

**CARMEN CASTELVI DE HIGGINS AND HORACE L. HIGGINS,
PLAINTIFFS AND APPELLANTS, VS. GEORGE C. SELLNER,
DEFENDANT AND APPELLEE.**

G. R. No. 15825. November 05, 1920

Ponente: MALCOLM, J.

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MALCOLM, J.:

This is an action brought by plaintiffs to recover from defendant the sum of P10,000. The brief decision of the trial court held that the suit was premature, and absolved the defendant from the complaint, with the costs against the plaintiffs.

The basis of plaintiffs' action is a letter written by defendant George C. Sellner to John T. Macleod, agent for Mrs. Horace L. Higgins, on May 31, 1915, of the following tenor:

"DEAR SIR: I hereby obligate and bind myself, my heirs, successors and assigns that if the promissory note executed the 29th day of May 1915 by the Keystone Mining Co., W. H. Clarke, and John Maye, jointly and severally, in your favor and due six months after date for P10,000 is not fully paid at maturity with interest, I will, within fifteen days after notice of such default, pay you in cash the sum of P10,000 and interest upon your surrendering to me the three thousand shares of stock of the Keystone Mining Co. held by you as security for the payment of said note.

"Respectfully,

(Sgd.) "GEO. C. SELLNER."

Counsel for both parties agree that the only point at issue is the determination of defendant's status in the transaction referred to. Plaintiffs contend that he is a surety; defendant contends that he is a guarantor. Plaintiffs also admit that if defendant is a guarantor, articles 1830, 1831, and 1834 of the Civil Code govern.

In the original Spanish of the Civil Code now in force in the Philippine Islands, Title XIV of Book IV is entitled "De la Fianza." The Spanish word "fianza" is translated in the Washington and Walton editions of the Civil Code as "security." "Fianza" appears in the Fisher translation as "suretyship." The Spanish word "fiador" is found in all of the English translations of the Civil Code as "surety." The law of guaranty is not treated of by that name in the Civil Code, although indirect reference to the same is made in the Code of Commerce. In terminology at least, no distinction is made in the Civil Code between the obligation of a surety and that of a guarantor.

As has been done in the State of Louisiana, where, like in the Philippines, the substantive law has a civil law origin, we feel free to supplement the statutory htw by a reference to the precepts of the law merchant.

The points of difference between a surety and a guarantor are familiar to American authorities. A surety and a guarantor are alike in that each promises to answer for the debt or default of another. A surety and a guarantor are unlike in that the surety assumes liability as a regular party to the undertaking, while the liability of the guarantor depends upon an independent agreement to pay the obligation if the primary payor fails to do so. A surety is

charged as an original promisor; the engagement of the guarantor is a collateral undertaking. The obligation of the surety is primary; the obligation of the guarantor is secondary. (See *U. S. vs. Varadero de la Quinta* [1919], 40 Phil., 48; *Lachman vs. Block* [1894], 46 La. Ann., 649; *Bedford vs. Kelley* [1913], 173 Mich., 492; *Brandt*, on Suretyship and Guaranty, sec. 1, cited approvingly by many authorities.)

Turning back again to our Civil Code, we first note that according to article 1822 "By fianza (security or suretyship) one person binds himself to pay or perform for a third person in case the latter should fail to do so." But "If the surety binds himself in solidum with the principal debtor, the provisions of Section fourth, Chapter third, Title first, shall be applicable. What the first portion of the cited article provides is, consequently, seen to be somewhat akin to the contract of guaranty, while what is last provided is practically equivalent to the contract of suretyship. When in subsequent articles found in section 1 of Chapter II of the title concerning fianza, the Code speaks of the effects of suretyship between surety and creditor, it has, in comparison with the common law, the effect of guaranty between guarantor and creditor. The civil law suretyship is, accordingly, nearly synonymous with the common law guaranty; and the civil law relationship existing between codebtors liable in solidum is similar to the common law suretyship.

It is perfectly clear that the obligation assumed by defendant was simply that of a guarantor, or, to be more precise, of the fiador whose responsibility is fixed in the Civil Code. The letter of Mr. Sellner recites that if the promissory note is not paid at maturity, then, within fifteen days after notice of such default and upon surrender to him of the three thousand shares of Keystone Mining Company stock, he will assume responsibility. Sellner is not bound with the principals by the same instrument executed at the same time and on the same consideration, but his responsibility is a secondary one found in an independent collateral agreement. Neither is Sellner jointly and severally liable with the principal debtors.

With particular reference, therefore, to appellants' assignments of error, we hold that defendant Sellner is a guarantor within the meaning of the provisions of the Civil Code.

There is also an equitable aspect to the case which re-enforces this conclusion. The note executed by the Keystone Mining Company matured on November 29, 1915. Interest on the note was not accepted by the makers until September 30, 1916. When the note became due, it is admitted that the shares of stock used as collateral security were selling at par; that is, they were worth P30,000. Notice that the note had not been paid was not given to the defendant until just about three years after it matured and when the Keystone Mining Company stock was worthless. Defendant, consequently, through the laches of plaintiff, has lost possible chance to recoup, through the sale of the stock, any amount which he might be compelled to pay as a surety or guarantor. The "indulgence," as this word is used in the law of guaranty, of the creditors of the principal, as evidenced by the acceptance of interest, and by failure promptly to notify the guarantor, may thus have served to discharge the guarantor.

For quite different reasons, which, nevertheless, arrive at the same result, judgment is affirmed, with costs of this instance against the appellants. So ordered.

Johnson, Araullo and Villamor, JJ., concur.

Mapa, C. J. and Avanceña, JJ., concur in the result.

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