obligor pays the whole debt and claims to recover against the principal;\(^6\) (b) a surety co-obligor pays and seeks to recover against the co-surety, and (c) a co-obligor principal pays the whole and seeks to recover a moiety against the other co-principal.

Smith v. Latimer\(^5\) was a case of the first type. The co-obligor-assignee made an agreement with the obligee-assignor whereby he reserved the right to sue his co-obligor in the name of the assignor. The court said that plaintiff had a right of action for contribution; that the surety had a remedy even without an agreement with the payee, and that the agreement operated to indicate that there was no intent to release the defendant. The transaction occurred prior to the enactment of the real party in interest statute. In Logan County National Bank v. Barclay,\(^5\) which was subsequent to that statute, the plaintiff seems to have followed the pleadings in the prior case without understanding the basis of the relief granted. The original obligation of A and B to C bank, which seems to have been of

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\(^5\) II Williston on Contracts, Sec. 1267. See also Sec. 1271.
\(^6\) Roberts v. Bruce, 12 K. L. R. 932, 15 S. W. 872 (1891).
\(^5\) 15 B. Mon. 75 (1854).
\(^5\) 104 Ky. 97 (1898).
JOINT CONTRACTS

the third type, was assigned by C bank the obligee, to the firm B and D. By a second assignment, the instrument came into the hands of X. X then brought an action in his own name and in the names of C, B and D. It was held that the claim against A was discharged because by assignment B was discharged and that as B had made no reservation of a right to sue A (in the name of C) such right did not exist, thus distinguishing this case from Smith v. Latimer. Formally, so far as C bank is concerned the claim was extinguished, but X should have the right to contribution which had been assigned to him by B who (in purchasing the claim from C) paid the original debt and was entitled to sue in quasi-contract for contribution. In Smith v. Latimer the court recognized the right of contribution without any agreement but recovery was had on the theory of assignment which meant subrogation.

When the joint obligor who pays can obtain no additional security, it is bad theory from which no practical advantage can accrue for him to attempt to retain the original cause of action instead of claiming contribution or indemnification. In Logan County Bank v. Barclay the court says that in Smith v. Latimer it was held that "one of several joint or joint and several obligors may pay off the note and by agreement with the obligee, reserve the right to sue the other joint and several obligors at law in the name of the obligee upon the note. In the case at bar

53 Supra n. 53.
54 Even though a joint and several obligation is discharged by payment by one co-obligor who is then released, it does not follow that he has no remedy against the obligor who did not pay. If the one who paid was a surety, he should recover the entire claim against the principal. If he were a joint principal obligor he, having shared the consideration, should have a right to contribution. Morris v. Evans, 2 B. Mon. 84 (1841); Logan County National Bank v. Barclay, supra n. 54. If he were a co-surety, he should also have a right of contribution against his co-surety. If he were the sole principal he of course, should have no claim against his co-obligor.

We may raise two questions as to the assignment-subrogation doctrine. Should equity keep such a claim alive under the doctrine of subrogation when no advantage can accrue over an action at law for indemnification or contribution? Secondly, should a joint-principal have a right to be subrogated under the guise of an assignment whether or not any advantage can accrue from this method of procedure. It would seem that this theory had given the unjustifiable impression in the Logan County Bank case that the paying co-obligor principal had no remedy if he had not taken the precaution to procure an assignment.

57 Supra n. 54.
58 Supra n. 53.
it is not pretended that one of the obligors paid the note off and reserved the right to sue in the name of the obligee, but the allegation is that the note was sold and delivered after maturity to Ryan and Barclay, not that it was paid off by Barclay as surety, and the note taken reserving the right to sue in the name of the obligee. It was held that the non-paying co-obligor was released here and that there could be no recovery by the assignee. Had it not been for the confusion of theory plaintiff might have had indemnification or contribution.

In another case where the surviving co-obligor had paid the joint judgment and sued the administrator of the deceased co-debtor for contribution, it was held that the defendant might plead that he had already paid the debt and had already defeated an action against himself on the same note under plea of payment. It was also declared that plaintiff was not in the position of an assignee.

Summary: The common law rule as to survivorship of joint rights and joint duties was modified by an early statute in Kentucky. Prior to the real party in interest statute, the representative of the deceased party however, need not be a party and at first it was held he must not be. After that statute he became a necessary party plaintiff. If deceased were a co-obligor the representative might be joined as defendant. An early statute also converted all joint obligations into joint and several obligations and the necessary result as to joinder of parties follows.

A rather strange phenomenon appeared in this state, to-wit: a party appearing on the same instrument as both obligor or co-obligor and obligee or co-obligee. The court has usually determined the factual situation and then allowed the action to proceed according to that determination. These are all older cases however, and the problem may not arise in the future.

Kentucky agrees with the Restatement with respect to the effect of a release and of a covenant not to sue one of several co-obligors. Along with the cases however, where one co-obligor paid and caused a release of the original obligation, are several cases where the paying (presumably in full) co-obligor has purported to take an assignment of the obligation to himself accom-

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29 Thomas v. Thomas, 2 J. J. Marsh. 60 (1829).
60 The obligee of an obligation which is joint, cannot assign his interest in the claim against one co-obligor and retain it against the other. See Lyon v. Lyon, 4 Bibb 433 (1816).
panied by an agreement with the assignor that he may sue in the latter's name. Through a misunderstanding of the rights involved it has occasionally been held that if such a right is not reserved there can be no recovery against the principal or co-surety in such cases. These are likewise not late cases and the problem may not arise again.**

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