1910

Cases on Suretyship

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CASES

ON

SURETYSHIP

SELECTED BY
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TABLE OF CONTENTS

CHAPTER I

Case number

NATURE AND FORM OF THE CONTRACT.

SEC. 1. AT COMMON LAW..... 1, 2, 3

SEC. 2. UNDER THE STATUTE OF FRAUDS.

A. *Construction of the Statute.*

a. Of the words "No action shall be brought" 4, 5, 6, 7, 8, 9

b. Of the words "Special promise"..... 10, 11

c. Of the word "Agreement"..... 12, 13, 14

d. Of the words "Memorandum or Note" 15

B. *Promises not within the Statute.*

a. When the promise is the original undertaking of the promisor..... 16, 17, 18

b. When the promisor is virtually discharging his own debt..... 19, 20, 21

c. When the promisor is beneficially interested in the consideration..... 22

d. When the promise is to indemnify 23, 24, 25, 26, 27, 28

e. When the party for whom the promise is made cannot be held liable..... 29

C. *Promises within the Statute.*

a. When the party for whom the promise is made can be held liable..... 30, 31, 32

b. To answer for the debt of another..... 33, 34

c. To answer for the default of another.. 35, 36

d. To answer for the miscarriage of another 37, 38

SEC. 3. GUARANTOR AND SURETY DISTINGUISHED. 39, 40, 41, 42

SEC. 4. CLASSIFICATION OF GUARANTIES.

General 43, 44

Special 45

Limited 46, 47, 48, 49

Case number

Continuing 50, 51
Absolute 52, 53, 54
Conditional 55, 56, 57

CHAPTER II

REQUISITES OF THE CONTRACT.

SEC. 1. COMPETENT PARTIES..... 58, 59
SEC. 2. CONSIDERATION.
When principal and assuring contracts are executed concurrently 60
When principal and assuring contracts are executed at different times..... 61, 62
When tainted by illegality of transaction..... 63
SEC. 3. EXECUTION AND DELIVERY..... 64, 65, 66

CHAPTER III

CONSTRUCTION OF THE CONTRACT. 67, 68, 69, 70, 71

CHAPTER IV

SURETYSHIP BY OPERATION OF LAW..... 72, 73

CHAPTER V

THE SURETY'S RIGHTS.

SEC. 1. THE RIGHT OF INDEMNITY.... 74, 75, 76, 77, 78
SEC. 2. THE RIGHT OF SUBROGATION..... 79, 80, 81, 82
SEC. 3. THE RIGHT OF CONTRIBUTION. 83, 84, 85, 86, 87
SEC. 4. THE RIGHT OF EXONERATION..... 88, 89, 90

CHAPTER VI

THE SURETY'S DEFENSES.

SEC. 1. DEFENSE FOUNDED UPON A MATERIAL ALTERATION OF THE CONTRACT.
Of the principal contract..... 91, 92, 93, 94, 95, 96
Of the assuring contract..... 97, 98
SEC. 2. DEFENSE FOUNDED UPON AN ABSENCE OF LIABILITY OF THE PRINCIPAL DEBTOR TO THE CREDITOR 99, 100, 101, 102, 103, 104

Case number

SEC. 3. DEFENSE FOUNDED UPON AN EXTINGUISHMENT OR SUSPENSION OF LIABILITY OF THE PRINCIPAL DEBTOR TO THE CREDITOR....105, 106, 107

SEC. 4. DEFENSE FOUNDED UPON THE PRINCIPAL DEBTOR'S RIGHT OF SET-OFF OR COUNTERCLAIM AGAINST THE CREDITOR.....108, 109

SEC. 5. DEFENSE FOUNDED UPON SURRENDER OR LOSS OF SECURITIES BY THE CREDITOR, 110, 111, 112, 113, 114

SEC. 6. DEFENSE FOUNDED UPON THE FAILURE OF CREDITOR TO USE MONEY WITHIN HIS CONTROL IN LAWFUL PAYMENT OF HIS CLAIMS, 115, 116, 117

SEC. 7. DEFENSE FOUNDED UPON THE FAILURE OF THE CREDITOR TO SUE THE DEBTOR AT THE SURETY'S REQUEST 118, 119

SEC. 8. DEFENSE FOUNDED UPON NON-DISCLOSURE BY OBLIGEE OF FACTS WHICH HE OUGHT TO REVEAL TO THE SURETY..... 120, 121, 122

SEC. 9. DEFENSE FOUNDED UPON RETENTION OF THE PRINCIPAL IN SERVICE AFTER KNOWLEDGE OF HIS DISHONESTY 123, 124

SEC. 10. DEFENSE FOUNDED UPON FRAUD OR MISCONDUCT OF THE PRINCIPAL TOWARD THE..... SURETY, ... 125, 126, 127

SEC. 11. DEFENSE FOUNDED UPON ABSENCE OF NOTICE OF ACCEPTANCE OF GUARANTY AND OF DEFAULT OF PRINCIPAL..... 128, 129, 130

CHAPTER VII

CREDITOR'S RIGHT OF SUBROGATION TO THE SURETY'S SECURITIES..... 131, 132, 133

CHAPTER VIII

COMPENSATED SURETYSHIP.

SEC. 1. NATURE AND CONSTRUCTION OF THE CONTRACT 134, 135

SEC. 2. COMPARED WITH THE CONTRACT OF INSURANCE 136

SEC. 3. COMPARED WITH THE CONTRACT OF PRIVATE SURETYSHIP 137

CASES SELECTED

Abbott v. Brown 163
Adams, Lowry, et al., v. 139
Aetna Insurance Co. v. Fowler, et al. 387
Aikin, Mathews, et al., v. 245
Andrews, Eising v. 329
Annable, Russell v. 314
Anniston Pipe & Foundry Co. (United States to use of) v. National Surety Co. 114
Argus Company v. The Mayor, &c. 49
Arons, et al., Morrison, et al., v. 304
Auchampaugh v. Schmidt 325

Backus, People of the State of New York v. 220
Bacon, Jones v. 86
Baker v. Morris 125
Baldy, Petriken v. 3
Barber, Easterly v. 273
Beal v. Brown 9
Beaver v. Slanker 264
Beers, Swift, et al., v. 313
Belknap, Philbrook v. 11
Bickford v. Gibbs, et al. 192
Bingham, Robbins v. 157
Blanchard, Gibbs, et al., v. 59
Boddicker, et al., Savings Bank v. 372
Bodey, Holt v. 346
Boston Penny Savings Bank v. Bradford 343
Bovill v. Turner 156
Brabason, Casey v. 55
Bradford, Boston Penny Savings Bank v. 343
Brown, Abbott v. 163
Brown, Beal v. 9
Brown, Leroux v. 15
Brown, Pike v. 23
Bruner, Moore v. 271
Buckmyr v. Darnall 104
Buie, et al., Saline County v. 345
Bush, Scott v. 20
Butler v. United States 392

Cambridge Savings Bank v. Hyde, et al. 296
Campbell v. Sherman 137
Campbell, Wilcox v. 235
Casey v. Brabason 55
Chalmers, et al., First National Bank v. 65
Chitwood v. Hatfield, et al. 204
City of Deering v. Moore 282
Clark, et al., v. Kellogg 181
Clark's Executors, et al., Russell v. 212
Clayton, Sheffield Banking Company v. (Re Walker) 407
Conkling, et al., National Mechanics' Banking Ass'n. v. 298
Cook, Thomas v. 84
Cooper, et al., Davidson v. 306
Cooper, et al., Ellesmere Brewery Company v. 307
Coster's Executors, Union Bank of Louisiana v. 143
Cox, Lansdale's Admr's and Heirs v. 269
Craig v. Van Pelt 6
Cresswell, Green v. 88
Cruger, et al., Gosman, et al., v. 188

Daniels, Thayer v. 241
Darnall, Buckmyr v. 104
Davidson v. Cooper, et al. 306
Davis v. Patrick 77
Davis, et al., v. Wells, Fargo & Company 172
Davis Sewing Machine Company v. Richards, et al. 393
Day, Stroughton v. 212
Deacon, Pearl v. 340
Deering v. Earl of Winchelsea 277
Deering, City of, v. Moore 282
Dobie v. Fidelity & Casualty Co. 284
Dover Stamping Co. v. Noyes 161
Dudlow, Wildes v. 100

Earl of Winchelsea, Deering v. 277
Easterly v. Barber 273
Eastwood v. Kenyon 26
Eising v. Andrews 329
Ellesmere Brewery Company v. Cooper, et al., ... 307
Emmert v. Thompson, et al. 260
Empire State Surety Co. v. Lakeside Land Co. 419
Estate of Ramsay v. Whitbeck, et al. 108
Evans, et al., Reed v. 45

Farmers' Bank of Kentucky, Gano v. 400
Farmers' Supply Company, Houser v. 191
Farnsworth, Simmang v. 196

Fidelity & Casualty Co., Dobie v. 284
First National Bank v. Chalmers, et al. 65
First National Bank v. Terry 394
First National Bank of Marshall, Inkster v. 366
First National Bank, The United States Fidelity and Guaranty Co. v. 422
Fish v. Richardson 2
Foster, et al., Vail, et al., v. 411
Fowler, et al., Aetna Ins. Co. v. 387
Foxall, Phillips v. 377
Freer, et al., Russell, Admr., v. 209

Gano v. Farmers' Bank of Kentucky 400
Gard v. Stevens 153
Gates v. McKee 215
Geagan, Manley v. 112
Gibbs, et al., Bickford v. 192
Gibbs, et al., v. Blanchard 59
Gillespie, et al., v. Torrance 335
Gosman, et al., v. Cruger, et al. 188
Green v. Cresswell 88
Grey, Sutton & Co. v. 72
Griffith, et al., v. Rundle, et al. 119
Griswold, Hazard, et al., v. 324
Gullick, Wolmershausen v. 287

Hall v. Soule 19
Hall, Whitcher v. 293
Hampton, Adm'r., et al., v. Phipps 413
Hartley v. Sanford 91
Hatfield, et al., Chitwood v. 204
Hatley, Jennings v. 1
Hawkins, Roberts v. 166
Haywood, Admr., v. Townsend, et al. 205
Hazard, et al., v. Griswold 324
Henry McShane Co., L'td., v. Padian 158
Holmes County, The State, use of, v. Swinney 301
Holt v. Bodey 346
Hooker, et al., v. Russell 107
Houser v. Farmers' Supply Company 191
Hungerford v. O'Brien 404
Hyde, et al., Cambridge Savings Bank v. 296

Inkster v. First National Bank of Marshall 366

Jenkins v. National Village Bank of Bowdoinham 351
Jennings v. Hatley 1
Jones v. Bacon 86

Kearnes v. Montgomery 126
Keate v. Temple 109
Kellogg, Clark, et al., v. 181
Kenyon, Eastwood v. 26
Kimball v. Newell 321
Kingham, Reader v. 95
Kirkham v. Marter 123
Konitzky, et al., v. Meyer 238

Lakeside Land Co. v. Empire State Surety Co. 419
Lansdale's Adm'rs and Heirs v. Cox 269
Lee v. Yandell, et al. 319
Leroux v. Brown 15
Littler, et al., Singer Man'fg Co. v. 129
Loosemore v. Radford 285
Lowry, et al., v. Adams 139

McConnell v. Poor 302
McKee, Gates v. 215
McMurray, et al., v. Noyes 183

Mahurin v. Pearson, et al. 333
Manley v. Geagan 112
Marter, Kirkham v. 123
Martin, Tapley v. 374
Mathews, et al., v. Aikin 245
Mathews, Railton v. 368
Mayor, &c., Argus Company v. 49
Mead, Mason & Co. v. Watson 113
Mease v. Wagner 102
Mercantile Credit Guarantee Co., Tebbets, et al., v. 437
Meyer, Konitzky, et al., v. 238
Miller v. Stout, et al. 252
Millikin, et al., Stoner v. 390
Millikin, Starr, et al., v. 185
Molleson, Smith v. 224
Montgomery, Kearnes v. 126
Moore v. Bruner 271
Moore, City of Deering v. 282
Moore, et al., Wesley Church v. 243
Morris, Baker v. 125
Morris, et al., v. Osterhout, et al. 56
Morrison, et al., v. Arons, et al. 304
Morse, E. W., O'Conor v. 356

National Mahaiwe Bank v. Peck 360
National Mechanics' Banking Ass'n v. Conkling, et al. 298

National Surety Co., United States to use of, Anniston Pipe and Foundry Co. v. 114
National Village Bank of Bowdoinham, Jenkins v. 351
Newell, Kimball v. 321
Noyes, Dover Stamping Co. v. 161
Noyes, McMurray, et al., v. 183

O'Brien, Hungerford v. 404
O'Conor v. E. W. Morse, et al. 356
Osterhout, et al., v. Morris, et al. 56

Packard, et al., Pain v. 365
Packard v. Richardson, et al. 32
Padian, Henry McShane Co., Ltd., v. 158
Pain v. Packard, et al. 365
Palmer, Adm'r., et al., Villars v. 327
Patrick, Davis v. 77
Pearl v. Deacon 340
Pearson, et al., Mahurin v. 333
Peck, National Mahaiwe Bank v. 360
People of the State of New York v. Backus 220
Petriken v. Baldy 3
Philbrook v. Belknap 11
Phillips v. Foxall 377
Phipps, Hampton, Adm'r., et al., v. 413
Pike v. Brown 23
Poor, McConnell v. 302
Power v. Rankin 70
Prince, Tenney v. 194

Radford, Loosemore v. 285
Railton v. Mathews 368
Ramsay, Estate of, v. Whitbeck 198
Rankin, Power v. 70
Reader v. Kingham 95
Reed v. Evans, et al. 46
Rice v. Southgate 240
Richards, Davis Sewing Machine Company v. 397
Richardson, et al., Packard v. 32
Richardson, Fish v. 2
Ridgley, United States Fidelity and Guaranty Co. v. 430
Robbins v. Bingham 157
Roberts v. Hawkins 166
Rundle, et al., Griffith, et al., v. 119
Russell v. Annable 314
Russell v. Clark's Executors, et al. 212
Russell, Adm'r., v. Freer, et al. 209
Russell, Hooker, et al., v. 107

Saint, et al., v. Wheeler & Wilson Mfg. Co. 131
Saline County v. Buie, et al. 345
Sanford, Hartley v. 91
Savings Bank v. Boddicker, et al. 372
Sawyer, Weare v 317
Schmidt, Auchampaugh v. 325
Scot v. Stephenson, ... 238
Scott v. Bush 20
Sheffield Banking Company v. Clayton, (Re Walker) 407
Shelden, et al., Smith v. 231
Sherman, Campbell v. 137
Simmang v. Farnsworth 196
Singer Man'fg. Co. v. Littler, et al. 129
Slanker, Beaver v. 264
Smith v. Molleson 224
Smith v. Shelden, et al. 231
Smith, et al., v. Van Wyck 154
Soule, Hall v. 19
Southgate, Rice v. 240
Starr, et al., v. Millikin 185
State, Sullivan v. 354
State, use of Holmes County, v. Swinney, et al. 301
Stephenson, Scot v. 238
Stevens, Gard v. 153
Stoner v. Millikin, et al. 390
Stout, et al., Miller v. 252
Stroughton v. Day 212
Sullivan v. State 354
Sutton & Co. v. Grey 72
Swift, et al., v. Beers 313
Swinney, et al., The State, use of Holmes County, v. 301

Tapley v. Martin 374
Taylor, et al., v. Wetmore, et al. 150
Tebbets, et al., v. Mercantile Credit Guarantee Co. 437
Temple, Keate v. 109
Tenney v. Prince 194
Terry, First National Bank v. 394
Thayer v. Daniels 241
Thomas v Cook 84
Thompson, et al., Emmert v. 260
Torrance, Gillespie, et al., v. 335
Townsend, et al., Haywood, Adm'r., v. 205
Turner, Bovill v. 156

Union Bank of Louisiana v. Coster's Executors 143
United States, Butler v. 392

United States Fidelity and Guaranty Co. v. First National Bank..... 422
United States Fidelity and Guaranty Co. v. Ridgley 430
United States to use of Anniston Pipe and Foundry Co. v. National Surety Co. 114

Vail, et al., v. Foster, et al. 411
Van Pelt, Craig v. 6
Van Wyck, Smith, et al., v. 154
Villars v. Palmer, Adm'r, et al. 327

Wagner, Mease v. 102
Wain, et al. v. Warlters 27
Walker, Re, Sheffield Banking Company v. Clayton..... 407
Warlters, Wain, et al., v. 27
Watson, Mead, Mason & Co. v. 113
Weare v. Sawyer 317
Wells, Fargo & Company, Davis v. 172
Wesley Church v. Moore, et al. 243
Wetmore, et al., Taylor, et al., v. 150
Wheeler & Wilson Mfg. Co., Saint, et al., v. 131
Whitbeck, et al., Estate of Ramsay v. 198
Whitcher v. Hall 293
Wilcox v. Campbell 235
Wildes v .Dudlow 100
Winchelsea, Earl of, Deering v. 277
Wolmershausen v. Gullick 287

Yandell, et al., Lee v. 319

CASES ON SURETYSHIP

CHAPTER I

NATURE AND FORM OF THE CONTRACT

SECTION 1. AT COMMON LAW[1]

1. JENNINGS v. HATLEY, Yelverton 20.[2]
Court of Queen's Bench, Mich. Term, 44 and 45 Eliz.

Oral promise to pay debt of another, good at common law. Consideration, sufficiency of to support such promise.

The plaintiff declared that such a day and year he recovered against one Basset in the Common Pleas in an action of debt on a bond of 50*l.* and upon that recovery he took forth a special *cap. utlagat.* for the body, goods and land of Basset; and shewed the tenor of that writ specially, and the defendant perceiving the plaintiff intended to serve the said writ on the goods of the said Basset, desired the plaintiff to stay the execution of the said writ till such a day; and if Basset did not that day pay the plaintiff the 50*l.* in consideration of such stay of execution of the said writ, and for 2*s.* 4*d.* to be given the defendant by the plaintiff for renewal of the said writ of *capias,* the defendant promised, if Basset by the day limited did not pay the 50*l.* that he would pay it the plaintiff: and alleged *in facto* the stay of the execution at the defendant's request, and the giving of the 2*s.* 4*d.* for the renewal of the said writ, and that Basset did not pay the 50*l.* at the day, &c. to his damage 100 marks, and upon *non assumpsit* pleaded it was found for the plaintiff: and it was alleged in arrest of judgment, that the consideration is not good, but void and against law: for the *capias utlagat.* is the queen's

[1]It was not necessary at common law that the contract of a surety or guarantor should be in writing. Brandt on Suretyship & Guaranty, § 37.
[2]S. C. Cro. Eliz. 909.

suit; and therefore a promise made in consideration to stay the queen's suit is not good: for if goods are stolen from J. S. and a stranger promises that in consideration J. S. will not prosecute any indictment against him who stole them, that he will give him so much money, this is a void promise; for it is in hindrance of the queen's justice and benefit: But by Gawdy, Fenner and Yelverton the consideration is good: for this *capias utlagat.* issued upon the original suit of the party, so the benefit which the queen is to have is by means of the party, and he is at the charge of suing it forth, and hath the carriage of the writ: and if the party is taken he shall be in execution at the suit of him who recovered; and if the queen by virtue of the *capias utlagat.* has any goods, she is to satisfy the party at whose suit the outlawry came; but *nota,* Popham contra in the case *supra;* for it is merely the queen's suit, which the party neither can, nor ought to delay: for the queen's attorney may take such goods, although he that recovered will not sue for them. But judgment for the plaintiff according to the opinion of the three justices. And in this case it was said to be adjudged between Garnons and Layton, that if a man is taken on a *capias utlagat.* after judgment, he is in execution for the party; and if he escapes, although he was taken at the queen's suit, yet the party has such an interest in the body, that he shall have escape against the sheriff. *Quod nota;* Yelverton was of counsel with the plaintiff.

2. FISH v. RICHARDSON, Yelverton 55.[3]
Court of King's Bench, Mich. Term, 2 Jac.

Oral promise of executor to pay debt of testator good at common law.

Consideration, forbearance sufficient to support such promise.

The case was such: Fish had a debt owing to him by the testator Richardson on a simple contract: and came to the defendant and told him of it; who said, that if the plaintiff would forbear suit against him for a time, he promised to pay him; it is a good promise in law; for although the defendant might wage his law in an action brought against him by the law, because it is of another's contract; yet in law such debt on simple contract remains a debt, and is not absolved by the testator's death: And according to the book 10 Hen. 6 an action of debt lies against the

[3] S. C. sub. nom. Fisher v. Richardson, Cro. Jac. 47.

executor for it; and if he plead to it, and doth not demur upon the declaration, judgment shall be given against him; and the court *ex-officio* will not abate it without the challenge of the party; but if the heir promises on forbearance of suit to pay such debt, yet no assumpsit lies against him; for there is no consideration, because the heir is liable to no debt without specialty.

3. PETRIKEN v. BALDY, 7 W. & S. 429.
Supreme Court, Pennsylvania, 1844.

Oral promise to pay debt of another must be established by clear and explicit evidence.

Error to the Common Pleas of Columbia county.

Peter Baldy against Dr. David Petriken.

This was an action of assumpsit to recover a debt due by Francis Tully to the plaintiff, upon the promise of the defendant to pay it in consideration of forbearance.

The plaintiff offered in evidence an item of charge in his book, in the account of the defendant, "21 July 1831 amount answered for Hugh Laughlin $2.89," with proof by the clerk who made the entry, that he would not have made it without the defendant's direction, that this was his invariable mode of making such entries, both as regards the defendant and other persons. The defendant objected. The court overruled the objection and sealed a bill of exceptions.

The evidence of the assumption by the defendant was given by the clerk of the plaintiff as follows:

"The account was shown to Dr. Petriken in the forepart of Oct. 1830, on or after the 5th of Oct. 1830. I was clerking for Mr. Baldy at the time; he was absent in the city purchasing goods; before he went to the city, he gave me a charge respecting some of the contractors on the Pennsylvania Canal line that had been dealing with us; the estimate was to have been drawn while he would be absent. Among the contractors indebted to Baldy at that time was Francis Tully, and the principal one I was charged with attending to. I was directed to call on Dr. Petriken for the amount of this bill, having been assumed by him on the morning the estimate was to be paid over to the contractors. I came out to make some inquiry about these persons indebted to Mr. Baldy, and I conversed with a number of persons about the probability of the estimate being paid that day. I met Dr. Petriken, asked him about some of the contractors, and told him I was directed by Baldy to

call on him for the amount of this bill against Tully. I had not the bill with me; he (the Doctor) replied that I had better attend to some other accounts; that there were other accounts that were much more in danger of being lost; that he and Baldy would fix that themselves; that Francis Tully could not draw any money from the Canal Commissioners; that the money came through his (the Doctor's) hands; that he had the drawing of the money in that contract. This was the substance of the conversation at the corner, and I returned to the store. On the same day and about the middle of the day, the Doctor called in at the store and asked to see the bill against Francis Tully, and I handed him this bill, this very paper in my own handwriting. He took it and added it up; it had been added up to $274.52½ at the date 28th Sept. 1830; from that date to 5th Oct., inclusive, there had been five charges made that was not added up; that he footed up, making the amount $343.52¾. He noted the amount down on a letter or piece of paper and took it with him. The Doctor put this same amount down in pencil on this account; the marks are here yet. He only wanted the amount, I was going to show him the items. He replied he only wanted the amount of the account. I showed this account to Francis Tully, before I saw the Doctor at the corner; it was shown to him at different times and also that day of the estimate; he admitted it to be correct. He never paid it nor anybody else."

The defendant requested the court to instruct the jury that the evidence, taken to be true, is not sufficient to charge the defendant with the debt. But the court was of a different opinion, and submitted the evidence to the jury, who rendered a verdict for the plaintiff.

Cornby and *Grecnough* for plaintiff in error.

Cooper and *Bellas,* contra.

The opinion of the court was delivered by

ROGERS, J.—It has been frequently regretted that the fourth clause of the Statute of Frauds, 29 Car. 2, ch. 3, which requires that to charge a person for the debt, default or miscarriage of another, the agreement should be in writing, was not extended to this State. In Pennsylvania, however, the law is otherwise, for such agreements may be proved by parol; but as a protection against fraud, it is required that the evidence of the promise should be clear and explicit, that there should be no room to suspect mistake, misapprehension, or any unfairness in the transaction. The first objection is contained in the first bill of excep-

tions. It is the charge in the book account, against the defendant, of the assumption of the debt of Hugh Laughlin. It is not pretended that this is such an item as is properly chargeable in a book account, but it is insisted that with the aid derivable from the clerk who made the entry, it was properly received in evidence. * * * We think the testimony entirely too uncertain and unsatisfactory. It is not unreasonable to require clear and explicit proof of the agreement; and this is absolutely necessary to guard against fraud. If by an inspection of the book he had remembered that the entry was made on the authority of the defendant, it would be a different question, for the book is only important as a means of refreshing the memory of the witness. But, unfortunately, he has no recollection whatever of it. And the only evidence of the agreement is an inference, which he derives from the fact that it is his handwriting, and his belief that he never put such charges in the books without the direction of the person who had assumed to pay.

In connection with this is the charge of the court in relation to the assumption of the debt against Francis Tully. It is alleged that the defendant assumed to pay this bill. That Tully was indebted to the plaintiff, would not seem to be questioned; but did the defendant assume to pay the debt? * * * That there was some understanding between the plaintiff and defendant in relation to debt of Tully may be reasonably inferred from the evidence, but what the contract or agreement was, nowhere appears. The money due Tully on his contract was to come through the hands of the defendant, but as it belonged to Tully, Dr. Petriken would have no right to pay it to Baldy without the assent of Tully, and there is no proof that Tully assented to any such disposition of the money. But did the defendant make himself absolutely responsible to the defendant, [plaintiff] and if so, what was the consideration of the promise to pay? Of the nature of the agreement we are left in the dark, and of any consideration I cannot see a particle of proof. Of these material points we are left entirely to conjecture. To make the defendant amenable for this debt, it is necessary for the plaintiff to prove, distinctly, the agreement or promise to pay the debt, and that the promise was made on a sufficient consideration. On both points the plaintiff's proof is defective. In the declaration it is alleged that the promise is in consideration of forbearance. It cannot be seriously contended that there was any contract made with Clayton, who acted as the agent of Baldy; if his evidence proves anything, it proves a pre-existing contract between Petriken and Baldy. It appears that

Tully was a sub-contractor under Petriken, and that the money, under some arrangement, was receivable by Petriken, but that would not authorize Petriken to pay Baldy without Tully's consent, and such assent is neither shown nor alleged. Why, then, should Petriken assume to pay this debt? What reason had he, what motive or consideration was there moving from Baldy to induce him to become liable for the debt of Tully, when, under the evidence, if he paid he must do so at his own risk? We may readily believe, that standing in the relation he does to Baldy and Tully, he may have been willing to lend his friendly aid to Baldy in collection of the debt he had against Tully. But beyond this, no legitimate or safe inference can be drawn. On neither point, therefore, does it seem to me that the plaintiff has given such evidence as we have a right to require, for it must be remembered, on him is thrown the burden of proof. On another trial, the declaration may be amended so as to avoid the objections made to it. It may be sufficient to observe, that in the other point we perceive no error.

Judgment reversed and *venire de novo* awarded.

SECTION 2. UNDER THE STATUTE OF FRAUDS[4]

A. Construction of the Statute.

a. Of the words "No action shall be brought."

4. CRAIG v. VAN PELT, 3 J. J. Marshall 490.
Court of Appeals, Kentucky, 1830.

Surety cannot recover back money voluntarily or coercively paid by him in response to his oral promise.

Statute does not render oral promise to pay debt of another void, but operates only to prevent enforcement of the promise by suit. Statute applies only while contract is executory.

Opinion of the Court, by Chief Justice Robertson.

Thomas Easterby, as administrator of Thomas Martin, having obtained a judgment against John VanPelt, executor, and

[4] The fourth section of the Statute of Frauds, 29 Car II, chap. 3, in its original form as given in Browne on the Statute of Frauds, 5th ed. page 648, is as follows:

IV. And bee it further enacted by the Authoritie aforesaid That

Mary Blair, executrix, of Robert Plummer, and caused a fieri facias on the judgment to be levied on assets in their hands; they replevied the debt for two years, with Silas Craig as their surety.

At the expiration of the two years, a fieri facias on the replevin bond was levied on the property of Craig, and he was compelled to pay the amount due. To recover the money thus paid, Craig filed his motion, on sufficient notice, against Samuel VanPelt, as the administrator of John VanPelt. After hearing the testimony the circuit court dismissed the motion, and Craig appealed.

Waiving objections not affecting the merits (and there are some such which might sustain the judgment), we shall consider only the main question involved in the case.

It was abundantly proved by parol testimony that the executor was anxious to pay off the amount of the execution without replevying. But as the judgment had been rendered against the testator, as the surety of Levi Craig, a brother of Silas Craig, the execution was held up by the sheriff, a few days, for the purpose of giving time to ascertain whether Silas would, as VanPelt said he had promised to do, pay the debt.

Silas, being consulted, admitted that he had promised to pay the debt for his brother, and that he had, as he then supposed, property of Levi's in his hands, sufficient to indemnify him. But he solicited time, and, to obtain it, urged the propriety of giving a replevin bond.

VanPelt persisted in his opposition to the replevin, and said that he would prefer paying off the execution at once. But, on receiving positive assurances from Silas Craig that he would discharge the bond when it should become due, he yielded, and the bond was given.

Whether these facts constitute a bar to the motion, is the only question to be considered.

Craig insists that they do not, for the following reasons:

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from and after the said fower and twentyeth day of June *noe Action shall be brought whereby to charge* any Executor or Administrator upon any speciall promise to answere damages out of his owne Estate or whereby to charge *the Defendant upon any speciall promise to answere for the Debt, Default or Miscarriages of another person* or to charge any person upon any agreement made upon consideration of Marriage or upon any contract or sale of lands Tenements or Hereditaments or any interest in or concerning them or upon any agreement that is not to be performed within the space of one Yeare from the makeing thereof *unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the Partie to be charged therewith or some other person thereunto by him lawfully authorized.*

1. The assumpsit was a collateral undertaking, without writing, to pay the debt of another.

2. It was not to be performed in a year, and, therefore, for these reasons, is within the operation of the statute of frauds and perjuries.

3. Parol evidence was inadmissible to prove the promise, because the parties are, (as he supposes) estopped by the recitals in the bond.

The last reason is futile. The testimony does not contradict the bond. The bond shows that Craig signed it as surety only. No attempt was made to prove that he was the principal. The sole object and effect of the evidence was to prove why he became surety, and that, in consideration of the motives which induced him to sign the bond, he promised to pay the amount of it when it should be collectible. This surely contradicts nothing in the bond.

It is not necessary to decide whether the promise was within the statute, because, admitting that it was, for either or both of the reasons assigned, nevertheless it is our opinion that the statute will not avail Craig, so as to sustain his motion.

The statute would not render the promise *void*. Its only effect would be, to prevent the enforcement of the contract *by suit*.

The promise is not now executory. It has been executed by Craig. The party in whose favor it was made, is not attempting to coerce performance. He prosecutes no suit. He is passive and content. But Craig, after having paid what he assumed to pay, sues to recover it back, because, if he had not paid it, he could not have been forced to do it by suit. There was no express promise to refund, and the law cannot imply one. *Ex aequo et bono,* no implication arises in his favor.

It is only while the contract remains executory, that the statute applies to it; after it shall have been executed, it would be preposterous to suffer its cancelment, merely because, as an express contract, it could not have been enforced, by action, by either party. To give such an operation to the statute, would pervert its aim and convert it into a sword instead of shield. It would then be a statute to encourage and legalize fraud, and not an act to prevent fraud.

This statute is exclusively preventive. It gives no remedy, it only withholds remedial aid.

The principles established in *Roberts* v. *Tennel,* 3 Monroe 247, seem to us to be decisive of this case.

Craig is endeavoring to recover money by pleading the statute. It was not framed to be an engine for any such purpose.

It is not material whether Craig paid the money voluntarily or coercively. VanPelt did not coerce him. The sheriff, knowing the contract and the reasons why the replevin bond had been executed, levied the execution on the property of Craig, as he ought to have done. By the operation of law then, without the active or improper interference of VanPelt, Craig has redeemed his promise, and the law will not turn round and restore to him his money, unless he can show that it has been taken from him illegally, unjustly, or fraudulently, which he has not attempted to do. But it was taken from him by the law, and in pursuance of his own contract, with which he was morally bound to comply.

Judgment affirmed.

5. BEAL v. BROWN, 13 Allen 114.

Supreme Judicial Court, Massachusetts, 1866.

One who has carried out his oral promise and paid the debt of another may recover the amount so paid in an action against the original debtor.

Contract upon an account annexed. The defendant, admitting the correctness of the plaintiff's account, claimed in set-off a larger sum for money paid for the plaintiff, on a verbal guaranty of a debt from the plaintiff to B. F. Poland.

At the trial in the superior court before Rockwell, J., the defendant introduced evidence tending to show that the plaintiff desired to make a purchase of leather on credit from Poland, who would not sell the same to him without a guaranty of payment of the price; and thereupon, at the special request of the plaintiff, the defendant verbally guaranteed such payment, and the leather was accordingly delivered to the plaintiff; and subsequently, the plaintiff having paid only a portion of the price of the leather when the same fell due, the defendant, upon Poland's demanding payment of the residue from him, gave his memorandum check for such residue to Poland, and before the same was paid the plaintiff forbade the payment of it by the defendant, the defendant, however, paid the same.

There was a conflict of evidence upon most of these matters.

The judge ruled that there was no sufficient evidence to warrant the jury in returning a verdict for the defendant for the claim in set-off, and directed them to return a verdict for the

plaintiff, for the amount of his account; which was accordingly done. The defendant alleged exceptions.

E. Ames, for the defendant.

P. Simmons, for the plaintiff.

BIGELOW, C. J.—There was direct and positive evidence that the defendant, at the plaintiff's request, entered into a verbal guaranty of a debt due from the plaintiff, in pursuance of which the former subsequently paid the debt. This evidence, if believed, would have required the jury to find that the money charged in the account in set-off was paid at the special instance and request of the plaintiff, and that the item of money so paid was a valid set-off to the plaintiff's claim. Of the credibility of this evidence, it was the exclusive province of the jury to judge; and it was erroneous to withdraw it from their consideration.

The statute of frauds cannot avail the plaintiff, as an answer to the set-off. Although the verbal guaranty was within it, and might have been avoided if the defendant had seen fit to rely upon the statute when called on by the plaintiff's creditor for the payment of the debt, the defendant was not bound to set it up. He had a right to perform his parol undertaking. It was a contract made on a good consideration, which the statute does not declare void or illegal, but only provides that no action shall be maintained upon it against the guarantor. But this enactment is exclusively for the benefit of the guarantor and is designed to protect him from the danger of being made liable for the debts of another by false testimony. He may elect to fulfill his verbal promise, and if he does so and pays money in pursuance thereof, the principal debtor is liable for the amount as for money paid at his instance and request. The statute of frauds can have no operation as between the original debtor and his guarantor. *Calhill* v. *Bigelow,* 18 Pick. 369, 372. Nor can the plaintiff resist the defendant's claim in set-off on the ground that he forbade the payment of the debt by the defendant. Even if such prohibition could be allowed to have any effect, if seasonably made, the evidence shows that it was not made until the defendant had become absolutely bound by his written promise for the payment of the debt.

Exceptions sustained.

6. PHILBROOK v. BELKNAP, 6 Vt. 383.

Supreme Court, Vermont, 1834.

The statute prohibits suits upon certain contracts for want of writing, but does not make them void. It operates upon the contract only while it is executory.

This was an action on book account, referred to auditors in the county court, who found for the defendant, and made the following special report of the facts in the case:

"The plaintiff produced the following account, to-wit:

'William Belknap to Alfred Philbrook, Dr.

1831, Oct. 1. To labor 5½ months, commencing 11th April, 1831, and ending about the last day of September following, at $8.00 per month—$44.00.

The defendant produced no account. The plaintiff offered himself to testify to his account, to which the defendant objected; he, the defendant, offering to prove that the labor charged was done under a contract by the parties, that plaintiff should labor for defendant three years, which was not performed on the part of the plaintiff. The objection was overruled, and the plaintiff sworn and testified in the case. The defendant was also sworn without objection, and testified in the case. The plaintiff having testified that he performed the labor, that it was worth the sum charged, and that he had received no pay therefor, rested his case. The defendant then offered to prove that the labor charged was performed under a contract, that plaintiff was to labor for defendant three years, at eight dollars per month, which contract plaintiff had violated, by refusing to labor other than the 5½ months as charged. To this evidence the plaintiff objected, that such testimony was irrelevant, and would constitute no defense in law. The objection was overruled and the testimony admitted, the parties having both testified relating to the amount. The defendant and sundry other witnesses having also been examined, the auditor finds the following facts in the case: That in April, 1831, the plaintiff, having had some practice in edge-tools, applied to defendant, who was a master millwright, to hire out to defendant to work with him at the defendant's trade, when it was agreed by the parties that plaintiff should work for the defendant at said trade three years at eight dollars a month, the defendant to instruct the plaintiff in the art or trade of a millwright; but if plaintiff left the defendant before the end of the three years, unless in case of sickness, plaintiff to have nothing for his labor. The

plaintiff then, in April, 1831, commenced laboring with defendant, and continued for five months and a half, during which time he was a faithful laborer at the trade, and well earned the defendant the sum charged in plaintiff's account, the defendant having the whole of said time received in goods out of different stores one dollar per day and board for the plaintiff's services for which the plaintiff had received no pay; that defendant, during said time boarded and properly instructed the plaintiff in said trade; that at the end of said five and a half months, plaintiff gave notice to defendant, that unless his wages were raised to one hundred and twenty dollars per year, he should quit, which being refused by defendant, plaintiff did quit, against the will of the defendant, said employment and town, without any reasonable cause, and has never since returned or offered to return to defendant's employment; that said contract between the parties was verbal and never reduced to writing. Whereupon, the auditor, after offering the parties to refer the law arising upon the facts to the court, (which they declined) reports that there is nothing due from either party to balance book accounts, (the auditor having disallowed the only item in the case) whereupon finds for the defendant his cost."

The county court reversed this decision of the auditor, and gave judgment for the plaintiff. To this the defendant excepted, whereupon the cause passed to this court for further adjudication.

The opinion of the court was pronounced by

PHELPS, J.—This case comes before us upon a special report of the auditor. It seems, that the auditor, upon the facts stated in his report, found for the defendant; the county court reversed that decision, and gave judgment for the plaintiff. To this the defendant excepted, and the question now is, which of the parties, upon the facts found, is entitled to judgment. An exception is taken to the form of the action, which we do not think well founded. If the plaintiff be entitled to recover at all, the claim becomes a mere claim for services at a fixed monthly compensation, and an ordinary subject of book charge, and of recovery in this form of action. The objection that the special contract precludes a recovery, depends upon the terms and effect of that contract, and goes to the merits, rather than the form, of the action. The effect of the contract upon this question, depends upon the inquiry whether the performance of the labor is a condition precedent to the right of recovery, or, on the other hand, whether the promises are independent.

The subject of dependent and independent covenants, or promises, is much perplexed, and so much ingenuity and learning

have been expended upon it, that, like some other branches of the law, it seems to be involved in a sort of artificial embarrassment. If, in this case, the plaintiff had stipulated for a gross sum, to be paid at the expiration of his service, the performance of the labor would doubtless be regarded as a condition precedent. But as the compensation was at a certain rate per month, if it should appear that payment was to be made as fast as it was earned, the case would be different. The auditor does not report when the wages were to be paid; but fortunately there is a fact stated in the report, which relieves us from all difficulty on the subject. It is clearly competent, for the parties to make their undertakings dependent, or independent, as they deem expedient; and where their intent is ascertained it is decisive of the question. In this case, the stipulation that the plaintiff should have nothing for his services, if he left the service of the defendant before the expiration of the three years, makes the performance of the whole service a condition precedent; and if that part of the contract be binding upon him he cannot recover.

It is argued, however, that the contract is void, by force of the statute of frauds. Admitting that this contract is within the terms of the statute, yet it may be well to inquire, what is the effect of the statute upon it. Although it is common to speak of a contract as void by the statute of frauds, yet, strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it. The statute provides, that no action shall be sustained upon certain contracts, unless they are evidenced by writing. It operates, therefore, upon the contract, only while it is executory. It does not make the performance of such a contract unlawful, but, if the parties choose to perform it, the contract remains in full force, notwithstanding the statute, so far as relates to the legal effect and consequence of what has been done under it. Hence a party may always defend under such a contract, when sued for any act done under it. Thus, suppose a crop of grass is sold by parole, and the vendee enters upon the land and cuts it. If an action of trespass should be brought against him, by the vendor, upon the ground that the contract was void, still, although the contract is within the statute, it would furnish a sufficient defence, because it is executed. This very case affords an illustration of the effect of the statute. If the defendant had sued the plaintiff for not performing the contract, in not serving the full period, the case would be open to a defence under that statute; the contract being, to the purposes of such a suit, executory, and the attempt being to sustain an action

on it as such. But in this case the contract, so far as the service has been performed, is executed, and is relied on as regulating and determining the right of the plaintiff to compensation for what has been done under it. We are here concerned only with what has been done. The question is, what the plaintiff is entitled to for his labor; and this depends upon the terms of the contract, under which he performed the service. Had the whole service been performed, the rate of compensation would, without doubt, be regulated by the terms of the contract. No court would discard that contract, and resort to a *quantum meruit*. The principle is the same as to a performance in part. The defendant may be without remedy, for the desertion of the plaintiff, but he may certainly protect himself as to what has been done.

Any other rule would be productive of monstrous injustice, and make the statute an instrument of fraud. It is on this ground, that courts of equity will enforce a contract of such a nature, which is partly performed, where the party cannot be made good without a full performance. The statute was merely intended to prevent frauds, by setting up and enforcing, by parol proof, simulated contracts, and hence is called the statute of frauds and perjuries. It was not intended to vary or control contracts, which the parties have voluntarily caried into effect; nor to deprive parties of the protection of such stipulations as they may have made for their security, and in reliance upon which they have acted.

This construction is the only safe one that can be given to the statute, and it is the only one which has ever been given to it. Suppose a party enters into possession, under a parol lease for years; was it ever imagined that he could be made liable as a trespasser? Suppose a promise to pay the debt of another, and the debt actually paid. Was it ever attempted to recover back the money by force of the statute?

We are the more satisfied with this view of the subject, as we are persuaded that full justice will be done by it. The plaintiff is doubtless amply compensated, for the loss of the stipulated wages, by the instruction received, and the enhanced wages which he may obtain elsewhere in consequence; and the defendant gains nothing, as he loses the services of the plaintiff when they become more valuable.

It only remains to add, that this case falls most clearly within the decision of *Hare* v. *Bell,* ante p. 35.

Judgment reversed and judgment for the defendant.

7. LEROUX v. BROWN, 12 Com. Bench 801.[5]
Court of Common Pleas, Mich. Term, 1852.

An oral agreement made in France and valid there is not enforceable in England, by reason of the 4th section of 29 Car. II, chap. 3.

The cause was tried before TALFOURD, J., at the second sitting in Middlesex, in Trinity Term last. It appeared that an oral agreement had been entered into at Calais, between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of £100 per annum, to collect poultry and eggs in that neighborhood, for transmission to the defendant here,—the employment to commence at a future day, and to continue for one year certain.

Evidence was given on the part of the plaintiff to show, that, by the law of France, such an agreement is capable of being enforced, although not in writing.

For the defendant, it was insisted, that, notwithstanding the contract was made in France, when it was sought to enforce it in this country, it must be dealt with according to our law; and being a contract not to be performed within a year, the statute of frauds, 29 Car. 2, c. 3, s. 4, required it to be in writing.

Under the direction of the learned judge, a verdict was entered for the plaintiff on the first issue,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him on that issue, if the court should be of opinion that the contract could not be enforced here.

Hawkins, in the last term, obtained a rule nisi, accordingly.

Allen, Serjt., and *Metcalfe,* now showed cause.

Honeyman (with whom was *Hawkins*) in support of the rule.

JERVIS, C. J.—I am of opinion that the rule to enter a nonsuit must be made absolute. There is no dispute as to the principles which ought to govern our decision. My Brother Allen admits, that, if the 4th section of the statute of frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the other hand, it is not denied by Mr. Honeyman,—who has argued this case in a manner for which the court is much indebted to him,—that, if

[5] The arguments of counsel and much of the statement of facts are omitted.

the 4th section applies to the contract itself, or, as Boullenois expresses it, to the solemnities of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the statute of frauds, and contrasting them with those of the 1st, 3rd, and 17th sections, this conclusion seems to me to be inevitable. The words of s.4 are, "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." The statute, in this part of it, does not say, that, unless those requisites are complied with, the contract shall be void, but merely that no action shall be brought upon it: and, as was put with great force by Mr. Honeyman, the alternative. "unless the agreement, *or* some memorandum or note thereof, shall be in writing,"—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice. This view seems to be supported by the authorities; because, unless we are to infer that the courts thought the agreement itself, good, though not made in strict compliance with the statute, they could not consistently have held, as was held in the cases referred to by Sir Edward Sugden, that a writing subsequent to the contract, and addressed to a third person, was sufficient evidence of an agreement, within the statute. It seems, therefore, that both authority and practice are consistent with the words of the 4th section. The cases of *Carrington* v. *Roots*, and *Reade* v. *Lamb*, however, have been pressed upon us as being inconsistent with this view. It is sufficient to say that the attention of the learned judges by whom those cases were decided, was not invited to the particular point now in question. What they were considering was, whether, for the purposes of those sections, there was any substantial difference between the 4th and 17th sections. It must be borne in mind that the meaning of those

sections has been the subject of discussion on other occasions. In *Crosby* v. *Wadsworth*, 6 East, 602, Lord Ellenborough, speaking of the 4th section, says,—"The statute does not expressly and immediately vacate such contracts, if made by parol: it only precludes the bringng of actions to enforce them." Again, in *Laythoarp* v. *Byant*, 2 N. C. 735, 3 Scott, 238, Tindal, C. J., and Bosanquet, J., say distinctly that the contract is good, and that the statute merely takes away the remedy, where there is no memorandum or note in writing. I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the 4th section of the 29 Car. 2, c. 3, relates only to the procedure, and not to the right and validity of the contract itself. As to what is said by Boullenois in the passage last cited by Brother Allen, it is to be observed that the learned author is there speaking of what pertains *ad vinculum obligationis et solemnitatem*, and not with reference to the mode of procedure. Upon these grounds, I am of opinion that this action cannot be maintained, and that the rule to enter a nonsuit must be made absolute.

MAULE, J.—I am of the same opinion. The 4th section of the statute of frauds enacts that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." Now, this is an action brought upon a contract which was not to be performed within the space of one year from the making thereof, and there is no memorandum or note thereof in writing signed by the defendant or any lawfully authorized agent. The case, therefore, plainly falls within the distinct words of the statute. It is said that the 4th section is not applicable to this case, because the contract was made in France. This particular section does not in terms say that no such contract as before stated shall be of any force; it says, no action shall be brought upon it. In their literal sense, these words mean that no action shall be brought upon such an agreement in any court in which the British legislature has power to direct what shall and what shall not be done: in terms, therefore, it applies to something which is to take place where the law of England prevails. But we have been pressed with cases which it is said have decided that the words "no action shall be brought" in the 4th sec-

tion, are equivalent to the words "no contract shall be allowed to be good," which are found in another part of the statute. Suppose it had been so held, as a general and universal proposition, still I apprehend it would not be a legitimate mode of construing the 4th section, to substitute the equivalent words for those actually used. What we have to construe is, not the equivalent words, but the words we find there. If the substituted words import the same thing, the substitution is unnecessary and idle: and if those words are susceptible of a different construction from those actually used, that is a reason for dealing with the latter only. It may be, that for some purposes, the words used in the 4th and 17th sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract. None of the authorities which have been referred to seem to me to be at all at variance with the conclusion at which we have arrived.

TALFOURD, J.—I am of the same opinion. The argument of Mr. Honeyman seems to me to be quite unanswerable. That drawn from *Laythoarp* v. *Bryant* and that class of cases in which it has been held that the 4th section of the statute of frauds is satisfied by a subsequent letter addressed to a third party, containing evidence of the terms of the contract, shows clearly that that section has reference to procedure only, and not to what are called by the jurists the rights and solemnities of the contract.

Rule absolute.

8. HALL v. SOULE, 11 Mich. 494.[a]
Supreme Court, Michigan, 1863.

An oral promise to pay the debt of another is void and cannot furnish a valid consideration for a subsequent promise in writing.

Error to Calhoun Circuit. The facts sufficiently appear by the opinion.

H. M. & W. E. Cheever, for plaintiff in error.

Joslin & Blodgett, for defendant in error.

CAMPBELL, J.—This was an action brought against defendant to recover from him, as guarantor or surety, the sum of $500, for which it was alleged he became responsible for his son, Harrison Soule. The goods were sold in 1858, and in January, 1859, Harrison Soule, to whom they were sold and charged, gave his notes for the amount due, which remain unpaid. It appeared from the parol evidence that previous to the sale defendant had agreed, if plaintiff's firm would give Harrison Soule a credit to the amount of $500, that he would be responsible for its payment. The only written instrument offered in evidence was a letter written July 7, 1861, which, so far as it relates to the transaction in suit, was as follows: "And now I hardly know what to say to you. I think, on the whole, that you will have to rely on my pledge already made, that as soon and fast as I can, I will see that $500 of the demand you hold against Harry is paid; beyond that I do not think myself under obligation."

It is entirely clear from the tenor of this letter that it does not undertake to set forth the terms or conditions of any previous contract, but refers to it as a matter understood. The parol evidence shows what this contract was, and explains fully all the conditions and pledges. But under our statute any agreement to pay

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[a] The statute under consideration, Sec. 3183, C. L. 1857; Sec. 9515, C. L. 1897, provided: "In the following cases specified in this section, every agreement, contract or promise shall be void unless such agreement, contract or promise or some note or memorandum thereof be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized, that is to say:

1. Every agreement that, by its terms, is not to be performed in one year from the making thereof;

2. Every special promise to answer for the debt, default or misdoings of another person;

3. Every special promise or undertaking made upon consideration of marriage except mutual promises to marry;

4. Every special promise made by an executor or administrator to answer damages out of his own estate.

the debt of another is absolutely void, unless a note or memorandum of it is made in writing: Comp. L. sec. 3183.[6] It has always been settled that the memorandum must show the whole terms of the contract, and that no resort can be had to parol evidence to add to them. Our statute does not require a contract of this kind to set forth its consideration, but makes no other change; sec. 3187. It is impossible to draw from this writing any recital or evidence that defendant made any promise to pay for a future credit to be given to Harrison Soule. The plaintiff below sought to rely upon it as a written memorandum of a former verbal agreement. But it does not recite any agreement, present or past, except to pay existing and not contemplated future indebtedness. Whether such a memorandum of a past transaction would have the full effect claimed for it, becomes, therefore, immaterial.

Viewed as a present contract to pay an existing debt, it is not and could not well be claimed that the contract is valid, because there is an entire absence of consideration for it, so far as the evidence showed, and the declaration avers none. The previous verbal agreement being null, it could not form a valid consideration for this promise.

The judgment is affirmed, with costs.

Manning and Christiancy, JJ., concurred.

Martin, Ch.J., did not sit in this case.

9. SCOTT v. BUSH, 26 Mich. 418.

Supreme Court, Michigan, 1873.

An oral agreement to purchase lands is void and money paid by the vendee under such agreement and with the understanding that the vendor may retain the same as stipulated damages in the event the vendee fails to complete the bargain, may be recovered back in a suit for money had and received, notwithstanding the vendor is willing and offers to convey.

Error to Jackson Circuit.

Gibson & Wolcott, for plaintiff in error.

Johnson & Montgomery, for defendant in error.

CAMPBELL, J.—This case presents the single question, whether a person who has made a verbal arrangement with another to purchase land of him, and has paid money with a stipulation that he may retain it if the purchaser fails to complete the bargain

can recover back the money, where the vendor is willing and offers to convey.

It is necessary to consider on what grounds the holder of the money can claim to hold it. It cannot be held as in any way analogous to a gift. It is delivered upon condition, to be held in case of failure to perform an expected act, but, in case of performance, to be applied towards the full price of land. It cannot, then, be put upon any other ground than that of an agreement, involving rights and obligations on both sides, and a forfeiture upon the default of the party paying over the money.

This agreement is an agreement for the purchase and sale of lands; and the stipulation for the forfeiture of the deposit is the agreed penalty, or, more properly, the stipulated damages for its breach. If the contract is valid, the forfeiture is valid, as it is not claimed to be unreasonable; but if the contract is not valid, then no part of it can be enforced, without leading to confusion and contradiction.

Under our statutes every contract for the sale of lands is void, unless the contract, or some note or memorandum of it, is in writing, and signed by the vendor, or his agent, lawfully appointed in writing—2 Comp. L., 1871, sec. 4694.[7] The law does not require the purchaser to sign the agreement, and he is liable, therefore upon the written contract, though his own assent is verbal.—*Hollond* v. *Hoyt*, 14 Mich. 238. The statute does not require the consideration to be set forth in writing, but, allows it to be proved otherwise—sec. 4695.

The validity of part performance, as taking contracts out of the statute so as to authorize their specific performance, is also declared—sec. 4696.

The only consideration for the agreement of the purchaser to forfeit his deposit in this case, was the verbal promise of the vendor to convey. No possession was given of the land, and no act whatever was done by the vendor. The payment of the deposit was not such an act of part performance as would, under any of the authorities, authorize the purchaser to demand a specific performance.

There was, then, no consideration whatever for his agree-

[7] The statute under consideration, Sec. 4694, C. L. 1871, Sec. 9511, C. L. 1897, provided: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands shall be void unless the contract or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made or by some person thereunto by him lawfully authorized by writing."

ment, and it gave him no rights against the vendor. The arrangement, therefore, was in no sense a contract, and he was not bound by it. Until both parties are brought into binding relations, their dealings have no effect. They can only be regarded as preliminary negotiations, which confer no rights.

They cannot, therefore, be made binding thereafter, by any attempt of a single party to force a contract on the other. If there was no contract already in existence, the subsequent assent of both was as necessary as if they had never negotiated. A party who has never become bound, cannot be held by any but his own agreement. And the cases which intimate that one party cannot retract, if the other is willing to perform, give to the arrangement all the effect of a solemn contract, and enable agreements to be made as well as enforced, at the will of one of the parties, without any concurrence of the other.

We have held in *Chamberlain* v. *Dow*, 10 *Mich. R.*, 319; *Hall* v. *Soule*, 11 *Mich. R.*, 494; *Holland* v. *Hoyt*, 14 *Mich. R.*, 238; *and Grimes* v. *VanVechten*, 20 *Mich. R.*, 410, that a contract void under the statute of frauds, is a mere nullity, and cannot be used for any purpose whatever. And we cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else.

The decisions which have been made in several states refer for their authority, chiefly to some early decisions in New York. The brief report in *Dowdle* v. *Camp*, 12 J. R., 451, rested the refusal to allow the purchase money to be recovered back from a vendor willing to perform, on the ground that equity would compel performance in favor of the purchaser. And the same doctrine was held in *Abbott* v. *Draper*, 4 *Denio R.*, 51, where the purchaser's possession was more distinctly relied on. And in *Rice* v. *Peet*, 15 J. R., 503, and *Thayer* v. *Rock*, 13 Wend., 53, it was said that there could be a recovery back of money paid, where there was no such exceptional circumstances. And in *Duncan* v. *Baird*, 8 Dana, 101, where a payment had been made in a specific article, and not in money, the court held that there was no room for even an implied assumpsit, and that the action should be replevin or trover, for the chattels withheld.

Some decisions have apparently disregarded this distinction between contracts, made valid by part performance, and stipulations or arrangements, which have never become binding. An agreement made valid by part performance, is, in law, as valid as in equity, for all purposes except the remedy to enforce it.

An equitable right is as good a consideration for a contract as a legal right.—*Holland* v. *Hoyt,* 14 Mich., 238. Had the plaintiff in this case obtained possession from the defendant, under the verbal arrangement, the contract would have been taken out of the statute, and would not have been void. But as the case stands, we cannot see why, if the willingness of the vendor to convey, entitles him to keep money paid and agreed to be forfeited, he would not equally be entitled to enforce a promise to pay a like sum, on the same conditions. There is no middle ground between binding contracts, and the absence of any binding obligation.

We think the court below erred in refusing to allow a recovery, and that the judgment should be reversed, with costs and a new trial granted.

The other Justices concurred.

b. Of the words "special promise."

10. PIKE v. BROWN, 7 Cush. 133.
Supreme Judicial Court, Massachusetts, 1851.

The statute limits the words "special promise" to promises actually made. Promises implied by law are excluded.

Writ of review. The case was argued at the last November term, by *I. W. Richardson* for the plaintiff in review, and by *H. C. Hutchins,* for the defendant in review. The opinion of the court exhibits all the facts.

SHAW, C. J.—This case comes up on a writ of review, granted on petition, to enable the plaintiff in review, defendant in the original action, to correct and set aside, if he can, a judgment recovered by Brown against him.

The original action was assumpsit to recover a sum of money, alleged to be due to him from the original defendant on these grounds: Brown, by deed poll, expressed to be in consideration of $4.000, conveyed an estate to Pike, designated as a house and lot on South Cove, and described as being subject to a mortgage, to secure Brown's note to one Walker, for $2,825, payable in four years, with an amount of interest specified, payable semi-annually; "which said sum is part of the consideration before named, and this deed is on condition that said Pike shall assume and pay said note and the interest thereon, as they severally become due and payable." It appears by the case, that Pike entered upon and

took possession of the estate conveyed, and held it till a half year's interest became due; he did not pay it, but Brown, being liable for it on his note, was called upon to pay it and did pay it to the mortgagee, and brought this action of assumpsit to recover it.

The court are of opinion that this action can be maintained. The principle is well settled, that where one, by deed poll, grants land, and conveys any right, title or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment, or perform such duty, and not having sealed the instrument, he is not bound by it as a deed; but it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie.

The most common and familiar case is that of a lease, or the creation of a term by deed poll, one of the stipulations of which is, that the lessee pay certain rents at certain times. The lessee does not contract by deed, but from the rent reserved the law implies a promise. It seems impossible to distinguish this case from that of *Goodwin* v. *Gilbert,* 9 Mass. 510. The counsel for the defendant supposed that the marginal note to that case announced a principle not warranted by the case. We can see no such discrepancy. The case stated certain facts and circumstances, upon which it was contended that the promise arose; the marginal note announced the general principle to be extracted from the case. The statement of the general principle would, of course, avoid all the particular circumstances, which were immaterial, and could not affect the result. This appears to be the only discrepancy between the marginal note and the detailed case. This case was referred to, with approbation, in a later case, in which the general principle above mentioned is restated. *Felch* v. *Taylor,* 13 Pick. 133. That was the assignment of a lease; this is the transfer of an equity of redemption. Each is an interest in land, and each is transferred, by deed poll, to an assignee, on the terms of paying money or doing some duty. There it was to pay money to a third person, which the grantor had covenanted to pay; here it was to pay the principal and interest of the grantor's note, and exonerate him from such payment.

Again; if we look at the intention of the parties, it seems to us the result is the same. The deed was in form not the conveyance of an equity of redemption, but a conveyance of the estate,

though, in legal effect, it conveyed an equity of redemption. The consideration for the entire estate was $4,000, of which Brown's mortgage to Walker was a part, which the defendant assumed and undertook to pay, as part of such consideration. Such payment, when made according to such stipulation, would relieve the plaintiff from his personal obligation to Walker and release the estate from the lien upon it. A stipulation to pay my debt, on a valuable consideration moving from me, accepted by me in place of so much money, is a promise to me, to indemnify me, and to reimburse me, if, not complying with his undertaking to pay it, he leaves me liable on my note, which I pay on demand.

It was urged on the consideration of the court, that this was a condition affecting the estate, and not creating a personal liability; and that if the grantee failed to perform the condition, the grantor's only remedy was a forfeiture. We think this is not so. If a condition at all, it is a condition subsequent, which might operate as a breach, and warrant a reentry for condition broken. But if the grantor has this remedy, it is collateral only, and far from being adequate. Take again the case of a lease by deed poll, the lessee "yielding and paying" rent, etc. These words are held to constitute both a condition and an obligation. It would afford a poor remedy, if, after the enjoyment of the estate by the lessee for several terms, say years or quarters, the lessor could only take the estate back again. No; all such words are to be construed according to the subject matter, and if they are such as ordinarily imply stipulation or undertaking, they create an implied promise, although they are also words of condition. In *Goodwin* v. *Gilbert*, the words in the deed poll, in which the duty was reserved, are not given; but in the case last cited, of *Felch* v. *Taylor*, 13 Pick. 133, the words in the devise, which stands on the same footing with a deed poll, were "upon condition that the said Daniel do pay," etc., and afterwards in the deed of the devisee to a third person, "excepting same condition;" it was held, in both instances, to create a debt or duty on which assumpsit would lie.

It was insisted, that this promise, if it existed at all, was a promise to pay the debt of another, and so void by the statute of frauds, if not made in writing; also that it concerned real estate, and so was void under another clause of the same statute. We think neither objection tenable. Although the consideration of this promise was a conveyance of real estate, it was a consideration past and executed, and the promise remained a simple obligation to pay money. As to the other objection, that it was a promise

to pay the debt of another, the substance of the contract with the plaintiff was on a consideration moving from him, to pay his debt, for his benefit, and to exonerate him, and was no less a direct promise to the plaintiff, because, in the performance of it, it would satisfy a debt due to another. Besides; promises implied by law are not within the statute.

Judgment affirmed, with additional interest and costs of review.

11. EASTWOOD v. KENYON, 11 Adol. & El. 438, 39 E. C. L. 245.
Court of Queen's Bench, Hilary Term, 1840.

The statute applies only to promises made to the person to whom another is answerable.

In this term, (January 16th,) the judgment of the court was delivered by

LORD DENMAN, C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of *Buttemere* v. *Hayes*, 5 Mee. & W. 456, that this defense might be set up under the plea of Non Assumpsit.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. *If the promise had been made to Blackburn,* doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.*

Rule to enter verdict for defendant discharged.

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*Everything but the opinion on the one point is omitted.

c. *Of the word "agreement."*

12. WAIN, et al. v. WARLTERS, 5 East 10.[a]
Court of King's Bench, Easter Term, 1804.

The word "agreement" as used in the statute must be understood to embrace the consideration for the promise as well as the promise itself.

Where one promised in writing to pay the debt of a third person, without stating the consideration, parol evidence of the consideration is inadmissible.

The plaintiffs declared that at the time of making the promise after mentioned they were the indorsees and holders of a bill of exchange, dated the 14th February, 1803, drawn by one W. Gore upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to pay to his, Gore's order, £56 16s. 6d.; which bill of exchange Gore had before then indorsed to the plaintiffs, and which sum in the bill mentioned was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one A. as their attorney to sue Gore and Hall respectively for the recovery of the said sum so due, &c. whereof the defendant at the time of his promise, &c. had notice. And thereupon, on the 30th of April, 1803, at &c., in consideration of the premises, and that the plaintiffs, at the instance of the defendant, would forbear to proceed for the recovery of the said 56*l.* 16*s.* 6*d.*, he, the defendant, undertook and promised the plaintiffs to pay them, by half-past four o'clock on that day, 56*l.* and the expenses which had then been incurred by them on the said bill. The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto forborne to proceed for the recovery thereof; and that the expenses by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the

[a] The rule of this case continued the rule in England until the adoption of the Mercantile Law Amendment, so-called, in 1856, 19th and 20th Vic., chap. 97. Among the American cases following this rule are: Weldin v. Porter, 4 Houst. (Del.) 236; Hargraves v. Cooke, 15 Ga. 321; Elliott v. Giese, 7 Harr. & J. 457; Underwood v. Campbell, 14 N. H. 420; Laing v. Lee, 20 N. J. L. 337 (but see statutes); Drake v. Seaman, 97 N. Y. 234; Parry v. Spikes, 49 Wis. 384; McFarlane v. Wadhams, 165 Fed. 987. Some states have changed the phraseology of the statute. California, for example, has omitted altogether the word "agreement." Some of the statutes have coupled the word "promise" with the word "agreement."

said A., and on account of his having, before the defendant's said promise, drawn and engrossed certain writs called special capias, against Gore and Hall respectively on the said bill, amounted to 20*l.*, of which the defendant had notice; yet the defendant did not, at half-past four o'clock on that day, &c., nor at any time before or since, pay the said sum of 56*l.* and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay. And the common money counts.

In support of the undertaking laid in the declaration, the plaintiffs, at the trial at Guildhall, produced the written engagement signed by the defendant, which was in these words: "Messrs. Wain & Co., I will engage to pay you, by half-past four this day, fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters (and dated), No. 2, Cornhill, April 30th, 1803." Whereupon it was objected, on the part of the defendant, that though the promise, which was to pay the debt of another, were in writing, as required by the Statute of Frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence (which the plaintiffs proposed to call in order to explain the occasion and consideration of giving the note); and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was, therefore, *nudum pactum* and void. And Lord Ellenborough, C. J., upon view of the Statute of Frauds, 29 Car, 2, c. 3, s. 4, which avoids any special promise to answer for the debt of another, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c., thought that the term *agreement* imported the substance at least of the terms on which *both* parties consented to contract, and included the consideration moving to the promise, as well as the promise itself: and the agreement in this sense not having been reduced to writing for want of including the consideration of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiffs. A rule *nisi* was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the *promise* or binding part of the contract to be in writing, and

that parol evidence might be given of the consideration which did not go to contradict, but to explain and support the written promise.

Garrow and *Lawes* showed cause against the rule.

Erskine and *Marryat*, in support of the rule.

LORD ELLENBOROUGH, C. J., after noticing the definition of the word *agreement* by Lord C. B. Comyns, who considered it as a thing to which there must be the assent of two or more minds, and which, as he says, ought to be so certain and complete, that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of Plowden; and better (his Lordship observed) could not be cited:

In all cases where, by long habitual construction, the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the Statute of Frauds, has the word *agreement* ("unless the agreement upon which the action is brought, or some memorandum or note thereof shall be in writing," &c.) And the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect: the more so when it is considered by whom that statute is said to have been drawn, by Lord Hale, one of the greatest Judges who ever sat in Westminster-hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another, is to be charged in the form of the proceeding against him, upon his special promise; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word *promise* being used in the first part of the clause, but still in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood the agreement in respect of which the promise was made, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in

writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain. The authorities referred to by Comyns, Plowd. 5, a, 6, a, 9, to which may be added Dyer, 336, b., all show that the word *agreement* is not satisfied unless there be a consideration, which consideration forming part of the agreement ought therefore to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing. Without this, we shall leave the witness whose memory or conscience is to be refreshed to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding therefore the word *agreement* in the statute, which appears to be the most apt and proper to express that which the policy of the law seems to require, and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause is to give its proper and legal meaning to every word of it.

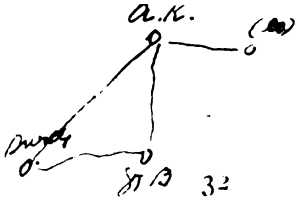
GROSE, J.—It is said that the parol evidence tendered does not contradict the agreement; but the question is, Whether the statute does not require that the consideration for the promise should be in writing as well as the promise itself? Now the words of the statute are, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, &c., what is required to be in writing, therefore, is the *agreement* (not the promise, as mentioned in the first part of the clause), or some *note* or *memorandum of the agreement*. Now the *agreement* is that which is to show what each party is to do or perform, and by which both parties are to be bound; and this is required to be in writing. If it were only necessary to show what one of them was to do, it would be sufficient to state the promise made by the defendant who was to be charged upon

it. But, if we were to adopt this construction it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent. For, without the parol evidence, the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the agreement, by which must be understood the whole agreement, should be in writing.

LAWRENCE, J.—From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration I agree with my lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the promise should have been stated in writing; but it goes on to direct that no person shall be charged on such promise, unless the *agreement*, or some note or memorandum thereof, that is, of the *agreement*, be in writing: which shows that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing.

LEBLANC, J.—If there be a distinction between *agreement* and promise, I think that we must not take it that *agreement* includes the consideration for the promise as well as the promise itself: and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said "unless the *promise or agreement* upon which the action is brought, or some note, or memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the agreement, which means the consideration for which as well as the promise by which the party binds himself.

Rule discharged.



13. PACKARD v. RICHARDSON, et al., 17 Mass. 121.*

Supreme Judicial Court, Massachusetts, 1821.

A written promise to pay the debt of another without a recital in the writing of the consideration upon which the promise is founded is in compliance with the statute of frauds.

Assumpsit by the endorsee of a promissory note, made by the Stony Brook Manufacturing Company, of which the defendants were members, signed by Henry Fiske, their agent, payable to one Asa Kingsbury, or order.

The defendants are counted against in various ways, upon their supposed liability, on account of a written promise on the back of the note, in the words following, viz., "We acknowledge ourselves to be holden as surety for the payment of the within note;" signed by the defendants.

Usury was attempted to be set up in defense, and Henry Fiske, who signed the note as agent, was called to prove it; but being objected to he was rejected.

The counsel for the defendants also objected to the proof of consideration for the guaranty, by oral testimony; and contended that, as no consideration was stated in the writing, the promise was within the statute of frauds and void.

The points were ruled against the defendants by the chief justice, before whom the cause was tried upon the general issue, at the sittings here during the present term.

Sumner, for the defendants.

Webster and *Morey* for the plaintiffs.

PARKER, C. J., delivered the opinion of the Court.

The case presents two questions of importance, neither of which has received a judicial determination in our courts. The arguments upon them have been exceedingly ingenious as well as able, leaving nothing untouched in point of authority or general reasoning, which has relation to the subject. * * * [Matter pertaining to the first question is omitted].

* * * The other question presented by this case is of a more embarrassing nature; not so much on account of any intrinsic difficulty in construing the statute out of which the question arises, as from an unwillingness to differ from the high

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*Among cases following the rule of this case are: Sage v. Wilcox, 6 Conn. 81; Gilligham v. Boardman, 29 Me. 79; Little v. Nobb, 10 Mo. 3 (see Hain v. Benton, 118 Mo. App. 557); Ashford v. Robinson, 8 Ired. Law 114; Moore v. Eisaman, 201 Pa. St. 190; Perley Potter & Co. v. Legare, Harp. (S. C.) 347; Gregory v. Gleed, 33 Vt. 405.

authorities, who have adopted a construction, which, after mature deliberation, we think is not warranted by the statute itself, or any particular exposition which has been given to it since it was enacted, until the case of *Wain* v. *Warlters* was decided, in the year 1804.

The case, as stated in the declaration, and as it was made out in proof, would admit of our avoiding the naked question presented by the report. For the plaintiff having made an attachment of property belonging to the company, and having relinquished that attachment upon receiving the guaranty of the defendants; according to most of the authorities, the promise would not be within the statute; there being a new consideration, between the new contracting parties, sufficient to maintain the promise without writing. But as the question is now fairly presented to us, and as has been ably argued, and as it often arises at *nisi prius,* we think it best to give our reasons for deciding that a promise to pay the debt of another, in writing, and signed by the party intending to be bound, is a sufficient compliance with the statute, without any recital in the writing of the consideration upon which the promise is found.

The original promise is by the Stony Brook Manufacturing Company, by a note payable on demand. After the making of the note, and after it was endorsed to the present plaintiff, the defendants severally signed their names on the back, and over their signatures were written these words:—"We acknowledge ourselves holden as surety for the payment of the within note." The consideration existing was, that these defendants were members of the company which made the note; and that a suit, which had been commenced, was stopped by the plaintiff, at their request. But this consideration was proved by parole, and the writing acknowledges no consideration whatever.

It is somewhat remarkable that a statute, which has so important a bearing upon contracts in daily use, should have remained without the construction recently given to it, from the time of its enactment, which was in the 29 Car. 2, to the year 1804, when the case of *Wain* v. *Warlters* was decided. That it did so remain will appear from the circumstance, that neither the counsel in arguing that case, nor the Court in deciding it, refer to any preexisting case in support of their doctrine; a doctrine which, when announced, excited much surprise both in England and in this country.

Our provincial act was passed in the year 1692, and continued in force until the year 1788, when it was superseded by the

statute of the commonwealth, which, as well as the provincial act, is similar in substance, and, except in one instance where the sense is not altered, is copied *verbatim* from the English statute. So that we have had the statute in operation more than a century, within which period innumerable collateral engagements have been made; and it has never, until within a few years, as far as we can ascertain, been doubted that, if one man, for a sufficient consideration, deliberately signed his name to a promise to pay the debt of another, he would be bound by it, although no consideration whatever was mentioned in the writing which he signed.

Although some consideration must exist to give validity to such a promise, it is generally of a nature not to be disputed; and if disputed, has been proved by parole testimony. The consideration need not be for the benefit of the party making the promise, and it seldom is for his benefit; forbearance to sue, or the surceasing of a suit, being most frequently the consideration of such undertakings, and these being altogether for the benefit of the original debtor. This being the case, it would seldom, if ever, enter into the imaginations of the parties to such a contract, that unless the motives and considerations, which led to it, were put down in writing, the engagement was void.

Having made these preliminary remarks, I shall proceed to consider the statute, and what is its most obvious construction, without reference to decided cases; and then take a view of the decisions which have been had upon it, both in England and in this country.

The first section of our statute of 1788, c. 16, corresponds, as has been observed, exactly with the fourth section of the statute of 29 Car. 2. Exclusive of other subjects provided for in the same section, it enacts, "That no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or misdoings of another person, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized."

The obvious purpose of the legislature would seem to be to protect men from hasty and inconsiderate engagements, they receiving no beneficial consideration; and against a misconstruction of their words by the testimony of witnesses, who would generally be in the employment and under the influence of the party wishing to avail himself of such engagements. To remove this mischief the promise or engagement shall be in writing, and

signed; in order that it may be a deliberate act, instead of the effect of a sudden impulse, and may be certain in its proof, instead of depending upon the loose memory or biased recollection of a witness. The agreement shall be in writing—what agreement? The agreement to pay a debt, which he is under no moral or legal obligation to pay, but which he shall be held to pay, if he agrees to do it, and signs such agreement.

This appears to be the whole object and design of the legislature; and this is effected, without a formal recognition of a consideration; which, after all, is more of a technical requisition, than a substantial ingredient in this sort of contracts. And it would seem, further, that the legislature chose to prevent an inference that the whole contract or agreement must be in writing; for it is provided that some memorandum or note thereof in writing shall be sufficient. What is this but to say, that if it appear by a written memorandum or note, signed by the party, that he intended to become answerable for the debt of another, he shall be bound, otherwise not?

How then is it possible, with these expressions in the statute, to insist upon a formal agreement, containing all the motives or inducements which influenced the party to become bound? Yet such is the decision of the Court of King's Bench, in the case of *Wain* v. *Warlters.*

But in a case happening in the same court a short time afterwards, on another section of the same statute, a different construction is adopted. By the seventeenth section of the British statute, and the second section of our own, it is provided, "That no contract for the sale of any goods, wares, or merchandise, for the price of ten pounds or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized." Yet in the case of *Egerton* v. *Matthews* it was decided that a memorandum, containing only one side of the bargain, and without any consideration expressed, was sufficient. When this case came before Lord Ellenborough, at *nisi prius,* he thought it governed by the case of *Wain* v. *Warlters;* and it is certainly difficult to perceive a difference between the two cases.

If the word *agreement* imports a mutual act of two parties, surely the word *bargain* is not less significative of the consent of

two. In a popular sense, the former word is frequently used as declaring the engagement of one only. A man may agree to pay money, or to perform some other act; and the word is then used synonymously with *promise* or *engage*. But the word *bargain* is seldom used, unless to express a mutual contract or undertaking. If then the technical meaning of the word *agreement* made it necessary to insert the consideration in a collateral promise to pay, why not the word *bargain* also, as Lord Ellenborough at first supposed? But the court, Lord Ellenborough consenting, overruled the decision at *nisi prius*, and decided that a contract for the sale of goods was valid, without any consideration expressed in the contract.

There are certainly grounds to suppose that some doubts began to be entertained of the correctness of the decision in *Wain* v. *Warlters*. We cannot otherwise account for the unwillingness to apply the same principle to the case of *Egerton* v. *Matthews;* and we shall see hereafter, that there was considerable cause for the Court of King's Bench to hesitate, before they applied the rule to other cases.

The import of the word *agreement* forms the principal, if not the only ground of argument, in favor of the doctrine; and because the word *bargain* is used in the seventeenth section, instead of the word *agreement*, the law is different. Well might Chief Justice Parsons say, as he did in the case of *Hunt, Adm.*, v. *Adams*, when the two cases of *Wain* v. *Warlters* and *Egerton* v. *Matthews* were incidentally brought before him; "These two decisions are not easily to be reconciled. A bargain is a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them. A contract of this sort is void in law, unless made on sufficient consideration. And the consideration of a bargain seems to be as necessary a part of it, as of any other contract or agreement; and there is the same danger of perjury in proving the consideration of a bargain by parole, as of any other agreement. But if the word *agreement* may be understood in the popular sense, as not necessarily including the consideration for it, we may approve of the decision in the latter case, while we may doubt as to the former case."

But admitting the case of *Wain* v. *Warlters* to have been received in England, as giving the true construction of the statute, and that the rule is well settled in that country,—which, it will be seen presently, is far from being the case,—it does not necessarily follow that it should be adhered to here. The decision took place long since our revolution, and can therefore be regarded only as

the opinion of great and learned men, not as an authority. We are to consider what has been the practical construction in our own country; and believing that to have been for more than a century different from the rule so lately adopted in England, it would be too late for us to resort to the etymology of a word for the purpose of obtaining a new construction, and to insist upon the legal import, instead of the popular sense of terms, which the legislature are as likely to have taken in the latter as in the former sense.

But it should be considered, in the second place, that this doctrine, when first promulgated in England, was not well received by the profession, and that to this day it is doubted and questioned, whenever it is advanced. The case of *Wain* v. *Warlters* appears to have been concurred in by all the judges of the King's Bench, but never seems to have been cited as an authority, without an apparent reluctance in the court to apply the same rule to other cases; and whenever it was possible, some distinction seems to have been sought out to save the case before the court from the operation of the rule.

Lord Ellenborough took the lead in the decision, grounding himself on the word *agreement,* and on the known accuracy of Sir Matthew Hale, who was supposed to have drawn the statute. Mr. Justice Lawrence, on the contrary, entertained doubts, and thought the statute loosely penned. Mr. Justice LeBlanc concurred, but expressed a wish that the statute had not reached the case of a promise, so as to require the consideration to be in writing.

If, as Mr. Justice Lawrence thought, the statute was loosely penned, it may be supposed the word *agreement* was untechnically used, or used in the popular sense; in which case it seems agreed that the subsequent words would not require that the consideration should be in writing. The same section provides for the case of an agreement in consideration of marriage, and of an agreement not to be performed within a year. The use of the word in these provisions led to the adoption of the same word in the succeeding part of the section, without any intention, I apprehend, of prescribing the form in which a promise in writing should be drawn up, to make it binding.

I have already adverted to the case of *Egerton* v. *Matthews,* as departing from the principle adopted in that of *Wain* v. *Warlters.* And as late as the year 1816, in the case of *Goodman* v. *Chace,* the case of *Wain* v. *Warlters* was again brought before the King's Bench. Chace, jun., was in the custody of an officer

upon a *capias ad satisfaciendum.* He had applied to the attorney of the creditor for time, and in the meanwhile to be released. The attorney consented, provided Chace's father would sign a written paper in the following words: "I do hereby undertake and agree to put the above defendant into the custody of the sheriff of H. on or before Saturday next; and in default of my doing so, I undertake to pay the damages and costs for which the said defendant has been this day taken in execution by the said sheriff, at the suit of the above-named plaintiff," The case of *Wain* v. *Warlters* was cited to show that the agreement was void, because no consideration was expressed in it. The counsel for the plaintiff denied the case to be law. Lord Ellenborough said, "It would be very desirable to have a further examination into the decisions on the other side of the hall, where these cases more frequently occur than here, in order that we may more clearly ascertain what the practice is there;" and for this purpose a second argument was ordered. But afterwards the court declared that it was not necessary to hear counsel, as this was a case clearly not within the statute, it being an original undertaking of the defendant Chace, sen. No doubt this decision was right; but the case is cited to show that counsel were allowed to deny the authority of *Wain* v. *Warlters,* and that the court hesitated so far as to order a second argument. There is strong reason to believe that the decision would have been overruled, if the case then before the Court had not been settled upon another principle.

In chancery the doctrine was not at all well received. In the case of a petition to be allowed to prove a debt which was guarantied against the guarantor, no consideration being expressed, the case of *Wain* v. *Warlters* being cited, the counsel for the petitioner said the decision of the Court of King's Bench in that case could not be supported. The Lord Chancellor Eldon said, "There is a variety of authorities directly contradicting the case in the King's Bench, which is a most important case in its consequences; for the undertaking of one man for the debt of another does not require a consideration moving between them."—14 Ves. jun. 189—So in the case Ex parte Garden. Mr. Bell, in support of the petition, mentioned the case of *Wain* v. *Warlters,* as one which could not be supported. Lord Eldon said, "The first objection, viz., that which *Wain* v. *Warlters* was cited to support, is of great importance. Until that case was decided, some time ago, I had always taken the law to be clear that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing."

This is very strong language; and yet, probably, every judge and lawyer in England and in this country would have felt himself warranted in saying the same. 15 Ves. Jun. 286.

But this is not all. The Common Bench also signified their dissent from this doctrine, as much as could be done without deciding directly contrary to it. The case of *Morris* v. *Stacy* was for the price of shoes sold to another person. The defendant was the agent and as such ordered the shoes. He proposed to give bills drawn by Wallis on Bromley, endorsed by Burns. He was pressed to endorse them himself, but refused, saying he would give a letter of guaranty, which would be as good. The letter was in these words: "I herewith send you draughts drawn by Wallis, accepted by Bromley, and endorsed by Burns; and should the bills not be honored when due, I promise to see that they do so." The counsel for the defendant cited the case of *Wain* v. *Warlters*. GIBBS, C. J., said, "It is sufficient, if it appears on the face of the letter that, in consideration the plaintiff would take the notes, the defendant would indemnify him. The consideration therefore is apparent. I do not think it necessary, in this case, to overrule the decision in *Wain* v. *Warlters*. I think this undertaking binding, notwithstanding that case." Holt's N. P. 153. This was in 1816, and it may be plainly inferred, from what fell from the chief justice, that if it had been necessary, the case of *Wain* v. *Warlters* would have been overruled. It was virtually overruled, although not expressly; for no consideration in truth appears in the letter. The signer says, I herewith hand you draughts. This imports no consideration, and it was only from extrinsic evidence that the chief justice's notion of a consideration could have been obtained. Anything seems to have been caught at, to save a case from the operation of the doctrine in *Wain* v. *Warlters*.

Such being the reputation of that case in England, it surely does not present a very formidable obstacle to a different construction of the statute in this country; and certainly it would not warrant us in overruling what we believe has been the practical, as well as the just construction in our courts for so long a period. It is indeed desirable that statutes, made for the regulation of personal contracts in commercial countries, should receive similar adjudications in all courts. But it is better for those courts, who may have adopted a novel construction, to retrace their steps, and go back to the old foundations, than that others, from a spirit of comity, should imitate them; for innovation in the administration of justice, or in the principles of jurisprudence, is more to be

dreaded than anywhere else; as it tends to unsettle the minds of the community, and to introduce into the judicial tribunals the practice of legislating, under the guise of declaring the law, which is their proper function.

We have taken pains to inquire what reception the doctrine, which we consider novel and unsound, has met with in any of the courts of the United States; and we do not find it has been recognized any where but in New York. We are in the habit of showing great respect to the decisions of the Supreme Court of that state; for that bench, ever since we have been enabled to judge of its character by the masterly reports of Mr. Johnson, has been distinguished by great learning and uncommon legal acumen. If any thing could cause us to hesitate in pronouncing an opinion, which we have arrived at after mature deliberation, it would be to find that opinion contradicted by a deliberate decision of a court we so highly respect.

But there are some circumstances attending the decision upon this subject by that court, which we think may justly, in some measure, impair its influence on our minds. The case of *Sears* v. *Brink*, in which the question first occurred, happened not a great while after the case of *Wain* v. *Warlters* was first promulgated in this country. The habitual veneration, which the courts of this country have ever entertained for the opinions of the great men who successively fill the seats of the Court of King's Bench, would naturally lead to the adoption of those opinions, in analogous cases. The judicial propensity is to repose upon authority. This propensity, although almost always useful, as it tends to repress ingenious searches after novelties and distinctions; which, if indulged, would produce uncertainty in that science, which, more than all others, the public interest requires should be fixed and stable, may sometimes lead to a hasty adoption of principles, which a deliberate investigation would prove unsound. In this case of *Sears* v. *Brink*, Judge VANNESS, who delivered the opinion of the Court, seems to have relied more upon the argument and reasoning of Lord ELLENBOROUGH, in the case of *Wain* v. *Warlters*, than upon the resources of his own mind, for the construction of the statute; and this it would be natural for any judge to do, under the like circumstances. Like him, he resorts to the etymology, and the technical import of the term *agreement*, as the basis of his construction.

I think that it has been shown that too much stress was laid upon this source of argument. Indeed, I cannot but entertain the belief that neither the British parliament, nor the legislature

of New York, or Massachusetts, ever looked into Plowden or Comyns, or any law dictionary, to ascertain the force and meaning of that term, as has been done since, in order to make out the construction of the statute. Sometimes the sense of an instrument or statute is lost by looking too deep for it; as men have been known to impoverish themselves by digging into the bowels of the earth for riches, which they would have obtained with less labor by working upon its surface. Not that I am disposed to treat with disrespect the labors and researches of patient and learned jurists, in ancient or modern times. Certainly the science of law requires such investigations, but, as in other sciences, the object of pursuit has been sometimes lost, by reason of its being thought at a distance, when all the time it has been near.

Another thing is worthy of remark, viz., that it is probable that neither the Court, nor the counsel, when the case of *Sears* v. *Brink* was discussed, knew that the case of *Wain* v. *Warlters* was a suspected case in England; for neither of them advert to any of the cases in which the doctrine has been doubted. Indeed, the strongest of those cases has been passed upon since the case of *Sears* v. *Brink*. The case of *Wain* v. *Warlters* at that time stood in New York unquestioned, and therefore came with great force upon the minds of the bench and bar.

But afterwards, in the case of *Leonard* v. *Vredenburg*, the question was again presented to the New York court; and Chief Justice Kent bestowed the attention of his powerful mind upon it. I do not understand him as approving the doctrine. On the contrary, in reference to the cases of *Wain* v. *Warlters* and *Sears* v. *Brink*, he says,—"I have not been altogether satisfied with the decisions referred to." He then discovers, what did not occur to him at the trial of the action, that it admitted of a distinction from those two cases, and therefore says—"The present motion can be determined in favor of the plaintiff, without disturbing them." He then proceeds to make an ingenious, and I think, a just classification of the cases which have generally been thought to come within the statute.

His first class is, where credit has been given upon the previous agreement of a third party to pay, or guaranty payment, for goods which shall be delivered. This he calls a collateral engagement within the statute, but no proof of consideration necessary, except the debt which is created. The collateral undertaking in such case is the essential ground of the credit given; and the case of a surety or guaranty of a contract, subscribing at the same

time with the principal, is within this class. *Vide Hunt, Adm.*, v. *Adams*, 5 Mass. Rep. 358, and *Stadt* v. *Lill*, 9 East, 348.

The second class is, where the collateral security is subsequent to the creation of the debt, and not the inducement to it. Here a further consideration must be proved, such, I suppose, as forbearing to sue, or the surceasing of a suit.

And the third class is, when the promise to pay the debt of another arises out of some new consideration of benefit or harm, moving between the new contracting parties. Such is the case, when the creditor gives up some lien or attachment, in consequence of the promise of the third party to pay the debt. This latter class he considers an original undertaking, capable of being proved by parole, as not coming within the statute; and this agrees with the English doctrine, as settled in the case of *Williams* v. *Leper*, 3 Burr. 1886.

Now it is a little remarkable, that, in giving so minutely the qualities of these different classes of contracts, and in adverting to *Wain* v. *Warlters*, as coming within the second class, nothing is said from which the necessity of having the consideration, as well as the promise, in writing, can be inferred. All the inference, which can be fairly made, is, that such a promise must have a new consideration proved. But the kind of proof is left undecided; and the case before the Court was determined to be within the third class, which required no proof of a distinct consideration. There was therefore no necessity of "disturbing the cases which had been decided," and with which the learned chief justice, "was not altogether satisfied."

But if the word *agreement* in the statute is to be referred to collateral promises, as was determined in the cases of *Sears* v. *Brink and Wain* v. *Warlters*, it is not easy to see why the first class of cases, any more than the second, should be excluded from the operation of the rule. There must be a consideration. This is admitted on all hands. The only question is about the mode of proof.

When a man, for his own debt, makes a promissory note, not negotiable, and a third party puts his name on the back of the note, this is to be considered a promise to pay the debt of another, and he may be sued either as a surety or guarantor. If he is considered a surety, according to our case of *Hunt, Adm.* v. *Adams*, he is viewed as an original promisor; and no other evidence of consideration would be required, than against the principal in the note. But no man can be held on such a promise, unless it be in writing and signed by him. So that the case is within the statute,

and yet whatever consideration moved to the undertaking, may be proved by parole, according to our law, and to the case of *Leonard* v. *Vredenburg*.

Suppose a promissory note given by A to B payable in sixty days, expressly in consideration of a preexisting debt; and C at the same time writes on the back, "I promise to pay the contents of the within note in ninety days, if A does not pay it according to its tenor, demand being made upon A, when it falls due, and notice given to me of non-payment." This is certainly a promise to pay the debt of A. No consideration is expressed; and yet the consideration is the credit given to A. It comes within the statute; for such a promise would be void unless in writing. But this agreement would be within Chief Justice Kent's first class of cases, in which the consideration may be proved by parole. All the mischiefs, supposed to be provided against by the statute, would exist in the case put, as much as if the collateral undertaker had signed his name the day after the original promise; which would bring the promise within the second class of cases, supposed by Chief Justice Kent to be governed by the case of *Wain* v. *Warlters*.

This important question came before the Supreme Court of the United States, in the case of *Violet* v. *Patton*, 5 Cranch 142. The case was from Virginia, and arose on their statute of frauds, which is like ours and the English statute; except that it provides that the undertaking shall be void, unless the promise or agreement shall be in writing, and signed by the party, &c. Chief Justice MARSHALL, in delivering the opinion of the Court, considers the variance from the English statute so essential, that the doctrine in the case of *Wain* v. *Warlters* does not apply. It is worthy of remark that the words of the Virginia statute are precisely what Mr. Justice LE-BLANC said, in the case of *Wain* v. *Warlters*, he wishes the English statute had been. There must be a consideration to a promise, as well as to an agreement; and if the intention of the legislature was that the consideration of an agreement should be in writing, there seems to be no reason of policy why a different principle should be applied to a promise. For the evils to be remedied by the statute are as great in one case as in the other; it being as easy to set up the consideration of a promise by perjury, as the consideration of an agreement.

The case of *Russell* v. *Clark & Al.*, 3 Dallas, 415, was referred to by the counsel for the defendants, as deciding that the consideration of a promise to pay the debt of another must be in

writing. But we have looked into that case, and do not find it to be so. Letters were relied upon to prove that the defendants promised to guaranty certain bills of exchange; but the letters did not prove the fact. Parole evidence was admitted at the Circuit Court, to prove that a promise was really intended by the letters; but the Supreme Court reversed the decision, on the ground that, by the statute, the whole agreement, that is, the whole promise, was required to be in writing; and this was certainly correct. Nothing was said about the consideration.

We have not been able to find that any judicial decision has taken place upon the statute of frauds, &c., in any other court within the United States than those I have alluded to. In a note, however, to the case of *Wain* v. *Warlters,* in the Connecticut edition of East's reports by Mr. Day, an elaborate examination of the doctrine is given by their late Chief Justice Swift. In his argument he has gone into a profound investigation of the legal meaning of the word *agreement,* in order to meet the principal argument of Lord Ellenborough; and he concludes with a decided disapprobation of the doctrine laid down by the Court of King's Bench.

With respect to our own Court, whenever the case of *Wain* v. *Warlters* has been cited, it has been treated as doubtful, and has never been recognized as law. I have already cited the observations of Chief Justice Parsons upon it, in the case of *Hunt, Adm.,* v. *Adams;* and there is no doubt, from what fell from that great man upon that occasion, that, had the case before him required it, he would have saved us the trouble of this elaborate investigation.

The case of *Ulen* v. *Kittredge,* 7 Mass, Rep. 233, was decided in direct opposition to the principle contended for by the defendants in this action; although the cases of *Wain* v. *Warlters* and *Sears* v. *Brink* were cited and urged by the able and learned counsel for the defendant. Indeed, the Court, in the case referred to, went far beyond what is necessary to support the action now before us. For the endorsement of Kittredge was in blank, upon a pre-existing note, to which he was not a party; and the plaintiff was permitted, not only to prove by parole the consideration, but to insert the words of a guaranty over the name of Kittredge, upon proof that he declared his signature as good, for the purpose intended, as if anything had been written over it.

Upon this review of the cases, which have arisen in this country and in England upon this important subject, we are relieved from any imputation of disrespect towards the courts of King's

Bench, or of New York, in declining to adopt the construction which they have given to this statute.

We find the case of *Wain* v. *Warlters* to have been received with doubt and hesitation by the tribunals of the same country in which it was decided; that the case of *Sears* v. *Brink* has not been fully recognized, in any case arising subsequently in New York; that in the Supreme Court of the United States the doctrine was doubted, and the application of it avoided; that in Connecticut an eminent jurist has borne testimony against it; that in our own state, a judge of the first eminence has spoken of it unfavorably; and that one case has been decided in direct opposition to it.

We are not, therefore, overruling a settled principle, or introducing a new construction, in refusing to yield to this doctrine, but are merely vindicating what we believe to be the true and established construction, from the doubts brought upon it by the decision of the Court of King's Bench.

A contemporaneous is generally the best construction of a statute. It gives the sense of a community, of the terms made use of by a legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature, and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law; and after it has been acted upon for a century, nothing but legislative power can constitutionally effect a change. We can say with Lord Ellenborough that, until the case of *Wain* v. *Warlters* was decided, "we had always taken the law to be clear, that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing;" and so understanding the law, we have no authority or disposition to change it.

The Court, for the foregoing reasons, are unanimously of opinion that the plaintiff's action is well maintained by the writing declared on, and by the parole proof which was given to support it.

Judgment on the verdict.

14. REED v. EVANS, et al., 17 Ohio 128.
Supreme Court Ohio, in Bank, 1848.

The consideration for a promise to pay the debt of a third person need not be in writing.

This is a writ of error, directed to the Court of Common Pleas of Lucas County.

The original action was founded upon the following guaranty: "$175. For value received, I promise to pay to John Forman & A. G. Evans, or order, one hundred and seventy-five dollars, with interest from date, to be paid as follows, to-wit: one-third in one year, one-third in two years, and the remaining third in three years. Witness my hand and seal, this 28th day of January, A. D. 1836.

HENRY REED, JR. (Seal).

I hereby obligate myself that the above note shall be paid in three years from this fourth day of June, 1838.

HENRY REED."

The declaration contains four counts.

The first averred a general indebtedness from Henry Reed, jr., to the plaintiffs, and in consideration that the plaintiffs would give time to said Henry Reed, jr. for the payment thereof, until three years from the fourth day of June, 1838, he, the defendant, by his promise in writing, bound himself to pay the same at such time—that time was given accordingly, and excused demand and notice at the expiration of the guaranty because of the insolvency of the principal.

The second was like the first, except that the indebtedness was described according to the fact, as by the note.

The third was like the second, except that demand and notice was averred instead of the excuse.

The fourth was the common count.

Plea, the general issue.

The case was submitted to the court, without the intervention of a jury, and judgment rendered for the plaintiffs. * * *

Young & Waite, for plaintiff in error.

Fitch & McBain, for defendants.

BIRCHARD, C. J.—This case was submitted to the court below upon the proofs offered by the plaintiff. Exception was taken to the sufficiency of the testimony offered in support of the action. The court found it sufficient, and no motion for a new trial was presented. By treating the exception as a demurrer to the evi-

dence, and in no other way, can the questions argued upon the assignment of error be considered. Viewed in this light, the proof offered below should be considered as establishing every fact which may reasonably be inferred from the evidence, without drawing therefrom forced or violent inferences. Trying the evidence by this rule, did it establish the cause set forth in the declaration?

The consideration of the promise declared upon is alleged to have been forbearance to sue Henry Reed, jr. for three years, from the fourth of June, 1838.

The evidence to support this averment consisted of the written promise, of proof that no claim of payment from Henry Reed, jr. was made within three years; that plaintiff below forbore to prosecute for three years, and that after the expiration of that time, the defendant below offered to pay the claim in Ohio state bonds. That again, in 1842, he proposed paying the same in property, or excused himself when called on, by alleging inability for want of means, but at no time denied his liability to pay the same.

Now it may be said that this all does not prove directly that the consideration alleged actually existed, yet one could scarce doubt from these facts that a good consideration did exist; and the presumption is that it is the one set forth in the declaration. It is unreasonable to presume that the written engagement was entered into without cause. The judges of the court of common pleas had the facts so before them that they were justified in drawing all reasonable and fair inferences that could be well based upon this evidence. They might well presume, from the circumstances, that the delay granted to the maker would not have occurred without cause.. That the promises to pay in state bonds or other property, as well as the excuses for non-payment, would not have been made without a binding promise. The circumstances, viewed in a favorable light, certainly looked toward the support of a consideration for the written guaranty; and to no other than the identical one set forth in the declaration. We are not prepared, therefore, to say that the court erred in this respect.

But it is further urged that no evidence was admissible to prove any consideration, none being expressed in the written guaranty.

This objection presents a vexed question, arising out of the act for the prevention of frauds and perjuries. It is believed that in this state it has been hitherto uniformly held, that a promise, in writing, to pay the debt of another, if founded upon a good

consideration, would sustain an action, and that such a consideration might be proved by parol, and need not be set forth or incorporated in the writing itself. Upon this question different courts have held different opinions. It was to me a matter of some surprise to find that the law of this state, upon this point, was considered unsettled. The case was brought into bank, in order that a reported case, in accordance with what was supposed to have been the uniform current of decisions in this state, might be placed within the reach of every one, and not because the point was regarded doubtful.

Our statute is similar, so far as it bears upon this question, to the English statute of 29th Charles 2d, c. 3, s. 4. In 1804, in the case of *Wain* v. *Warlters*, that statute, for the first time, received a construction requiring a recital, in writing, of the consideration on which a promise to pay the debt of another is founded. The doctrine seems to have taken the profession in England by surprise. It has been repeatedly questioned in England, but has hitherto been sustained there. 14 Ves. p. 189; 15 Ves. p. 286.

In 1808, the principle held in *Wain* v. *Warlters* was adopted in New York, and these decisions have been perhaps the means of giving a more extended currency to the doctrine of that case in some of our sister states, and possibly may have contributed to its stability in the country of its origin. But in 1809, in the case of *Hunt* v. *Adams*, 5 Mass. Rep. 360, the doctrine of *Wain* v. *Warlters* was departed from, by the supreme court of Massachusetts, and, as we think, very good reasons were given for the departure by the learned Chief Justice Parsons. He held the English case to be one of first impression, but admitted that if the word *agreement*, as used in the statute, is to be taken not in a popular but in a strictly legal sense, it might be unreasonable to question that decision. He held, however, that the word agreement originally incorporated into the statute, was used in the popular sense, as intending the undertaking of the party charged, and not necessarily including the consideration for it. This view of the statute was reaffirmed by the same court in 1821, in a learned and able opinion by Parker, C. J., in *Packard* v. *Richardson et al., 17 Mass. Rep.* 137, in which he reviewed at length all the cases then decided upon this subject. His concluding remarks are worth copying. "We are not (says the judge) overruling a settled principle, or introducing a new construction, in refusing to yield to this doctrine; but are merely vindicating what we believe to be the true and established construction, from the doubts brought upon it by the court of King's Bench."

Well might he call it the vindication of an established construction, for from the reign of Charles II. to the year 1804, it had always been understood, both in England and the United States, that it was not necessary that the consideration should appear on the face of the writing. So said Lord Eldon, and so said Lord Ellenborough. The question was, what did the statute mean, or rather what did the men who framed the act, and parliament mean in King Charles' time, when they enacted the law? Those best able to answer were its cotemporaries—the legislators and judges who lived at the time of the enactment, and within the first century afterward. Their construction, in the language of the Massachusetts court, "became established law," for whatever was the meaning of the statute when first enacted, should be its meaning through all future time. It is the very essence of a law, that it be uniform and unchangeable.

Again, it is said there should have been a demand and notice of non-payment. To this, we reply, that the engagement was an original undertaking to pay the amount of the note in three years. It was not an engagement that the maker should pay the note when due and if not, that the guarantor would pay it, but that in consideration that the payee would delay the payment until two years after the maturity of the note, the guarantor would pay it. No demand, under this contract, was required of the maker, at the maturity of the note; it was not contemplated by the parties. On the contrary, the consideration of the promise not only excused the making of such demand, but made one improper. The promise was made because the payee had agreed to delay payment when the note fell due, and not then demand it.

Judgment affirmed.

d. Of the words "memorandum or note."

15. THE ARGUS COMPANY, respondent v. THE MAYOR, &c., appellants, 55 N. Y. 495.

Court of Appeals, New York, 1874.

A resolution of a common council, duly adopted and entered upon its records and signed by the clerk of said common council, constitutes a memorandum or note in writing.

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, reversing a judgment in favor of plaintiff, entered upon the report of a referee and granting a new trial. (Reported below, 7 Lans., 264).

This was an action for an alleged breach of contract.

The common council of defendants, on the 26th day of January, 1863, adopted the following resolution:

"*Resolved*, That the proceedings of this board be reported for, and published in, one daily paper, to be designated by the board, at an annual expense not to exceed $1,000; and that all city advertising be published, at the rates prescribed by law for the publication of legal notices, in the same paper, such designation to be for the term of three years; also, that all printing and binding chargeable to the city be done by the proprietor or proprietors of such paper for the like term, at the rates current in the city, and that the chamberlain be and he is hereby authorized and directed to enter into contract accordingly with such proprietor or proprietors as the board may designate."

The said resolution was adopted by a vote of two-thirds of all the members, taken by yeas and nays. On motion, the Atlas and Argus, a daily newspaper published by plaintiff, was designated "as such official paper." The resolution and motion were entered in the book of minutes, and the minutes for the day, thus entered, were signed by the clerk of the common council. In pursuance of said resolution, a contract in writing was executed on the 27th day of January, 1863, by the chamberlain on behalf of the defendants and by plaintiff, for three years from that date.

On the 16th day of January, 1866, the common council adopted the following resolution:

"*Resolved*, That the Argus be, and hereby is, designated as the official paper, in accordance with the former resolutions of the common council, establishing an official organ for the city."

This resolution was not adopted by a vote taken by yeas and nays entered on the minutes, but the resolution was entered on the minutes, which were signed by the clerk of the common council. "The Argus" mentioned in the resolution was the newspaper published by the plaintiff. After the resolution was adopted, the plaintiff subscribed a written acceptance thereof, which was filed by it with the clerk of said common council on the 27th day of January, 1866, and no contract with defendant's chamberlain was made. After such acceptance, the plaintiff proceeded to, and did publish the proceedings of the common council, in The Argus, and continued so to do for the space of three years thereafter. On the 4th of June, 1866, the common council passed a resolution, by its terms rescinding the resolution of January 15, 1866, and another resolution amending that of January 26, 1863, in substance striking out the clause as to publication of the proceedings, and giving the residue of the work provided for therein to other papers.

After the passage of said resolutions, plaintiff served written notice on the common council, protesting against the same, claiming its paper to be the official organ, and expressing its willingness to do the work and perform its contract. Plaintiff claimed to recover the contract price for publishing the proceedings of $1,000 per annum, and the profits on the work given to other papers. * * *.

N. C. Moak for the appellants.

Samuel Hand for the respondent.

FOLGER, J.—The plaintiff seeks to recover upon an agreement which, by its terms, was not to be performed within one year from the making thereof. It can do so if the agreement, or some note or memorandum is in writing and subscribed by the party to be charged thereby. * * *

In this case the party to be charged, and whose subscription is needed is the defendant, a municipal corporation. It is plain that such a defendant can make no note or memorandum, nor subscribe the same, save by an officer or agent thereof. It is so, also, that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded, as it takes place, in the books kept for that purpose by its clerk or secretary. Hence it is that its agreements are rarely oral, but, *pari passu* with the making of them, they are on the instant of formation put into writing, and thus a note or memorandum of them is made; and the minutes of the day's doings of the body, being signed by the clerk thereof, there is a subscription of the note or memorandum, made by the party, by its agent duly authorized. This is a satisfactory compliance with the statute. It meets the purpose and intention of the law, by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing, subscribed by the party to be charged thereby, the subscription made by an authorized agent. And so are the authorities. (*Johnson* v. *Trinity Ch. Society*, 11 Allen 123; *Tufts* v. *Plymouth Gold Mining Co.*, 14 id. 407; *Chase* v. *City of Lowell*, 7 Gray 35; *Dykers* v. *Townsend*, 24 N. Y. 57).

The resolution of the 26th January, 1863, is a full note or memorandum of an agreement as to the work which the defendant agreed to have done. Nor did this resolution expire by any limitation of its own, at the end of three years from its adoption, and so require a new passage to be still operative. Until rescinded in terms, it was lasting in its expression of a determination by the city to have its printing done at certain rates, by one daily paper

to be designated by the city. It was this designation, only, which had a limit to a term of three years. The resolution, as to all but the party with whom the agreement was to be, was perpetual, unless rescinded by action of the city; and it needed nothing but the designation of some daily paper, at the end of each term of three years, entered upon the daily minutes, signed by the clerk, to do all which the city need to do, to make a note or memorandum in writing, subscribed by the party to be charged thereby.

The resolution of 15th January, 1866, also recorded in the minutes and signed by the clerk, designating anew the plaintiff's daily paper, started another term of three years. For the agreement was already there, save the name of the party to be agreed with, and that this resolution supplied.

Nor did this last resolution need to be passed with a call of the ayes and nays, and they entered upon the record. It was not a law or a resolution involving an appropriation or payment of money for any purpose. (Laws of 1848, chap. 139, p. 217, sec. 1). The purpose was decided upon by the former resolution. The design of the provision of the act of 1848, is to expose to accountability to the public, those who in places of public trust, sanction new objects and purposes for expenditure of public money. An expenditure having been once determined upon, it does not again involve it, that by resolution one is selected to do the work, any more than where an office under the city government, having been created by resolution and a compensation having been attached to it, by a subsequent resolution one is named to fill it.

Nor does the resolution contemplate that the chamberlain is to negotiate for the publication of the proceedings of the board at a sum less than $1,000. It is a proposal—in connection with the other resolution, designating the plaintiff's paper as the official organ—to the plaintiff, to pay it not to exceed $1,000 for doing certain work; the plaintiff's answer is an acceptance of that sum and an agreement to do the work therefor. It is different from *Haydock* v. *Stow* (40 N. Y., 364). That was a power intrusted to an agent, with a minimum limit of price, but no maximum; and hence the duty of the agent to his principal to obtain more if he might. This is an offer by one party to another, which the other accepts without intervention of an agent, and the maximum compensation named is the compensation agreed for. Besides, the direction to the chamberlain does not contemplate any change of the terms of the resolution; he is directed to enter into a contract *accordingly*, i. e., in the terms specified in the resolution. Moreover, before the second resolution of designation, he has

already done his duty in making the contract, with which the defendant is satisfied. The second resolution, of January 16, 1866, is an offer by the defendant to renew it for another term of three years; and so the defendant does not remain free from obligation, under that resolution, until the chamberlain has again entered into a contract. The contract which he was directed to make, expressing no more in fact than the resolution of 1863, was satisfactory to the defendant. The defendant, agreeing to the terms of that resolution and contract, by the resolution again designating the daily paper of the plaintiff, proposed to it to renew the same for another term of three years. As soon as the plaintiff signified in writing its acceptance of that proposal, the contract was renewed for another three years' term, and, as we have seen, was legally embodied in writing, and was subscribed according to the statute. A letter from a party to be charged, specifying the terms of an agreement, and directing an assignment to be drawn in accordance with it, is a good memorandum of the contract, though the assignment never be made. (See *Smith* v. *Watson,* cited in *Gibson* v. *Holland,* Law Rep. [1 Com. Pl.] 6). The common council did not contemplate not being bound, until a contract other than the resolutions and some acceptance of it was made. Those cases which have turned on such point, have been where a further contract was needed to express the details of the bargain, where those had yet to be arranged between the parties.

Nor does the fact that the rates for printing and binding are not expressed, but reference is made to something outside of the contract, and which must be established by parol testimony, invalidate the contract. This contract is not so much open to objection for this cause, as if no price was expressed, nor reference made to anything by which it might be determined, and the parties were left to proof of a *quantum meruit.* Yet in such case, a memorandum has been held to be in compliance with the statute. (*Hoadly* v. *McLaine,* 10 Bing., 482; *Ashcroft* v. *Morrin,* 4 M. & G. 450). The first resolution does not require that the chamberlain ascertain what the current rates are, when he enters into his contract, and make them the rule of compensation the three years through. What he is to do, if he does aught, is to put into his contract the phrase of the resolution. For the designation and the contract is for three years; and the rates current at the beginning of the term, may be quite different from those current in any time and at all times through the term of three years, that the defendant contracts, willing to pay its designated official paper so much and no more, and asking work for no less than at the

terms current for the same service, in the city where the work is done, from time to time.

Nor is the idea that there was no delivery to the plaintiff of the resolution of 1866, one that can prevail. There had once been delivery of the same agreement and performance of it by both parties. It was not changed. The resolution of 1866 was but a proposal to the plaintiff to renew it. It was adopted 16th January, 1866. Until that day, under the first contract, all proceedings of the common council were reported for, delivered to, and published in, the paper of the plaintiff. The resolution of January, 1866, at once on its passage, was reported for and delivered to the plaintiff, to the knowledge of the defendant's agents. Nor is it always needed that there be delivery to the other contracting party, to bind the one who is sought to be charged by the note or memorandum. Where one, by his agent, has dealt with another, a written communication to the agent, reciting the terms of the agreement made by the agent with that other, and ratifying the same, will answer the statute. (*Gibson* v. *Holland*, supra). And so will a written communication to the other, expressive of the terms, yet repudiating an obligation. (*Bailey* v. *Sweeting*, 9 C. B. [N. S.,] 843). The plaintiff did accept the proposal for a renewal by filing its written acceptance with the clerk of defendant. The clerk had no authority to make a contract or to assent to a proposition for one. But he was the custodian of the papers of the common council, and an organ of communication between it and those not members of it. It also accepted it, by acting under it to the knowledge and with the assent of defendant's agents. (*Smith* v. *Neale*, 2 C. B. [N. S.] 66).

The plaintiff has a good cause of action on the contract; but for the reason given by the General Term, it was proper that there should be a new trial, rather than judgment absolute ordered in that court. But there being a stipulation under the eleventh section of the Code, on appeal to this court, the order of the General Term, should be affirmed, and judgment absolute for the plaintiff.

All concur, except *Grover and Rapallo*, JJ., dissenting.

Order reversed, and judgment accordingly.

B. Promises Not Within the Statute.

a. When the promise is the original undertaking of the promisor.

16. CASEY v. BRABASON, 10 Abb. Pr. 368.
Supreme Court, New York, Special Term, 1860.

One who signs a note as if he were principal is in law an original promisor, although in fact he was a mere surety.

Motion for a new trial.

This action was brought upon a promissory note, in the words and figures following, to-wit:

"$200.

On or before two years, we jointly and severally promise to pay to Michael Casey, or his order, the sum of two hundred dollars. Given under our hands,

January 8, 1856." (Signed) Bernard McCabe,
Catholic Pastor.
Charles J. Brabason."

The defendant alleged in his answer that he signed the note as surety, and without consideration.

The proof showed that the note was given for a debt of McCabe's, and that the defendant signed it as his surety, without receiving any consideration therefor.

The defendant insisted that he was not liable, but the judge held otherwise, and directed the jury to find for the plaintiff; to which decision and direction the defendant excepted. The jury rendered a verdict in favor of the plaintiff for $229.10.

The action was tried at the Chenango circuit in February, 1860.

Defendant moved for a new trial on a case and exceptions.

The other points in the case need not be stated, as they were not deemed of sufficient importance for examination.

Wm. H. Hyde, for plaintiff.

Horace Packer, for defendant.

Balcom, J.—The instrument in question is a valid promissory note, although it does not contain the words *for value received*, or any words tantamount to them. (Edwards on Bills and Promissory Notes, 56, 78; 1 Cow., 2d ed., 163).

The defendant's counsel does not deny but that McCabe was liable on the note; but he contends that the defendant is not liable on it, because he signed it as surety, and did not receive any con-

sideration therefor. He insists that the statute of frauds applies to the case, and exempts the defendant from the payment of the note. The statute is, that "every special promise to answer for the debt, default, or miscarriage of another," shall be void, unless the agreement containing such promise, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party to be charged therewith. (2 Rev. Stat., 135, sec. 2).

McCabe owed the plaintiff the money mentioned in the note; and the defendant, though in fact a mere surety, signed the note *as principal*, with Mc Cabe. The note, therefore, was not a special promise by the defendant to answer for the debt, default, or miscarriage of McCabe.

I think the debt, for which the note was given, a sufficient consideration to uphold the note against the defendant as well as McCabe. The note, on its face, is an original undertaking of both of them.

If the defendant had indorsed the note for the accommodation of McCabe, instead of signing it as maker, he would clearly have been liable on it, if it had been duly protested for non-payment; and I am unable to see why he is not liable on it as maker.

I am of the opinion that the statute of frauds does not apply to the case; and that the jury were properly directed to find a verdict in favor of the plaintiff for the amount of the note.

The point that the defendant supposed he was only signing his name to the note as a witness when he wrote it, is untenable; for his answer concedes he signed it as surety.

I think there was no question for the jury upon the evidence; and that the defendant's motion for a new trial should be denied, with $10 costs.

17. MORRIS, et al., v. OSTERHOUT, et al., 55 Mich. 262.
Supreme Court, Michigan, 1884.

A promise to pay for goods supplied to a third person is not within the statute of frauds as a promise to pay the debt of another person.

Assumpsit. Defendants bring error. Affirmed.

T. J. O'Brien, for appellants.

Cooper & Winsor, for appellees.

SHERWOOD, J.—The plaintiffs, who are millers residing at Reed City, brought their action of assumpsit against the defend-

ants, who are engaged in the lumber business and reside at Grand Rapids, to recover for a quantity of flour and mill-feed, amounting to the sum of $482.92. James H. Carey had a contract with defendants whereby he was to do sawing and make shingles for them at Careyville, in Lake county, where the defendants had a quantity of pine timber. The flour and feed was purchased by Carey and used by him while doing the sawing for defendants, and when he made the purchase he told the plaintiffs that the goods were for the defendants; that he was at work for them, and that they had ordered him to get the goods for them. The plaintiffs seek to hold the defendants liable under the authority, which was verbal, thus claimed to have been given Carey to make the purchase, and a subsequent promise claimed to have been made by Hughart to pay for the goods, which, however, is denied by the latter. The defendants claim that by the terms of their agreement with Carey they were under no obligation to supply the goods or to make advances to Carey, and that they never authorized him to make the purchase on their account.

The questions at the circuit were mostly those of fact, and were submitted to the jury, who, under the rulings and charge of the court, rendered their verdict for the plaintiffs for the amount claimed. The defendants bring error, and the rulings and charge of the court are now before us for review.

At the close of the trial the defendants' counsel asked the court to direct a verdict for the defendants. The request was refused.

We do not think the record presents a case for the instruction asked. Carey swears, in substance, that the defendants gave him authority to make the purchase on their credit, and the credibility of his testimony was for the jury. If he stated truly the direction sworn to by him as coming from defendant Hughart, the jury would be warranted in finding that the defendants authorized the purchase. The promise would be by defendants and not by Carey, and therefore not within the statute of frauds. It would be a debt contracted upon their own promise, and not a liability for the debt of another.

It is alleged as error that the court refused to give defendants' second, eighth and ninth requests to charge, which requests were as follows:

"*Second.* If the jury finds from the evidence that the goods were charged, shipped and billed to Carey; that no bill was ever sent to the defendants; that the plaintiffs took an order on the defendants for the amount of the bill, and afterwards presented

this order and requested its acceptance and payment, and still retain this order—such evidence is inconsistent with the claim now made by the plaintiffs, and they cannot recover in this action."

"*Eighth.* Under the undisputed facts in this case, it appears that Carey is still liable to the plaintiffs for the amount of the goods in question, and the plaintiffs cannot recover in this action."

"*Ninth.* It is not sufficient for the jury to find that Hughart authorized Carey to buy in their name and upon their credit. They must also find from the evidence that the credit was given to Osterhout and Hughart and not to James H. Carey. And in arriving at a conclusion on this point they should consider all the acts and conduct of the plaintiffs: such as the entry in their books, the shipping of the goods, the taking of the order, their repeated efforts to collect it, and their present possession of it."

The second and eighth requests, we think, were properly refused. The facts stated in the second request exclude the idea that the inconsistency claimed for them is susceptible of explanation, but such is not the law. The eighth request seeks to have the court state what the undisputed facts show. What they show was a question for the jury, and in this case cannot be considered disconnected with the other testimony in the case bearing on the same point.

The circuit judge in his charge stated to the jury that the *first* proposition for the plaintiffs to establish was that Carey was authorized by defendants to purchase the goods for them; and *second,* that plaintiffs, when Carey made the purchase, relied entirely upon defendants, and not upon Carey, for the pay; and if they found in the affirmative of these propositions the plaintiffs would be entitled to recover; if not, the defendants must prevail. He further told them that, in solving these propositions, they must take into consideration all the testimony in the case, including the actions of the parties. We think these charges sufficiently cover the substance of the defendants' ninth request.

We have carefully examined the remainder of the charge excepted to by defendants' counsel and do not find any error therein. The facts were for the jury, and whether the court below or this court would or would not have come to the conclusion reached upon the testimony is not for our consideration. We find no error in the record committed by the court, and here our duty ends.

The judgment must be affirmed.

The other Justices concurred.

18. GIBBS, et al. v. BLANCHARD, 15 Mich. 292.
Supreme Court, Michigan, 1867.

A joint promise to pay the debt of one is an original undertaking as between the promisors and promisee and does not come within the statute of frauds.

The facts and the exceptions to the rulings and the charge of the court are stated in the opinion.

M. J. Smiley, for plaintiff in error.

H. F. Severens, for defendant in error.

CHRISTIANCY, J. The main question in this case is whether the promise of Gibbs (one of the defendants below) comes within the second clause of the second section of our statute of frauds, as a "special promise to answer for the debt, default, or misdoings" of Daily, the other defendant.

The declaration contains a special count upon the contract, and the common counts for goods sold and delivered. The special count sets forth that, "in consideration that said plaintiff agreed to sell to the said Daily a certain horse which the plaintiff then and there had, of the value of sixty dollars, undertook and promised the said plaintiff to make, sign and deliver their promissory note to said plaintiff or bearer, in the sum of sixty dollars, for the purchase price of said horse, which said promissory note was to be payable thereafter, in six months from date." It further alleges that the plaintiff, relying upon said promise of said defendants, and in consideration thereof, did sell and deliver the horse to said John Daily, for the price of sixty dollars. The breach alleges the failure and refusal to make and deliver the note, as well as the refusal to pay the money.

It was clear, from the evidence, that the horse was bought for the benefit of, and delivered to Daily, and that the plaintiff would not have sold the horse on the credit of Daily alone. But upon the question, whether Daily and Gibbs were to give a joint note, or whether the latter was only to indorse the note of the former, or to become his guarantor, the evidence was conflicting.

There was evidence from which the jury might have found a joint promise, or, in other words, a promise by both to execute and deliver to the plaintiff a joint note for the price; and from the circumstances and subsequent acts of the parties, the jury might have been authorized to find that the note was to be made payable in six months, though they might also have found that no particular time was mentioned or expressly agreed upon for which the note was to run.

The evidence tending to show that the promise was joint, or that a joint note was to be given, was substantially this: Gibbs and Daily called upon the plaintiff together, and Gibbs asked plaintiff if he wanted to sell his mare. Plaintiff said he did. Gibbs inquired the price, and being told sixty dollars, wanted to know if plaintiff would take Daily's note if he, Gibbs, would sign it and see it paid; to this plaintiff assented. The mare not being present, and Gibbs, being anxious to get home, said Daily might go with plaintiff and see the mare, and if the mare suited him he might fetch her back with him and draw up a note and Daily might sign it, and the first time he, Gibbs, went to town he would sign it. The mare was delivered to Daily, who signed a note for it at six months, which was afterwards endorsed by Gibbs on Sunday. This note was produced on the trial and tendered back to defendants.

The court charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as indorser, the plaintiff must fail. If however, the understanding of the parties was, at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for the price, then both are purchasers, and the case is not within the statute of frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the statute of frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Though the question is one requiring some accuracy of discrimination, I have come to the conclusion, after a careful examination of the authorities, that the charge of the court was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness.

No question can arise as to the sufficiency of the consideration for the undertaking of Gibbs, whether original or collateral, within or without the statute. Without his promise, the plaintiff

would not have parted with his property. The consideration, therefore, is equally as good in law as a sale of the horse to him alone would have been for his sole promise to pay the price.

The plain ordinary meaning of the language used in this clause of the statute would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promisor and promisee, is original or primary. If there be no such original or primary undertaking or liability of another party, there is nothing to which the promise in question can be secondary or collateral, and the promise, is, therefore, original in its nature, and not within the statute. In other words, the statute applies only to promises which are in the nature of guaranties for some original or primary obligations to be performed by another. This has been settled by a remarkably uniform course of decision since the passage of the statute (29 Car. II., ch. 3, Sec. 4), which does not essentially differ from our own and those of most of the states of the Union. So numerous and so uniform have been the decisions upon this point, that it would savor of affectation to cite them. They will be found cited in most of the elementary treatises: See Browne on Stat. Frauds, ch. 10; Chitty on Cont., p. 442, et seq.; 2 Pars. on Cont., 4th ed., 301. And though the terms *original* and *collateral* have been criticized, yet when used, the one to mark the obligation of the principal debtor, the other that of the person who undertakes to answer for such debt, they are strictly correct, and give the true view of this clause of the statute: *Mallory* v. *Gillett,* 21 N. Y. 412, 414; Browne on Stat. Frauds, ch. 10, Sec. 192.

As a result of this principle, that one must be held originally or primarily, and the other only collaterally, or in default of the former it follows that the statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising, and not a joint liability with the party in whose behalf it is made. For if one be bound in the first instance and at all events, and the other only contingently, or on default of the first, the liability could not be joint. On the other hand, if the promise or the obligation of the two be joint, as between them, on the one side and the promisee on the other, then neither is collateral to the other and such joint promise is original as to both. Hence it has been held in England that an agreement to convert a separate into a joint debt is not within the statute; the effect being to create a

new debt, in consideration of the former being extinguished: *Ex parte Lane,* 1 De Gex. 300; Browne on Stat. of Frauds, 193.

Where the question arises (as it has in almost all the cases) as one of the *several* liability of the party promising in behalf of another (as for the price of goods sold to another), the true rule undoubtedly is, that if the latter (to whom the goods are sold) be liable at all, then the promise of the former is collateral, and must be in writing; because, from the very nature of such a case, the party to whom the goods are sold, and in whose behalf the promise is made, is the principal debtor, and because it would be manifestly unreasonable to hold that both were in such cases *severally* liable as principals, as upon several original undertakings at the same moment. See *Hetfield et al.* v. *Dow,* 3 Dutcher, 440; *Dixon* v. *Frazee,* 1 E. D. Smith, 32. And this rule applies equally when the promise is made in reference to a pre-existing liability of another, if the plaintiff in accepting the promise does not release the principal. In reference to all such cases the authorities may be said to be entirely uniform. But the rule thus established as to cases where the question is one of the *several liability* of the party making the special promise, can, I think, have no application to the question of a joint liability upon a joint promise of the two. The only intimation to the contrary which I have seen is to be found in a dictum of Judge Catron in *Matthews* v. *Milton,* 4 Yerg. 576, a case in which no such question was involved, there being no evidence tending to show a joint promise. To say that when the party originally owing the debt, or for whom goods are purchased and to whom they are delivered, is liable at all, no other person can be held severally liable unless the promise be in writing, is merely saying that such promise is collateral, and, therefore, within the statute. But to say that they cannot both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is *not competent* for both to become original promisors, as between them and the promisee, unless both are under an equal obligation, as *between themselves,* for the ultimate payment of the debt. Such a proposition, it seems to me, can not be maintained either upon a principle or authority. Such an objection to a joint promise seems rather to have reference to some supposed defect of consideration (a question entirely distinct from the statute) than to the promise. And, if the party promising jointly with another to whom goods are furnished, can not be bound jointly with the latter, because,

as between the two promisors, he, not having received the goods, is under no obligation to pay; then the same reason ought to operate with still greater force against his *several* promise to pay the *whole* price of goods received by the other. But the law in the latter case is well settled the other way.

It was very correctly remarked by Whelply, J., in *Hetfield et al.* v. *Dow*, above cited, that, "to settle the rights of promisors *inter sese*, to ascertain as *between them* who is to pay the debt ultimately, is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors ultimately may be bound to pay the debt, as *to the promisee*, the principal debtor. That does not concern him." This view, it seems to me, rests upon sound reasons—reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or delivered to, another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise would operate as a fraud upon the vendor.

The question of a joint promise appears to have been seldom raised for adjudication in connection with the statute of frauds; but the following cases fully sustain the proposition that a joint promise of two, whether to pay the pre-existing debt of one of them, or a debt contracted at the time for his benefit (as for goods bought for and delivered to the one), does not come within the statute, but is an original promise, as between them and the promisee, and valid without writing: *Ex parte Lane*, 1 De Gex, 300; *Wainwright* v. *Straw*, 15 Vt. 215; *Stone* v. *Walker*, 13 Gray, 613; and *Hetfield* v. *Dow*, 3 Dutcher 440. See also by analogy *Batson* v. *King*, 4 H. & N., 739. The same doctrine is laid down by Mr. Browne in his able treatise on the statute of frauds: Ch. 10, Sec. 197.

It is true that in *Wainwright* v. *Straw*, which most resembles the present case, the decision is placed in part upon the ground that the sale was made to both. The facts were that Straw and Cunningham both went to plaintiff's store and said they wished to buy a stove for Straw, but that both would be responsible. Now, I can see no difference in legal effect between the case where A and B say to a merchant, "We want to buy a stove for B,

and both of us will be responsible," and the case where A says, "B wishes to purchase a stove, but we will both be responsible." *Substantially,* the transaction is the same; in both cases alike it is a sale for the benefit of the one on the joint credit of the two, and the real question in both cases is, whether the credit was given to both jointly. I do not think the court, in *Wainwright* v. *Straw,* based their decision upon the narrow and merely verbal ground of the use of the first person plural, showing merely who wanted the stove, but upon the broad ground above stated, that it was sold upon their joint credit. And in all such cases where the sale is upon the joint credit and promise of the defendants, though the property is purchased for and delivered to but one of them, I think the legal effect of the transaction constitutes, as between them and the vendor, a sale to the two jointly. The sale as between the vendor and the vendee is to the party or parties to whom the credit is given for the price, without reference to the question for whose use it is purchased, or who, as between the promisors, is to be its owner when bought.

This brings us to another point in the case. The sale (if upon the joint credit and promise of the defendants) was a joint sale to both, as between them and the plaintiff. But in the special count of the declaration it is alleged as a sale to Daily alone. The plaintiff cannot, therefore, recover upon the special count.

But upon the count for goods sold and delivered, the sale having been made to both, the plaintiff would be entitled to recover, if the facts be such as would warrant a recovery upon a sale made for the joint benefit of, and the property delivered to both.

I think there was no error in the charge or proceedings of the court below, and that the judgment should be affirmed, with costs.

b. When the promisor is virtually discharging his own debt.

19. THE FIRST NATIONAL BANK, respondent, v. CHALMERS, et al., appellants, 144 N. Y., 432, 39 N. E. 331.

Court of Appeals, New York, 1895.

A promise made to a creditor to pay the debt of a third person is original when such third person has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the promisor's agreement to assume and pay the outstanding debt.

Such an agreement is not merely a promise to answer for the debt or default of another, and is not within the statute of frauds.

Appeal from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made at the May Term, 1893, which affirmed a judgment in favor of the plaintiff, entered upon a decision of the Court on trial at Circuit without a jury.

A *mem.* of the case on a former appeal appears in 120 N. Y. 658.

This action was brought upon an alleged agreement made by defendants for a valuable consideration, to pay to plaintiff the amount of an indebtedness of the firm of Charles Spruce & Co. to it.

On October 30, 1882, said firm, being financially embarrassed, confessed judgment to defendants for various sums due them and for amounts owing to other parties. The statement on which the judgment was entered, under the head of "Liabilities assumed," set forth, among other items, the following: "Money due by Charles Spruce & Co. to First National Bank of Sing Sing on overdrawn account, $1556.47.

The court found that defendant made an absolute, unconditional promise to pay plaintiff's debt.

Further facts are stated in the opinion.

Calvin Frost, for appellants.

Francis Larkin, for respondent.

FINCH, J. What constitutes an original promise, upon which the statute of frauds does not operate, and which therefore may be valid and effectual without a writing, is fairly settled in one direction at least. Wherever the facts show that the debtor has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement

to assume and pay the outstanding debt, and he, thereupon, has promised the creditor to pay, that promise is original, upon the ground that by the acceptance of the fund or property under an agreement to assume and pay the debt the promisor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor. *Ackley* v. *Parmenter,* 98 N. Y. 425; *White* v. *Rintoul,* 108 id. 223. In such a case the debt has become that of the new party promising; his promise is not to pay the debt of another, but his own; as between him and the primary debtor the latter has become practically a surety entitled to require the payment to be made by his transferee. The consideration of the primary debt, by the transfer of the money or property into which that consideration had been in effect merged, may be said to have been shifted over to the new promisor, who thereby comes under a duty of payment as obvious as if such original consideration had passed directly to him.

The question before us therefore is whether the promise of the defendants, made to the bank, to pay the debt due it from Leary & Spruce, was founded upon such a transfer of property as I have above described, and thus was original, or whether it was not so founded, and must for that reason be deemed collateral.

We are bound to assume upon the findings that the promise to pay was absolute, and clean of condition or contingency. The question whether it was made at all was severely litigated, and depended upon the conclusion to be drawn from testimony full of violent contradictions, and we are not at liberty to review the determination of fact which affirms that the promise to pay was in truth made, and was absolute in its terms as sworn to by the witnesses on the part of the plaintiff. As to the substance of the agreement between the defendants and the primary debtors, there is also contradiction. The former assert that their assumption of the debt went no further than a consent to pay it out of the proceeds of the debtor's property after the discharge of their own debt, or in other words, that their agreed liability was to pay plaintiff only out of proceeds when realized, and even then out of any possible excess remaining over and above their own debt. If that is true, they were under no present duty to pay the bank when the promise was made; the debt had not become theirs; might never become theirs; and so their verbal promise to the bank was purely collateral and to answer for the debt of another. That proposition was quite distinctly held in *Ackley* v. *Parmenter, supra,* and

upon the authority of *Belknap* v. *Bender,* 75 N. Y. 446, which disclosed an agreement simply to pay out of proceeds when realized, and so far as sufficient. On this branch of the case the inquiry turns upon the facts, and the findings fail to disclose any such agreement, but establish the contrary. They determine that for a valuable consideration, and by an agreement with Leary and Spruce, the defendants agreed to pay the plaintiff the debt due to it. This finding is free of any condition, and imports an absolute agreement to pay at once and in full, and so negatives the defendants' version of the facts. It is sustained by the testimony of the plaintiff's witnesses, and is strongly corroborated by the form of the confession of judgment which the defendant's attorney drew, which they accepted, upon which they issued an execution, and which provides for an assumption of the bank debt absolutely and without condition. All the requisites of an original promise, unaffected by the statute of frauds, were thus explicitly embraced in the findings, except one. It is not in terms or expressly found that the consideration, described simply as valuable, was, beyond that, such a consideration as would avoid the statute because it consisted of a transfer to the defendants for their own use and benefit of the debtor's property. That fact is involved in the findings, since it is essential to the legal conclusion, which cannot stand without it. We may look into the evidence, therefore, to see whether it would have sustained such a finding if it had been explicitly made, and thereupon assume the fact in support of the judgment. (*Ogden* v. *Alexander,* 140 N. Y. 356.)

I can find in the proof no express agreement in words transferring the real and personal estate of the firm to the defendants, but that there was such a transfer in fact is abundantly established and beyond any reasonable doubt. The situation appears to have been this. Leary and Spruce were manufacturers of files. The defendants in New York were the regular purchasers at established rates, of their whole product. The manufacturers became seriously indebted to their vendees in the progress of the business, and as security therefor had given to them a mortgage on their real estate for $2,500, dated in 1876, and payable in one year; a second mortgage on the same land for $5,000, dated in April, 1882, and payable in one year, and, as collateral to the last-named security, a chattel mortgage for $5,000 covering all machinery and personal property used in the manufacture of files. The stock on hand and the equity of the mortgagors still remained to them. There was due, or to become due, on these securities about the sum of $7,400 at the date of the final arrangement of October, 1882, assuming

that all the debt created prior to their dates was protected by the mortgages. But an added indebtedness, not covered by the securities, had later accrued in the form of two notes and one indorsement, amounting to about $4,200, no part of which had matured on October 30, 1882. On that day the debtors announced to the defendants their inability to pay. Of course the statement created alarm. None of the mortgages secured future advances, and the defendants found themselves unsecured creditors to the amount of over $4,000. The chattel mortgage was not due and contained no danger clause permitting an immediate seizure. The whole stock on hand, manufactured and unmanufactured, was encumbered by no lien, and that and the equity under the mortgages belonged to the debtors, was open to attack and could be disposed of by the firm. They estimated the entire value of their property at $16,000, which was the footing of their last preceding inventory, and claimed it to be sufficient, not only to pay the defendants in full but also the bank and certain other creditors whom they wished to protect. They were talking of an assignment, but assured the defendants that they were ready to give them a bill of sale of all their property, or any other security, provided that the bank and other named creditors were protected. The defendants agreed to assume and pay those debts, and chose instead of a bill of sale to take a confession of judgment. In that the debtors swore that they were justly indebted to the defendants in a sum made up of the total debt to the latter, and of the debts to other named creditors, which the defendants had assumed and agreed to pay. Had the transaction stopped at this point it would be difficult to support the promise to the bank, unless upon the ground of an intended purchase by the defendants of the debtor's assets, the price of which was secured by the confession of judgment. But it did not stop there. The defendants could at once have levied upon the whole personal property, and advertised a sale of the real estate, but all that was needless, because the debtors at once turned over the whole property to the defendants, and put them in entire and complete possession, for their own use and benefit. Leary abandoned it utterly and went away. Spruce remained as the hired servant of the defendants, working for wages which they cut down at their pleasure, obeying their orders, shipping the whole manufactured product to them in New York, drawing on them for the pay roll, and treating the property in all respects as theirs. Not a vestige of it ever came back to the debtors. The latter were willing to transfer it, as their offer of a bill of sale proves; they did transfer it, and in the light of the confes-

sion of judgment and the promise to the bank, it is impossible not to see that it was in consideration of an agreement by the defendants to pay the specified debts.

I have not failed to consider the attempted explanation of Chalmers and the argument about it of his counsel. The former sought to put himself in the attitude of a tenant under Spruce as landlord, to claim that his wages of $20 a week were in part for rent, and to show that the goods were sold to him by Spruce as before the failure. But the latter, though unwillingly, controverted the theory, and Chalmers' own version of the facts does not harmonize with the explanation made. The claim that Spruce was to remain owner and work out the debts does not account for Leary's abandonment of the possession, nor Spruce's service for wages, still less for the instant assumption and payment of all expenses and exercise of complete control by the defendants. They took all the products, and if they continued to keep the accounts in the old way it was but a natural measure of convenience in order to separate the factory business from their own, and be able to ascertain its ultimate results. They took the confession of judgment as a guard and protection against other creditors, and as a defense of the transfer made to them. They issued no execution at once because that was needless to attain possession, but did issue it later when their title was threatened. That all this was done upon an understanding and agreement in accord with the facts seems to me a natural and necessary inference.

Nor have I overlooked the fact that the confession of judgment was set aside on the motion of a junior creditor. The defendants' attorney, after a consultation with his clients, accepted short notice of the motion, and then suffered it to be granted by default. The probabilities are that the proceeding was collusive, but if not, it was one of the risks which the defendants assumed and is immaterial as to the result.

I have reached my conclusion without reliance upon the previous decision of this court on the first appeal (120 N. Y. 650), and without any reference to the doctrine of *Lawrence* v. *Fox*, which has played some part in the discussion. The opinions of the second division on the former appeal indicate that a majority of the court did not agree upon any one proposition discussed. I should treat that judgment as decisive if it had decided, but the only authoritative determination was the order for a new trial. I do not deem the doctrine of *Lawrence* v. *Fox* involved in this controversy. That doctrine applies where no express promise has been made to the party suing, but he claims the right to rest

upon a promise between other parties having respect to the debt due to him and as having been made for his benefit. It struggles to obviate a lack of privity upon equitable principles, but is needless and has no proper application where the privity exists, and a direct promise has been made upon which the action may rest. Here we have the promise, and if it is valid the whole problem is solved.

I think the promise proved and found rested not only upon a valuable consideration, but one of such character as to make the promise original and save it from the condemnation of the statute of frauds.

The judgment should be affirmed, with costs.

All concur, except Haight, J., not sitting.

Judgment affirmed.

20. POWER v. RANKIN, 114 Ill. 52.

Supreme Court, Illinois, 1885.

An oral promise to pay the debt of another out of property of the debtor placed in the hands of the promisor for that purpose is not within the statute of frauds.

Appeal from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. W. R. Welch, Judge, presiding.

Messrs. *Bradley & Bradley*, for the appellant.

Messrs. *Patton & Hamilton*, for the appellee.

MR. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by William L. Rankin, against James E. Power, to recover $1,000, which it is alleged Power agreed to pay in consideration that Rankin would permit certain corn, upon which he held a mortgage, to be delivered to a certain person to whom the corn had been sold by Mrs. Glasscock. Rankin recovered a judgment in the circuit court for the amount claimed, and that judgment was affirmed in the appellate court.

After the plaintiff had concluded his evidence, the defendant entered a motion to exclude the evidence from the jury. The court overruled the motion, and this decision of the court is relied upon as error.

The main ground relied upon in support of the motion is, that the admitted evidence established merely a verbal promise to

pay the debt of another, and was therefore void under the statute of frauds. We do not concur in the view taken by the appellant's counsel. As we understand the testimony, in the fall of 1881 Mrs. Glasscock was indebted to Rankin on a certain note for $1,249, bearing date November 16, 1881, and due October 1, 1882. The payment of the note was secured by a chattel mortgage on a crop of corn raised that season. In the summer of 1882, Mrs. Glasscock contracted the corn to Ulrich, who gave Power a check for $1,000, which he was to hold until one thousand dollars' worth of the corn should be delivered, when the money was to be paid to Mrs. Glasscock, or her order. After the check was placed in the hands of Power, and before any of the corn was delivered, Rankin and Power met at the office of Mr. Sales, and Rankin refused to allow the corn to be delivered unless the money in the hands of Power should be applied on his mortgage indebtedness. After discussing the matter for some time, Power finally agreed if Rankin would permit the corn to be delivered to Ulrich, he would apply the money in his hands in payment of the note and mortgage held by Rankin. This arrangement was made, according to the testimony of Sales, about the first of August, 1882.

A parol promise to pay the debt of another is rendered void by the statute of frauds, and an action cannot be enforced upon such a promise. There is no room for doubt as to the general rule on this subject. In *Scott* v. *Thomas,* 1 Scam. 58, it was held that where the moving consideration for the promise is the liability of a third person, there the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor there the superadded consideration makes it a new agreement, which is not within the statute. In *Borchenius* v. *Canutson,* 100 Ill. 82, where the plaintiff had relinquished a lien or given up a security for a debt in consideration of a promise by a third party to pay the debt, the promise was held to be an original undertaking, and not affected by the statute of frauds. Here Rankin had a lien on the corn for the payment of his debt, which he relinquished, and allowed the corn to be sold, upon the promise of Power that the money ($1,000) which he held in his hands should be paid to him. A promise of this character, under the rule established by the authorities, is an original undertaking, and in no manner affected by the Statute of Frauds. Such being the case, the evidence was properly admitted, and the court did right in overruling the motion to exclude the evidence from the jury.

But it is said in the argument that Rankin had no mortgage

at the time Power promised to pay the money to him, and hence no lien was waived, or security given up, on the faith of the promise. This is a clear misapprehension of the evidence bearing upon this branch of the case. It is true that Rankin fixed the date of the promise made by Power to him, in September or October, 1881; but this was a mistake as to the date. The corn sold was the crop of 1881, but it was not delivered until August, 1882, and Sales, who was present and heard the arrangement made between Rankin and Power, testified that it occurred "about the beginning of the delivery of the corn, * * * from the 1st to the 11th of August, 1882." If there had been no evidence as to the date of the agreement except Rankin's testimony, there might be much force in appellant's position on this question; but the evidence of Sales places the date of the agreement beyond question, and at the time when the mortgage lien was in full force and effect. * * *

* * * It is also objected that a recovery could not be had under the common counts. Where the promise sued upon is a collateral undertaking, then the declaration is required to be special; but where the promise, as here, is regarded as an original undertaking, a recovery may be had under the common counts. *Runde* v. *Runde,* 59 Ill. 98, is an authority in point on this question.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

21. SUTTON & CO. v. GREY, [1894] 1 Q. B. D. 285.

In the Court of Appeal, 1893.

An oral agreement to share commissions and losses on Stock Exchange transactions—not within the statute of frauds.

Appeal by the defendant against the judgment of Bowen, L. J., at the trial of the action without a jury.

The plaintiffs were stockbrokers and members of the London Stock Exchange. The defendant was not a member of the Stock Exchange. The plaintiffs had, as they alleged in their statement of claim, in January, 1891, entered into an oral agreement with the defendant that he should introduce clients to them, and that they should transact business on the Stock Exchange for the clients thus introduced, upon the terms, as between the plaintiffs and the defendant, that he should receive one-half the commission earned by the plaintiffs in respect of any transactions by them for and on

behalf of such clients as were introduced by the defendant, and that the defendant should pay to the plaintiffs one-half of any loss which might be incurred by the plaintiffs in respect of those transactions.

The plaintiffs claimed from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of a client named Robertson, who had been introduced to them by the defendant in pursuance of the oral agreement.

By his statement of defence, the defendant pleaded that Sec. 4 of the statute of frauds had not been complied with; that the contract alleged by the plaintiffs was, within the meaning of Sec. 4 of the statute of frauds (29 Car. 2, c. 3), "a special promise to answer for the debt of another person;" and that, consequently, as it was not in writing, an action upon it could not be maintained.

Stevenson, for defendant.

Rufus Isaacs, for the plaintiffs, was not called upon.

LORD ESHER, M. R.—In my opinion this appeal should be dismissed. I think that the judgment of BOWEN, L. J., was in every respect right. I do not think that the relation between the plaintiffs and the defendant was that of partnership. They had no intention to become partners, and, as the law now stands, a partnership can not be constituted without such an intention. In my opinion the true relation between the plaintiffs and the defendant was this: The plaintiffs being brokers upon the Stock Exchange, of which defendant was not a member, they agreed together that the plaintiffs should carry out transactions upon the Stock Exchange for the mutual benefit of themselves and the defendant. The defendant could not himself transact business upon the Stock Exchange, and the plaintiffs made this arrangement with him: "If you will find persons who wish to operate upon the Stock Exchange, and will introduce them to us as clients, we will, on behalf of the persons whom you thus introduce to us, transact the ordinary business of a broker on the Stock Exchange, and make ourselves personally responsible according to its rules on these terms—that our brokers' commission on the Stock Exchange shall be divided between us and you, just as if you were our partner and a member of the Stock Exchange, and that, if there should be a loss in respect of the transactions, you shall indemnify us against half the loss." The defendant verbally agreed to this, but there was not any contract or memorandum in writing. The contract, in my opinion, is one which regulated the part which the defendant was to take in the transactions which were contemplated,

and, if he was to be an agent for the plaintiffs, the contract regulated the terms of his agency. Again, before the transactions were entered into, the terms were regulated by the agreement, and they were such as to give the defendant an interest in the transactions. The transactions were to be entered into by the plaintiffs partly for their own benefit and partly for the benefit of the defendant. Is such a contract a simple contract of guarantee—"a special promise to answer for the debt or default of another person"—so as to bring the case within Sec. 4 of the statute of frauds, or is it a contract of indemnity? Whether any contract is the one or the other is often a very nice question. But certain tests have been laid down to guide the Court in determining under which head any particular contract comes. The principal case in English law which affords such a guide is *Couturier* v. *Hastie*, 8 Ex. 40. · In that case a test was given by PARKE, B., who delivered the judgment of himself and ALDERSON, B. (from whom POLLOCK, C. B., differed as to the construction of the contract). The learned Judge said (at p. 55): The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale" (I would read that "totally unconnected with the transaction"), "they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale" (that is, as I read it, "being connected with the transaction"), "the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all questions whether the loss arose from negligence or not and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee,

and Sec. 4 does not apply. The rule thus laid down has been adopted as a test in subsequent cases. In *Fitzgerald* v. *Dressler*, 7 C. B. (N. S.) 374, COCKBURN, C. J., said (at p. 392): "The law upon this subject is, I think, correctly stated in the notes to *Forth* v. *Stanton*, 1 Wms. Saund. 211e, where the learned editor thus sums up the result of the authorities: 'There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (Sec. 4) or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I, therefore, agree with my learned brothers that this case is not within the Statute of Frauds." The learned Judge there used the words, "has himself no interest in the property which is the subject of the undertaking," because he was dealing with a case of property; but if his words be read, as I think they should be, "has no interest in the transaction," he is adopting that interpretation of *Couturier* v. *Hastie*, 8 Ex. 40, which I think is the right one. Then again, in *Fleet* v. *Murton* (Law Rep. 7 Q. B. at p. 133), BLACKBURN, J., quotes the passage which I have read from the judgment of PARKE, B., in *Couturier* v. *Hastie* (8 Ex. 40), and thus interprets it: "He says that it is neither a guaranteeing nor a contract for sale, and that consequently the statute of frauds is out of the

question. It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment." If in the present case the agreement is taken as regulating the terms of the defendant's employment, it is not within Sec. 4 of the statute: on the other hand, if the transaction is looked at as entered into partly for the benefit of the plaintiffs and partly for the benefit of the defendant, it comes within the rule laid down by PARKE, B., in *Couturier* v. *Hastie,* and adopted by COCKBURN, C. J., in *Fitzgerald* v. *Dressler.* The contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee; it is an indemnity with regard to a transaction in which the defendant has an interest equally with the plaintiffs. In my opinion, BOWEN, L. J., was right in holding that the agreement is not within the statute, and his decision ought to be affirmed.

LOPES, L. J.—I am of the same opinion. BOWEN, L. J., has adopted the view of the plaintiffs, that the contract was one of indemnity, and I think he was right in so holding. The defendant says that the contract amounts to "a special promise to answer for the debt or default of another person," and is therefore within the statute. The true test, as derived from the cases, is, as the master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise. In the former case, the agreement is within the statute; in the latter, it is not. In the present case, it appears to me beyond all question that the defendant had an independent interest in the transaction, because it was entered into for the mutual benefit of the plaintiffs and himself. In another view, the contract was to regulate the terms of the defendant's employment by the plaintiffs. In my opinion, the decision of BOWEN, L. J., was right, and the appeal must be dismissed.

KAY, L. J.—According to the report which I have of the judgment of BOWEN, L. J., he said, "I have come to the conclusion that the plaintiffs are correct in saying that it was arranged between them and the defendant that he should contribute to any loss that might occur to them upon Robertson's transactions." I agree that this arrangement hardly comes up to a partnership, though it is very near it. The commission received in respect of any transaction might not be all clear profit; the expenses of the office establishment would have to be provided for; and therefore the contract

with the defendant was not that he should share the profit whatever it might be. On the whole I think it would be going too far to say that the contract was that the defendant should share in the profits and losses of the transactions. But then comes in the principle of the decision, that a contract to employ a *del credere* agent is not within the statute and need not be in writing, because its main object is to regulate the terms of the agent's employment, and, though in the result the agent may have to indemnify the principal against losses, that is not the main object of the contract. The present case, however, is not strictly that of a *del credere* agent, and the question is, whether the exception from the statute which has been established in the case of a *del credere* agent applies to the present case. I can not see any difficulty in holding that it does, when I look at the reasons given by PARKE, B., for the decision in *Couterier* v. *Hastie* (8 Ex. 40), when a man simply agrees to assume liability for the debt of another, he has no interest whatever in the transaction, except by virtue of the guarantee.

In the present case the defendant had an independent interest in the transactions. Another distinction is this, that the contract is one which regulated the terms upon which the defendant was to be employed by the plaintiffs. I agree with BOWEN, L. J., that "this is really a contract which regulates the terms of the agency, and the defendant's liability to answer for the debt of another is only an ulterior consequence of the terms in which the contract is framed." I agree that the appeal must be dismissed.

Appeal dismissed.

c. When the promisor is beneficially interested in the consideration.

22. DAVIS v. PATRICK, 141 U. S. 479, 35 L. Ed. 826.

Supreme Court, United States, 1891.

A beneficial participation by the promisor in the consideration is sufficient to make his promise original, although it may be in form a promise to pay the debt of another.

The case was stated by the court as follows:

This case was commenced on the 24th day of November, 1880, by the filing of a petition in the District Court of Knox county, Nebraska. Subsequently it was removed to the Circuit Court of the United States, and at the May term, 1883, of that court a judgment was rendered in favor of the plaintiff. That judgment was reversed by this court, at its October term, 1886.

Davis v. *Patrick,* 122 U. S. 138. A second trial in January, 1890, resulted in another verdict and judgment for the plaintiff, and again the defendant alleges error. The petition counts on two causes of action. No question is made by counsel for plaintiff in error with respect to the first count or the rulings thereon—the only error alleged being in reference to the second count. That count is for the transportation of silver ore from the Flagstaff mine, in Utah Territory, to furnaces at Sandy, in the same Territory. In the first trial it was claimed that Davis, the defendant, was the real owner of the Flagstaff mine, and therefore primarily responsible for all debts contracted in its working. The relations between Davis and the Flagstaff Mining Company were disclosed by a written agreement, of date December 16, 1873. By that agreement it appeared that Davis, on June 12, 1873, had advanced to the Company £5,000, at the rate of 6% interest, a sum then due; that it had sold to Davis and agreed to deliver at the ore-house of the Company, free of cost, 5,195 tons of ore, of which it had only then delivered 200 tons, although Davis had paid in full for the entire amount. The agreement also recited that Davis was to advance an additional amount, if needed, not exceeding £10,000. It then provided that the mine should be put under the sole management of J. N. H. Patrick, to be worked and controlled by him until such time as the ore sold had been delivered and the sums borrowed had been repaid, with interest. This control was irrevocable, save at the instance of Davis. Coupled with this agreement was a full power of attorney to Patrick. This court held that such contract established between Davis and the Mining Company simply the relation of creditor and debtor, and did not make him in any true sense the owner. For the erroneous rulings of the trial court in this respect, the judgment was reversed. In the second trial, this construction of the relations of Davis to the Flagstaff Mining Company was followed by the court, and the jury instructed that the contract put in evidence between Davis and the Mining Company created simply the relations of creditor and debtor, and did not make the former liable for expenses created in working and operating the mine; and the trial proceeded upon the theory that during the time the services sued for were being rendered, Davis was the party mainly and pecuniarily interested in the working of the mine, and that he assumed to Patrick a personal responsibility for such services; and the real question tried was whether Davis' promises were collateral undertakings to pay the debts of another, and void because not in writing.

Mr. J. M. Woolworth, for plaintiff in error.

Mr. John L. Webster, for defendant in error. *Mr. Nathaniel Wilson* was with him on the brief.

Mr. Justice BREWER, after stating the case, delivered the opinion of the court:

That Davis was interested in having the ore transported to the furnaces is clear. He was interested in two respects: First, as to the 4,995 tons to be delivered to him at the ore-house, it being his property when thus delivered, any subsequent handling was wholly for his benefit; and in respect to the balance, as the transportation was one step in the process of converting the product of the mine into money, it would help to pay the debt of the Company to him. Davis, therefore, was so pecuniarily interested in, and so much to be benefited by, the prompt and successful transportation of the ore, that any contract which he might enter into in reference to it, was supported by abundant consideration. We proceed, therefore, to inquire what he said and did. After the execution of the papers, the newly appointed manager took possession of the mine; and in the fore part of 1874 the plaintiff commenced the transportation of the ore under a contract with the agent of the manager. The business was carried on in the name of the Mining Company. The plaintiff understood that Davis was interested in the matter, though not informed as to the extent of the interest, or the terms of the agreement between him and the Mining Company. In the fall of 1874 Davis came to Utah to examine the property. He was introduced by the manager to the foreman of plaintiff, in the latter's presence, as the boss of the mine, to which Davis assented. After this, plaintiff, who had not received his pay in full for the services already rendered, had an account made up showing the balance due him, and presented it to Davis. His testimony as to the conversation which followed is in these words: "I showed it to Mr. Davis and told him I was not getting my money, and Mr. Davis said my account was all right and he would be personally responsible to me for the money, and for me to go on as I had been doing and draw as little money as I could get along with to pay the men and the running expenses, and he would see that I got every dollar of my money." The plaintiff's cashier who was present at this conversation, gives this as his recollection of the conversation:

"Q. In that conversation state what Mr. Davis said about being responsible to A. S. Patrick for that account.

"A. He stated to Mr. Patrick in my presence that he would personally be responsible for that account. He says, 'You know, Al., I practically own this mine, but money is scarce and we must get what we can out of the mine.' He says we are making large expenditures for improvements, and he says you shall have all the money you want to pay your men and expenses, but you must wait for the balance, and I will see that you are paid.

"Q. What did he say in that connection to A. S. Patrick about continuing on in the hauling of the ores?

"A. He requested him to continue in the hauling of the ores. He requested him to do it.

"Q. In response to Mr. Davis to that request what did Mr. Patrick say?

"A. He said to Mr. Davis, if he would guarantee him to be paid he would continue to work, and Davis said he would see him paid."

After this, the plaintiff continued the work of transportation until the fall of 1875, receiving such payments from time to time as to extinguish the amount due him at the date of this conversation, and leaving a balance more than covered by the work done in 1875, and it is only for work done after these promises that this recovery was had and in respect to which the questions presented and discussed arise. The plaintiff testified to another conversation, in September, 1876, in the city of New York. His account of that conversation is given in these words: "Plaintiff told Davis that his brother and himself were hard up for money, and wanted to know if Davis would not give them some money on the 'Flagstaff' account, for hauling the ores. Plaintiff had his account with him and showed it to Davis. Davis said the whole of the account was all right, and he proposed to pay the account, and said he would pay the plaintiff. Plaintiff said to Davis that if he would give him some money on the account it would help him out. Davis said he had some securities in London which he was going to sell, and would have some money in a few days and would give plaintiff $5,000 on the account. Plaintiff said if the money was going to be there in a few days he would wait for it, but Davis said, 'No; you go home and I will pledge you my word that I will telegraph the money to you to the First National Bank by the first of October.'"

And, again, he testified to an interview in 1877 with Davis, in the city of Omaha, in the presence of other parties, in which he said: "Davis, you promised all along to pay me that money," and Davis replied, "I believe I did."

This testimony of plaintiff as to conversations with defendant is corroborated by other witnesses and contradicted by none. It must therefore be accepted as presenting the facts upon which this case must be determined. Were these promises binding upon Davis, or of no avail to the plaintiff because not in writing? Were it not for the statute of frauds there would be no question, for obviously there was both promise and consideration. Defendant relies upon that provision of the statute of frauds which forbids the maintenance of an action "to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As said by this court in *Emerson* v. *Slater*, 22 How. 28, 43: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some

pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To this may be added the observation of Browne, in his work on the Statute of Frauds, Sec. 165: "The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." The thought is, that there is a marked difference between a promise which, without any interest in the subject matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract inured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining company's debt to him; and as the mining company was apparently destitute of any other property, and the payment of its debt to Davis therefore depended upon the continued and successful working of this mine; and as the control and working of the mine had been put in the hands of Davis so that he might justly say, as he did: "I am practically the owner," it follows that he was a real, substantial party in interest in the performance of this contract. His promise was not one purely collateral to sustain the obligations of the mining company, but substantially a direct and personal one to advance his own interests. While the mining company was ultimately to be benefited, Davis was primarily to be benefited by the transportation of the ore, for thereby that debt, which otherwise could not, would be paid to him. He, therefore, in any true sense of the term, occupied not the position of a collateral undertaker, but that of an original promisor and it would be a shadow on justice if the administration of the law relieved him from the burden of his promise on the ground that it also resulted to the benefit of the mining company, his debtor.

Counsel for Davis placed stress on the form of expression attributed by Patrick to Davis, to-wit: "I will be personally responsible; I will see you paid;" and contends that the import of such language is that of a collateral promise. There is force in

this contention, as it implies that someone else was also bound, but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Patrick declares he understood it to be a direct promise, and acted on the faith of it. That Davis understood it in the same way, is evidenced not only from the circumstances surrounding the parties at the time, but from the fact that in a subsequent interview, when charged to have always promised to pay this debt, he admits that he believes that he did. The plaintiff, believing that Davis was, as he said, practically the owner, the party primarily to be benefited by the conversion of the products of the mine into money, understood that Davis was making an original promise to pay for the work which he might do, and upon such promise he might surely rely as an original promise, at least for any work done thereafter.

The merits of the case, therefore, as disclosed by the testimony, were with Patrick, and the judgment in his favor was right. It is objected that the court in its instructions spoke of Davis as an original promisor, as one promising to pay the debt, and not as one promising to be responsible for the debt, or to see it paid. But as Davis, in the second conversation, promised to pay, and in the third admitted that he had always promised to pay the debt, we cannot think that the court misinterpreted the scope and effect of his words. It is not probable that the parties to this transaction understood the difference between an original and a collateral promise. We must interpret Davis' promise in the light of the surroundings and of his subsequent admissions, and in that light we cannot think that the court erred in its construction thereof; and if the jury believed that he had made such promises, we cannot doubt that the verdict should have been as it was.

It is also objected that the court erred in not directing a verdict for defendant upon the ground of a departure from the allegations of the petition. That counts on an original employment by Davis, in 1873, while the testimony shows that the original employment was by the mining company, and that the promise of Davis was made in the fall of 1874, and after Patrick had been at work for months for the mining company. As no objection was made to the admission of testimony on this ground, and as an amendment of the petition to correspond to the proof would involve but a trifling change, we cannot see that there was any error in the ruling of the court. If objection had been made in the first

instance, doubtless the court would, as it ought to have done, have permitted an amendment of the petition. There was no surprise, for the facts were fully developed in the former trial.

Upon the record as presented, we think that the verdict and judgment were right, and as no substantial error appears in the proceedings the judgment is

Affirmed.

The CHIEF JUSTICE, Mr. Justice BRADLEY and Mr. Justice GRAY did not hear the argument or take part in the decision of this case.

d. When the promise is to indemnify.[10]

23. THOMAS v. COOK, 8 Barn. & Cress. 728, 15 E. C. L. 358.
Court of King's Bench, Mich. Term, 1828.

A promise to indemnify does not fall within either the words or the policy of the statute of frauds.

Assumpsit. The declaration stated that on, &c., a certain partnership in trade between one W. Cook, since deceased, and one N. D. Morris, was dissolved; that it was agreed between W. Cook, since deceased, and Morris, that the former should take upon himself the payment of certain debts, (specified in the declaration); and that it was also agreed that a bond of indemnity, executed by W. Cook, since deceased, and two other persons, should be given to Morris to save him harmless from the payment of the said debts. And thereupon afterwards, to-wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would, together with the defendant and W. Cook, since deceased, execute a bond of indemnity to Morris in the sum of 4100*l.* conditioned to save him harmless from the said debts, the defendant undertook and promised the plaintiff that he, the defendant, would save harmless and indemnify him from all payments, damages, costs, and expenses which he (plaintiff) should or might incur, bear, pay, sustain, or be put unto by reason or means of his so executing the said writing obligatory. Averment, that plaintiff was afterwards compelled to pay on account of the said debts the sum of 360*l.*, and that defendant had not indemnified him. * * *

[10] The authorities are divided on this proposition. Cases illustrating both rules are included under this heading.

Plea, the general issue and statute of limitations. Replication, that defendant promised within six years. * * *

The learned Judge directed the jury to find a verdict for the plaintiff for 300*l.*, and gave the defendant leave to move to reduce it to 150*l.* A rule *nisi* for that purpose was obtained in last Easter term, against which

Taunton and *Chilton* now showed cause.

Russell, Serjt., and *Curwood,* contra.

BAYLEY, J.—It is provided by the fourth section of the statute of frauds, that "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized." Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds; and if so, there was sufficient evidence to entitle the plaintiff to a verdict for 300*l.*

PARKE, J—This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought, therefore, to be discharged.

Rule discharged.

24. JONES, appellant, v. BACON, as surviving Executor, etc., respondent, 145 N. Y. 446, 40 N. E. 216.

Court of Appeals, New York, 1895.

A promise by one person to indemnify another for becoming a guarantor for a third person is not within the statute and need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise.

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which denied a motion for a new trial and ordered judgment in favor of defendant entered upon an order nonsuiting plaintiff.

This action was brought to recover damages for a breach of an oral contract alleged to have been made by James McKechnie, defendant's testator, to indemnify him in case of his indorsement of certain notes made by one Kingsbury.

Upon the trial plaintiff called Kingsbury as a witness to prove the alleged promise. His testimony on that subject was objected to by defendant's counsel on the ground that the witness was incompetent to testify in regard thereto under section 829 of the Code of Civil Procedure. Plaintiff thereupon produced and proved and gave in evidence an instrument executed by plaintiff under seal, by the terms of which, in consideration of the sum of one dollar, he released Kingsbury from "all liability, responsibility or damages" sustained or which might thereafter be sustained by him by reason of his indorsement. This release was by an amended answer set up as a defense.

The further material facts are stated in the opinion.

William H. Smith, for appellant.

Henry M. Field and *Frank Rice,* for respondent.

ANDREWS, Ch. J.—The oral promise of the defendant's testator to the plaintiff was, in substance, a promise of indemnity in case the plaintiff would become indorser on the note of Kingsbury to the banking firm of McKechnie & Co. for a debt of Kingsbury to the bank. The plaintiff thereupon indorsed the note of Kingsbury to the bank, and has been compelled to pay thereon the sum of about $16,000, Kingsbury having made default and being insolvent. This is a statement of the facts in the simplest form, and the question arises whether the oral promise by the defendant's testator to indemnify the plaintiff was void under the Statute of Frauds, as being a promise to "answer for the debt, default or mis-carriage of another person." (2 Rev. St. 135, Sec. 2, Sub. 2.)

This is no longer an open question in this state. It was decided in *Chapin* v. *Merrill,* 4 Wend. 657, that a promise by one person to indemnify another for becoming a guaranty for a third is not within the statute and need not be in writing, and that the assumption of the responsibility was a sufficient consideration for the promise. The doctrine of *Chapin* v. *Merrill* was approved in *Mallory* v. *Gillett,* 21 N. Y. 412, in *Sanders* v. *Gillespie,* 59 id. 250, and *Tighe* v. *Morrison,* 116 id. 263, and in other cases in this court. The same doctrine now prevails in the English courts. *Thomas* v. *Cook,* 8 Barn. & C. 728; *Reader* v. *Kingham,* 13 Com. Bench. N. S. 344; *Wildes* v. *Dudlow,* L. R. 19 Eq. Cas. 198. We do not deem it proper to reopen the discussion or to refer to cases where a different view has prevailed. The court below considered the subject at large, and the able opinion of Bradley, J., refers to many of the cases on the subject.

The plaintiff was, therefore, entitled to maintain an action except for his act in releasing Kingsbury from his liability for the money he was compelled to pay on account of the indorsement. The release was probably essential in order to enable the plaintiff to make any proof of the agreement for indemnity, since he could establish the promise only by Kingsbury, the plaintiff himself not being a competent witness by reason of the death of the promisor McKechnie, and there being no other person cognizant of the transaction. By the release Kingsbury was discharged from all responsibility to the plaintiff. The plaintiff having paid the debt in part out of his property, could, prior to the release, have maintained an action against Kingsbury to recover the sum so paid. *Butler* v. *Wright,* 20 Johns, 367; *Hunt* v. *Amidon,* 4 Hill, 345. The indemnitor of the plaintiff, on restoring to him this sum in performance of the contract of indemnity, would be entitled to be substituted to the claim of the plaintiff against Kingsbury. This stands upon the most obvious principles of natural justice. The money paid by the plaintiff was at the request of Kingsbury, implied from the legal liability as indorser assumed by him, and Kingsbury was bound to reimburse the plaintiff. But, by an independent contract between the plaintiff and his indemnitor, McKechnie, the latter was also bound to save the plaintiff harmless. On performance of this obligation by the indemnitor, he would be entitled to stand in the shoes of the plaintiff as to his right to call upon Kingsbury. By equitable substitution the indemnitor would take the right which the plaintiff had against Kingsbury. There was no privity of contract between the indemnitor and Kingsbury, but there was between the plaintiff and Kingsbury. On paying

the plaintiff what he had been compelled to pay for Kingsbury, pursuant to the contract of indemnity, the indemnitor would stand as the equitable assignee of the plaintiff of the obligation of Kingsbury to him. Kingsbury had no equity to be relieved from his obligation, because the plaintiff had recourse against McKechnie. The plaintiff, though not strictly such, had the equities of a surety against Kingsbury, and the equities by operation of law would pass to McKechnie on his performing his contract of indemnity, except for the release. The release of Kingsbury by the plaintiff materially changed the rights and remedies of the defendant against Kingsbury. It barred any claim against Kingsbury in behalf of the estate of the indemnitor, to recover as the representative of the rights of the plaintiff against him, in case the plaintiff should prevail in the action. Such an interference plainly operates to discharge the estate of the indemnitor.

Upon the ground that the release defeated the right of action, the judgment should be affirmed.

All concur, except Haight, J., not sitting.

Judgment affirmed.

25. GREEN v. CRESSWELL, 10 Adol. & El. 453, 37 E. C. L. 250.

Court of Queen's Bench, Trinity Term, 1839.

No action lies upon a promise not in writing to indemnify plaintiff against the consequences of his becoming bail for a third person.

Assumpsit. The first count of the declaration stated that, on 2d February, 1836, a capias, directed to the sheriff of Warwickshire, issued from the Court of Exchequer against one Joseph Hadley, at the suit of one John Reay, which was endorsed for bail for £35, and was delivered to the sheriff, who, on the day and year aforesaid, arrested Hadley; that afterwards, to-wit, 9th February, 1836, in consideration that plaintiff, at the request of defendant, would become bail and surety for Hadley, and would, as such bail and surety, seal and as his act and deed deliver to the said sheriff, a bail bond, conditioned for putting in special bail by Hadley, defendant then promised plaintiff that he, defendant would save harmless and indemnify plaintiff from all payments, damages, costs, and expenses which he, plaintiff, should or might incur, bear, pay, sustain, or be put unto by reason or by means of so becoming bail and surety; that plaintiff, confiding, &c., did afterwards, to wit, on the day and year last aforesaid, at the request, &c., seal and deliver the bail bond, but that Hadley did

not put in special bail, whereby, the bond became forfeited; that afterwards, to wit, 15th February, 1836, the sheriff assigned the bail bond to Reay, who thereupon afterwards, to wit, on the day and year last aforesaid, sued the present plaintiff on the bond in the Court of Exchequer, and recovered judgment for £75 5s damages and costs; and afterwards, to-wit, 11th August, 1836, sued out execution by fieri facias against the now plaintiff, who was thereby compelled to pay £98 6s; of all which, defendant had notice. Breach, that defendant had not indemnified plaintiff, nor repaid him any of the £98 6s, nor divers other sums expended for costs, &c., to-wit, £50, &c.

Second count on an account stated.

Pleas.—1. Non assumpsit. Issue thereon.

2. To first count, *actionem non;* because the promise in the first count mentioned was a special promise to answer for the debt and default of another person, in manner and form as in the said first count is stated and set forth; and that no agreement in respect of or relating to the promise and supposed cause of action in the said first count mentioned, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shown, was in writing, and signed by the defendant, or any person thereunto by him lawfully authorized, according to the statute, &c. Replication, that the said promise was not a special promise to answer for the debt or default of another person in manner and form, &c. Issue thereon.

On the trial, before PARKE, J., at the Warwickshire Summer Assizes, 1837, evidence was given of the promise, as stated in the declaration; but no evidence was given of any writing. The learned judge was of opinion that the case was not within the Statute of Frauds; and a verdict was found for the plaintiff, on the replication to the second plea. In Michaelmas term, 1837, GOULBURN, Sergeant, obtained a rule for a new trial or arrest of judgment.

Balguy now showed cause.

Goulburn, Sergt., and *Mellor,* contra.

LORD DENMAN, C. J., afterwards, in this term, (June 11th), delivered the judgment of the Court. After stating the facts, his lordship proceeded as follows:

A motion has been made in arrest of judgment, the promise appearing by the plea not to have been in writing, and the replication only averring in answer that it was not a special promise to answer for the debt or default of another.

The promise in effect is, "If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him."

If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another. The case most relied on by the plaintiff is that of *Thomas* v. *Cook,* 8 B. & C. 728, where this court held that a promise of B to hold A harmless against the consequences of his entering with B and C, at B's request, into a joint bond to indemnify D against debts due from C and D was binding, though not in writing; BAYLEY, J., and PARKE, J., the only judges present, saying that a promise to indemnify does not fall within the words or policy of the statute. But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down; which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but even in that shape, we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls.

Adams v. *Dansey,* 6 Bing 506 (19 E. C. L. R. 149,) does not bear out the general doctrine. That was a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe. This is not becoming responsible for debt or default of any other, but merely promising to pay what the promisee may lose by defending the promisor's interests in a suit.

In some of the cases the language employed seems to assume that the debt, default, or miscarriage must have been incurred at the time of making the promise. But the common case of becoming responsible for goods supplied to another on the faith of that promise, and of course after it, shows that criterion to be inadmissible.

A distinction was also hinted at, from the circumstances of Hadley's debt being due to a third person, and the default therefore incurred towards him, not towards the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt, or surrendering?

There does not appear any objection to the test laid down in the note to 1 William's Saunders, 211 c.; and it is decisive in

favour of the objection. The original party remained liable; and the defendant incurred no liability except from his promise.

Rule absolute for arresting the judgment.

26. HARTLEY v. SANFORD, 66 N.J.L. 627, 50 Atl. 454, 55 L.R.A. 206.
Court of Errors and Appeals, New Jersey, 1901.

A promise by one person to indemnify another for becoming surety for the promisor's son is within the statute of frauds.

Error to the Supreme Court to review a judgment in favor of plaintiff in an action brought to enforce a promise to indemnify plaintiff for payments which he had been compelled to make as a surety for defendant's son. Reversed.

The facts are stated in the opinion.

Mr. John B. Humphreys, for plaintiff in error.

Mr. Zebulon M. Ward, for defendant in error.

DIXON, J., delivered the opinion of the court.

The material facts in this case, as disclosed by the record, are that the defendant's son was indebted to M., who desired additional security; that thereupon the defendant applied to the plaintiff to become surety for the son, and promised him that, if he was compelled to pay the debt, he (the defendant) would reimburse him; that accordingly the plaintiff became surety for the son, and subsequently was obliged to pay the debt. This suit was brought upon the promise, which was oral only. It appears that at the trial in the Passaic circuit the jury were instructed to find for the plaintiff if they were satisfied the promise had been made; but the question as to the legal sufficiency of the promise was reserved and certified to the supreme court, which afterwards advised the circuit that the promise was valid, and thereupon judgment was entered on the verdict.

In this court error has been assigned on the charge at the circuit, as well as on the advisory opinion of the supreme court; but, there being no bill of exceptions presenting the charge, the assignment of error respecting it is futile, and must be disregarded. The assignment upon the opinion of the supreme court is legal, and presents the only question now before us, which is whether the plaintiff's suit can be maintained, in view of our statute, "that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing

and signed by the person to be charged therewith or some other person thereunto by him or her lawfully authorized." The advice of the supreme court was based upon its opinion that under the adjudications in this state the promise of one person to indemnify another for becoming surety of a third is not within the statute. The cases cited in that opinion to support this view are *Apgar* v. *Hiler,* 24 N. J. L. 812; *Cortelyou* v. *Hoagland,* 40 N. J. Eq. 1; and *Warren* v. *Abbott* (36 Vroom 99), 46 Atl. 575. Of these, the only one of controlling authority here is that of *Apgar* v. *Hiler,* which is a decision of this court. That decision does not sustain the broad proposition for which it was cited. This court there held merely that, between two persons who had signed the same promissory note as sureties for another signer, the oral promise of one surety to indemnify the other was valid. This promise was deemed outside of the statute, because by signing the note the promisor had himself become a debtor, and so his promise to indemnify was to answer for his own debt. In *Cortelyou* v. *Hoagland* several stockholders and directors of a corporation had promised to indemnify another stockholder and director for indorsing a corporate note, and *Warren* v. *Abbott* was of similar character. In the *Cortelyou Case* the chancellor rested his decision on *Apgar* v. *Hiler,* which, as above stated, was essentially different, and on *Thompson* v. *Coleman,* 4 N. J. L. 216, which was a promise to indemnify a constable for selling under execution goods claimed by an outside party,—a case where the promisee had no redress except on the promise, and therefore clearly outside of the statute. If the decisions in *Cortelyou* v. *Hoagland* and *Warren* v. *Abbott* are to be supported on prior New Jersey adjudications, such support must be found in the doctrine that where the consideration of a promise to answer for the debt, default, or miscarriage of another is a substantial benefit moving to the promisor, then the statute does not apply. This rule was recognized in *Kutzmeyer* v. *Ennis,* 27 N. J. L. 371, and *Couenhoven* v. *Howell,* 36 N. J. L. 323. To support those decisions on this rule, it must be held that the payment of a corporate debt is substantially beneficial to the stockholders or directors of the corporation,—a proposition which seems to be denied in other tribunals. Browne, Stat. Fr. § 164. In the promise now under consideration there was no such element, and no case has been found in our reports involving the present question We should therefore decide the matter on principle, or as nearly so as related adjudications will permit. Looked at as *res nova,* it seems indisputable that the defendant's promise was within the statute. It

was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him,—an obligation either to pay the debt for which the plaintiff was to be surety, or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee, (2) that this obligation should be the foundation of the promise, *i. e.*, that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfillment of the son's obligation; and (3) that the obligation of the promisor should be collateral to that of the son, *i. e.*, if the latter should perform his obligation, the promisor would be discharged, while, if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor. An examination of the cases will show that not many of them are in conflict with this view, when they are free from differentiating circumstances. In the leading case of *Thomas* v. *Cook*, 8 Barn. & C. 728, such a circumstance appears in the fact that the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which, as to the promisee, was the promisor's own debt. On this difference may be explained the decisions in *Jones* v. *Letcher*, 13 B. Mon. 363; *Horn* v. *Bray*, 51 Ind. 555, 19 Am. Rep. 742; *Barry* v. *Ransom*, 12 N. Y. 462; *Sanders* v. *Gillespie*, 59 N. Y. 250; *Ferrell* v. *Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393; and others,—resting on the rule applied in *Apgar* v. *Hiler*, 24 N. J. L. 812. The remark of Bayley, J., in *Thomas* v. *Cook*, that a promise to indemnify was not within either the words or the policy of the statute, has caused much of the confusion existing on this subject, but is more than counterbalanced by the observations of Lord Denman in *Green* v. *Cresswell*, 10 Ad. & El. 453, and Pollock, C. B., in *Cripps* v. *Hartnoll*, 4 Best & S. 414 to the effect that a promise to indemnify may be also an undertaking to answer for the debt or default of another, and that when it is it comes within the operation of the statute. Another circumstance taking cases out of the simple class with which we are now concerned is that mentioned in *Kutzmeyer* v. *Ennis*, 27 N. J. L. 371, 376, viz. the existence of a new consideration beneficial to the promisor, or, as it is sometimes

expressed, moving to the promisor. Such cases are *Smith* v. *Sayward,* 5 Me. 504; *Lucas* v. *Chamberlain,* 8 B. Mon. 276; *Mills* v. *Brown,* 11 Iowa, 314; *Reed* v. *Holcomb,* 31 Conn. 360; *Smith* v. *Delaney,* 64 Conn. 264; 29 Atl. 496; *Potter* v. *Brown,* 35 Mich. 274; *Comstock* v. *Norton,* 36 Mich. 277; *Harrison* v. *Sawtell,* 10 Johns. 242, 6 Am. Dec. 337; *Sanders* v. *Gillespie,* 59 N.Y. 250; *Tighe* v. *Morrison,* 116 N. Y. 263, 5 L. R. A. 617, 22 N. E. 164. Cases of still another character are sometimes cited in support of the statement that contracts to indemnify are outside of the statute, such as *Cripps* v. *Hartnoll,* 4 Best & S. 414; *Reader* v. *Kingham,* 13 C. B. (N. S.) 344; *Anderson* v. *Spence,* 72 Ind. 315, 37 Am. Rep. 162; *Keesling* v. *Frazier,* 119 Ind. 185, 21 N. E. 552; *Beaman* v. *Russell,* 20 Vt. 205, 49 Am. Dec. 775. But these judgments rest on the same idea as *Thompson* v. *Coleman,* 4 N. J. L. 216,—that there existed no other liability to the promisee than that of the promisor, and so manifestly the statute was not applicable. On the other hand, there is sufficient judicial authority for the proposition that an undertaking to indemnify a person for becoming surety for another is, in the absence of any modifying fact, a promise within the statute. *Green* v. *Cresswell,* 10 Ad. & El. 453; *Simpson* v. *Nance,* 1 Speers, 4; *Brown* v. *Adams,* 1 Stew. (Ala.) 51, 18 Am. Dec. 36; *Kelsey* v. *Hibbs,* 13 Ohio St. 340; *Clement's Appeal,* 52 Conn. 464; *Bissig* v. *Britton,* 59 Mo. 204, 21 Am. Rep. 379; *Nugent* v. *Wolfe,* 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15; *Draughan* v. *Bunting,* 31 N. C. (9 Ired. L.) 10; *Hurt v. Ford,* 142 Mo. 283, 41 L. R. A. 823, 44 S. W. 228; and *May* v. *Williams,* 61 Miss. 126, 48 Am. Rep. 80,—were decided on this basis. In the case last mentioned, PORTER, J., stated the true rules very clearly and concisely. No doubt, there are opposing cases which cannot be explained on any distinguishing circumstances. Such seem to be *Chapin* v. *Merrill,* 4 Wend. 657; *Jones* v. *Bacon,* 145 N. Y. 446, 40 N. E. 216; *Dunn* v. *West,* 5 B. Mon. 376; *Vogel* v. *Melms,* 31 Wis. 306, 11 Am. Rep. 608; and *Wildes* v. *Dudlow,* L. R. 19 Eq. 198. But some of these cases merely follow *Thomas* v. *Cook,* 8 Barn. & C. 728, without noticing the distinction which later discussion has justified, while others appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature.

No doubt injustice may result from the enforcement of the statutory rule; but that rule sprang from a conviction that its adoption would prevent more wrong than it would permit, and

its enactment in England and perhaps every state in this Union indicates the generality of this assurance. Said Mr. Justice Sterrett in *Nugent* v. *Wolfe*, 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15: "The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom." With more detail did Chief Justice Shaw, in *Nelson* v. *Boynton*, 3 Metc 396, 37 Am. Dec. 148 say: "The object of the statute, manifestly, was to secure the highest and most satisfactory species of evidence in a case where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of a debtor,—father, son, or brother,—by means of false evidence, by exaggerating words of recommendation, encouragement to forbearance, and requests for indulgence into positive contracts."

Our conclusion is that the promise proved at the trial was insufficient to sustain the action, that *the judgment for the plaintiff should be reversed*, and that, in accordance with the reservation at the trial, a verdict and judgment should be entered in favor of the defendant.

27. READER v. KINGHAM, 13 C. B. (N. S.) 344, 106 E. C. L. 344.
Court of Common Pleas, Mich. Term, 1862.

The true test whether the statute of frauds applies or not, is, whether or not the principal remains liable for the debt; if he does, the promise is collateral, and must be in writing; if not, it is an original promise, and need not be in writing.

On the 6th of May last, the plaintiff, who was bailiff of the Buckinghamshire County Court, was about to arrest one Hitchcock under a warrant of commitment for disobedience of an order made in a cause in the County Court of *Malins* v. *Hitchcock*, when the defendant (who was Hitchcock's brother-in-law) promised the plaintiff that, if he would forbear to execute the warrant, he the defendant would before 12 o'clock on the following Saturday morning pay the plaintiff 17*l*., which sum the plaintiff said he was authorized by Malins to take in satisfaction of the debt and costs in the County Court, or surrender Hitchcock. The plaintiff accordingly forbore to arrest Hitchcock; but the de-

fendant neither paid the money nor surrendered Hitchcock. The 17*l.* was not the whole debt and costs in the suit in the County Court. These amounted to between 34*l.* and 35*l.* But the plaintiff in that suit had authorized the bailiff to take 17*l.* in satisfaction. Under these circumstances, the present action was brought by the bailiff against Kingham upon his undertaking.

At the trial before the undersheriff of Buckinghamshire on the 2nd of July last, it was objected on the part of the defendant, upon the supposed authority of *Butcher* v. *Stewart,* 12 Law J., Exch. 291, 9 M. & W. 405, 1 Dowl. N. S. 620, *Goodman* v. *Chase,* 1 B. & Ald. 297, and *Davies* v. *Fletcher,* 2 Ellis & B. 271 (E. C. L. R. vol. 75), 22 Law J., Q. B. 429, that the defendant's promise being a promise to answer for the debt of another, it was one which by the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, required to be in writing.

The undersheriff ruled that this was a conditional promise to pay and therefore within the 4th section of the Statute of Frauds, and ought to have been in writing; and that, on the evidence of the plaintiff, he had not released Hitchcock from the debt. He accordingly directed the jury to find for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for 17*l.*, if the Court should be of opinion that his ruling was erroneous.

Evans, on a former day in this term, obtained a rule *nisi.*—He submitted that the promise sued upon was an original promise to pay the plaintiff 17*l.* upon the consideration named, and not a collateral promise to answer for the debt or default of a third person within the 4th section of the Statute of Frauds.

LUSH, Q.C., and HANNEN, on a subsequent day, showed cause.—The promise in question was a promise to answer for the debt or default of another, and therefore within the 4th section of the Statute of Frauds: the debt of Hitchcock was not extinguished; he remained, and still remains, liable upon the original judgment: *Davies* v. *Fletcher,* 2 Ellis & B. 271 (E. C. L. R. vol. 75). Part of the contract here was, that, Kingham failing to pay the money, Hitchcock was to be surrendered. The true test whether the Statute of Frauds applies or not, is, whether or not the principal remains liable for the debt: if he does, the promise is collateral, and must be in writing; if not, it is an original promise, and need not be in writing.

ERLE, C.J.—I am of opinion that this action is maintainable, notwithstanding the objection that the Statute of Frauds required

the defendant's agreement to be in writing and signed, and consequently that the rule to enter a verdict for the plaintiff should be made absolute. It appeared that one Malins had recovered a judgment in the County Court against Hitchcock for 34*l.* or thereabouts, debt and costs, and that a warrant had been obtained for the committal of Hitchcock to gaol for thirty days, and placed in the hands of the now plaintiff, who was bailiff of the County Court. Now, it is conceded that the arrest and imprisonment of the debtor under this warrant would not operate a discharge of the debt. Although the debt and costs exceeded 34*l.*, it seems the bailiff was instructed by Malins to accept 17*l.* in satisfaction. The bailiff being about to arrest Hitchcock at the house of his relative Kingham, the latter promised the bailiff that if he would abstain from executing the warrant, he would on the following Saturday either pay the 17*l.* or surrender Hitchcock. When the Saturday arrived, the defendant neither paid the money nor surrendered Hitchcock. The plaintiff (the bailiff) has therefore brought this action to recover the 17*l.*: and the question is whether the promise sued upon is a promise to answer for the debt or default of Hitchcock, within the 4th section of the Statute of Frauds. I am of opinion that it is not. The debt was due to Malins from Hitchcock; the promise was made to Reader. It has been distinctly settled, that to bring the promise within the statute, the promisee must be the original creditor. Such was the decision of the Court of Queen's Bench in *Eastwood* v. *Kenyon,* 11 Ad. & E. 438 (E. C. L. R. vol. 39), 5 P. & D. 276. So also was the decision of the Court of Exchequer in *Hargreaves* v. *Parsons,* 13 M. & W. 561, where Parke, B., gave a considered judgment to the same effect. And so was the decision of this Court in *Fitzgerald* v. Dressler, 7 C. B. (N. S.) 374 (E. C. L. R. vol. 97). There are two cases in the Court of Queen's Bench, where the plaintiff sued on a promise to indemnify him in consideration of his having at the defendant's request become bail for a third party, and where it was held that the statute required the promise to be in writing. Those were the cases of *Green* v. *Cresswell,* 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. 438, and *Cripps* v. *Hartnoll,* 31 Law, J., Q. B. 150. Whether the fact of the promise relating to bail makes any valid distinction, I do not stop to consider. But clear I am, that, upon the balance of authority, the promise of the defendant in this case is a collateral promise, and not within the statute. The debts are totally distinct debts, as well as the debtors. No satisfaction resulted to Malins on account of what passed between Kingham and Reader. Reader was the agent of Malins

to accept 17*l.* in satisfaction of the debt and costs in the county court; but he was not his agent to postpone the payment. If Malins had chosen, he might have revoked Reader's authority between the time of Hitchcock's release and the Saturday; and the payment of 17*l.* would have been no discharge of Malins's claim under the judgment. The payment of the 17*l.* therefore, would not necessarily have been a discharge of Malins's demand, but only a discharge or satisfaction of the contract between Kingham and Reader. The case is clearly not one to which the Statute of Frauds can apply.

WILLIAMS, J.—I am of the same opinion. I think the authorities bind us to the principle that the fourth section of the Statute of Frauds applies only to the case of a promise made to one to whom another is answerable. It is said that the Court of Queen's Bench in *Green* v. *Cresswell*, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. 433, refused to acknowledge that principle, and that that case was recently acted upon by the same Court in *Cripps* v. *Hartnoll*, 31 Law J., Q. B. 150. My brother Crompton, in giving judgment in the last mentioned case, certainly says that the Court felt themselves bound by *Green* v. *Cresswell;* yet they did not decide it altogether with reference to such refusal. What the Court says is this: "The point which was raised before us, that, in order to bring the case within the Statute of Frauds, the debt or default in respect of which the promise is made must be towards the promisee, we say nothing upon; for the very point was taken in *Green* v. *Cresswell*, and, was held not to govern the case. We are bound by *Green* v. *Cresswell*; and, without expressing any opinion as to what would be the judgment of a Court of Error upon the case before us, we hold that the nonsuit was right." In *Green* v. *Cresswell*, Lord Denman, in delivering the judgment of the Court, says: "The promise in effect is, 'If you will become bail for Hadley, and Hadley by not paying or appearing forfeits his bail-bond, I will save you harmless from all the consequence of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him.' If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another." So that he actually put it on the fact of the duty being due from Hadley. And after saying that "a distinction was also hinted at from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred towards him, and not towards the bail," he goes on,—"But here again is the surmise of an intention

in the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt or surrendering?" So that the Court distinctly put it on both grounds. The same Court distinctly put it on both grounds. The same Court distinctly decided in *Eastwood* v. *Kenyon*, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, that the statute applies only to the promises made to the person to whom the debt is due: and that decision is deliberately recognised by the Court of Exchequer in *Hargreaves* v. *Parsons*, 13 M. & W. 561. Notwithstanding the Court of Queen's Bench in *Cripps* v. *Hartnoll* thought themselves bound by *Green* v. *Cresswell*, I do not feel that to be a denial of the authority of *Eastwood* v. *Kenyon* and *Hargreaves* v. *Parsons*. By these two cases, I think we are bound: and they distinctly establish that the statute is not applicable to such cases as the present.

BYLES, J.—I am of the same opinion. The Court of Queen's Bench in *Thomas* v. *Cook*, 8 B. & C. 728 (E. C. L. R. vol. 15), 3 M. & R. 444, held that the promise, to bring it within the statute, must be made to the original creditor; and that a promise to indemnify stands on the same ground. The Court of Exchequer in *Hargreaves* v. *Parsons*, 3 M. & W. 561, in the written judgment of Parke, B. also lays it down that the debt in respect of which the promise is made must be due to the promisee. And the last dictum, in this Court, of my Brother Williams, in *Fitzgerald* v. *Dressler*, 7 C. B. (N. S.) 374 (E. C. L. R. vol. 97), is to the same effect. The case is therefore concluded by the authorities. If it were not so, I should come to the same conclusion from reading the earlier part of the 4th section, which deals with promises that are to bind executors personally. The words are the plain and obvious words to use if it was intended to apply to the original promisee, but a very roundabout way of expressing it if meant to apply to a third person. This is not the case of an engagement to the original promisee, nor is it a case of indemnity, but that of a promise made to a stranger. The contract is between Reader and Kingham,—"If you, Reader, will abstain from arresting Hitchcock, I will pay you 17*l.*" It was contended by the counsel for the defendant that Reader was the agent of Malins. But the answer is, that the transaction was not for his benefit, and he has not recognised Reader's act. The rule must be absolute.

KEATING, J.—I am of the same opinion. I have been much struck with the arguments urged by Mr. LUSH and Mr. HANNEN.

But upon the whole, I think the balance of authority is clearly in favor of the proposition, that, to bring the case within the Statute of Frauds, the promise must be made to the original creditor. Certainly some of the cases which have been referred to tend to throw some doubt upon the proposition. But, to hold this case to be within the statute, we must be prepared to overrule several very distinct and well-recognized authorities.

Rule absolute.

28. WILDES v. DUDLOW, L. R. 19 Eq. 198.

Equity Cases, 1874.

Where one person induces another to enter into an engagement by a promise to indemnify him against liability, such promise is not within the statute of frauds and need not be in writing.

[Plaintiffs as legatees under the will of John Dudlow, whose estate was insufficient to satisfy their several legacies, bring this proceeding against the executors to compel them to account for £1000 alleged to have been wrongfully retained. Dudlow set up the following defense:][11]

"Moreover, upon the said bankruptcy of the said Henry Atkinson Wildes, I, John Noble Dudlow, was compelled to pay a sum of £1000 due upon a joint and several promissory note made by me and the said Henry Atkinson Wildes under the following circumstances:—In or about the year 1853 the testator, who had often assisted the said Henry Atkinson Wildes in raising money, requested me, John Noble Dudlow, to join the said Henry Atkinson Wildes in a note for £1000, saying "that he, the said testator, did not like his (the said testator's) name going so often to Randell & Co." (the bankers of the said testator), "from whom the said Henry Atkinson Wildes intended to raise the said sum, or words to that effect, and offering to indemnify me from any loss that might arise from my joining in the said note. Under the circumstances aforesaid, I, John Noble Dudlow, consider myself entitled to recoup myself out of the testator's estate for the said sum of £1000, and I submit whether I am liable to account for the same."

Mr. *Glasse, Q.C.,* and Mr. *Herbert Smith,* for the plaintiffs.

Mr. *Higgins,* Q.C., and Mr. *Grosvenor Woods,* for the Defendant Dudlow.

SIR R. MALINS, V.C.—The question is, whether this contract

[11] This is an abridged statement of the case.

is, within the 4th section of the Statute of Frauds, required to be in writing. The words of that clause are, "charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another." What was the promise made by the testator in this case to the defendant John Dudlow? It was not, "I engage with you to be answerable to you for the debt of Wildes," because Wildes did not owe Dudlow anything, but he says, "If you will do a certain act, namely, render yourself liable for that debt, I will indemnify you." I think it perfectly clear that the only contract which I have to consider is, that between father and son. It is not that he will pay the debt of Wildes, but that if the son will guarantee Wildes' debt he will see him harmless, or in other words, indemnify him. If one man could induce another to alter his line of conduct in that way, and then meet him with the Statute of Frauds, that statute, instead of being a protection against fraud, would be the direct means of fraud. The statute enacts that if one man promises to pay the debt of another, the promise is void unless it is in writing, and no one doubts that to be the law; but it appears to me, upon principle, so plain that the present case is not within the statute, that I am very glad to find that what occurred to me as being the proper view of the case is finally decided to be the law on the subject. There has been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided by two of the most eminent judges known on the bench (Mr. Justice BAYLEY and Mr. Justice PARKE, afterwards Lord Wensleydale) in the case of *Thomas* v. *Cook*, 8 B. & C. 728, and they decided it upon the plainest principles of common sense and justice. I was therefore surprised to find that in a later case of *Green* v. *Cresswell*, 10 Ad. & El. 453, the same Court, constituted at that time of other judges had taken a different view, and a view which, if it had been maintained, I possibly should not have felt myself obliged to follow. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader* v. *Kingham*, 13 C. B. (N. S.) 344, when the full number of judges was present, the case of *Green* v. *Cresswell* was overruled, and the law as laid down by *Thomas* v. *Cook* restored. The learned judges commented upon those cases, and said that the law was accurately laid down in *Thomas* v. *Cook*, and I entirely agreed in that expression of opinion. I accordingly decide that where one person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement within the Statute of Frauds and does not re-

quire to be in writing. This is a case in which a father induced his son to guarantee the debt of his son-in-law upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him; and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come into his hands. The force of the decision in *Reader v. Kingham* was somewhat shaken by the opinion expressed by Mr. Justice BLACKBURN in *Mountstephen v. Lakeman*, L. R. 7 Eng. & Ir. App. 17; but as the decision of the Queen's Bench in that case was reversed in the Exchequer Chamber and also in the House of Lords, the law rests on the plain and reasonable ground upon which it was put in *Reader v. Kingham*. The decision is, therefore, entirely in favor of the defendant; and I hold that the Chief Clerk has done perfectly right in allowing this £1000 with interest. Therefore the motion to vary the certificate in that respect must be dismissed with costs.

c. When party for whom the promise is made cannot be held liable.

29. MEASE v. WAGNER, 1 McCord L. 395.
Constitutional Court, South Carolina, 1821.

The promise is original, when no action will lie against the person undertaken for.

This was an action for the articles furnished the funeral of Mrs. Bradley, at the request and by order of the defendant. Mrs. Bradley was the widow of Dr. Bradley, who left her his estate during life, remainder to his nephew, John Bradley. Mrs. Bradley, prior to her death, expressed a wish to be buried in a particular manner. As soon as she expired, the defendant was sent for as a friend of the family, and she undertook to procure the articles necessary to such a funeral as the deceased had desired. She proceeded to the shop of the plaintiff, where she selected the articles required, saying they were for Mrs. Bradley's funeral. She was asked "by whom they were to be paid for?" She replied, "charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." The articles furnished were such as were suitable to the condition in which Mrs. Bradley had lived.

On the arrival of the nephew in the city, the account was presented to him, and he refused to pay it, saying that the defendant

had no authority to procure the articles at his expense. The defendant was then applied to, and she refused payment. Some time after this refusal, one of the witnesses remonstrated with the nephew on the impropriety of his conduct, when he said he would pay it, but did not. It appeared that a Miss Teabout administered upon the estate of Mrs. Bradley.

The counsel for the defendant contended that she was not responsible, as it was a collateral and not an original undertaking.

The court charged the jury that it was an original, and not a collateral undertaking, and that the defendant was liable.

A verdict was accordingly rendered for the plaintiff. A motion was now made for a new trial, on the ground that the court misdirected the jury.

Mr. Justice HUGER delivered the opinion of the court.

It has been regarded as settled doctrine ever since the case of *Buckmyr* v. *Darnall*, (2 Lord Raymond, 1085; Robt. on Frauds, 218), that when no action will lie against the party undertaken for, it is an original promise. If A promise B that in consideration of his doing a particular act, C shall pay him such a sum, and if C do not pay him, he, A, will pay the same; this is said to be no collateral undertaking on the part of A unless C was privy to the contract, and recognized himself as a debtor also. (Fitzgibbon, 302; Robt. on Frauds, 223.) In the case before me, the defendant undertook for the representative of Dr. Bradley, against whom no action could lie for the articles furnished for the funeral of Mrs. Bradley. And there was no privity of contract between the plaintiff and the nephew of Dr. Bradley. But it has been urged, that the subsequent promise of the nephew had a retroactive operation, and rendered him liable; but if he were not liable before the promise was made, he could not be so afterwards. It was not in writing, and was *nudum pactum*. Had the defendant undertaken *for the state or legal representative of Mrs. Bradley*, who was legally bound to pay the expenses of her funeral, it would have been a different question; but she unfortunately undertook for one who was not responsible, and who was so far from being privy to the contract, or acknowledging himself a debtor, refused payment and denied the authority of the defendant to render him responsible.

I am of opinion, therefore, that the motion must be refused.

NOTT, JOHNSON, RICHARDSON and COLCOCK, JJ., concurred.

Mr. Justice GANTT dissented.

C. Promises Within the Statute.

a. When the party for whom the promise is made can be held liable.[12]

30. BUCKMYR v. DARNALL, 2 Ld. Raymond 1085, 5 Mod. 248, Salk. 27, 3 Salk. 15, Holt 606.

Court of Queen's Bench, Mich. Term, 1704.

One having a remedy against the principal cannot have an action against the assurer, save upon a memorandum or note in writing.

An action upon the case wherein the plaintiff declared that the defendant, in consideration the plaintiff, at his request *locaret et deliberaret cuidam* Josepho English a gelding of the plaintiff's *ad equitandum et itinerandum usque ad* Reading *in comitatu* Berks, *assumpsit et promisit* the plaintiff, *quod* the said Joseph and Charles the said gelding to the plaintiff *redeliberarent*, etc. Upon *non assumpsit* pleaded, this cause came to trial before Holt, Chief Justice, at Westminster Hall; and the counsel for the defendant insisting that the plaintiff ought to produce a note in writing of this promise, within the statute of frauds, 29 Car. 2, c. 3, § 4; and the Chief Justice doubting of it, a case was made of it and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by *Sergeant Darnall* for the defendant and by *Mr. Raymond* for the plaintiff. And it was insisted for the defendant that this case was within the statute of frauds, 29 Car. 2, c. 3, § 4, for it was a promise to answer for the default and miscarriage of the person the horse was lent to. The very letting out and delivery of the horse to English implies a contract by English to re-deliver him, and he is bound by law so to do, and consequently the defendant is to answer for the default of another. In a case, 2 Will. & Mar., your Lordship settled this rule, that where an action will lie against the party himself, there an undertaking by J. S. is within the statute; and where no action will lie against the party himself, there it is otherwise. And therefore I agree this case, that if a man should say to another, "Do you build a house for J. S. and I will pay you;" that case is not within the statute, because there J. S.

[12] Cases included under this heading are placed here to make the contrast between them and cases included under the last preceding heading more immediate and striking. What might appear a more natural arrangement is sacrificed for this purpose.

is not liable. But this case is not more than this, if a man should say, do you let J. S. have goods, and if he does not pay you I will, and this is within the statute, because an action will lie against J. S. for the money for the goods. Or, if a man should say, "Take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible," that is also within the statute.

To this it was answered for the plaintiff, that here the credit was wholly given to the defendant; that, that rule of the sergeant's must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case, for an actual conversion, or for refusing to redeliver the horse, English may be charged in trover or detinue, yet, he being not chargeable upon the contract, the case is not within the statute. This contract cannot be said properly to be a promise to answer for the default or miscarriage of another, unless English were liable by the first contract.

Upon the first motion and arguing this case, the three judges against Powys seemed to be of opinion that this case was not within the statute, because English was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And POWELL, Justice, said that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract. This case is just like the case where a man says, "Send goods to such a one, and I will pay you," that is not within the statute, for the seller does not trust the person he sends the goods to. So here the stablekeeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent he may be charged in detinue, or trover and conversion, which is a collateral action.

POWYS, Justice, said that there was a trust to English, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute.

POWELL, Justice, agreed, that if a man should say, "Lend J. S. a horse, and I will undertake he shall pay the hire of it," or "Send J. S. goods, and I will undertake he shall pay you," that those cases would be within the statute; and agreed with POWYS,

that if any trust were given to English, then the case would be within the statute. But he and the Chief Justice and GOULD held, that here was no credit given to English, and the Chief Justice agreed with him, that if there had, this promise would have been but an additional security, and within the statute. And the Chief Justice said, that if a man should say, "Let J. S. ride your horse to Reading, and I will pay you the hire," that is not within the statute, no more than if a man should say, "Deliver cloth to J. S., and I will pay you." He said also, that a bailee of an horse for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excused. And so it was ruled in the case of *Coggs* v. *Bernard,* 2 Stra. 916.

The last day of the term the Chief Justice delivered the opinion of the Court. He said that the question had been proposed at a meeting of judges, and that there had been a great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion that the case was within the statute. The objection that was made was, that if English did not re-deliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and consequently this promise by the defendant is collateral, and is within the reason and the very words of the statute; and is as much so as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, "I will not sell him the goods unless you will undertake he shall pay me for them," such a promise is within the statute; otherwise, if a man had been the person to pay for the goods originally. So here detinue lies against English the principal; and the plaintiff having this remedy against English the principal, cannot have an action against the defendant the undertaker, unless there had been a note in writing.

31. HOOKER, et al., respondents, v. RUSSELL, appellant, 67 Wis. 257, 30 N. W. 358.

Supreme Court, Wisconsin, 1886.

The principal being presumptively liable, the assurer's promise is void unless in writing.

Appeal from the County Court of Fond du Lac County.
Sutherland & Sutherland, for appellant.
Eli Hooker and *C. E. Hooker,* for respondents.
The facts will sufficiently appear from the opinion.

ORTON, J. In 1883 the village board of the village of Brandon, in Fond du Lac county, determined that no license for the sale of intoxicating liquors in said village should be granted during the ensuing year, and passed an ordinance prohibiting such sale and providing for the punishment of those who should violate the same. Certain persons continued to sell intoxicating liquors in said village notwithstanding, and in violation of said ordinance, and in July, 1883, said village board, by resolution, employed the said plaintiffs and respondents to act as the attorneys of the village in the prosecution of such offenders. The respondents, as such attorneys of the village, commenced several prosecutions under such employment, and rendered therein legal services, amounting in value to $173.66, up to and including September 7, 1883, when on that day an injunction was served upon said village, at the suit of one David Whitton, a taxpayer of said village, restraining the village board from appropriating or paying out of the treasury any money for the payment of attorneys' fees in the prosecution of criminal actions theretofore or thereafter had for the violation of the excise laws of the state, and from appropriating or paying any money for expenses incurred in such prosecutions. Notwithstanding said injunction, the respondents continued to render legal services for said village in such prosecutions up to and including the 26th day of January, 1884, the value of which then was the sum of $657.34, including the above amount of $173.66. The bill for these services was presented to and filed with the village board as a claim against the village, and the respondents brought suit against the village therefor, which suit is still pending.

The seventh finding of fact, which must be received as a verity in the case as neither party has excepted thereto, is as follows: "That on or about the 8th day of September, 1883, and subsequent to the service of such injunctional order upon said

village, the defendant, George A. Russell, requested the plaintiff to continue said prosecutions notwithstanding said injunction, and promised and agreed to pay them for their past and future services therein *in case of their inability to collect their claim therefor from said village.*" It was on this promise that this suit was brought against the appellant, and on which the respondents recovered in the county court. There can be no question but that this special promise of the appellant, not in writing, to answer for the debt of the village of Brandon, is void by the statute of frauds (R. S. sec. 2307, subd. 2). The services of the respondents were rendered for the village, and under a contract with the village. They have presented their claim to, as being against, the village, and have sued the village as being liable therefor. "So long as the original debt remains payable by the debtor to his creditor, any arrangement whatever by which another party promises to pay that debt is within the very letter of the statute, no matter from what source the consideration of the latter promise is derived." *Emerick* v. *Sanders,* 1 Wis. 77; *Cotterill* v. *Stevens,* 10 Wis. 422; *Cook* v. *Barrett,* 15 Wis. 596.

Against the operation of the statute upon this promise it is claimed (1) that it has been judicially determined, in the injunction suit against the village, that the village is not liable for such services. It is sufficiently answered that neither of these parties was a party to that suit, and therefore not bound by the judgment therein. But, again, it was a suit in equity, and there might have been other reasons for the injunction than that the village was not legally liable on the contract to pay their attorneys for their services in the prosecutions. (2) It is claimed that for the future services of the respondents the credit was given to the appellant. All the services were performed under one contract with the village. It is so alleged in the complaint, and the respondents not only so testify, but they have preferred their claim against the village, and brought suit against the village for it. The village has never been released from any part of it. (3) It is claimed that the appellant originally promised to pay for such future services on a new consideration of benefit or advantage to himself as a citizen and officer of the village, having an interest in enforcing the laws against the sale of intoxicating liquors. His zeal in the cause of temperance, and his interest in enforcing the laws in common with all other citizens, would scarcely be a good or valuable consideration for a promise to pay. But the above finding is sufficient to show that the same promise embraced the payment for the past and future services alike.

We shall not decide in this case whether the village of Brandon is liable to the respondents on its contract, although the county court found, as a conclusion of law, that the village was not liable and had no authority to make the contract. The village is not a party to this suit, and has not denied its liability in this suit. The village is presumptively liable, for it has the capacity to contract. It will be in time to decide the question of the liability of the village on this particular contract when the action of the respondents against the village to enforce it is on trial.

Are the respondents bound by the finding in this case that the village is not liable? It can only be determined whether the respondents are able to collect their claim against the village, when their suit for that purpose, now pending, shall be tried. In any view that can be properly taken of this promise, it is a collateral one and void.

By the Court.—The judgment of the county court is reversed, and the cause remanded for a new trial.

32. KEATE v. TEMPLE, 1 Bos. & Pul. 158.
Court of Common Pleas, Mich. Term, 1797.

In determining whether a given promise is original or collateral the Court will take into consideration, not only the expressions used, but the particular situation of the parties and the amount involved in the undertaking.

Assumpsit for goods sold and delivered, work and labour, and common money counts.

Plea, Non assumpsit.

This cause was tried before LAWRENCE, J. at Winchester summer assizes 1797, when the principal facts in evidence were as follows:

The Plaintiff was a tailor and slopseller at Portsmouth, and the Defendant the first lieutenant of his Majesty's ship the Boyne. When that ship came into port, the Defendant applied to a third person to recommend a slopseller, who might supply the crew with new cloaths, saying, "He will run no risk; I will see him paid." The Plaintiff being accordingly recommended, the Defendant called upon him, and used these words, "I will see you paid at the pay table; are you satisfied?" The Plaintiff answered, "Perfectly so." The cloaths were delivered on the quarter deck of the Boyne: slops are usually sold on the main deck: the De-

fendant produced samples to ascertain whether his directions had been followed: some of the men said, that they were not in want of any cloaths, but were told by the Defendant, that if they did not take them, he would punish them; and others who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers only. The cloathing of the crew in general was light, and adapted to the climate of the West Indies, where the ship had been last stationed. Soon after the delivery, the Boyne was burnt, and the crew dispersed into different ships. On that occasion, the Plaintiff having expressed some apprehensions for himself, was told by the Defendant "Captain Grey, (the Captain of the Boyne) and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the Commerce de Marseilles in order to pay the crew of the Boyne: at which time the Defendant stood at the pay table, and having taken some money out of the hat of the first man who was paid, gave it to the Plaintiff; the next man refused to part with his pay, and was immediately put in irons. The Defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done.

The learned Judge in his direction to the jury said, that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the Defendant as immediately responsible, the Plaintiff was entitled to a verdict; but if they believed, that at the time when the goods were furnished, the Plaintiff relied on being able, through the assistance of the Defendant, to get his money from the crew, they ought to find for the Defendant.

Verdict for the Plaintiff 576*l.* 7*s.* 8*d.*

A rule *nisi* for a new trial having been obtained on a former day, by Shepherd, Serjt. on the ground of the Defendant's undertaking being within the statute of fraud

LeBlanc and *Marshall*, Serjts. now shewed cause.

Shepherd, Serjt. in support of the rule, was stopped by the Court.

EYRE, CH.J. There is one consideration, independent of everything else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is 576*l.* 7*s.* 8*d.* and this against a lieutenant in the navy: a sum so large, that it goes a great way towards satisfying my mind, that it never could have been in the contemplation of the

Defendant to make himself liable, or of the slopseller to furnish the goods on his credit, to so large an amount. I can hardly think that had the Boyne not been burnt, and the Plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. The circumstances of this case create some prejudice against the Defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these cloaths against their inclination. But it was in evidence, that though they were pretty well cloathed, yet their cloaths were adapted to a warm climate rather than to the service in which they were to be engaged. It was, therefore, the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know, that a sailor is so singular a creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know, that he will risk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his situation may require. The whole of the imputation then on the Defendant and Captain Grey amounts to this, that when the men were to be clothed, they wished them to be somewhat well dressed. I do not know but that this circumstance may have had some influence with the jury. But I do not feel the force of it when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case, it is apparent, that the men were to pay in the first instance; the Defendant's words were "I will see you paid at the pay table; are you satisfied?" and the answer then was, "Perfectly so." The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, Whether the slopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum? Considering the whole bearing of the evidence, and that the learned Judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial.

HEATH, J. I am of the same opinion.

ROOKE, J. I am of the same opinion.

Rule absolute on payment of costs.

b. To answer for the debt of another.

33. MANLEY, Adm'strix, v. GEAGAN, 105 Mass. 445.
Supreme Judicial Court, Massachusetts, 1870.

A promise to pay for work already done for a third person without previous contract with or employment by the promisor is a promise within the statute of frauds.

CONTRACT by the administratrix of Edwin Manley upon an oral promise to pay the following order:

"FALL RIVER, October 9, 1868.

"Nicholas T. Geagan.

"Sir: Please to pay Edwin Manley thirteen hundred and fifty-four dollars for work on your house, corner of Bedford and Twelfth streets, and charge the same to account of H. B. BORDEN & Co."

The answer denied all the plaintiff's allegations, and pleaded want of consideration, and the statute of frauds.

The trial was in the superior court, without a jury, before PITMAN, J., who made the following report of the case for the determination of this court:

"The plaintiff proved that her intestate, in whose favor the order was drawn, did work as a stone mason on a block of buildings belonging to the defendant, and which he was then erecting, prior to the time of drawing this order. It appeared that the whole contract was taken by H. B. Borden & Co., who employed the plaintiff's intestate to do the mason work, and that there was no contract between the plaintiff's intestate and the defendant, and no employment by the defendant; that after the work was done the defendant sent word to the plaintiff's intestate to get an order from Borden & Co. on him, adding, 'I am going to pay all off on the 10th, and am not going to trust Borden & Co. to pay it; I am going to see the help all paid;' and that this was communicated to the intestate; that the next day he procured the order in suit and presented it to the defendant; that the defendant took it, read it, said it was all right, and that he would accept it, and pay it on Monday; that on Monday he could not be found, was gone out of town for a week, and has since refused to pay it. The defendant who was called as a witness by the plaintiff, testified that he owed H. B. Borden & Co. nothing at the time when this order was presented; and I find as a fact that it is not proved that he actually did owe them anything. The defendant offered no evidence.

"Upon the above, the court ruled that the promise of the defendant, being an oral promise to pay the debt of another, and

being also without any consideration, no action could be maintained on it, and thereupon found for the defendant. If this ruling is wrong, a new trial is to be had; otherwise, judgment on the verdict."

J. C. Blaisdell, for the plaintiff.

J. M. Morton, Jr., for the defendant.

GRAY, J. The promise of the defendant was to pay for work already done by the intestate for Borden and Company, without any previous contract with or employment by the defendant. The defendant owed Borden & Company nothing, and received no consideration either from Borden & Company or from the intestate for his promise. The intestate neither did any work nor paid any money upon the faith of this promise, nor gave up any right or security against Borden & Company. Their original liability to him was not altered or affected by the defendant's promise. This promise was therefore clearly a promise to answer for the debt of another, and, not being in writing, was within the statute of frauds. Gen. Sts. c. 105, § 1, cl. 2. *Stone* v. *Symmes,* 18 Pick. 467; *Curtis* v. *Brown,* 5 Cush. 488; *Furbish* v. *Goodnow,* 98 Mass. 296; Browne on St. of Frauds, §§ 172-174.

Judgment on the verdict for the defendant.

34. MEAD, MASON & CO. v. WATSON, 57 Vt. 426.
Supreme Court, Vermont, 1885.

Guaranty of a future liability—a debt to be incurred—is within the statute precisely as it would be if the liability existed when the promise was made.

Assumpsit. Heard on a referee's report, December Term, 1884, TAFT, J., presiding. Judgment for the plaintiffs. The referee found, that the plaintiffs were dealers in doors, windows, and materials for house furnishing; that the defendant, who was known to be responsible, introduced Cameron to the plaintiffs; that the house, for which the articles were purchased, was situated on the defendant's land; that the understanding was, that when the house was completed, it was to be deeded to Cameron's wife; that Cameron abandoned the house before it was completed, and it was finished by the defendant, who retained the title; that the defendant's contract with the plaintiffs was by parol. The other facts are sufficiently stated in the opinion.

S. M. Pingree, for the plaintiffs.

T. O. Seaver, for the defendant.

The opinion of the court was delivered by

POWERS, J. The referee says the plaintiffs understood "that whatever Cameron ordered for said house of the plaintiffs the defendant would guarantee the payment of," and the plaintiffs "would not have sold said articles to Cameron except for this understanding, that the payment was guaranteed by the defendant." Later on he says, "Those articles were all charged to Cameron on plaintiffs' books; and plaintiffs understood that they were to collect the same of said Cameron, if possible, and that the defendant was only liable to pay the same in case the plaintiffs were unable to make collections of Cameron."

The contract of the defendant therefore was collateral to the contract of Cameron.

It is true that no debt existed against Cameron when the defendant's promise was made. But the defendant only promised to be responsible for a *future* debt. His promise could only attach to the principal obligation of Cameron, when that obligation came into force. The defendant did not promise to pay primarily, but only in case the plaintiff failed to collect of Cameron.

If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the Statute of Frauds, precisely as it would be if the liability existed when the promise was made. Brandt, Sur., § 61; Browne, St. Fr., § 162; *Matson* v. *Wharam,* 2 Term, 80.

Judgment reversed, and judgment on the report for defendant.

c. To answer for the default of another.

35. UNITED STATES, to use of ANNISTON PIPE & FOUNDRY CO., v. NATIONAL SURETY CO., 34 C. C. A. 526, 92 Fed. 549.

Circuit Court of Appeals, Eighth Circuit, 1899.

Bond of contractor for public work performs double function: (1) To secure faithful performance of contract; (2) To protect third persons from whom contractor may obtain labor or materials in the prosecution of the work.

In error to the Circuit Court of the United States for the Eastern District of Missouri.

This suit was brought by the Anniston Pipe & Foundry Company, the plaintiff in error, in the name of the United States, against the National Surety Company, the defendant in error,

on a bond executed by the defendant on July 15, 1895, as surety for T. J. Prosser, the bond having been executed pursuant to the provisions of an act of congress approved August 13, 1894 (28 Stat. 278, c. 280), which is as follows:

"*An Act for the protection of persons furnishing materials and labor for the construction of public works.*

"Be it enacted," etc., "that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution; provided, that such action and its prosecution shall involve the United States in no expense."

T. J. Prosser, the principal in the bond, had entered into a contract with Charles B. Thompson, assistant quartermaster of the United States army, who acted for and in behalf of the United States of America, for the construction of a boiler and pump house, pumping machinery, and connections, water mains, steel trestle, and water tank, etc., for the water-supply system for the new military post near Little Rock, Ark.; and the bond contained a condition, in substance, that if said Prosser, his heirs, executors, and administrators, should in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed to be observed and performed by said Prosser, according to the true intent and meaning of said contract, as well during any period of extension of said contract as during the original term, and should make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the obligation should become void, but otherwise remain in full force and virtue. The plaintiff company sued to recover of the defendant, as surety in said bond, the sum of $842.98, with interest and costs, being the value of certain water pipe which it had supplied to Prosser, subsequent to the execution of the aforesaid bond and contract, to enable him to execute his agreement with the government, and which pipe so supplied he had actually used for that purpose,

but had not paid for. For a defense to the action the defendant pleaded, and the trial court so found, that subsequent to the execution of the aforesaid bond, and the contract which it was given to secure, the government had entered into a further agreement with Prosser, modifying the terms of the original contract, or, more accurately, the specifications thereto attached, in such a manner that Prosser was required to lay only 1,866 linear feet of six-inch water pipe in place of 3,850 feet, as specified in the original contract, and that this change in the terms of the original contract, or rather in the plans for its execution, was made without the knowledge or consent of the surety company. In view of the change in the plans for the execution of the contract which lessened the amount of water pipe necessary to be supplied and used, the trial court ruled that the plaintiff could not recover. It accordingly rendered a judgment in favor of the defendant, to reverse which the record has been removed to this court by a writ of error.

Truman A. Post, for plaintiff in error.

J. E. McKeighan (*Shepard Barclay, M. F. Watts,* and *G. A. Vandeveer,* on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, C.J., after stating the case as above, delivered the opinion of the court.

It is a familiar rule that the contract of a surety must be strictly construed, and that it cannot be enlarged by construction, and that when a bond, with sureties, has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes, it may be conceded that the finding of the lower court in the case at bar discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated, and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance of which the bond was intended to secure. Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the

bond, which was intended solely for the protection of laborers and material men who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or materials while the work was in progress.

The real question to be considered, therefore, is whether the act of congress under which the bond in suit was taken constituted the United States the agent or representative of the persons who supplied labor and materials after the contract and bond were executed, in such a sense that its action in consenting to a modification of the contract with Prosser must be imputed to the laborers and material men, and held to deprive them, as well as the government, of all recourse against the surety.

The act of congress of August 13, 1894, does not authorize the United States to bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and material men. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. It is also noticeable that in its title the act professes to be one for the benefit "of persons furnishing materials and labor," and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be "the usual penal bond;" meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There

was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function,—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience.

In view of these considerations, we are of the opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from liability to persons who have supplied labor or materials to their principal to enable him to execute his contract with the United States, simply because the government and the contractor, without the surety's knowledge, have made some changes in the contract, subsequent to the execution of the bond given to secure its performance, which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution. When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor. If such were not the case, it would be possible for the contractor and some officer of the United States, by making some change in the contract or specifications, to deprive laborers and material men of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions. It is not probable that such a result was contemplated by the lawmaker. On the contrary, the act bears every evidence that it was intended to provide a security for laborers and material men on which they could rely confidently for protection, unless they saw fit, by their own deal-

ings with the contractor, to relinquish the benefit of the security. We are confirmed in these views by the following authorities: *Dewey* v. *State,* 91 Ind. 173; *Conn.* v. *State,* 125 Ind. 514, 25 N. E. 443; *Doll* v. *Crume,* 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper,* 46 Neb. 644, 65 N. W. 796; *Steffes* v. *Lemke,* 40 Minn. 27, 41 N. W. 302. The first two of these cases are very much in point. Bonds were given to the state of Indiana as obligee for the doing of public work, in pursuance of a statute of that state, which bonds contained conditions requiring—First, the faithful performance and execution of the work undertaken by the contractor; and, second, the prompt payment by the contractor of all debts incurred by him in the prosecution of the work for labor and materials supplied by third parties. It was held, in substance, that for any breach of the second condition of the bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or prejudiced by any act done by the obligee in the bond after the bond had been taken and approved. It was accordingly ruled that changes made in the contract by the parties thereto, to-wit, the contractor and the public authorities, after the bonds had been executed and accepted, would not deprive material men of their right to recover against the sureties in the bond. It results from what has been said that the judgment of the circuit court was erroneous upon the facts found by that court, and should be reversed. It is so ordered, and that the case be remanded for a new trial.

36. GRIFFITH, et al. v. RUNDLE, et al., 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381.
Supreme Court, Washington, 1900.

Penalty in statutory bond as limit of liability thereon.

Appeal by defendants from a judgment of the Superior Court for Spokane county in favor of plaintiffs in an action brought to hold sureties on a contractor's bond liable for unpaid labor and materials which went into the construction of the building.

Affirmed.

The facts are stated in the opinion.

Messrs. *Henley, Kellam, & Lindsley* and *A. G. Avery,* for appellants.

Messrs. *Lewis & Lewis,* for respondents.

REAVIS, J., delivered the opinion of the court:

In July, 1897, defendant Rundle entered into a contract with

the United States for the construction of certain buildings at the army post near Spokane. At the time the contract was executed, a bond was duly executed in accordance with the provisions of the act of Congress approved August 13, 1894 (28 Stat. at L. p. 278, chap. 280). The law is entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." Its provisions are substantially that any person entering into a formal contract with the United States for the construction of any public building shall be required, before commencing, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work provided for in the contract; that any persons performing labor or furnishing materials for such work shall be furnished on application with a certified copy of the contract and bond upon which the person supplying labor and materials shall have a right of action, and be authorized to bring suit in the name of the United States against the contractor and sureties, provided that such action shall involve the United States in no expense. The defendants Henley and Snodgrass were sureties upon the bond, the penal sum of which was $10,000. While the contractor, Rundle, was engaged in the construction of the buildings under his contract, materials were furnished by plaintiffs to the contractor, and used by him in the work of construction. Subsequently, and while the buildings were but partially completed, the United States, in the exercise of the right reserved in the contract, took the work out of the hands of Rundle, and at the same time notified the sureties, Henley and Snodgrass, of its action. Thereupon the sureties took up the work of construction, and completed the buildings according to Rundle's contract, and the United States accepted their work as full performance of the contract. For defense to the action, after some denials, the sureties set up the fact that Rundle did not complete the contract, but the sureties, under its terms, made full performance, which was duly accepted by the United States, and that in their completion of the contract they were necessarily compelled to expend sums in excess of $10,000, the amount of the penalty in the bond.

1. The several assignments of error made by the appellants may be grouped together, and stated as the refusal of the superior court to admit testimony under the affirmative defense set forth in the answer. The court excluded any evidence with reference to the United States having demanded of the sureties the per-

formance of the contract or the payment of damages. It is maintained by counsel for appellants that the limit of the liability of the sureties was the penalty stated in the bond, $10,000; that, if the sureties had not undertaken the performance of the contract of their principal, the entire damages to both the government and the respondents and all of the other claimants for labor and materials would have been liquidated by the payment of $10,000; that the fact that the sureties necessarily expended more than that sum in the completion of the contract, and over the contract price, relieves them from further liability. It is also maintained that, if the contract had not been completed, the government is a preferred creditor, and its claim would exhaust the penalty, and there would be no funds left for the satisfaction of plaintiffs and other claimants of like character; and counsel maintain that it is necessary to determine the question of priority of rights as between the government and these claimants. In a case involving these facts,—*United States use of Fidelity Nat. Bank* v. *Rundle*,—in the United States circuit court, judgment was entered in conformity with the contention of counsel here. But the cause was afterwards reversed by the United States circuit court of appeals (40 C. C. A. 450, 100 Fed. 400), and the appellate court observed: "The undisputed facts of the present case are such that it is not necessary to consider the question presented in the court below, and argued here, whether if the United States had any cause of action upon the bond in suit, its claim should be preferred to that of the laborers and material men; for as has already been observed, the United States received full performance of the contract, and therefore has no cause of complaint." In the case of *United States use of Anniston Pipe & Foundry Co.* v. *National Surety Co.*, 34 C. C. A. 526, 92 Fed. 549, such a bond was under consideration by the court, and it was there adjudged that the bond was intended to perform a double function: First, to secure the faithful performance of the contract to the government; and, second, to protect third persons from whom the contractor might obtain labor or materials in the prosecution of the work. In its second aspect, the bond , by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons as to which the agency of the government ceases when the bond is given and approved, and subsequent changes in the contract, agreed upon between the government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability to persons who supply labor or materials thereunder. The court observed of the statute under which the bond is exe-

cuted: "It is also noticeable that in its title the act professes to be one for the benefit 'of persons furnishing materials and labor,' and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be 'the usual penal bond;' meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. * * * Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the government, and the one for the benefit of third persons—are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience." In the case of *Dewey* v. *State ex rel. McCollum,* 91 Ind. 173, it was substantially held that for any breach of the second condition of such a bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or abridged by any act done by the obligee in the bond after the bond had been taken and approved; and it was ruled that changes made in the contract by the parties thereto—that is, the contractor and the public authorities—after the bonds had been accepted would not deprive material men of their rights to recover against sureties in the bond. To the same effect is *Conn* v. *State ex rel. Stutsman,* 125 Ind. 514, 25 N. E. 443, and the same principle is affirmed in *Doll* v. *Crume,* 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper,* 46 Neb. 644, 65 N. W. 796; *Steffes* v. *Lemke,* 40 Minn. 27, 41 N. W. 302. The practical effect of the statute, and others of similar character in a number of the states,

seems to be to confer a special lien in favor of such persons who furnish labor and material, and to substitute the bond in place of the public building as a thing upon which the lien is to be charged. Such liens evidently appear, from an inspection of the current legislation, to be favored, and the courts have usually adopted a liberal rule of construction in their enforcement.

2. It is pertinent to suggest that in the performance of the unfinished contract by the sureties, if they had expended less than the amount to be paid by the government on the completion of the contract, the excess or profit would have belonged to them, and, if they undertook the completion of the contract and sustained a loss, it would seem that it should fall upon them. As sureties under the terms of the contract, they might elect to complete it upon default of their principal, but such completion was not the full performance of the contract by the principal himself. It satisfied the sureties' contract with the government, but, as observed by the circuit court of appeals in *United States use of Fidelity Nat. Bank* v. *Rundle*, 40 C. C. A. 450, 100 Fed. 400, the United States is not a claimant here, and the question of priority of claims to the amount due from the sureties under the terms of the bond is not involved in this case.

The judgment of the Superior Court must be affirmed.

DUNBAR, Ch. J., and FULLERTON and ANDERS, JJ., concur.

d. To answer for the miscarriage of another.

37. KIRKHAM v. MARTER, 2 Barn. & Ald. 613.
Court of King's Bench, Easter Term, 1819.

"Miscarriage," as used in the statute of frauds, comprehends that species of wrongful act for the consequences of which the law would make the party civilly responsible.

This was an action on an oral promise. The plaintiff declared that one T. E. Marter, before the making of the promise of defendant, had without the leave or license of the plaintiff, wrongfully ridden a horse of the plaintiff's, in consequence whereof the horse died; that the plaintiff had threatened to commence an action against said T. E. Marter for the recovery of such damages as plaintiff had sustained by reason of the premises; and thereupon, in consideration of the premises, and that the plaintiff, at the request of the defendant, would not bring any action against the said T. E. Marter for the cause aforesaid, and that the plaintiff

would be content to take, for and on account of said horse, what should be agreed upon between the defendant and one A. B., defendant promised to pay plaintiff what should be agreed upon between defendant and said A. B. for and on account of said horse. Plaintiff further declared that he had brought no action for the cause aforesaid, and that he was willing to take, for and on account of the horse, what had been agreed upon between the defendant and A. B., and that defendant and A. B. did agree that defendant should pay plaintiff fifty guineas for the said horse, and the bill due for the maintenance and keep of the said horse.

Breach: The non-payment of the said several sums.

Plea: General Issue.

On the trial of the cause the plaintiff proved an oral contract as laid in the declaration. ABBOTT, C. J., thought this an undertaking for the default or miscarriage of another within the statute of frauds, and consequently that the promise ought to have been in writing, and the plaintiff was non-suited.

Plaintiff moved for a new trial.

ABBOTT, C. J.—This case is clearly within the mischief intended to be remedied by the statute of frauds; that mischief being the frequent fraudulent practices which were too commonly endeavored to be upheld by perjury; and if it be within the mischief, I think the words of the statute are sufficiently large to comprehend the case. The words are these: "No action shall be brought to charge a defendant upon any special promise to answer for the debt, default or *miscarriage* of another person." Now the word "miscarriage" has not the same meaning as the word "debt" or "default;" it seems to me to comprehend that species of wrongful act for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages and therefore, in my judgment, falls within the meaning of the word "miscarriage." The case of *Reed* and *Nash* (1 Wilson, 305), is very distinguishable from this: The promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault, brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original, and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consid-

eration of the plaintiff's forbearing to sue the son. I therefore think that the nonsuit was right.

Rule refused.

38. BAKER v. MORRIS, 33 Kan. 580, 7 Pac. 267.
Supreme Court, Kansas, 1885.

A promise without consideration and not in writing made by a father to answer for the wrongful act of his minor son is not actionable.

Error from Greenwood District Court.

At the May term, 1884, plaintiff Morris recovered a judgment for $50 and costs against defendant Baker, who brings it here for review. The opinion states the facts.

T. L. Davis, for plaintiff in error.

Clogston & Fuller, for defendant in error.

The opinion of the court was delivered by

VALENTINE, J.—The only question presented to this court for determination is, whether the following bill of particulars sets forth facts sufficient to constitute a cause of action. The amended bill of particulars (omitting court and title) reads as follows:

"Now comes the above plaintiff, and for cause of complaint against said defendant says, that said defendant is justly indebted to him in the sum of seventy-five dollars, as follows, to-wit: That on or about the 21st day of December, 1883, one Frank Baker, a son of said defendant, and a minor, did negligently and carelessly fire and shoot off a gun in the direction of the stable of said plaintiff; and that said stable contained one mare pony, the property of said plaintiff; that said shot so fired and shot off penetrated the said stable, and struck and killed said mare, said property of said plaintiff; that said mare was of the value of $75—thereby damaging said plaintiff in the sum of $75.

"Plaintiff further says, that after said death of said mare, said plaintiff requested said defendant to pay for said mare so killed; that——agreed so to do, but has failed so to do; plaintiff therefore says that said defendant voluntarily and of his own free will did, immediately after the injuries and damages complained of hereinbefore, come to plaintiff, and said he would pay this plaintiff the full value of said mare so killed by his said son, thereby ratifying and confirming the said acts of his son Frank, and thereby becoming responsible to plaintiff for the damages

sustained by plaintiff. Therefore, plaintiff prays judgment against said defendant for the sum of $75 and costs."

Under the authority of the case of *Edwards* v. *Crume*, 13 Kas. 348, the defendant below (plaintiff in error) is not liable, unless by his subsequent promise and supposed ratification he has made himself liable. In that case it is held as follows:

"Where a minor son who lives with his father and is under his father's control commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, the father is not liable in a civil action for damages for such wrongful acts."

See also *Schouler on Domestic Relations*, 361. The promise made by defendant to pay the plaintiff for the mare killed is not valid. It was a collateral undertaking, made without consideration, and was not in writing. (Sec. 6, Statute of Frauds). And there was no ratification of the defendant's son's acts, except such as resulted from the promise itself; and this in fact was no ratification at all. The defendant might have disapproved the son's acts wholly and entirely, and condemned them severely, and yet promised to pay the value of the mare killed. * * *

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

SECTION 3. GUARANTOR AND SURETY DISTINGUISHED.

39. KEARNES v. MONTGOMERY, 4 W. Va. 29.
Supreme Court of Appeals, West Virginia, 1870.

The contract of the guarantor is collateral and secondary; that of the surety collateral and primary or direct.

Boggess, for plaintiff in error.
Dennis & Price, for defendant in error.
The facts are stated in the opinion of Maxwell, J.

MAXWELL, J.—This was an action of assumpsit, to recover from the defendant the sum of 2,000 dollars, with interest. The facts certified show that on the 28th day of January, 1860, the plaintiff held the bond of the defendant and one J. N. Montgomery for 2,000 dollars; that the defendant, on the day and year afore-

said, proposed to exchange with the plaintiff for the said bond, a bond of 2,000 dollars executed by Thomas Creigh and L. S. Creigh to the plaintiff; that the plaintiff refused to accept the said last mentioned bond unless the defendant would indorse the same, inasmuch as it was payable to the plaintiff and not to the defendant; whereupon the said defendant wrote his name upon the back of the said bond, which was then accepted by the plaintiff, who, in exchange therefor, delivered to the defendant the said bond of the defendant and J. N. Montgomery; that afterwards, and after the institution of the suit, but before the trial, the plaintiff wrote above the blank indorsement of the defendant, a promise binding the defendant as surety of the said Thomas Creigh and L. S. Creigh; that the bond with the indorsement thereon is as follows:

"On or before the first of March, 1861, with interest from the first of March, 1860, we or either of us bind ourselves, our heirs, etc., to pay Alexander Kearnes the just and full sum of two thousand dollars, for value received.

"Witness our hands and seals this 28th day of January, 1860.

"THOMAS CREIGH. [seal]
"LEWIS S. CREIGH." [seal]

"For value received, I hereby become the surety of Thomas Creigh and Lewis S. Creigh as obligors in the within bond.

WM H. MONTGOMERY."

That the debt against the Creighs could have been made by suit in the year 1861, and after the close of the war in 1865, and that the said Creighs have been insolvent since 1866, and that since that time the debt could not have been made off of them by suit. Upon these facts judgment was rendered for the defendant. The plaintiff in error insists that the judgment is erroneous, because upon the facts proved, the defendant was a surety or maker of the bond in question and primarily liable for its payment, while it is insisted for the defendant that he was guarantor merely and only liable for the payment of the bond in case the money could not be made off the makers of the paper after it fell due, by the use of due diligence which, he insists, was not used before the makers became insolvent. Whether the defendant is guarantor or maker depends on the understanding of the parties. If the payee or assignee of paper, not negotiable, indorse his name in blank on the back of it, he is *prima facie* assignor, but if a stranger indorse his name in blank on the back of paper, not negotiable, he is *prima facie* guarantor; but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred.

The contract of a guarantor is collateral and secondary. It

differs in that respect generally from the contract of a surety which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment and so is responsible at once if the principal debtor makes default. As the proper diligence was not used against the Creighs, if the defendant is guarantor merely he is not liable for the payment of the debt; while if he is to be treated as surety, he is liable. It becomes, therefore, necessary to determine whether he is a technical guarantor merely or a surety. * * *

The plaintiff, after suit brought, wrote over the name of the defendant, "For value received, I hereby become the surety of Thomas Creigh and Lewis S. Creigh as obligors in the within bond." It is upon this contract, so written by the plaintiff, that he claims his right to recover from the defendant. The plaintiff might write anything over the name of the defendant, consistent with the contract of the defendant, so as to carry it out. He could not write the words which he did write, unless upon special contract between the parties, disclosed by the evidence and surrounding circumstances. The evidence, instead of sustaining and authorizing this special contract as written by the plaintiff, does not even tend to show any such understanding, but on the contrary shows, so far as can be inferred from it, that the defendant was to assume the same situation as to liability that he would have occupied if the paper had been executed to him as payee and transferred by him to the plaintiff. As the facts proved wholly fail to show a contract on the part of the defendant to be liable as maker or surety, it follows that he is liable only as guarantor.

The facts proved show affirmatively that, by the use of due diligence against the Creighs, the plaintiff might have made the money.

The judgment complained of will, therefore, have to be affirmed with damages and costs.

40. SINGER MAN'FG CO. v. LITTLER et al., 56 Ia. 601; 9 N. W. 905.
Supreme Court Iowa, 1881.

The assurer on the bond of an agent for the sale of sewing machines, conditioned that such agent will account for all money and property coming into his hands is a guarantor, not a surety. Guarantor entitled to notice within a reasonable time of the amount of his liability.

Appeal from Wapello circuit court.

ACTION AT LAW. The cause was tried to the court below without a jury, and judgment was rendered for defendants. Plaintiff appeals. The facts of the case appear in the opinion.

D. F. Miller and *H. B. Hendershott,* for appellant.

Wm. McNett, for appellees.

BECK, J.—1. The action is upon a bond executed by Littler as principal, and the other defendants as sureties, conditioned that Littler shall pay to plaintiff all his indebtedness to it, existing or afterwards to exist, whether upon notes, accounts, or in any other manner. The petition alleges that Littler became agent of plaintiff for the sale of sewing machines, and the bond in suit was executed when he was appointed, to secure plaintiff from loss that might accrue on account of his employment. The petition alleges that Littler became delinquent in his payments and executed a note to plaintiff, upon which a judgment was afterward rendered for the amount of his indebtedness. The sureties answered the petition, alleging that Littler and the plaintiff entered into an agreement whereby Littler became plaintiff's agent, and became bound to pay to plaintiff money upon the sales of sewing machines, or upon the indorsement of paper taken upon such sales, as stipulated in the agreement. The agreement provides that either party may terminate the contract at their pleasure. Other conditions need not be set out.

The answer further alleges that plaintiff had terminated Littler's agency before the note was executed by him, and that the defendants had no notice at any time that Littler was in default, or that any claim was made by plaintiff against them upon the bond. Upon a demurrer to this answer, the court held that the defendants were entitled to notice of the amount due from Littler within a reasonable time after the settlement between him and plaintiff. The court found upon the trial that no such notice was given to the defendants, wherefore they suffered loss, and that plaintiff, therefore, is not entitled to recover.

2. The controlling question in the case, and the only one argued by counsel, involves the correctness of the court's ruling in holding that defendants are not liable for the reason that notice was not given them of the extent of Littler's liability within a reasonable time after his agency was terminated, and his indebtedness fixed by his settlement with plaintiff. The ruling of the court, we think, is correct, and in accord with *Davis Sewing Machine Co.* v. *Mills,* 55 Ia. 543, 8 N. W. 356. We held in that case, "where the guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guarantied, without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the transactions guarantied are closed, of the amount of his liability thereunder." It will be observed, upon considering the statement of the terms of the contract guarantied as above set out, that they are within this rule, and that under it the defendants in this case are not liable, in the absence of the notice contemplated therein.

3. But counsel for plaintiff, in an ingenious argument, attempt to distinguish this case from *Davis Sewing Machine Co.* v. *Mills.* They insist that while the contract in that case was a guaranty, in this case defendants are not guarantors, but are sureties for Littler, and are jointly liable with him upon an original contract. The error of this position is apparent. Littler was or was about to become indebted to plaintiff upon the contract under which he was appointed agent. Defendants were not bound upon that contract. Neither were they bound upon the notes, accounts, acceptances, or upon any contract upon which Littler became indebted to plaintiff. They became first and only bound upon the bond, whereby they guaranteed that Littler would pay his indebtedness to plaintiff in whatever form it assumed. A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted. A surety is bound with the principal upon the contract under which the principal's indebtedness arises. This is a familiar doctrine of the law. Upon applying it to the facts of the case, it will be seen that defendants are guarantors, and not sureties, for the performance of the contract upon which Littler's indebtedness to plaintiff arose. They were therefore entitled to notice under the rule of *Davis Sewing Machine Co.* v. *Mills.*

It may be observed that guarantors are often called sureties.

We use the term "sureties" in the foregoing discussion, to describe one who is bound by a contract with his principal—who joins with his principal in the execution of the contract, and becomes pecuniarily liable thereon. But, as we have seen, a guarantor—the surety in a contract of guaranty—is not primarily liable upon the principal's contracts, and only becomes liable upon his default. A guarantor, under this rule, is entitled to notice of the amount of his liability within a reasonable time after that liability is determined by the transaction between the original debtor and creditor.

It is our opinion that the judgment of the circuit court ought to be affirmed.

41. SAINT, et al. v. WHEELER & WILSON MFG. CO., 95 Ala. 362, 10 So. 539, 36 Am. St. R. 210.

Supreme Court, Alabama, 1891.

Difference between guarantor and surety. Suretyship indicated by joint contract.

Action by Wheeler & Wilson Mfg. Co. against R. F Saint, A. J. Crosthwaite, C. M. Wright, J. F. Hall and J. R. Spragins, parties to a contract under seal, in the words and figures following:

"For value received and in consideration of the within contract, R. F. Saint (and the other defendants, giving their names and residences respectively), hereby guarantee to the Wheeler & Wilson Mfg. Co., its successors or assigns, the full and faithful performance of the foregoing contract, including all damages which may result to the said company from any failure on the part of said R. F. Saint to perform any of the provisions of said agreement to the amount of $1,000; hereby waiving all necessity on the part of said company of instituting legal proceedings against said R. F. Saint before having recourse on us; hereby waiving the benefit of all constitutional or statutory homestead or exemption laws now in force; further agreeing to pay plaintiff's attorney's fees and all costs should suit be necessary to enforce the collection of this bond.

"Witness our hands and seals, etc."

This contract or bond was written on the back of the contract therein referred to, by which said company, as party of the first part, employed said Saint, party of the second part, as its collector, which contract contained these provisions, among others:

1. The party of the first part (Wheeler & Wilson Mfg. Co.) agrees to employ the party of the second part as its collector.

2. The party of the second part is to engage in no other business but to devote his time exclusively to collecting claims given him from time to time by the party of the first part.

3. The party of the second part agrees to remit to the party

of the first part on Saturday of each week the full amount of all collections made by him.

4. All notes, leases and cash received by the party of the second part on account of the party of the first part shall be held and rendered strictly as the property of the said party of the first part subject to their order and under their control.

All the defendants filed the plea of the general issue.

A. J. Crosthwaite separately pleaded that, before Saint had entered on the discharge of his duties as collector, he notified plaintiff to take his name off the bond—that he would not become a surety on the bond; that the plaintiff made no objection and he was thereby released from any obligation on the bond. The other sureties on the bond filed a separate plea that they signed the bond with the understanding that Crosthwaite was also jointly liable with them on the bond and that a release of Crosthwaite on the bond without their consent released them.

The evidence introduced on the trial of the case established the following facts: That the above contract was executed by the plaintiff and R. F. Saint and the bond was executed by the defendants, Wright, Crosthwaite, Hall and Spragins, as sureties. That Saint received from the plaintiff a large list of notes and accounts for collection; that he collected a considerable amount of money for it, paying over a portion of it and retaining or embezzling the balance of it. After the bond was executed, Saint carried it or sent it to Nashville to the plaintiff; that when Saint went to Nashville to begin work under the contract and before he had reached that place or had received any notes or accounts from the plaintiff, Crosthwaite notified plaintiff to take his name off the bond, which was a revocation of his guaranty, and, plaintiff not having refused, he regarded himself released. Plaintiff did not decline to release him but simply asked his reasons; and after that plaintiff gave Saint the notes and accounts to collect. That when Saint went to Nashville to take charge of the work assigned to him under the contract, the original contract was changed and Saint was permitted to retain from his weekly collections all his expenses and a salary of $50 per month instead of remitting to plaintiff the full amount of his collections. That in February, 1888, the plaintiff, through W. W. Walls, made another change in the contract, whereby Saint was to get only $9 per week instead of $50 per month for his services as collector, and that Saint worked under this last contract until he quit, but, on a settlement he made with the company through Walls, he was allowed $50 per month. That Saint was required to sell and discount notes and accounts

which had been put in his hands for collection under the contract. That he was required to take up the sewing machines and sell them again for such prices as he could get for them, and that he did take up some machines for the plaintiff, but did not know how many, and sold some of them under instructions from the plaintiff. That Wright, Hall and Spragins knew nothing about Crosthwaite revoking his guaranty on the bond; that they signed it with the understanding and agreement that Crosthwaite was jointly liable with them. It was also proved that in February, 1888, the plaintiff, through its agent, had notice of Saint's defalcation and that after such notice said company continued Saint in its employment. The defendants knew nothing about the changes made in this contract between Saint and the plaintiff after the bond was signed. They never consented to any of the changes. The plaintiff never notified either of them of Saint's dishonest act in appropriating the plaintiff's money. Defendants then offered to prove by each of the defendants that they had not consented to a change in the contract and had no knowledge of such change.

Defendants introduced as evidence a number of letters written by plaintiff to the defendant, R. F. Saint, in which they authorized him to discount notes and use his discretion. All the letters show that Saint was required to do other work than that required under the written contract; all of which increased the risk which the sureties had incurred.

In addition to the other charges requested by the defendant in writing were the following:

5. "If the jury believe from the evidence that in February, 1888, Saint had only used $50 or $60 of the plaintiff's money, and that Saint notified the plaintiff that he was short that amount, then it was the duty of the plaintiff to notify the sureties, Wright, Crosthwaite, Hall and Spragins, and, if the plaintiff failed to notify them of such fact. they cannot recover against these sureties for any defalcation of Saint after that time."

7. "If the jury believe from the evidence that A. J. Crosthwaite was released from the bond as guaranty after the other sureties, Wright, Crosthwaite, Hall and Spragins had signed it, then I charge you that such release was a material change in the contract. And if you further believe from the evidence that such change was made without the knowledge and consent of Wright, Hall, and Spragins, and Crosthwaite, then the plaintiff cannot recover against them."

9. "If the jury believe from the evidence that in February, 1888, the plaintiff had notice that defendant, Saint, had collected

money for it which he had converted to his own use, then it was the duty of the plaintiff to notify Wright, Hall, Crosthwaite, and Spragins, his securities, and if it failed to notify them, the plaintiff cannot recover against said sureties for the money collected and appropriated to his own use after the time."

The defendants separately excepted to the court's refusal to give the several charges requested by them * * *

There were verdict and judgment for the plaintiff. Defendants appeal.

Kirk & Almon, for appellants.

Roulhac & Nathan, for appellee.

McCLELLAN, J. The contract sued is not a guaranty, but one of suretyship. Crosthwaite and the other defendants, who undertake that Saint shall faithfully perform his contract with the company, are sureties of Saint and not guarantors. The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money or do any other act in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor cannot. The first is sponsor absolutely and directly for the principal's acts; the latter, only for the principal's ability to do the act. "The one is the insurer of the debt; the other, an insurer of the solvency of the debtor." This is the essential distinction. There is another, going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety. "The contract of the guarantor is his own separate undertaking, in which the principal does not join." Indeed, it has been held, pretermitting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter. (*McMillan* v. *Bank,* 32 Ind. 11, 10 Amer. Law Reg., N. S., 435, and notes.) Though we apprehend that a case might

be put, involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship. * * *

Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty, but a suretyship, on the part of Crosthwaite, Wright, Hall and Spragins. It is not their separate undertaking, but the principal also executes it. While they employ the word "guaranty," they directly obligate themselves, along with Saint, to pay—absolutely and wholly, irrespective of Saint's solvency or insolvency—all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and in short, a primary undertaking on their part not secondary and collateral to pay to the company in the event of Saint's failure and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors; and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter. One of the important differences in the operation, effect, and discharge of the two contracts finds illustration in this case. The undertaking of guaranty, in a case like this, is primarily an offer, and does not become a binding obligation until it is accepted and notice of acceptance has been given to the guarantor. Till this has been done, it cannot be said that there has been that meeting of the minds of the parties which is essential to all contracts. * * * Being thus a mere offer it may be recalled, as, of course, at any time before notice of acceptance. Indeed, there are authorities which hold that even after acceptance, and notice thereof, the guarantor may revoke it by notice that he will no longer be bound, unless he has received a continuing or independent consideration which he does not renounce, or unless the guarantee has acted upon it in such way as that revocation would be inequitable and to his detriment; and, in cases of continuing guaranty, the effect of such revocation is to confine the guarantor's liability to past transactions. * * * All this is otherwise with respect to the contract of a surety. He is bound originally, in all respects, upon the same footing as the principal. His is not an offer depending for efficacy upon acceptance, but an absolute contract, depending for efficacy upon complete execution; and its execution is com-

pleted by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes. He cannot assert the right to revoke unless the right is therein nominated. As was said by the English court, "if he desired to have the right to terminate his suretyship on notice, he should have so specified in his contract." *Calvert* v. *Gordon,* 3 Man. & R., 124; Brandt, Sur. Sec. 113, 114.

The evidence here as to the release of Crosthwaite tends to show no more than this: That after the bond had been delivered to plaintiff, and after its officers had advised Saint that they were ready for him to enter on the discharge of his duties under the contract secured by the bond, he (Crosthwaite) requested plaintiff to take his name off the paper. No assent to this request is shown, but only an inquiry on the part of plaintiff as to Crosthwaite's reasons for desiring to be released. It would seem that the court itself should have decided that these facts did not release Crosthwaite, but the question appears to have been submitted to the jury. If this submission, or any of the instructions accompanying it, was erroneous, no injury resulted to defendants, since the jury determined the point against the alleged release, as the court should have done, assuming it to have been a question of law. On the other hand, if it were a question for the jury, it is to be presumed they were properly instructed as to the rules of law which should guide them to its solution, as no exceptions were reserved in that regard. The exceptions which were reserved on this part of the case are to charges given, and to the refusal to give charges asked by defendants declaratory of the effect which the discharge of Crosthwaite, if the jury found he had been discharged, would have upon the liability of his co-sureties. As the jury found expressly that he had not been discharged, these exceptions present mere abstractions not necessary to be decided. We have no doubt, however, but that the law in this respect was correctly declared by the court to be that the release of Crosthwaite operated to release the other sureties only to the extent of his aliquot share of the liability. * * *

[Reversed on the ground that Saint was retained in the plaintiff's service after notice of his defalcation.]

42. CAMPBELL v. SHERMAN (Homet's Appeal) 151 Pa. St. 70, 25 Atl. 35.

Supreme Court, Pennsylvania, 1892.

The surety undertakes to perform the contract of the principal, if the principal does not; the guarantor, if the principal cannot.

Appeal from court of common pleas, Sullivan county; John A. Sittser, Judge.

Contest between J. A. Homet, claimant, and other lien creditors of Adam Sherman, upon distribution of a fund arising from a sheriff's sale of the real estate of said Sherman. From a judgment allowing Homet's claim in part only, he appeals. Reversed.

J. G. Scouten, for appellant.

E. M. Dunham, for appellee.

McCOLLUM, J. On the first of January, 1887, J. A. Homet, the appellant, bought of Adam Sherman two judgments against A. R. Robbins, on which there was then an unpaid balance of $592.38, and they were duly assigned to him. At the same time he loaned to Sherman $266.62. To secure the payment of the judgments and the money loaned he received the bond of Sherman in the sum of $859, on which, by virtue of the warrant of attorney contained therein, judgment was entered Jan. 3, 1887. On a distribution of the proceeds of a sale by the sheriff on the 13th of September, 1890, of the real estate of Sherman, the appellant claimed to apply on his judgment the fund remaining after paying costs and prior liens. The subsequent lien creditors of Sherman admitted that the appellant was entitled to receive the sum loaned, with interest thereon, but contended that Sherman was released from liability as to the balance because of the appellant's failure to revive the Robbins judgments. To this the appellant answered that his omission to revive these judgments did not release Sherman, and that, if it did, the creditors could not take advantage of it on distribution. The conclusion reached by the learned auditor was that he could not, at the instance of the lien creditors, set aside or disregard the judgment on the showing before him, but that Sherman might, in an appropriate proceeding, rely on the appellant's negligence as a defense to it. The learned president of the common pleas thought that this defense could be successfully made before the auditor by the lien creditors, and the fund was accordingly awarded to them.

In reviewing the decision of the court below, the first important inquiry is whether the obligation of Sherman in respect to the

Robbins judgments was that of a surety or of a guarantor. If he was a surety, he was not released from liability by the negligence of the appellant, and the contention concerning the powers of the auditor has nothing to rest upon. It is well settled that mere forbearance, however prejudicial to a surety, will not discharge him, and that the failure of a creditor to revive a judgment does not release the surety, unless there was an express agreement that it should be kept revived for his benefit. *Winton* v. *Little,* 94 Pa. St. 64; *U. S.* v. *Simpson,* 3 Pen. & W. 437.

We think the undertaking of Sherman was that of a surety. His bond included the money loaned and the balance due on the Robbins judgments, and by its express terms was to remain in force until the whole sum was paid. The written conditions in the bond define the liability of the obligor, and we cannot add to them by implication a condition which would render them nugatory. The written condition applicable to this contention is that, if the judgments "shall be paid in full by the said A. R. Robbins, his heirs and assigns, to the said J. A. Homet, then this obligation to be void, otherwise to be and remain in full force and virtue."

The appellant purchased the judgments on the agreement of his vendor to pay them if Robbins did not. It was a contract of suretyship, and not of technical guaranty, on which he parted with his money. On the failure of Robbins to pay the judgments at maturity, he was at liberty to proceed directly against the surety. He was not bound to resort to legal proceedings against Robbins or to show that they would have been unavailing in order to sustain process upon the bond. He was under no legal duty to the surety to revive the judgments, unless requested to do so, and, as no such request was made, negligence in this particular cannot be imputed to him. The law on this subject is stated by Agnew, J., in *Reigrat* v. *White,* 52 Pa. St. 440, as follows:

"A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, and a guaranty is a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not, and in the latter the guarantor undertakes that his principal can perform—that he is able to do so. From the nature of the former, the undertaking is immediate and direct that the act shall be done which if not done makes the surety responsible at once; but, from the nature of the latter, non-ability, in other words insolvency, must be shown."

In *Kramph's Ex'x* v. *Hatz's Ex'rs,* Id. 525, Woodward, C.J.,

discussing the same subject said: "The contract of a guarantor is to be carefully distinguished from that of a surety, for whilst both are accessory contracts, and that of a surety in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings, with notice that he will not continue bound unless they are instituted. *Cope* v. *Smith,* 8 Serg. & R. 110.

By his contract he undertakes to pay if the debtor do not—the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt; the other, an insurer of the solvency of the debtor. It results as a matter of course out of the latter contract that the creditor shall use diligence to make the debtor pay, and, failing in this, he lets go the guarantor." The foregoing extracts from the opinions of eminent Pennsylvania jurists draw with remarkable clearness and precision the distinction between a contract of suretyship and a contract of guaranty, and accurately define the respective rights and obligations of a surety and a guarantor. There has been no departure by this court from the principles announced in them, and they sustain the contention of the appellant that his omission to revive the Robbins judgments did not affect Sherman's liability on his bond. It follows that it was error to award the fund to the subsequent lien creditors.

Decree reversed, and record remitted to the court below, with direction to distribute the fund in accordance with this opinion; the costs of this appeal to be paid by the appellees.

SECTION 4. CLASSIFICATION OF GUARANTIES.

43. LOWRY, et al., v. ADAMS, 22 Vt. 160.
Supreme Court, Vermont, 1850.

Guaranty addressed to no person in particular is general.

Assumpsit upon a written contract of guaranty. The facts are stated in the opinion.

F. E. Woodbridge and *E. J. Phelps* for plaintiffs.

J. Pierpont for defendant.

POLAND, J. From the bill of exceptions and other papers referred to in this case the following facts appear to have been proved by the plaintiffs at the trial of this cause in the county court. That E. N. Drury was the son-in-law of the defendant,

and some time previous to September, 1846, had been in partnership with him in mercantile business in the city of Vergennes, and had purchased the defendant's interest in the partnership business and had succeeded him therein. That in the month of September, 1846, Drury, being about to go to the city of New York to purchase his usual supply of fall goods for his store in Vergennes, applied to the defendant for a letter of credit, to enable him to purchase said goods; and the defendant, on the seventeenth day of September, 1846, gave to Drury a writing in these words, to-wit: "Mr. E. N. Drury is buying goods in New York, and what he may want, more than he pays for himself, I will be responsible for; Vergennes, September 17, 1846. (Signed) Hiram Adams." That Drury carried said writing to the city of New York, and, on the twenty-second day of September, 1846, presented the same to Stearns & Johnson, and, upon the strength and credit of it. purchased of them a small bill of goods. That Drury left said paper in the possession of Stearns & Johnson, and at the same time told them, that he should buy goods of other persons in New York, and desired Stearns & Johnson to keep said paper in their possession and exhibit it to those who called on them to see it, and to hold it for the use and benefit of any person, from whom he might purchase goods. That on the same day, or within a day or two after, Drury applied to the plaintiffs to sell him a bill of goods on credit, and at the same time informed them of said writing, and that he had deposited the same with Stearns & Johnson for the purposes above stated; and the plaintiffs thereupon sent their clerk to the store of Stearns & Johnson to see the writing, and it was exhibited to the clerk by Stearns & Johnson, and a copy of it was taken by him and delivered to the plaintiffs. That the plaintiffs, being satisfied of the sufficiency of said paper, sold and delivered to Drury a bill of goods, amounting to the sum of $371.38, and took his note for the amount, payable in four months from date, (September 25, 1846,) relying upon the said paper as their security for payment. That on the ninth day of November, 1846, the plaintiffs, upon the credit and faith of said paper, sold and delivered to Drury another bill of goods, amounting to the sum of $81.90. That Drury returned with said goods to Vergennes, and continued to carry on his business there, as a merchant, until some time in the winter of 1847, when he failed and became insolvent, and the plaintiffs have never been paid for said goods. The plaintiffs introduced evidence tending to prove, that between the sixth day of December, 1846, and the second Tuesday of the same month they gave notice to the de-

fendant, that they had sold and delivered the above mentioned bills of goods to Drury, upon the faith of defendant's said guaranty, that the same were not paid for, and that they should look to the defendant for payment,—and also proved, that they gave notice to the defendant, on the twenty-fifth day of January, 1847, that Drury had not paid said note. The county court ruled, that the plaintiffs could not maintain their suit against the defendant upon said guaranty; whereupon the plaintiffs submitted to a verdict for the defendant, with leave to except to the ruling of the court; and the question is now before us upon the correctness of that decision.

The defendant insists, that, although the writing signed by him was not addressed to any particular person, yet that, when it had been presented by Drury to Stearns & Johnson, and they had given Drury credit upon the faith of it, its object and purpose had become complete and executed; and that thereafter the paper was to have the same legal effect and consequences, as if it had been originally addressed to Stearns & Johnson by the defendant.

If the purpose of the parties were such, that it might have been fulfilled by such use of the paper, or if the parties, at the time it was executed, might reasonably be supposed to have contemplated only a single purchase upon the credit of it, at some one particular house, this position of the defendant is doubtless correct. It becomes important, then, to ascertain and determine, if possible, the true object and intent of the defendant executing the paper and delivering it to Drury; for the law aims in all cases if possible, to give effect to and carry out the real designs of the parties in every species of contracts; and in no one class of cases have the courts gone so far for that purpose, as in those of mercantile transactions and securities.

For the purpose of ascertaining the intent of the parties in entering into any contract, courts will look at the situation of the parties making it, the subject matter of the contract, the motives of the parties in entering into it, and the object to be attained by it; and, even in cases where the contract is reduced to writing, will allow all these circumstances to be shown by *parol* evidence, if the intent of the parties, upon the face of the contract is doubtful, or the language used by them will admit of more than one interpretation. See *French* v. *Carhart*, 1 Comst. 96, and observations of JEWETT, Ch.J., p. 102; Chit. on Cont. 74, and notes. When, from the contract itself and all the surrounding circumstances, the true object and intent of the parties has been ascertained, courts will enforce the contract according to that intent, unless

there be found in the way some stubborn, inflexible rule of law, absolutely requiring a different determination.

Considering the case in this view, what was the intention and understanding of the defendant, at the time he made and delivered the guaranty, or letter of credit, in question, to Drury? Drury was going to New York to purchase his usual fall supply of goods for the business of a country store, where goods of every variety and description are usually kept for sale. The defendant had been a merchant himself, and had formerly carried on the mercantile business in the same store then occupied by Drury, and must have known, that it would be impossible for Drury to have supplied himself with all the various kinds of goods, usually kept for sale in a country store, at any single house in New York, and that he must necessarily make purchases of goods at several different houses. The defendant, having been in business, and known to be responsible, under this state of things gives to Drury a general letter of credit to carry to New York, addressed to no one, in which he agrees to be responsible for the goods Drury may purchase, more than he pays for. It would seem from the writing itself, and from the situation of the parties, impossible for any one to doubt, what the defendant really intended, when he executed the paper and delivered it to Drury. We are fully satisfied, that his object must have been, and that he intended, to give to Drury the necessary credit to enable him to purchase his fall stock of goods, of the various descriptions and varieties kept in a country store, at as many different houses, and of as many different dealers, as might become necessary for that purpose.

Is there, then, any imperative rule of law in the way of giving effect to this intention of the parties, and which will prevent these plaintiffs, who sold goods to Drury upon the credit and faith of the defendant's letter, from holding the defendant liable, because another firm had previously trusted Drury with a bill of goods upon the credit of the same letter? No case has been shown us, and the counsel for the defendant admits, that after a laborious search he has not been able to find any decided case, or statement by any elementary writer, that, upon a general letter of credit, like the present one, the signer could only be liable to the person who gave the first credit upon it. In the case of *McClung et al.* v. *Means,* 4 Ham. Ohio R. 193, the supreme court of Ohio seem to have held, that, upon a guaranty very similar to the present, different persons might give credit upon the faith of it, —though judgment in that case was given for the defendant upon

another point. We do not find, that this precise point has been adjudged by the courts, either in England or in this country; but in many cases we find dicta fully warranting the sustaining of such an action. See *McLaren* v. *Watson's Ex'r.*, 26 Wend. 436, 437, by Verplanck, Senator; *Burckhard* v. *Brown*, 5 Hill 642. See, also, opinion of Judge Story, in note to Story on Bills, 545 to 555; Story on Cont. 737, and cases cited in notes; Smith's Merc. Law 448, and Am. editor's note; *Lawrason* v. *Mason*, 3 Cranch 492; *Bradley* v. *Cary*, 3 Greenl. 233. Without taking farther space upon the question, we are not able to discover any principle, or authority, by which we are precluded from giving to the defendant's letter of credit the effect we are satisfied he intended,—that is, to make himself responsible to each and every person, who should sell goods to Drury, relying upon the faith and credit of it, and that he became liable to each in the same manner, and to the same legal effect and extent, as if he had given a separate letter to each. * * *

The judgment of the county court is therefore reversed and a new trial ordered.

44. UNION BANK OF LOUISIANA v. COSTER'S EXECUTORS, 3 N. Y. 203.

Court of Appeals, New York, 1850.

General guaranty; consideration; notice; construction.

On the 29th of May, 1841, Heckscher & Coster, merchants of the city of New York, executed and sent to Kohn, Daron & Co., merchants in New Orleans, a letter of credit as follows:

"NEW YORK, 29 May, 1841.

"SIR: We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days' sight, issued by Messrs. Kohn, Daron & Co. of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank. We are respectfully, sir, your obd't serv'ts,

"HECKSCHER & COSTER."

At the foot of the letter of credit was a guaranty executed at the same time by John G. Coster, as follows:

"I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit.

"JOHN G. COSTER."

On the faith of the above letter of credit and guaranty, the Union Bank of Louisiana, in January, 1842, purchased two drafts drawn by Kohn, Daron & Co. on Heckscher & Coster, amounting to about $9,000, which were accepted and paid by the latter ac-

cording to their agreement. On the 14th of February, 1842, the bank, under the same letter of credit, purchased another draft for $4,000, at sixty days' sight, drawn by and upon the same parties; and on the 26th of that month this draft was presented to Heckscher & Coster, in New York, for acceptance, which they refused. On the 9th of April, 1842, the attorney for the Union Bank gave notice to John G. Coster that he had received the draft for collection, and on the 2d of May, 1842, formal notice of the protest of the draft for non-payment was served on Mr. Coster. In August, 1844, John G. Coster died, and the Union Bank subsequently brought this suit in the superior court of the city of New York, against his executors, upon the guaranty above set forth, for the purpose of recovering the amount of the draft. On the trial, in addition to the facts already stated, it appeared that prior to any of the above mentioned transactions with the Union Bank, the said letter of credit and guaranty had been held by the City Bank of New Orleans, which, upon the faith thereof, in December, 1841, had purchased a draft of $10,000 drawn by Kohn, Daron & Co. upon Heckscher & Coster. The letter and guaranty were not addressed to any particular person or bank.

Wm. M. Evarts, for appellants.

B. W. Bonney, for respondents.

PRATT, J., delivered the opinion of the court. Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default or miscarriage of another, to be in writing subscribed by the party to be charged thereby, and expressing therein the consideration; and no parol evidence will be allowed as a substitute for these requirements of the statute. But in other respects the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts. Hence the consideration which will support a contract of this character, as in other cases, may consist in some benefit to the promisor, or some other person at his request, or some trouble or detriment to the promisee. (20 Wend. 184, 201; Theobald on Pr. & Surety, 3, 4; 2 H. Bl. 312.) Nor is any particular form of words necessary to be used for expressing the consideration; but it is enough if from the whole instrument the consideration expressly or by necessary inference appears; so that it be clear that such and no other was the consideration upon which the promise was made. (24 Wend. 35; 21 id. 628; 4 Hill, 200; 8 Ad. & El. 846; 5 Barn.

& Ad. 1109.) And the rule allowing two or more instruments given at the same time and relating to the same subject matter to be construed together as one instrument, applies also to this class of contracts; so that when a guaranty is given at the same time with the principal contract and forms a part of the entire transaction, if the consideration be stated in the principal contract, though none be stated in the guaranty, it will suffice. 8 John. 35; 9 Wend. 218; 18 id. 114. So also as in other cases, parol evidence of the circumstances under which the contract was made may be given, to aid the court in giving a true construction to ambiguous terms therein, or to show that separate contracts relate to the same subject matter.

It should also be observed here, that our statute in terms only requires the contract to express therein what it had been well settled the statute of Elizabeth required it to contain, and the same rules of construction should therefore be applied in cases under both statutes. 24 Wend. 35.

With these observations in relation to the law governing cases of this kind, we come to the consideration of the contract in question.

The letter of credit of Heckscher & Coster is an original undertaking on the face of it to accept any drafts to be drawn upon them at sixty days by Kohn, Daron & Co. to the extent of $25,000, and negotiated by the bank to whom it is addressed. The consideration of their undertaking appears very plainly from the instrument. It is an open proposition to the bank to which it is addressed, that if it will purchase the drafts drawn by Kohn, Daron & Co. they will accept and pay the same. As soon therefore as the bank complied with the proposition the contract was closed, and the rights and liabilities of the parties became fixed. Upon this part of the contract there can be no question that a sufficient consideration appears upon the face of the contract to uphold it. But it requires no greater or different consideration to support a guaranty than to support an original promise. The only difference in the two cases consists in the former requiring the consideration to appear upon the contract itself, whereas the consideration to support the latter may be proved by parol. The question therefore in this case is whether the consideration of the undertaking of the defendants' testator appears upon the instrument itself, or rather whether the two instruments may be read together so that the same consideration shall support both.

The guaranty is without date and at the foot of the letter of credit. Independent of the parol testimony it should be deemed

to have been made at the same time. It is addressed to the same person and relates to the same subject matter. It should therefore, within every rule of construction, be deemed part of the same transaction, and the two instruments should be read together as one contract. The two would read thus: "In consideration that you, the Union Bank of Louisiana, will purchase any draft or drafts to be issued by Kohn, Daron & Co. upon Heckscher & Coster, at sixty days, not exceeding $25,000, we the said Heckscher & Coster will accept and pay the same; and I the said John G. Coster agree that Heckscher & Coster shall accept and pay the same." Now it seems to me clear that such is the fair reading of the two contracts taken together; and although the contract of John G. Coster may be deemed collateral, yet had the two been drawn in the above form no question could have been raised upon the statute of frauds. But what may be fairly inferred from the terms of a contract should be considered, for the purpose of giving it effect, as contained in it; and this rule applies as well to collateral as to original undertakings. 5 Hill, 147.

There is a wide difference between the guaranty of an existing debt and the guaranty of a debt to be contracted upon the credit of the guaranty. It is the difference between a past and future consideration. A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee implies a request, and a compliance on the part of the latter closes the contract and makes it binding. And although it may be necessary from the nature of the case to prove performance by parol, yet such evidence is no violation of the statute requiring the consideration to be in writing. The consideration of the promise is expressed, and the parol evidence is only used to show, not what the consideration is, but that the act which constitutes that consideration has been performed. Any other rule would require every person to whom a letter of credit is directed to accept the same in writing before the drawer would be bound. For instance, a letter drawn in the country and addressed to a merchant in the city, guaranteeing the responsibility of the person for whose benefit the same was drawn for a given bill of goods to be sold to him, would require a written acceptance by the city merchant before it would be binding upon the drawer. No such strict rule can be found supported by any adjudication. I am therefore satisfied that the consideration of the guaranty in the case at bar sufficiently appears in the contract, and that the same was valid and binding upon the defendants' testator. I have

not been able to find a case in our own or the English courts which would conflict with the doctrine above advanced; but on the contrary, the books are full of cases similar in their circumstances to this case, where the guaranty has been sustained. 8 John. 35; 11 id. 221; 10 Wend. 218; S. C. in error, 13 id. 114; 12 id. 218; 24 id. 35; 4 Hill, 200; 4 Denio, 559; 1 Ad. & E. 57; 5 Bligh's N. R. 1; 7 Mees. & Wels. 410; 9 East, 348; 1 Camp. 242; 3 Brod. & Bing. 211; 4 C. & P. N. P. 59; 8 Dowl. & Ryl. 62.

The next question raised in the case is as to notice of acceptance. We must hold the law to be settled in this state that where the guaranty is absolute no notice of acceptance is necessary. Judge COWEN in *Douglass* v. *Howland* (24 Wend. 35), and Judge BRONSON in *Smith* v. *Dann* (6 Hill, 543), examined the cases at length upon this question, and they showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts. In this case the only condition of Coster's undertaking was that the bank should purchase the drafts to be issued by Kohn, Daron & Co., and upon complying with that condition the rights of the parties became fixed, and the contract binding. There is nothing in the contract from which we can infer that it was the intention of the parties that notice should be given in order to fix the guarantor. No more is required to make the guarantor liable than to make Heckscher & Coster, and the only notice to them necessary was the presentment of the drafts for their acceptance within a reasonable time. *Allen* v. *Rightmere*, 20 John. 365; *Clark* v. *Burdett*, 2 Hall, 197; Cro. Jac. 287, 685; 2 Salk. 457; Vin. Ab. Notice, A. 3; Com. Dig. Plead. C. 75; 2 Chitty, 403.

As to notice of non-acceptance and non-payment of the bills by the drawees, that can only involve the subject of laches on the part of the holders of the drafts, and all the cases, both in England and in this country, concur in holding that this defense can only be set up to an action against the surety in cases where he has suffered damage thereby, and then only to the extent of such damage. 7 Peters, 117; 12 id. 497; 1 Mason, 323, 368; 1 Story, 22; 13 Conn. 28; 5 Man. & Gran. 559; 13 Mees. & Wels. 452; 3 Kent's Com. 122. If, therefore, it were necessary in this case to give any notice, no evidence has been given showing that the defendants, or the guarantor, suffered any loss in consequence of the want of such notice.

The only remaining question, therefore, worthy of consid-

eration in this case, arises out of the fact that another bank had previously purchased drafts drawn in pursuance of the letter of credit and guaranty. It is claimed that by such purchase the contract became a fixed and binding contract between such bank and the promisor, and thereby lost its negotiable character, and became located so that no other person or bank could purchase drafts upon the credit of it.

The guaranty, in this case, was manifestly intended to accompany the letter of credit, and is subject, in this respect, to the same construction. If, therefore, it was competent for Kohn, Daron & Co. to draw several drafts not exceeding the limit in the bill of credit specified, and to negotiate them at different banks, and Heckscher & Coster would be bound by their letter of credit to accept and pay them, the guarantor would also be liable to the same extent. As a general rule the surety is liable to the same extent as the principal, unless he expressly limits his liability. (Theobald on Prin. and Surety, 46.) It therefore only becomes necessary to examine the letter of credit, and ascertain whether it was intended to be limited to one particular bank, or is a general letter of credit to any and all persons who may advance money upon it. It is somewhat singular that we find so few adjudications in our courts upon a class of commercial instruments which enter so largely into the commerce and business of this country, and of the world.

In England it seems to be at this time questionable whether a party who advances money upon a general letter of credit can sustain an action upon it. *Russell et al.* v. *Wiggins,* 2 Story, 214; *Bank of Ireland* v. *Archer,* 2 Mees. & Welsby, 383. The reason assigned is that there is no privity of contract between them. It is there assumed that it is only a contract between the drawer of the letter and the person for whose benefit it is drawn. But in this country the contrary doctrine is well settled. Letters of credit are of two kinds, general and special. A special letter of credit is addressed to a particular individual by name, and is confined to him, and gives no other person a right to act upon it. A general letter, on the contrary, is addressed to any and every person, and therefore gives any person to whom it may be shown authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes in legal effect the same as if addressed to him by name. *Russell* v. *Wiggins,* 2 Story's Rep. 214; 12 Mass. 154; 2 Metcalf, 381; 12 Wend. 393; 12 Peters, 207; *Burkhead* v. *Brown,* 5 Hill, 641; Story on Bills; See Beames' Lex. Mer. 444.

But these general letters of credit may be subdivided into two kinds, those that contemplate a single transaction, and those that contemplate an open and continued credit, embracing several transactions. In the latter case they are not generally confined to transactions with a single individual, but if the nature of the business which the letter of credit was intended to facilitate, requires it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him. Thus a general letter of credit may be issued to a person to enable him to purchase goods in the city of New York, for a country store. The very nature of the business requires him to deal with different individuals and houses in order to obtain the necessary assortment. It has never, as I am aware, been questioned that the guarantor might be bound to several persons who should furnish goods upon the credit of the letter.

So letters are issued by commission houses in the city, to enable persons to purchase produce in the western states. The money is obtained from the local banks in those states by drafts drawn upon those houses, and upon the faith of the letters of credit. It may often happen that a single bank can not furnish the requisite amount, or it may be necessary to use money in different and distant localities. I am not aware of any question ever having been raised as to the authority of different banks to act upon the same letter of credit. It is absolutely necessary that such should be the effect of them in order to facilitate the commerce of the country, and to carry out the object of the parties in issuing the letters of credit. *Burkhead* v. *Brown,* 5 Hill, 641; 2 Story's Rep. 214.

The letter of credit in this case was evidently intended to be general; it did not contemplate a single transaction, or draft for the whole amount, but several drafts limited in the aggregate to twenty-five thousand dollars. Although the address "sir," and "your bank," is in the singular number, yet I think it was intended to be used in a distributive sense, and apply to any bank or banks who should purchase the drafts. I can see no object which the drawers should have for limiting the party for whose benefit the letter was issued to a single bank. It is said that it would enable them more readily to revoke the authority. But these letters are not issued without either undoubted confidence in the persons for whose benefit they are drawn, or upon ample security. The idea of giving notice of revocation to any party but that for whose benefit they are drawn, is never entertained by the guarantors in

cases of general letters. When they wish to provide for any such contingency the letters are framed accordingly. Again, in this case the parties themselves have treated this letter as not limited to a single bank, for they accepted bills which had been discounted by the plaintiffs.

I am, therefore, satisfied that the plaintiffs were authorized to purchase bills upon the faith of the letter and accompanying guaranty, and that the previous purchase of bills by another bank is no defense.

Whether the letters had been revoked with the knowledge of the plaintiffs before the draft was discounted by them, was a question of fact for the jury. It would clearly constitute no defense unless the plaintiffs had notice of it. The judgment of the superior court must therefore be affirmed with costs.

Judgment affirmed.

45. TAYLOR et al. v. WETMORE et al., 10 Ohio 491.

Supreme Court, Ohio, 1841.

Special guaranty—Addressee a particular firm. Notice to guarantor.

This is an action of assumpsit from the county of Portage.

The declaration contains two special counts. In the first, it is averred that one C. D. Farrar, on November 26, 1836, being desirous of purchasing a general assortment of goods in the city of Pittsburg, for a retail country store, on a credit, and being unknown to the business men of said city, applied to the defendants, Messrs. Wetmores, then doing business at Cuyahoga Falls, in Portage county, for a general letter of credit, directed to some one or more of their correspondents in the said city of Pittsburg, by means of which the said Farrar might be enabled to make his purchases; and the said defendants upon such application, made and delivered to Mr. Farrar a letter of credit, or written guaranty, addressed to Messrs. A. D. McBride & Co., merchants in Pittsburg, in the words following:

"CUYAHOGA FALLS, November 26, 1836.

"MESSRS A. D. MCBRIDE & Co.

"Gentlemen: Mr. C. D. Farrar has concluded to purchase a few goods; we have that confidence in Mr. Farrar, that we will say that we will be responsible to the amount of $2,000 for goods delivered him.

"We are truly,

"C. W. & S. D. WETMORE."

And which said letter, the plaintiffs aver was taken by Mr. Farrar, and presented to Messrs. McBride & Co. at Pittsburg, who

retained it, as security for themselves and such other merchants in the said city, as should, at that time and on the faith of said guaranty, sell goods on a credit to the said Farrar.

It is also averred that Mr. Farrar was unable to obtain a general assortment of goods from the house of the Messrs. McBrides, whose business was confined to that of grocers, and therefore he made application to the plaintiffs, upon the strength of the said guaranty, then in the hands of McBride & Co. referring the plaintiffs to the house of McBride & Co. and to the said guaranty; that the plaintiffs did in fact call upon McBride & Co., examined the letter of credit, and being satisfied with their statements in regard to the responsibility of the defendants, and of the guaranty, in consideration thereof, sold and delivered to Mr. Farrar, upon a credit of six months, a bill of dry goods, amounting to $760.75; of all which the defendants had due and timely notice. The plaintiffs then aver that the credit has expired, and that Farrar has omitted to pay, etc.

The second count states that on November 6, 1836, etc., in consideration that the plaintiffs at the special instance and request of the defendants, would sell to said Farrar, on credit, all such goods as said Farrar should have occasion for and require of said plaintiffs in their trade and business of wholesale dry goods merchants, they, the defendants, undertook and promised to pay the plaintiffs therefor; this count then avers the sale and delivery of goods to the amount of $760.75, on a certain credit, agreed upon between the parties, that the credit had expired, that Farrar had not paid, of which the defendants had notice; avers their liability, and breach in the non-payment.

To this declaration the defendants filed their plea of the general issue.

The testimony submitted on the part of the plaintiffs, proves: (1) The execution and delivery of this mercantile guaranty, as set forth in the first count of the declaration; and (2) That a few days after its date, it was handed to the firm of McBride & Company, who not being dealers in dry goods, the witness (who was a partner of the last mentioned firm), went with Mr. Farrar to the plaintiffs, and the said guaranty was shown to Mr. Taylor, one of the plaintiffs; the witness stated to Mr. Taylor, that he had sold a bill of groceries on the strength of the letter, and Mr. Taylor then said he would sell a bill of goods on the strength of the *same*, and Mr. Farrar accordingly obtained the goods. The clerk and salesman of the plaintiffs prove the amount of the goods sold to be $760.75, and on a credit of six months.

The evidence on the part of the defendants proves that Farrar was in business at Cuyahoga Falls from December, 1836, until April or May, 1837, when he transferred all his goods to the defendants, and closed his store. That he paid none of his debts in Pittsburg. That in September, 1837, the witness was present at a conversation between Taylor, one of the plaintiffs, and C. W. Wetmore, one of the defendants, in which the defendant asked Taylor, if he considered him responsible, either legally, morally, or honorably, for the goods Farrar had purchased of him. To which Taylor replied he did not, but that the defendants had more goods in their possession, received of Farrar, than they were holden to the house of McBride for; that the goods would amount to $500 or $700. To this the defendant replied he did not know how that was; that there was also left with them, by Farrar, notes and accounts to the amount of about $200, and what they could not make up out of them, must be made up out of the goods; and if there was any balance, so far as he was concerned, that should go to the plaintiffs.

Birhard, for the plaintiffs.

WOOD, J. Under the avertments in the declaration, and the testimony submitted, are the plaintiffs entitled to judgment?—and I may here remark, in the outset, in this case, that I know of no arbitrary rule applicable to actions founded upon mercantile guaranties, which creates obligations between the parties to which they have neither expressly nor impliedly assented. In all actions founded in contract, the agreement as set forth must be proved or the circumstances existing between the parties must be such as to leave it clearly to be inferred. In enforcing them, courts of justice, though they may sometimes be confined by technical rules, always endeavor to ascertain the understandings and intentions of the parties, and these are considered as the essence of their agreements in carrying them into execution. Mercantile guaranties are either general or special; though a single letter of credit may bear upon its face both of these distinctions. It may be general, as to the whole world, to whom the bearer may be accredited, and to any portion of whom, at his own option, he may make the guarantor a debtor, and special, as to the amount of the credit; or unlimited or general in the amount, and special as to the parties.

The first inquiry which arises here, is, whether the guaranty in question is not special as to persons. It is directed to the house of McBride & Co., in the city of Pittsburg, and nothing upon its face evincing an intention to give Farrar credit, or to incur responsibility with any other house.

The counsel for the plaintiff here admit, that a surety can not be held beyond the terms of his engagement, but they insist that although it is addressed only to McBride & Co. as it does not say "we will be responsible *to you,*" it is a letter of credit to any other, who will advance the goods. It seems to us, this reasoning is more ingenious than sound. The guaranty being addressed to A. D. McBride & Co., it is to them the defendants speak when they say, *"we will be responsible to the amount of* $2,000," and it contains no general terms, by which either Farrar, or the house of McBride, had the authority to transfer it to the plaintiffs, and they to make the defendants their guarantors, without their assent, *express or implied.*

Judgment for the defendants.

46. GARD v. STEVENS, 12 Mich. 292.
Supreme Court, Michigan, 1864.

Guaranty limited as to time.

Case made after judgment, from Berrien Circuit. The facts sufficiently appear by the opinion.

C. I. Walker, for plaintiff.

G. V. N. Lothrop, for defendant.

MANNING, J.—The action is assumpsit for the price of leather sold to one Gates, on the following guaranty:

"ST. JOSEPH, Sept. 18, 1858.

"JOSEPH GARD.

Dear Sir: If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasable length of time, Yours, etc.,

"J. E. STEVENS."

As plaintiff sold leather to Gates at several different times, and for different amounts, the first question is whether the guaranty is limited as to time. We think it limited to a single purchase or transaction. We must hold this, or that it is unlimited both as to time and amount. Every person is supposed to have some regard to his own interest; and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms or by clear implication. If the guaranty was limited in express terms, either as to time or amount, but not as to both, it might be said it was the intention of the guarantor to leave it open as to the other, or that a further limitation could

not be implied. But where it contains no express limitation as to either, and there is nothing in the instrument itself from which it can be inferred that it was the intention of the guarantor to leave it open as to both, we think it must be understood as referring to a single transaction. The cases of *Rogers* v. *Warner*, 8 Johns. 119, and *Whitney* v. *Groot*, 24 Wend. 81, we think are correct in principle, and not in conflict with any of the cases cited on the argument by plaintiff's counsel.

We are further of opinion that the first moneys afterwards received by plaintiff on Gates' general account should be applied in payment of the leather sold on the guaranty. * * *

The judgment below must be reversed, and a judgment be entered for the defendant, with costs of both Courts.

MARTIN Ch. J. and CAMPBELL, J., concurred.

CHRISTIANCY, J., did not sit in this case.

47. SMITH, et al., appellant, v. VAN WYCK, respondent, 40 Mo. App. 522. Kansas City Court of Appeals, Missouri, 1890.

Guaranty limited as to transactions. Rule of construction. No presumption against guarantor.

Jenkins & Wells, for appellant.
C. O. Tichenor, for respondent.

SMITH, P. J. * * * The plaintiffs sued defendant upon this undertaking:

"KANSAS CITY, Mo., July, 1885.

"I hereby guarantee the payment of bills as they mature, purchased by E. S. Mendenhall, of R. P. Smith & Sons, of Bloomington, Illinois, to the amount of thirteen hundred dollars ($1,300).

"T. C. VAN WYCK,
"1501 East Eighteenth Street."

For a bill of goods amounting to $1,240.60, sold by plaintiffs to said Mendenhall. The facts and circumstances surrounding the execution of the said undertaking, and the relation of the parties thereto, and to each other, may be summarized thus: Defendant had rented to Mendenhall a store and business house. Mendenhall had placed with one of the plaintiffs, who were wholesale merchants, an order for goods amounting from thirteen hundred to seventeen hundred dollars. The plaintiffs hesitated about filling the order, and one of them went to defendant and told him that Mendenhall had placed with them an order for goods to the amount stated, and that they did not like to fill the same unless defendant would guarantee the payment thereof; that if

defendant would give his guaranty for thirteen hundred dollars, and if they sold Mendenhall more goods than that, on such excess they would take their chances for collecting. That thereupon the defendant signed the undertaking sued on. The plaintiffs delivered Mendenhall goods to the amount of the defendant's guaranty, for the payment of which the defendant furnished part of the money. The plaintiffs thereafter continued to sell goods to Mendenhall for about two years, amounting in the total to several thousand dollars. Finally Mendenhall failed, owing the plaintiffs on account of such sales the amount sued for. It may be well doubted whether any question of interpretation of the said undertaking properly arises on the abstract of the record before us, and at which alone we can look. But, waiving the consideration of that question for the present, we may state that it appears to us that if we interpret the language of the said undertaking in the light of a knowledge of the relation of the parties, their antecedent acts, and of the subject-matter of the same, as we have the right to do, 2 Parsons on Contracts [7Ed.] top p. 564; *Edwards* v. *Smith*, Adm'r, 63 Mo. 119; *Bunce*, Adm'r v. *Bick's* Ex'r, 43 Mo. 266; *Hutchinson* v. *Bowker*, 5 Mees. & W. 535; *Black River L. Co.* v. *Warner*, 93 Mo. 374, it becomes quite obvious that it cannot be held to be a continuing one, and this, too, in view of the maxim, *verba fortius accipiuntur contra proferentem*. It is held in this state that when it is doubtful from the language contained in the contract, whether the guaranty was for a single dealing or a continuous one, the true principle of sound ethics is not to set up a presumption for or against the guarantor, but to give the contract the sense in which the person making the promise believed the other party to have accepted it, if, in fact, he did accept it. *Bochne et al.* v. *Murphy*, 46 Mo. 57; *Shine's Adm'r* v. *Bank*, 70 Mo. 524. Extrinsic evidence cannot be received to contradict, add to, subtract from or vary the terms of a guaranty, but, as has been stated, when its meaning is doubtful, or obscurely expressed, parol testimony in relation thereto, requisite to a clear understanding of its purport, is admissible. The very language of the instrument sued on negatives the idea that it was intended to be a continuing guaranty. When the relation of the parties, and the circumstances under which the guaranty in question was entered into, are considered, its meaning becomes quite apparent. The fact that plaintiffs had sold Mendenhall goods amounting to thirteen hundred dollars, and that they would not deliver the same to him without defendant would guarantee the payment thereof, coupled with the further fact that this amount was in-

serted in the instrument, for which defendant bound himself for "bills as they mature, purchased"—not to be purchased—conclusively shows that the transaction and undertaking related solely and entirely to the unfilled order, or orders, for goods plaintiff had received of Mendenhall, at the time of the execution of the contract, and not to subsequent sales and purchases. We think that upon the record before us the judgment of the circuit court was for the right party. The exceptions to the rulings of the court in respect to the introduction of evidence were not preserved by a motion for a new trial, as appears by the abstract. But, whether this is so or not, it is quite evident that none of these adverse rulings of the court to the plaintiffs materially affected the merits of the case. Indeed, the plaintiffs, in their brief, make no point in respect to that matter.

The judgment, with the concurrence of Judge ELLISON, Judge GILL not sitting, will be affirmed.

48. BOVILL v. TURNER, 2 Chitty's Practice Cases 205.
Court of King's Bench, 1815.

Guaranty limited as to amount.[13]

Bolland moved to set aside a nonsuit. It was an action for the price of coals, the payment of which the defendant had guaranteed in these words: "You may let Laney have coals to 50*l.*, for which I will be answerable at any time." Coals were supplied for many years, and many were, from time to time, delivered and paid for; but ultimately more than the sum of 50*l.*, was in arrear.

BAYLEY, J.—You say it is a running guarantee for 50*l.* at all times.

Bolland. Laney was a dealer; he could never be supposed to be confined to 50*l.* only. There was notice afterwards that the defendant would not be liable further.

ABBOTT, C. J.—There was evidence that the words "at any time" were introduced afterwards, because the plaintiff thought they were omitted.

BAYLEY, J.—He was only a guarantee for 50*l.*

Rule refused.

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[13] See United States, etc., v. National Surety Co., ante p. 114.

49. ROBBINS v. BINGHAM, 4 Johns. 476.
Supreme Court of Judicature, New York, 1809.

Guaranty limited as to parties.

This was an action of assumpsit. The declaration stated, that the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, would credit one Heman Dickenson, goods, &c., to the amount of 800 dollars, the defendant would be security for the payment, &c., and averred, that the plaintiff did deliver to Dickenson, goods, to the value of 800 dollars, &c. Plea, non assumpsit. At the last Rensselaer circuit, by agreement of both parties, the cause was referred to three referees, and if any questions of law should arise, before the referees, they were to be referred to one of the judges of this court.

The parties, afterwards, agreed, that the evidence submitted to the referees and the law arising thereon, should be stated in the form of a case, and submitted to the decision of this court, and that judgment should be entered thereon, according to the opinion of the court, in the same manner, as if there had been a verdict in the case.

The plaintiff produced before the referees, a letter of credit, from the defendant, directed to the plaintiff, as follows: "Fairfield, October 2, 1804. Sir, if you will credit Heman Dickenson, goods, to the amount of 800 dollars, I will be his security, that he shall pay you according to the contract. Solomon Bingham, jun." On the back of the letter of credit was endorsed by Dickenson, as follows, to-wit: "Received, the 15th and 16th October, 1804, on account of the within letter of credit, or recommendation, the following sums of money, in goods, to-wit, of John Robbins, the sum of 293 dollars and 22 cents; of Gersham, Richards and sons, the sum of 237 dollars and 62 cents; and of Russell and Tracy & Co., the sum of 55 dollars and 89 cents, amounting in the whole to 586 dollars and 63 cents."

It appeared that the goods mentioned as received from the plaintiff, were delivered by his clerk to Dickenson, and not having goods which suited, to the full amount of the letter of credit, he went with Dickenson and the letter of credit to the other persons, and offered them the benefit of the letter of credit for the residue, saying, that the defendant was a good man for the amount; that the other persons let Dickenson have goods to the amount specified in the indorsement, and which were charged to Dickenson in their books. It appeared also, that the plaintiff had been paid for the amount of the goods delivered by him to Dickenson. The ref-

erees reported in favour of the plaintiff for 377 dollars and 28 cents, including goods delivered by Richards and Son, and Tracey & Co. as indorsed on the letter of credit.

Van Vechten, for the defendant, moved to set aside the report of the referees.

Foot, contra.

Per Curiam. The interest of the plaintiff, in the letter of credit, was not any assignable interest; it was not a general letter of credit, but addressed to a particular person. The defendant was responsible to the plaintiff only for the goods delivered by him and not for the goods delivered by others. The report of the referees must be set aside.

Rule granted.

50. HENRY McSHANE CO., Ltd., v. PADIAN, 142 N. Y. 207, 36 N. E. 880.

Court of Appeals, New York, 1894.

Continuing guaranty; construction of the contract.

Appeal from common pleas of New York city and county, general term.

Action by the Henry McShane Company, Limited, against William Padian. From a judgment of the general term affirming a judgment for defendant, plaintiff appeals. Reversed.

Thos. C. Ennever, for appellant.

William J. Fanning, for respondent.

BARTLETT, J.—The plaintiff seeks to recover of the defendant upon the following guaranty:

"I, William Padian, hereby guaranty to the Henry McShane Company, Limited, the payment by John P. Wiegers, plumber, to them for any and all materials which they may deliver to John P. Wiegers, I not to be liable for any balance exceeding five hundred dollars which may become due. William Padian. Witness: Wm. H. Barth. Dated New York, March 31st, '90.

This case was tried before a referee, who held that the guaranty was susceptible of two constructions, and admitted, to quote from his opinion, "oral evidence of the *res gestae* so as to arrive at the probable intention of the parties." The evidence was admitted against the objection and exception of plaintiff. Upon conflicting evidence, the referee found, substantially, that the guaranty had reference to certain goods sold by plaintiff to John P.

Wiegers, to be used in the performance of a contract named, and that, before the commencement of this action, Wiegers had paid for them. He further found that said guaranty was not intended by the parties thereto as a running or continuing guaranty, other than for the goods already referred to, and dismissed the complaint, with costs. The general term of the court of common pleas for the city and county of New York affirmed a judgment for the defendant entered upon the report of the referee. The question presented on this appeal is whether the language of the guaranty is so ambiguous as not to furnish conclusive evidence of its meaning, and entitles the defendant to prove the circumstances under which it was executed, so that the court can construe it in the light of all the facts. If this ambiguity exists, the evidence of the circumstances surrounding the execution of this guaranty was properly admitted (*Bank* v. *Kaufman,* 93 N. Y. 281, and cases cited; *Bank* v. *Myles,* 73 N. Y. 341), and, as the findings of the referee were made on conflicting evidence, they are not reviewable in this court (*Sherwood* v. *Hauser,* 94 N. Y. 626; *Fire Department of New York* v. *Atlas S. S. Co.,* 106 N. Y. 578, 13 N. E. 329; *Crim* v. *Starkweather,* 136 N. Y. 635, 32 N. E. 701). We are, however, unable to agree with the learned court below in its construction of this guaranty. We regard its language as clear, presenting no ambiguity, and as creating a continuing guaranty, which, by its terms, limits defendant's liability to any balance, not exceeding $500, which may become due, but does not undertake to regulate the amount of John P. Wiegers' future transactions with the plaintiff. The cases are numerous, construing instruments of this character, and it is not always an easy task to determine on which side of the line separating continuous from limited liability they belong. In *Whitney* v. *Groot,* 24 Wend., at page 84, Chief Justice Nelson remarks: " It is, in most of these cases, a nice and difficult question to determine whether the guaranty is a continuing one or not. The intent of the party, to be derived from the words, is the only sure guide; and therefore very little aid is to be derived from the adjudged cases, as they turn upon the peculiar phraseology of the guaranty." In *Bank* v. *Myles,* 73 N. Y., at page 341, Judge Earl says: "Precedents do not help much in the construction of such instruments." In *Gates* v. *McKee,* 13 N. Y., at page 234, Judge Denio says: "The cases are not entirely harmonious as to the principles of construction which ought to govern in this class of cases, but the weight of authority is altogether in favor of construing guaranties by rules at least as favorable to the creditor as those which courts apply to other

written instruments, irrespective of the consideration that the guarantor is a surety." In the leading English case of *Mason* v. *Pritchard,* 12 East, 227, the court said the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit. The supreme court of the United States has also expressed the same views. *Drummond* v. *Prestman,* 12 Wheat. 515; *Douglass* v. *Reynolds,* 7 Pet. 113, 122; *Lawrence* v. *McCalmont,* 2 How. 426.

Applying these principles to the guaranty now under consideration, it leads to the construction we have already indicated. The natural and ordinary import of its language discloses an intent on the part of the defendant to guaranty the purchases of Wiegers from plaintiff of any and all materials, provided his liability was not to exceed $500, on any balance which might become due. To place upon this instrument the construction contended for by defendant is to ignore its plain provisions, and import into the case an entirely new contract. The defendant contends he was only guaranteeing payment of $395 worth of specific materials which were to be used in the performance of a certain building contract. On the other hand, the plaintiff states that Wiegers was a young man starting in business, and it was customary to require a guaranty in such cases. The evidence in the case shows that Wiegers, after the execution of the guaranty, made purchases of plaintiff aggregating between six and seven thousand dollars, and made payments of between four or five thousand dollars, and owed plaintiffs a balance of twenty-two hundred dollars when this action was commenced. We hold, however, that parol evidence was inadmissible as to surrounding circumstances to aid in construing this guaranty, and rest our decision upon the language of the instrument solely. The answer of the defendant alleges that he was induced to sign the guaranty by the false and fraudulent representations of plaintiff, made through its agents. The proof failed to establish this defense, and the referee made no such finding. The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.

51. DOVER STAMPING CO. v. NOYES, 151 Mass. 342, 24 N. E. 53.
Supreme Judicial Court, Massachusetts, 1890.

Continuing guaranty—Interpretation of correspondence forming the contract.

Appeal from Superior Court, Suffolk county.

Action by Dover Stamping Company against B. B. Noyes to recover $210.20 and interest for goods sold and delivered by plaintiffs to F. P. Field & Co., the payment of which plaintiffs claim was guarantied by defendant. The guaranty relied on is contained in the following correspondence:

"BOSTON, MASS., U. S. A., Nov. 18, 1887.
"MESSRS. B. B. NOYES & Co.
"Gentlemen: We have recently become acquainted and opened trade with Messrs. F. P. Field & Co., who seem to be good fellows, without much money, but claim to be backed by you. Will you kindly tell us if this is so,—if we can consider you as having responsibility for their debts, or intending to see that they are paid. Yours truly,
"DOVER STAMPING CO. C. D. F."

"GREENFIELD, MASS., Nov. 21, 1887.
"THE DOVER STAMPING CO., Boston, Mass.
"Gentlemen: We have your favor of the eighteenth instant, relating to the firm of F. P. Field & Co. As Mr. Noyes is away, writer cannot say what arrangement he has made with them as to being responsible for their bills, but should presume they would not misrepresent any arrangement they may have with him. Mr. Noyes has helped this firm some in starting, and considers them good, honest, hard-working fellows, who will be likely to meet their bills. Yours respectfully.
"B. B. NOYES & Co. Jones."

"BOSTON, MASS., U. S. A., Nov. 22, 1887.
"MESSRS. B. B. NOYES & Co.
"Gentlemen: Your favor of the twenty-first instant is at hand. We are obliged to you for your attention to our request, and glad to hear that Messrs. F. P. Field & Co. stand so well with you. We would, however, like to hear from Mr. Noyes on his return. It is needful for us to know whether the statement of the young men is correct or not, as, leaving out the question of misrepresentation, they evidently have not enough of the 'sinews of war,' of their own, to carry on business successfully, however competent and energetic they may be. Yours truly,
"DOVER STAMPING CO. C. D. F."

GREENFIELD, MASS., Nov. 28, 1887.
"DOVER STAMPING CO., Boston, Mass., North Street.
"Dear Sirs: Answering yours of 22d, I am assisting F. P. Field & Co. in a small way, financially, and in a measure directing their efforts; and I have advised them to pay their bills promptly at maturity, and, if they find they are unable to do so at any time, to let me know. I think they will follow my advice in your case. If they fail to, please let me know, and I will see that you are taken care of. B. B. NOYES."

BOSTON, MASS., U. S. A., Nov. 29, 1887.

"MESSRS. B. B. NOYES & Co.

"Gentlemen: Your esteemed favor from Mr. B. B. Noyes, in person, is received. We are much obliged for the assurance given us regarding Messrs. F. P. Field & Co., and, on the strength of it, will be glad to continue the trade. Yours truly,

"DOVER STAMPING Co. C. D. F."

There was judgment for plaintiff. Defendant appeals.

E. Merwin, for plaintiff.

Greene & Griswold, for defendants.

KNOWLTON, J.—The decision of this case depends on the proper interpretation of the correspondence relied on by the plaintiff corporation as showing a continuing guaranty by the defendant that F. P. Field & Co. would pay at maturity any debts they might contract, in their dealings with the plaintiff. If these letters, fairly construed, authorized the plaintiff to sell goods to Field & Co. from time to time, to be paid for by the defendant if not paid for by the purchasers, the plaintiff is entitled to recover. The plaintiff's first letter was manifestly written in reference to possible future transactions. It says that the corporation has recently "opened trade" with Field & Co., and refers to their representation, apparently made with a view to obtaining credit. The inquiry relates to the subject of legal liability. The defendant is asked whether he will be responsible for their debts, or will see that the debts are paid. Upon receiving the letter of November 21st, written by the defendant's clerk, in his absence, and containing a recommendation of Field & Co., the plaintiff, by its letter of November 22d, said, in effect, that it was not content with a recommendation, but wanted an explicit answer to its former letter. Thereupon the defendant wrote the letter of November 28th, stating that he was financially assisting Field & Co., and promising to see that the plaintiff was "taken care of," if notified that Field & Co. failed to pay their bills promptly at maturity. This can hardly be construed as anything less than a promise to pay if the principal debtor did not. It also had reference to bills to be contracted in the future; for it was written in answer to the plaintiff's questions, and Field & Co.'s possible inability to pay promptly was spoken of as something which they might discover "at any time." If it was necessary to give notice of the acceptance of a guaranty given in this way, which we do not intimate, the plaintiff by its letter of November 29th accepted it, and notified the defendant that it would continue the trade on the strength of it. Here we find all the elements of a valid, continuing guaranty; and it is

agreed that on the faith of it the plaintiff sold goods which never have been paid for, of which the defendant has had due notice. Upon the agreed facts, the plaintiff's case is made out. *Paige* v. *Parker,* 8 Gray, 211; *Bent* v. *Hartshorn,* 1 Metc. 24; *Jordan* v. *Dobbins,* 122 Mass. 170.

52. ABBOTT v. BROWN, 131 Ill. 108, 22 N. E. 813.
Supreme Court, Illinois, 1889.

Guaranty absolute. Guarantor of payment of a promissory note not jointly liable with maker thereof. Construction of contract.

Appeal from Appellate Court, First District.

ASSUMPSIT by Henry G. Abbott against John B. Brown. The circuit court rendered judgment for defendant, and the appellate court affirmed the judgment. Plaintiff appeals.

Osborne Bros. & Burgett, for appellant.

Osburn & Lynde, for appellee.

CRAIG, J.—On the 1st day of July, 1876, Kirk B. Newell, being indebted to H. G. Abbott, the appellant, executed his promissory note as follows:

"CHICAGO, ILLS., July 1, 1876.

"One day after date I promise to pay to the order of H. G. Abbott two thousand dollars, with interest at the rate of ten per cent. per annum, at First National Bank of Chicago. Value received.

(Signed) "KIRK B. NEWELL."

Indorsed on the back of the note was the following guaranty:

"For value received, I hereby guaranty the payment of the within note at maturity, or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same, including attorney's fees.

(Signed) "J. B. BROWN."

This action was brought by H. G. Abbott against Brown to recover certain costs and attorney's fees which he paid out and expended in the collection of the amount named in the note in an action against Brown on his guaranty. The costs and attorney's fees which the plaintiff sought to recover in this action were not expended in attempting to collect the note which was executed by Kirk B. Newell. No suit was ever brought on the note against the maker, nor was any evidence offered to prove that any costs or expenses were ever incurred in an attempt to collect the note. But on the trial of the cause Abbott, who is appellant here, put in

evidence, showing that on July 3, 1882, he brought an action in assumpsit against Brown "on the guaranty signed by him, indorsed on the note, whereby he guarantied payment of the note," in which he recovered judgment for the amount due on the note, $3,338.34; that an appeal was taken by Brown to the appellate court, and to the supreme court from the judgment of the appellate court affirming the judgment of the circuit court, and that upon the affirmance thereof by the supreme court Brown paid appellant the amount of the judgment; that the firm of which witness was a member was employed as attorneys to conduct this action, and rendered services therein of the value of $1,500, and they had been paid that sum by appellant for said services; and, also, in the prosecution of this action, appellant expended for printing and otner necessary expenses the sum of $26. On this evidence the circuit court held, as a matter of law, "that the guaranty on which this suit was brought is not an agreement to pay the costs or expenses or attorney's fees, paid or incurred in a suit against Brown upon said guaranty," and rendered judgment for the defendant.

There is no ambiguity in the contract of guaranty executed by Brown. The terms of the contract are plain and easily understood. By the contract Brown agreed that the note should be paid with interest at ten per cent, and he also agreed to pay all costs and expenses incurred or paid, including attorney's fees, in collecting the note. Obviously the meaning of the language used was, if costs and expenses and attorney's fees were incurred in the collection of the note and interest from the maker, then such costs, expenses, and attorney's fees should be paid by Brown. If the contract of Newell, the maker of the note, and the contract of guaranty by Brown, were but one contract, the position of appellant that the action on the guaranty was an action on the note might be regarded more plausible; but such is not the case. Daniel, Neg. Inst. § 1752, defines a contract of guaranty as follows: "A 'guaranty' is defined to be a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is in the first instance liable to such payment or performance." 2 Pars. Cont. 3, says: "Guaranty is held to be the contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party." Story, Prom. Notes, § 457, says: "A guaranty, in its legal and commercial sense, is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty, by another person, who himself remains liable to pay or perform the same." In *Dickerson* v. *Derrickson* 39

Ill. 574, this court, in speaking of a guaranty, says: "The contract of an absolute guaranty is that if the principal fails to pay, the guarantor will. If it were not so, it would not be a guaranty, but an independent undertaking." See, also, *Rich* v. *Hathaway*, 18 Ill. 548. Here, Newell, as maker of the promissory note, agreed to pay a certain sum of money at a certain time. By his contract he became liable on the note; but Brown, as guarantor, was not liable with him. No joint liability existed. In Baylies, Sur. 389, the author says: "In an action to enforce a contract of guaranty the guarantor is the proper party defendant, and the principal debtor should not be joined. As has been shown, all the parties to a contract of suretyship may be joined as defendants; but a guarantor cannot be sued with his principal, for his engagement is strictly an individual contract, and not an engagement jointly with his principal."

Here Brown's engagement as guarantor was his individual contract, under which he became bound to pay in case the maker of the note failed to do so. When the maker of the note failed to pay at maturity of the instrument, the guarantor then, and not before, became liable, on his contract of guaranty, to an action. The liability of the maker of the note and the guarantor were separate and distinct. To enforce the liability of the maker an action should be brought on the note against him, while to enforce the liability of the guarantor an action could only be brought on the contract of guaranty; and it seems plain that an agreement to pay costs and attorney's fees which might be incurred in one action does not include costs and attorney's fees incurred in the other. Here Brown, by the terms of his guaranty, bound himself to pay costs and expenses including attorney's fees, which might be incurred in an action to collect the note, but he saw proper not to agree to pay such costs and expenses as might be incurred in an action brought on the contract of guaranty; and in the absence of such an agreement we are aware of no principle which would make him liable. Had a suit been brought on the note against the maker, under the contract of guaranty, Brown would have been liable for such costs and expenses, including attorney's fees, as might have been incurred in that action; but no such action was brought, and there has been no breach of his contract so far as costs and expenses are concerned.

One other question remains to be considered: On the trial the appellant offered to show that he employed counsel to "watch Brown from 1878 to 1882, and the business operations in which he was engaged, to see when there was a reasonable prospect for

collecting the note out of him." Also that in April, May, June, and July, 1882, his attorney had negotiations with Brown for the settlement of his liability on the guaranty for which the services of counsel were worth $50, and which sum appellant had paid. As to those services the appellate court held if they were a proper charge against appellee, they should have been included in the former suit. We concur in the view of the appellate court, if any liability existed for those services, as they had been rendered before appellee was sued on the guaranty, they should have been embraced in that action. The judgment of the appellate court will be affirmed.

53. ROBERTS v. HAWKINS, 70 Mich. 566, 38 N. W. 575.
Supreme Court, Michigan, 1888.

Guaranty absolute; guaranty of payment.

Error to Superior Court of Grand Rapids. *Assumpsit.*
Norris & Norris, for appellant.
J. C. FitzGerald (*Charles Chandler,* of counsel), for plaintiff.

LONG, J.—January 12, 1884, one Lyman D. Follett made his promissory note as follows:

"$1,000.

GRAND RAPIDS, MICH., January 12, 1884.

"One year after date, I promise to pay to the order of Helen M. Roberts one thousand dollars, with interest at eight per cent. per annum. Value received. LYMAN D. FOLLETT."

And defendant signed an endorsement on the back thereof, as follows:

"For value received, I hereby guarantee the payment of the within note. L. E. HAWKINS."

On the delivery of this note to plaintiff, she paid Follett $1,000. January 8, 1885, seven days before this note became due, Follett paid one year's interest; and neither at that time, nor at the maturity of the note, was the same presented to Follett or defendant for payment. No notice of non-payment was given defendant then or at any time prior to June 8, 1887. January 15, 1886, Follett paid the interest for the next year, and January 17, 1887, for the year following. About June 8, 1887, the note being then two years and five months overdue, it was first presented to defendant, and payment demanded and refused. August 13 this suit was brought.

On the trial, plaintiff, having proved the note and guaranty, and its non-payment, rested. Defendant then sought to make his defense as pleaded, and offered to show—

1. That he was an accommodation guarantor, without consideration or security.

2. That, at or about the maturity of the note, he inquired of the maker of the note if it was paid, and was told it was.

3. That neither at the maturity of the note, nor at any subsequent time, prior to June 8, 1887, was any notice of the non-payment of this note given to defendant, nor any demand made on him for the payment thereof.

4. That at the maturity of this note, and for some considerable time thereafter—at least a year—Follett, the maker of the note, was solvent, and had property out of which defendant could have procured him to pay the note or obtained security.

5. That when defendant, on June 8, 1887, learned of the non-payment of this note, the maker was insolvent, out of the jurisdiction, and that he could then obtain no security or payment.

The court directed a general verdict for plaintiff on all the counts of the declaration. Judgment being entered on the verdict in favor of plaintiff for the amount of the note and interest, defendant brings the case into this Court by writ of error.

The declaration contains three counts. The first alleges the guaranty, demand of the maker at maturity, non-payment, and notice of said demand and non-payment to defendant at maturity.

The second alleges the guaranty, the refusal by maker to pay at maturity, and notice to defendant, at maturity, of maker's refusal.

The third is the common counts in *assumpsit,* with copy of note annexed, and an alleged indorsement on back of L. E. Hawkins, without any guaranty over it.

The plea is the general issue, with notice of the defense of release by plaintiff's failure to give notice of non-payment to defendant, and the consequent damage and loss to him thereby.

It is claimed that the court erred in receiving the note and guaranty in evidence under the third count in plaintiff's declaration, for the reason that the note and guaranty offered were not the note and guaranty set forth in that count; that the contract set out in plaintiff's third count was that defendant had indorsed his name in blank on the back of the note, not payable to his order; and that this would make him a maker of the note, and liable as such, while the note offered had a guaranty of payment indorsed thereon. Defendant claimed that this was a variance, and that

the court should have excluded the guaranty under this third count, and confined the verdict to a recovery under the first two counts.

As we view the case, however, this objection has no force. The plaintiff being entitled to recover under the first and second counts of the declaration, the defendant was not prejudiced in the course taken by the court in not withdrawing all consideration of the case under the third count. The declaration was sufficient in the first two counts to allow a recovery thereunder.

The chief error complained of is the exclusion of the entire defense, and the direction of a verdict for plaintiff. On the trial the plaintiff proved by a witness the application for the loan, the loaning of the money, the giving of the note and guaranty, and, after reading the note and guaranty in evidence, rested. The defendant was then called and sworn as a witness in his own behalf, and was asked by his counsel:

"Q. When that note became due in January, 1885,—January 15,—was any notice given you of the fact that it remained unpaid?"

To this question counsel for plaintiff objected, that the same was irrevelant and immaterial; that the defendant was not an indorser nor guarantor of collection, but of payment of the note.

Counsel for the defendant then offered to show by the witness that he had no notice of the non-payment of the note prior to June 8, 1887; that he was an accommodation guarantor without security; that, at or near the maturity of the note, he inquired of the maker, and was informed that it was paid; that, at the time, the maker of the note was solvent, and for some considerable time thereafter—probably a year—and that the defendant could, if he had any knowledge of its non-payment, have secured himself, or procured the maker to pay it; that, when the defendant learned of the non-payment of the note, the maker was insolvent, and out of the State, and no security could have been obtained by the defendant; the counsel then saying—

"That this, of course, is the line of defense marked out by the notice in the pleadings. It is all covered by my brother's argument; and, if we have no right to show that defense, then, of course, there remains nothing but for the court to direct a verdict for the amount of the note, and interest."

The court sustained the objection, and directed a verdict for plaintiff.

In considering the case, the defendant's offer to prove this state of facts must be taken as true. *Clay, etc., Ins. Co.* v. *Manufacturing Co.*, 31 Mich. 356. Under this offer by the defendant, the issue is made: Is a person not being a party to a promissory note, who at its date and before delivery, and for the purpose of

having a loan made upon the strength of his guaranty, guarantees the payment of such note, liable thereon in case the note is not paid at maturity, without notice of non-payment having been given to him by the holder at the maturity of the note, or within a reasonable time thereafter; or in case notice is not given, and no proceedings taken to collect the note from the maker, and the maker of the note, at the maturity thereof, was solvent, and subsequently, and before suit is brought on the guaranty, becomes insolvent, can such guarantor, when such action is brought against him, set up such insolvency as a defense? The defense being based on plaintiff's laches in not giving notice to the defendant of the non-payment of this note at maturity, and the consequent damage to defendant thereby, the correctness of the court's ruling depends on whether or not there rested on the plaintiff the duty to give such notice under any circumstances.

The defendant claims that his liability existed only on the happening of a contingency and the performance of a condition; that whether or not that contingency happened, or condition was performed, was matter peculiarly within the knowledge of the plaintiff, and not within his own; and that if plaintiff intended to assert the performance of the condition, or the happening of the contingency, whereby alone defendant was to become liable, it was her duty to do so within a reasonable time, and, in any event, before the maker of the note became insolvent and a fugitive; that her neglect to do so, and the damage to him thereby, has released him from the obligation of his conditional contract.

The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the maker was solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of non-payment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker.

A guaranty is held to be a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party. 2 Pars. Cont. 3.

The contract or undertaking of a surety is a contract by

one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. 3 Add. Cont. Sec. 1111; 3 Kent, Comm. 121; *Wright* v. *Simpson,* 6 Ves. 734.

In the case of *Pain* v. *Packard,* 13 Johns. 174 (decided in 1816), it was held that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request, and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged. A directly contrary decision was given by Chancellor Kent, upon argument and full consideration, the following year. *King* v. *Baldwin,* 2 Johns. Ch. 554. Two years later the last decision was reversed by the court of errors by casting vote of the presiding officer, a layman, and against the opinion of the majority of the judges. *King* v. *Baldwin,* 17 Johns. 384.

In the case of *Brown* v. *Curtis,* 2 N. Y. 226 (decided in 1849), the action was brought against the guarantor of a promissory note. On the trial it was admitted that there had been no demand of the maker, nor any notice of non-payment, and the note was dated April 2, 1838, and payable six months after the date. The suit was brought against the guarantor in September, 1845. The defendant offered to prove that, from the time the note fell due until the latter part of 1843, the maker was able to pay the note; that he then failed, and was insolvent at the time of the commencement of the suit, and still remained so. This evidence was objected to, and excluded, and verdict directed for plaintiff. The court (at p. 227) says:

"The undertaking of the defendant was not conditional, like that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment, nor that he should sue the maker, or use any diligence to get the money from him. * * * Proof that when the note became due, and for several years afterwards, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity. * * *

"If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligation to institute legal proceedings."

The weight of authority, both in this country and in England, sustains this doctrine, and we think with much good reason. *Bel-*

lows v. *Lowell*, 5 Pick. 310; *Davis* v. *Huggins*, 3 N. H. 231; *Page* v. *Webster*, 15 Me. 249; *Dennis* v. *Rider*, 2 McLean, 451.

In *Train* v. *Jones*, 11 Vt. 446, it is said:

"An absolute guaranty that the debt of a third person shall be paid, or that *he* shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give reasonable notice of non-payment." *Noyes* v. *Nichols*, 28 Vt. 174.

In *Bloom* v. *Warder*, 13 Neb. 478 (14 N. W. Rep. 396), which was an action against the guarantors of payment of a promissory note, the court says:

"This is an absolute contract, for a lawful consideration, that the money expressed in the note shall be paid at maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder."

Mere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent. *Breed* v. *Hillhouse*, 7 Conn. 528; *Bank* v. *Hopson*, 53 Conn. 454 (5 Atl. Rep. 601); *Foster* v. *Tolleson*, 13 Rich. Law, 33; *Machine Co.* v. *Jones*, 61 Mo. 409; *Barker* v. *Scudder*, 56 Id. 276; *Norton* v. *Eastman*, 4 Greenl. 521; *Brown* v. *Curtiss*, 2 N. Y. 225; *Allen* v. *Rightmere*, 20 Johns. 365; *Bank* v. *Sinclair*, 60 N. H. 100; *Gage* v. *Bank*, 79 Ill. 62; *Hungerford* v. *O'Brien*, 37 Minn. 306 (34 N. W. Rep. 161).

It follows that, this being an absolute undertaking on the part of the defendant as guarantor to pay the amount of this note at maturity in the event of the default of payment by the principal, the guarantor could not demand any diligence on the part of the holder of the note to collect the same from the principal. It was his duty to perform his contract—that is, to pay the note upon default of the principal; and it is no answer for him to say that the principal was solvent at the maturity of the note, and that the same could then have been collected of him by the holder, and that he has since become insolvent. If he wished to protect himself against loss, he should have kept his engagement with the holder of the note, paid it upon default of the principal, taken up the note, and himself prosecuted the party for whose faithful performance of the contract he became liable.

The court properly directed the verdict for the plaintiff; and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

54. DAVIS, et al., Plffs. in Err., v. WELLS, FARGO & COMPANY, 104 U. S. 159, 26 L. Ed. 686.

Supreme Court, United States, 1881.

Guaranty absolute. Notice of acceptance. Notice of default.

In error to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. *James M. Woolworth,* for plaintiffs in error.

Messrs. *Shellabarger & Wilson,* for defendants in error.

Mr. Justice MATTHEWS delivered the opinion of the court:

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co.

This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

Dated, Salt Lake City, 11th November, 1874.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ERWIN DAVIS. [seal]
J. N. H. PATRICK. [seal]

Witness: J. GORDON."

The answer set up, by way of defense, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice, after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter.

But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence that this guaranty was executed by the defendants below and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed. with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was

made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendant's counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered, first, second, third and fifth.

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it, and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements, of the amount advanced under the guaranty, and if the plaintiff failed or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not, in contemplation of law, a reasonable notice, and your verdict. if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty, it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and, on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made, and no notice given to the defendants, the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance and action thereon by plaintiff bind the defendants, and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co., at the date of said delivery of said guaranty, and since and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding $10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and further, if you believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the question whether the guaranty becomes operative if the guarantor be not within a reasonable time informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In *Adams* v. *Jones,* 12 Pet. 213, *Mr. Justice Story,* delivering the opinion of the court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guar-

antor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary and this is not now an open question in this court, after the decisions which have been made in *Russell* v. *Clark,* 7 Cranch, 69; *Edmonston* v. *Drake,* 5 Pet. 624; *Douglass* v. *Reynolds,* 7 Pet. 113; *Lee* v. *Dick,* 10 Pet. 482; and again recognized at the present term in the case of *Reynolds* v. *Douglass,* 12 Pet. 497. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty, for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In *Reynolds* v. *Douglass,* 12 Pet. 504, decided at the same term and referred to in the foregoing extract, Mr. Justice McLEAN stated the rule to be that "to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted"; and he added, "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation

of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formally declared to be so by Mr. Justice NELSON, speaking for the court in delivering its opinion in the case of *Manufacturing Co.* v. *Welch,* 10 How. 475, where he uses this language:

"He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; *it is deemed essential to an inception of the contract;* he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in *Wilds* v. *Savage,* 1 Story, 22, Mr. Justice STORY, who had delivered the opinion in the case of *Douglass* v. *Reynolds,* 7 Pet. 113, after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer. Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly

from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell Cas. on Cont., 987), "Though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never, in strictness, become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wilds* v. *Savage, supra,* where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which at the time the undertaking is given from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor. For in each of these cases, the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is, that until it is accepted and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guaranty the debt of another, and it must be accepted and notice thereof given to the

party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times,* etc."—cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guaranty the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words—"for and in consideration of one dollar, to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence* v. *McAlmont*, 2 How. 452, and was overruled. Mr. Justice STORY said:

"The guarantor acknowledged the receipt of the one dollar and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in *Dutchman* v. *Tooth*, 5 Bing. (N. C.) 577, where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had

consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence, paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon a mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety and cannot be separated into distinct parts. The covenant is single and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that he delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire, what effect is to be given to the use of the words which declare that the guarantors thereby "Guarantee unto them, the said Wells, Fargo & Co., *unconditionally, at all times,* any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of $10,000, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not, and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions

whatever. This is the natural, obvious and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions:

1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty.

For, if the necessity in either or both of these contingencies existed, to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions were waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defense.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the expressed decision of this court in the case of *Manufacturing Co.* v. *Welch* (*supra*). An unreasonable delay in giving notice, or a failure to give it altogether, is not, of itself, a bar.

There was a question made at the trial, as to the meaning of the word "overdrafts," as used in the guaranty; it was contended that it would not include the debit balance of accounts charged to Gordon & Murray, and assumed by Gordon & Co., as

their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record, and the judgment is affirmed.

55. CLARK, et al. v. KELLOGG, 96 Mich. 171, 55 N. W. 676.
Supreme Court, Michigan, 1893.

Guaranty of collection. Due diligence to collect from principal a condition precedent to guarantor's liability.

Assumpsit. Plaintiffs bring error. The facts are stated in the opinion.

Thomas A. Wilson, for appellants.

Blair & Wilson and *Parkinson & Day,* for defendant.

MONTGOMERY, J. The plaintiffs sued the defendant, counting upon a breach of an agreement given on the occasion, and in consideration, of the purchase by the plaintiffs from the defendant of a stock of goods and a quantity of notes and accounts. That portion of the agreement material to be considered in determining the questions involved reads as follows:

"The said party of the first part * * * does covenant and agree * * * that the annexed invoice is a true statement of the amount and value of stock, merchandise, and property, and also guarantee, represent, and warrant that there is in said stock, goods to the value of $14,709.68; also that the amount of $29,702.54 net shall be realized, without charging for the personal services of the parties of the second part, nor other charges of second parties, except incurred in suits, by the parties of the second part, upon the accounts and notes herein conveyed. The parties of the second part shall use due diligence in their collections."

The declaration counted upon this agreement, and set out no subsequent modification or waiver of its terms. On the trial the plaintiffs sought to recover by showing that they had dealt with the accounts as men of ordinary business judgment would, and also sought to show that the defendant had, as to a large portion of the accounts, directed the plaintiffs as to what he would require as evidence of due diligence, and that the plaintiffs had complied with the demands of the defendant in this regard.

1. The circuit judge construed the original contract as amounting to a guaranty of collection, and held that no showing of diligence was sufficient which did not include proof that the accounts had each been put in judgment, and execution had been taken out, and returned unsatisfied. This ruling was unquestionably right, if the proper construction was placed on the contract. *Bosman* v. *Akeley,* 39 Mich. 710; *Schermerhorn* v. *Conner,* 41 Id. 374.

It is contended, however, that the contract in question should not be construed as a guaranty of collection of each individual account, requiring resort to legal process in the collection of each, but amounted to a warranty and representation that there should be realized $29,702.54 from the total of the accounts and that the fact that the amount guaranteed to be realized was much less than the face of the accounts negatives the idea that resort should be had to suit upon each account. The infirmity of this construction is that it ignores the subsequent language, "The parties of the second part shall use due diligence in their collection," or accords to this language a meaning at variance with the settled significance of the terms employed. What constitutes due diligence is settled by the cases of *Bosman* v. *Akeley* and *Schemerhorn* v. *Conner, supra.*

In the case of *Ralph* v. *Eldredge,* 58 Hun 203, a similar question was presented. Plaintiff and defendant were co-partners. Defendant conveyed his interest to the plaintiff in the notes, accounts and demands owing to the firm. The defendant at the same time executed to the plaintiff a bond with the condition that defendant should pay to the plaintiff one-half of the amount of the notes, accounts, and claims of the late firm assigned by defendant to plaintiff that should prove to be uncollectible, if any such there should be. The court say:

"It seems to be settled in this state that a guaranty of collection is an undertaking to pay the sum of money guaranteed, provided the principal debtor is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him. * * * The plaintiff urges that the bond does not guarantee the collection of these claims, but is only a contract to pay plaintiff one-half of the amount of those which should turn out bad. But the bond uses the word 'uncollectible,' and the question must be, what is the legal meaning of that word? That word has a definite meaning, as decided in the cases above cited; and that meaning should be here enforced."

The legal signification of the term "due diligence," as applied

to a guaranteed note or account, is well understood, and the parties must be assumed to have contracted with reference to that meaning.

2. The court rightly held that the alleged subsequent waiver could not be shown under the pleadings in this cause. The contract itself having fixed upon the plaintiffs a specific duty, the averment in the declaration that the plaintiffs did use due diligence amounted, in effect, to an averment that they had pursued the course which the law imposes upon them in order to charge the guarantor. If they relied on any excuse for failing to use due diligence, this should have been counted upon in the declaration. *Aldrich* v. *Chubb*, 35 Mich. 350.

Judgment affirmed, with costs.

The other Justices concurred.

56. McMURRAY, et al. v. NOYES, 72 N. Y. 523.
Court of Appeals, New York, 1878.

Conditional guaranty, guaranty of collection; conditions precedent to liability of guarantor; laches sufficient to discharge guarantor.

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was upon a guaranty, which is set forth in the opinion, wherein the material facts are also stated.

Esek Cowen, for appellant.

Irving Browne, for respondent.

RAPPALLO, J. The guaranty on which this action is brought is contained in an assignment of a bond and mortgage, and is in the following form:

"I hereby covenant * * * that in case of foreclosure and sale of the mortgaged premises described in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, with the costs of foreclosure, I will pay the amount of such deficiency to the said party of the second part, or its assigns, on demand."

On the part of the appellants, it is contended that this guaranty is subject to the rules applicable to guaranties of collection, and thus laches in foreclosing the mortgage, after default, is a defense. The respondents insist that it is a guaranty of payment, and that they were under no obligation to use diligence in endeavoring to collect the mortgage debt by foreclosure.

The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.

These rules are well settled and are not controverted, and the only question is to which class of guaranties the one now before us belongs.

It is apparent upon the face of the instrument that the undertaking of the defendant was not an unconditional one that the mortgagor should pay, or that the guarantor would pay on default of the mortgagor, but only that the guarantor would pay, in case of a deficiency arising on a foreclosure and sale. The foreclosure and sale were consequently conditions precedent, and the general principle is, that wherever a condition precedent is to be performed for the purpose of establishing the liability of a surety or guarantor, such condition must be performed in good faith and with due diligence. It is upon this principle that, in case of a guaranty of collection, diligence is required of the creditor.

I am unable to see why this principle is not applicable to the guaranty now in controversy. The respondents claim that it is an undertaking to pay any deficiency which may arise, and is, therefore, a guaranty of payment of the mortgage debt to that extent, and to be governed by the same rules as if it had been a guaranty of payment of the whole mortgage. But the fallacy of this reasoning is that it is not an unconditional guaranty that the mortgagor will pay the mortgage debt, or any part of it, but only that after the remedy against the land has been exhausted, and the deficiency ascertained by foreclosure and sale, the guarantor will pay such deficiency. The only difference between this and an ordinary guaranty of collection is, that in the latter case the undertaking is that after it has been ascertained by all such legal proceedings as the case admits of, that the demand cannot be col-

lected, the guarantor will pay; while in the present case the only proceedings which the creditor is bound to adopt are a foreclosure of the mortgage and sale of the mortgaged lands. To that extent the condition precedent exists alike in both cases, and the duty of exercising due diligence attaches, there being nothing in the instrument qualifying or dispensing with it.

The case of *Goldsmith* v. *Brown* (35 Barb. 484) is relied upon by the respondents as sustaining their position. In that case the covenant was, as construed by the court, to pay the deficiency upon the mortgage debt *whenever* the remedy against the lands mortgaged should have been exhausted and the deficiency ascertained. The decision in that case can only be sustained by construing the covenant as waiving diligence in foreclosing, and binding the covenanter to pay the deficiency without regard to the time of the foreclosure. Nothing in the covenant now under examination has any relation to the time of the foreclosure, or can be construed as waiving diligence required by the general rules of law in performing the condition.

The delay in foreclosing in the present case was fourteen months after the mortgage debt became due. During upward of ten months of this time the property was a sufficient security, but afterward the buildings thereon were destroyed by fire, and the value was reduced below the amount of the mortgage debt. It cannot be questioned that this delay was sufficient to constitute *laches*. In *Craig* v. *Parkis*, 40 N. Y. 181, a delay of six months in foreclosing a bond and mortgage was held to be *laches* which discharged a guaranty of its collection.

The judgment should be reversed, and a new trial ordered with costs to abide the event. All concur.

Judgment reversed.

57. STARR, et al. v. MILLIKIN, 180 Ill. 458, 54 N. E. 328.

Supreme Court, Illinois, 1899.

Guaranty conditional; construction of contract.

Appeal from the Appellate Court for the Third District:—heard in that court on appeal from the Circuit Court of Macon county; the Hon. EDWARD P. VAIL, J., presiding.

LeForgee & Lee, and *Mills Bros.*, for appellants.

I. A. Buckingham and *Hugh Crea*, for appellee.

Mr. Justice PHILLIPS delivered the opinion of the court:

Suit was brought in the Circuit Court of Macon county by

William H. Starr and Isaac R. Mills, for the use of William H. Starr, against James Millikin, upon the following contract:

"Whereas, Murray G. Millikin has purchased of Starr & Mills lot sixteen (16) and fifteen feet off of the east side of lot fifteen (15), in block three (3), in Starr & Mills' addition to the city of Decatur, for the sum of $800; and whereas, the said Murray G. Millikin has given to the said Starr & Mills his certain promissory notes to secure the payment of said consideration, together with a mortgage upon said premises; and whereas, the said Murray G. Millikin is a minor under the age of twenty-one years but is desirous of having the deed to said lots so purchased made to him:

"Now, therefore, in consideration of the premises and in consideration of the making of the deed direct to the said Murray G. Millikin, I, James Millikin, do hereby guarantee that the said Murray G. Millikin will ratify said purchase and the giving of said notes upon his arrival at the age of twenty-one years, in such manner as will make him personally liable on said notes so given for said purchase money, and in the event that said Murray G. Millikin shall repudiate or refuse to pay said notes I hereby agree to pay the same to the said Starr & Mills, or their assigns.

"Dated at Decatur, Illinois, this 26th day of June, A. D. 1893.

"JAMES MILLIKIN."

A verdict was returned in the trial court against appellee for $1076.88. Judgment was rendered on this verdict, but on appeal to the Appellate Court for the Third District the judgment was reversed without remanding, the Appellate Court at the same time making a finding of facts to be recited in its final order.

The Appellate Court found from the evidence in the case that James Millikin undertook, in the contract above mentioned, to pay the sum of money therein mentioned upon condition, only, that Murray G. Millikin, a minor, upon his arrival at the age of twenty-one years, would fail to ratify the notes in controversy in such manner as would make him personally liable, or if the minor should repudiate or refuse to pay the notes on acount of their having been executed during his minority. This finding of facts was the result of the legal construction given the contract by the Appellate Court. That court also found as a fact arising out of the evidence, that upon his arrival at the age of majority Murray G. Millikin did ratify the notes made by him, thus making himself personally liable, and that he did not repudiate or refuse to pay them on account of their having been executed during his minority. As this record is presented to us, therefore, only one question is involved. This is conceded by counsel for appellants, as they say that the construction to be placed upon this contract is the only real question involved in the litigation in this court, and that this question, when determined, ends the controversy.

The finding by the Appellate Court as to the legal construction to be given this contract is not such a finding of fact as is

binding upon this court. The construction to be given a contract is one of law, rather than of fact. However, that is not material in this case, as we in nowise differ from the Appellate Court as to the legal construction to be given the contract. Starr & Mills were conveying some property to Murray G. Millikin, a minor. From the fact that upon his arrival at his majority he would have the right, in law, to repudiate the notes or refuse payment on account of their having been executed during his minority, this separate contract was executed to guarantee there should be no such refusal or repudiation. The entire controversy occurs over the last clause of the contract, which reads: "In the event that said Murray G. Millikin shall repudiate or refuse to pay said notes I hereby agree to pay the same to said Starr & Mills, or their assigns." This clause, however, when taken in connection with all the circumstances of the case and the recitals in the contract preceding this clause, to the effect that Murray G. Millikin was a minor under the age of twenty-one years and that he was desirous of having the deeds to the lots made to him, and that appellee guaranteed Murray G. Millikin would ratify such purchase and the giving of said notes upon his arrival at the age of twenty-one years, tends to establish, without question, that the only purpose of the execution of this contract was that the notes should not be repudiated or payment refused on account of the age of the maker. It is evident that there was no intention on the part of James Millikin to personally guarantee the payment of this indebtedness. The parties connected with the transaction were all business men,—one a banker, another a lawyer,—and if the intention had been to personally guarantee this indebtedness such guaranty would have been on the back of the note, or as a joint maker, or in some other manner much less cumbersome than as shown by this record.

The construction given this contract by the Appellate Court was the correct one, and the judgment of that court will be affirmed.

Judgment affirmed.

CHAPTER II

REQUISITES OF THE CONTRACT.[14]

SECTION 1. COMPETENT PARTIES[15]

58. GOSMAN, et al., appellants, v. CRUGER, et al., respondents, 69 N. Y. 87.

Court of Appeals, New York, 1877.

Under the Married Woman's Act, a married woman's contract as surety on a guardianship bond, not expressed to be binding on her separate estate, is void, even though ordered by court decree.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department affirming so much of the judgment herein as dismissed the complaint, as to defendant Eliza L. C. Cruger. (Reported below, 7 Hun 60.)

This action was brought upon a bond executed by defendants as sureties for one Edward R. Olcott, since deceased, conditioned for the faithful performance of his duties as guardian of plaintiffs.

The complaint alleged that said defendant Eliza was, at the time of the execution of the bond, a married woman, having a separate estate, and it was asked that the amount of the recovery be adjudged a charge upon her separate estate.

Attached to the bond was an affidavit, signed by the sureties, to the effect that they were each worth the sum of $10,000, over and above all debts and liabilities. The bond was presented and filed with the petition for the appointment of said guardian, and upon them he was duly appointed, and received as such, in pur-

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[14] "To constitute the contract of suretyship or guaranty the same things are necessary as to constitute any other contract, viz.: That the parties be competent to contract; that they actually do contract; and that the contract, if not under seal, be supported by a sufficient consideration."—Brandt on Suretyship (2 ed.), vol. 1, p. 5.

[15] *Infant's* contract as surety is voidable, not void. Harner v. Dibble, 31 Oh. St. 72, and cases cited.

Insane person not liable on note signed as surety. VanPatton, et al., v. Beals, et al., 46 Ia. 62.

suance of an order of the court, moneys belonging to plaintiffs, which he converted to his own use.

The court directed judgment against defendant, John P. Cruger, but directed a dismissal of the complaint as to defendant, Eliza. Judgment was entered accordingly.

Elihu Root, for the appellants.

C. Frost, for the respondent.

FOLGER, J. A married woman is bound by her contracts made in her separate business, or relating to her separate estate, as provided in the married woman's acts of 1848, 1849, 1860 and 1862; and they may be enforced against her at law or in equity.

If her contracts are not thus made, or do not thus relate, they are void at law, and may not be enforced in equity against her separate estate, unless the intention of charging that estate is expressed in the contract, or implied from its terms; *Yale* v. *Dederer,* 22 N. Y., 450.

The bond sued upon in this action is not a contract made by Mrs. Cruger in her separate business, nor does it relate to her separate estate, nor is there expressed in it an intention of charging that estate. It seems, therefore, that the plaintiffs cannot recover against her.

The appellants seek to go outside the bond, and to find the requisite expression of intention in the other circumstances, acts and papers in the proceeding. Authorities are cited, to the effect that a bond given in pursuance of a decree, is to be construed with the decree, and that the terms of the latter enter into and form a part of the contract. But there is nothing to be found in the proceedings which led to the execution of this bond, which shows a purpose on the part of the court to compel Mrs. Cruger to bind her separate estate, even if there was the power to compel a married woman so to execute a bond. It does not appear, indeed, that it was known that she was a married woman. The reference made to the rules of the Supreme Court (rule 65), of chancery (rule 148), and to the statute which authorized those rules (2 R. S., 175, sec. 46), is no more than to say, that the law required two sufficient sureties. If one of the sureties had been an infant, he would not, because of the rules and the statute, have been held to have made a valid contract. And though Mrs. Cruger might have made a valid contract had she put it in the requisite form, she is not to be held to have done so merely for the reason that the law was not complied with when she did otherwise. Nor does the fact that she made an affidavit that she possessed enough

estate to make her a sufficient surety, incorporate into the contract of suretyship the expression of an intention to bind that estate, if it was separate. That it was a statement in writing makes it no more efficient than if by parol (*Maxon* v. *Scott,* 55 N. Y. 247), so far as the expression of an intention is concerned. It might be demanded in writing to meet the Statute of Frauds. But it was, though in writing, outside of the written contract, as much as such a statement in parol *aliunde,* would be outside of a contract valid by parol. Parties may struggle against the rule, but it is the rule, that the intention to charge the separate estate must be expressed in the contract, or implied in the terms of it. The affidavit is no part of the contract or of its terms. It is but a statement in legal form that the person named in the contract is of sufficient estate to be a proper party to it.

It is claimed that the reason of the rule declared in *Yale* v. *Dederer* does not apply to this case, and that, therefore, the rule ceases. That reason is said to be this: That a contract made by a married woman is void at law; that it may be enforced in equity under some circumstances, but not when it is a contract of suretyship, for there is no equity springing out of the consideration. It is then claimed, that suretyship for a guardian is an exception to this rule, as equity will enforce against persons, *sui juris,* who become sureties, their obligations, the same as if they made them as principals. The authorities in this state, cited by the appellants, do not sustain the proposition. What was substantially held in *Wiser* v. *Blackly* (1 J. Ch. R., 607), was that one signing a bond as surety was, as well as one signing as principal, liable to a suit to reform the contract so as to conform it to the intention of the parties, and as the defendant's answer admitted that the surety intended to bind himself for the guardian, a mistake in the form of the bond was corrected or treated as so. So it was in *Prior* v. *Williams* (2 Keyes 530), which was not the case of guardianship.

The case from Jones' Reports (*Sikes* v. *Truitt,* 4 Jones Eq. [N. C.] 360), is professedly based on that from Iredell, and with some distrust of the correctness of the precedent. That from Iredell (*Armistead* v. *Bozman,* 1 Ired. Eq. 117), is to the same effect as *Wiser* v. *Blackly* (*supra*); that the instrument may be corrected in form to agree with the intention of the surety as admitted or proven.

It is then claimed that Mrs. Cruger, by not making known to the court that she was a married woman, was guilty of a fraud on it. It is claimed that, either as a mistake or as a fraud, the court will take hold of it, and enforce the bond against her. It

need only be said, as to this, that the intention to charge the separate estate is made an issue by the pleadings and found against the plaintiffs; and that fraud is not found nor alleged.

The judgment must be affirmed.

All concur.

59. HOUSER v. FARMERS' SUPPLY COMPANY, 6 Ga. App. 102, 64 S. E. 293.

Court of Appeals, Georgia, 1909.

A contract of guaranty or suretyship entered into by an ordinary commercial or industrial corporation not in direct furtherance of authorized corporate purposes is not valid.

Action on contract, from city court of Dublin—Judge JORDAN presiding. December 21, 1908.

Peyton L. Wade, for plaintiff in error.

J. S. Adams, W. C. Davis, contra.

POWELL, J. Houser sued the Farmers' Supply Company, a mercantile corporation, alleging, that the corporation had agreed with him if he would enter its employment and would become a stockholder therein, it would, in addition to paying him a salary, indorse his note at the bank for a sum necessary to pay for the stock, continuing the indorsement from time to time, and from year to year, for five years, at the end of which period there was to be a division of profits, through the declaration of an accumulated dividend; that at the end of the first year (December, 1902), the corporation refused to continue to indorse the note given for the procurement of the money under the circumstances just stated, whereupon it became necessary for him to make a new arrangement to get the money, by which the person from whom he got the funds was to obtain four per cent. interest in addition to one-half of the profits to be earned by his stock; that on account of the prosperity of the business, the profits amounted to a considerable sum in excess of what the legal interest on the loan would have been. The alleged contract with the corporation was made through the persons who on its organization became president and general manager. The plaintiff was himself a director and vice-president. No express power appeared in the charter authorizing the corporation to enter into any contract of suretyship and guaranty. The court granted a nonsuit, and the plaintiff excepts.

While industrial and mercantile corporations are not wholly

prohibited from making contracts of guaranty and suretyship, such contracts are closely scrutinized, and are not valid unless it appears that they were in direct furtherance of authorized corporate purposes. Ordinarily the officers of a corporation have no power to make a contract in its behalf guaranteeing a private debt of one of its stockholders. Brandt on Suretyship (3d ed.), sec. 12 and note. The contract in the present case seems to have been *ultra vires* and not binding on the corporation. * * * The plaintiff seems to have suffered a hardship, but the law is against him on the facts of his case as developed at the trial.

Judgment affirmed.

SECTION 2. CONSIDERATION

When Principal and Assuring Contracts are Executed Concurrently.

60. BICKFORD v. GIBBS, et al., 8 Cush. 154.
Supreme Judicial Court, Massachusetts, 1851.

Consideration—no proof of a distinct consideration to support a guaranty is necessary when the guaranty is made simultaneously with the principal contract.

This was an action of assumpsit on the following note:

"July 26th, 1845. $100. For value received, I promise to pay on demand to Joseph Bickford, or order, one hundred dollars with interest.
"George May."

On the back of the note was the following agreement, signed by the defendants: "We guarantee the payment of the within, waiving demand and notice."

R. B. Caverly, for the defendants.

B. F. Butler, for the plaintiff.

Shaw, C.J. Assumpsit to recover the amount of a note given by one May, and guaranteed by the defendants.

An exception is now taken, that this guaranty should have been specially declared on. No such exception was taken at the trial; had it been, an amendment might have been made; the objection comes too late.

The exception is also taken, that as the guaranty was a contract collateral to the note a distinct consideration should be

proved. There would be force in this objection, had the guaranty been made after the note had been made, delivered and received as a complete contract. But when the guaranty is made on the note before its delivery by the maker to the promisee, it must be deemed to be done for the benefit of the maker, to add to the strength of the note and to induce the promisee to take it and advance his money on it; and no other consideration is necessary than the credit thus given to the maker. And the guaranty being without date, and there being no direct proof of any time at which it was made, we think the court were right in leaving it to the jury, to find that the guaranty was simultaneous with the note itself. *Benthall* v. *Judkins,* 13 Met. 265.

Supposing, then, that the defendants were regularly bound as guarantors, and thereby assumed an obligation somewhat differing from that of either sureties or indorsers, what was that obligation? This question has been much discussed, especially since the leading case of *Oxford Bank* v. *Haynes,* 8 Pick. 423. The principle to be deduced from that case, and the Pennsylvania case of *Gibbs* v. *Cannon,* 9 S. & R. 202, there cited with approbation and relied on, is this: That in order to maintain an action against a guarantor, a demand of payment must be made in a reasonable time of the principal, and notice of non-payment given to the guarantor; and if in consequence of want of such notice, the guarantor suffers loss, he is exonerated. *Dole* v. *Young,* 24 Pick. 250. The same prompt demand and notice, as are required to charge an indorser, are not necessary; and if the circumstances of parties remain the same, and the guarantor suffers no loss by delay, demand and notice at any time before action brought, will be sufficient. *Babcock* v. *Bryant,* 12 Pick. 133. Such being the obligation of the defendants, as guarantors, they would not be liable by the general law, without proof of demand and notice. But they have expressly agreed to waive demand and notice, and *conventio legem vincit.* The effect of that waiver is, to put the plaintiff in the same situation as if he had proved that he seasonably demanded the money of the promisor, who did not pay it, and gave reasonable notice thereof to the defendants. In the absence of all proof on the part of the defendants, that they have suffered any loss by the laches of the plaintiff, the court are of opinion that this proof would entitle the plaintiff to recover.

Exceptions overruled.

When Principal and Assuring Contracts are Executed at Different Times.

61. TENNEY v. PRINCE, 4 Pick. 385.

Supreme Judicial Court, Massachusetts, 1826.

New consideration is required to support guaranty made after execution and delivery of principal contract.

This was assumpsit upon an indorsement by the defendant on a negotiable promissory note given by L. Pierce to the plaintiff, dated December 1, 1820, payable in twelve months, with interest after six months. The indorsement was made in blank, about three months before the note became due, and was filled up by the plaintiff as follows: "Eastport, Dec. 1, 1820. For value received I promise to pay Perley Tenney or order the within sum, being 824 dollars, 65 cents, in twelve months from date, with interest after six months." A verdict was taken for the plaintiff, subject, &c.

Moseley, for the defendant, objected that this was a collateral promise, being made subsequently to the original promise and independently of the credit given to the principal debtor, and that it was void for want of a consideration. If there was any consideration beyond that which originally passed between the plaintiff and Pierce, it was incumbent on the plaintiff to show it. He referred to *Josselyn* v. *Ames,* 3 Mass. 274; *Uten* v. *Kittredge,* 7 Mass. 233; *Moies* v. *Bird,* 11 Mass. 436 * * *

J. Pickering and *Marston,* for the plaintiff.

PARKER, C.J., delivered the opinion of the Court. This case presents a question which has not yet been decided in this commonwealth, nor does it appear that the researches of counsel have discovered any precedent for us in the reports of any other court.

By the facts agreed it appears that the defendant put his name on the back of the note about nine months after its date, and three months before it became due. There is no evidence of the intent and purpose of this act of the defendant, nor of any consideration which moved him to it. The writing made by the plaintiff over the signature would make it an original promise, of the same date with the note, to pay the contents of the note according to its tenor. We do not think there was any authority in the plaintiff to make this use of the signature, because it is inconsistent with the circumstances under which the signature was given. It is impossible to infer an original promise to pay this

note, coeval with its date, from a signature put upon it nine months after. The case of *Ulen* v. *Kittredge* is no authority for it; for in that case Kittredge was charged as guarantor, and there was a consideration in forbearance towards the promisor, and the Court inferred from the act and declarations of Kittredge an authority to make him thus liable, the note being due when the indorsement was made. Nor does the case of *Moies* v. *Bird* support it, for though the signing of Bird was two or three days after the note was made, there were facts from which an agreement to be responsible from the beginning was justly inferred.

These two cases approached nearer to the one before us than any which have been cited from our books, but they do not reach the present case, for this is a naked indorsement without any accompanying facts or declarations tending to explain the act. The principle by which all our decisions have been regulated, from the case of *Josselyn* v. *Ames* downwards, is, that where the indorsement is made at the time of making the note, the person indorsing the note is to be treated as an original promisor, and this because he is supposed to participate in the consideration, that is, the payee is supposed to have parted with something valuable upon the strength of the liability of the party who puts his name on the note, and as such party cannot be answerable as an indorser, he shall be answerable as an original promisor. This is well understood to be the law of this commonwealth, and we do not feel disposed to change it. No authority has been produced from this or any other state or country, which would justify us in extending the liability of these anomalous indorsers. We cannot yield to the suggestion of counsel, that the blank signature gives authority in this case to refer the effect of the signature to the date of the note, because it is proved that that signature was given nine months afterwards, and we have no facts to justify such a reference.

But this signature is not without effect; it was intended as security to the plaintiff, and it ought to avail as intended. The only form of engagement which is consistent with the time and circumstances under which the signature was made, is a guaranty of the payment of the note when it should become due, and that is a contract which may be enforced, if it was made on legal consideration, and not otherwise. If within the statute of frauds, it is sufficiently in writing, with the engagement to that effect which the plaintiff is authorized to place over the signature, to be sustained. But whether within the statute or not, it cannot avail the plaintiff without proof of consideration, because it is a col-

lateral, not an original undertaking. We think the signature conveys the authority to superscribe this engagement, as was decided in 1801, in a case reported in a note to Precedents of Declarations (2d ed.), 150, afterwards in *Josselyn* v. *Ames, Ulen* v. *Kittredge,* and many other subsequent cases.

The action in its present form therefore cannot be maintained; but if it is supposed that a consideration can be proved, the plaintiff has leave to amend his declaration and his indorsement over the signature, and a new trial is granted.

62. SIMMANG v. FARNSWORTH, 24 S. W. 541.

Court of Civil Appeals, Texas, 1893.
(Not officially reported).

Nature of consideration required.

Appeal from district court, Bexar county, W. W. KING, Judge.

Action by Tom Farnsworth against William Simmang on a promissory note. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Otto Staffel and *L. N. Walthall,* for appellant.

T. F. Shields, for appellee.

FLY, J. Appellee, who was plaintiff below, sued appellant on a note for $200, signed by him and one John Cavanaugh. Appellant answered that he had signed the note as a surety some time after the consideration had passed between appellee and Cavanaugh, and that there was no consideration passed to him for signing said note. The evidence shows that the note was executed on December 19, 1888, and was at that time only signed by Cavanaugh, and thus signed, was delivered to appellee. Appellant was not present at this time. The note was given for a one-third interest in machinery, the other interests being owned by appellee and one Charles Simmang. Appellant did not sign the note until in January, 1889, after the machinery was in running order. It was handed to appellant by Cavanaugh, who requested him to sign it. There is but one point to consider in order to arrive at a conclusion. If the consideration had not passed between Cavanaugh and Farnsworth at the time that the note was signed by appellant, then the appellant is responsible, and the judgment of the lower court is correct, and should not be disturbed; if, however, the consideration had passed and become executed before the appellant signed the note, then his signing was no part of the in-

ducement to the creation of the original debt as evidenced by the note, and appellant is not responsible. 1 Brandt, Sur. (2d ed.), p. 20, sec. 17; *Baker* v. *Wahrmund,* 23 S. W. 1023, (decided by this court at this term.) There must be some consideration moving to the principal alone, contemporaneous with or subsequent to the promise of the surety. If, after the original consideration has moved between the principal and creditor, the surety signs upon a new consideration moving from the creditor to the principal, this is sufficient. Also where a promise is made at the time the note is executed by the principal that the name of the surety will be obtained to the note, and the surety afterwards signs the note, the consideration would be legal and valid. But where the consideration between the creditor and principal had passed and become executed before the contract of the surety is made, and such contract was no part of the inducement to the creation of the original debt, the surety would not be bound. *Jackson* v. *Jackson,* 7 Ala. 791; 1 Brandt, Sur. (2d ed.), p. 20, sec. 17. The note was executed by Cavanaugh on December 19, 1888, at the time of the delivery of the machinery at the depot in San Antonio, and the note was delivered to Farnsworth, who put it in his pocket. The note was given for one-third interest in the machinery, and the putting up of the machinery did not seem to be a part of the consideration; but if it was, it was in complete running order when appellant signed the note. The note shows that the consideration for its execution was an interest in machinery furnished by Farnsworth. There was no agreement at the time that Cavanaugh signed the note that appellant's name would be secured to the note, and when he signed it the consideration was fully executed, and the debt had been created without the inducement of appellant's suretyship. There was no consideration for his signature. Judgment in the lower court was for appellee as against appellant and Cavanaugh, and over against Cavanaugh in favor of appellant. The judgment of the lower court is here reversed, and rendered in favor of appellee against John Cavanaugh for the amount of the note and all costs, and in favor of appellant against appellee for all costs in this and the lower courts expended.

WHEN TAINTED BY ILLEGALITY OF TRANSACTION.

63. ESTATE OF RAMSAY, deceased, v. WHITBECK, et al., 183 Ill. 550.
Supreme Court, Illinois, 1900.

A contract of indemnity made in furtherance of an unlawful scheme is illegal and void.

Appeal from the Appellate Court for the Fourth District—heard in that court on appeal from the Circuit Court of Clinton county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

M. P. Murray (*G. VanHoorebeke, John G. Irwin, T. E. Ford, John J. McGaffigan,* and *D. Kingsbury,* of counsel) for appellant.

R. L. Tatham and *Follansbee & Follansbee,* for appellees.

Mr. Chief Justice CARTWRIGHT delivered the opinion of the court:

On November 8, 1892, Rufus N. Ramsay was elected Treasurer of the State of Illinois for two years from the second Tuesday of January, 1893. On December 20, 1892, he, with ten sureties, executed a bond in the sum of $500,000 to the State of Illinois, conditioned for the faithful discharge of his duties as such treasurer. He entered upon the duties of his office January 10, 1893, and died during his term, on November 11, 1894. At that time there should have been in the treasury $1,510,383.14, and an examination showed that there was but $1,031,843.62, leaving a deficit of $478,539.52. This deficit was paid, on behalf of the sureties, by check drawn by F. M. Blount upon the Chicago National Bank, of which he was cashier. The bank was reimbursed by the sureties. After making up the deficit the sureties received $115,000 thereon by the collection of notes of individuals and securities found in the vault of the treasury. For the balance, $363,539.52, the sureties filed a claim in the county court of Clinton county against the estate of Ramsay, and applied to the court to be subrogated to the rights of the State of Illinois and to have the claim allowed as a preferred claim of the sixth class. The estate being insolvent, the general creditors of the seventh class, with the administrator, objected to the claim and resisted its allowance. The defense made was, that by reason of an unlawful consideration moving to the claimants for becoming sureties upon the bond, the transaction as between them and Ramsay was vitiated, and in consequence thereof they had no right to reimbursement which the law would recognize or enforce. This illegality was alleged to consist in a mutual agreement of the Treasurer

and his sureties for the unlawful use of the money of the State for the benefit of the Treasurer and certain banks, of which the sureties were officers and representatives, contrary to the public policy of the State and in contravention of its statutes. The county court decided in favor of the claimants and entered judgment for the amount of the claim as of the sixth class, and ordered it paid in due course of administration. From that judgment an appeal was taken to the circuit court, and there was a hearing which resulted in a reversal of the order of the county court and a disallowance of the claim. On appeal to the Appellate Court for the Fourth District the judgment of the circuit court was reversed, and the cause was remanded generally for further proceedings. A petition for rehearing was filed and granted. A change had taken place in the membership of the court, and the cause was re-considered by the present members of that court, but the judgment was adhered to and the opinion re-filed. The case was redocketed in the circuit court and additional testimony was taken. On the first trial certain officers of the bank testified, by deposition, and under advice of counsel refused to answer whether there was any arrangement between Ramsay and the sureties by which Ramsay was to furnish money for the banks of the sureties, in consideration of which he was to receive any benefit, directly or indirectly, from the banks. In the additional evidence they testified to the circumstances under which the bond was given. The case was again heard on the original testimony and the additional evidence, and the claim was allowed as of the sixth class. The amount was reduced somewhat by credits and the allowance was for $351,948.41. The judge filed a written opinion in the case, stating that the Appellate Court had held there were two contracts, one lawful and the other unlawful—two considerations, one lawful, the other unlawful,—for executing the bond, and that the unlawful contract and consideration did not taint the one which was lawful, and this conclusion he felt bound to follow from the obedience due to the superior court. He stated that but for the opinion of the Appellate Court on substantially the same evidence he should adopt a different view, but was constrained to accept the conclusion of the Appellate Court, which he would not do if free to act otherwise. The death of Edson Keith and William A. Hammond, two of the claimants, was suggested, and judgment was entered in favor of the surviving claimants for the amount of the claim. An appeal was again taken to the Appellate Court for the Fourth District and the judgment was affirmed. This further appeal has been prosecuted from the judgment of the

Appellate Court. * * * The unlawful agreement, the existence of which is affirmed on the one hand and denied on the other, is, that the sureties on the bond, who were officers of five banks in the city of Chicago, representing said banks and in their interest, became sureties because of an agreement that the Treasurer should loan to said banks a large amount of the State funds, upon which they were to allow and pay him interest monthly, at the rate of two and one-half per cent per annum, and that pursuant to such an agreement over $1,500,000 was loaned to said banks about the time the Treasurer went into office, and substantially that sum remained in said banks until his death, and the stipulated interest was regularly paid to him according to the agreement. * * *

This agreement which was made and executed was in direct and palpable violation of section 81 of the Criminal Code, which prohibits any State officer from using, by way of investment or loan, for his own use, except as authorized by law, with or without interest, any portion of the money entrusted to him for safe keeping, disbursement, transfer or any other purpose. (Rev. Stat. p. 363). It was also against the public policy of the State. Section 23 of article 5 of the constitution provides as follows: "The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms, and they shall not, after the expiration of the terms of those in office at the adoption of this constitution, receive to their own use any fees, costs, perquisites or office, or other compensation. And all fees that may hereafter be payable by law for any service performed by any officer provided for in this article of the constitution, shall be paid in advance into the State treasury." Section 1 of chapter 53 of the Revised Statutes, (p. 500), entitled "Fees and Salaries," provides: "That there shall be allowed and paid in annual salary, in lieu of all other salary, fees, perquisite, benefit or compensation, in any form whatsoever, to each of the officers herein named, the following sums respectively: * * * Treasurer, the sum of $3,500."

Nothing is better settled in the law of contracts than that if any part of the consideration upon which a promise rests is illegal the entire promise fails. (*Nash* v. *Monheimer,* 20 Ill. 215; *Henderson* v. *Palmer,* 71 id. 579; *Tenney* v. *Foote,* 95 id. 99; *Tobey* v. *Robinson,* 99 id. 222). No one can gain any right by obtaining a promise founded upon considerations in violation of the law, and the courts will not destroy the respect due to the law by enforcing such a promise, but will leave the parties where they have placed themselves by their own conduct. This is not denied,

and it is agreed by all the counsel in the case that where parties are engaged in illegal agreements or transactions courts will not enforce their promises. But while the rule of law is not questioned by appellees, they insist that there was no illegal contract by the sureties, but that the agreement is divisible as to parties between them and the banks. The supposed division is, that the illegal transaction was between Ramsay and the banks and not between him and the sureties; that he never agreed at any time with the sureties that if they signed the bond he would deposit State money with them; that whatever Ramsay agreed to do in the way of loaning State funds was with the banks, which were entities in law, and not with the individuals who signed the bond; that there was no agreement of the banks themselves prior to January 12, 1893, when the certificates were issued, that they were not certificates of the bondsmen; that the banks and not the bondsmen, paid the interest and paid back the principal. This is a refinement in separating the parties to the transaction that we are not able to appreciate or approve. The sureties signed the bond as representatives of the banks, and they all understood it in that way. A bank cannot, as such, become a surety upon a bond, and it cannot have any understanding or make a contract except as its officers understand and make the promise. Upon the examination of the president of the Metropolitan National Bank he was asked if the banks were not the real sureties and not the individuals, and if the benefits which the banks received from the State funds were not the consideration for becoming sureties, and his answer was, "There is no way of a national bank becoming surety on a bond." Again, he was asked if it was not the understanding that the officers would not have to pay anything, and answered, "We could not make such an agreement—it would not be legal." The president of the Chicago National Bank testifies that when he drew his check to make good the deficit he drew it with the expectation that he would be reimbursed, because the profits that would have accrued from the use of the money would have benefited the bank and he expected the bank to stand the loss. The officers signed the bond for the benefit of the banks, as their officers and representatives, and at least three of the banks have reimbursed them. This suit is being prosecuted for the benefit of the banks, and what the officers did in signing the bond and are doing now is by virtue of their official relations as agents of the banks. We cannot say that the banks are guilty, and that their officers, who made the bargain and did the business, are innocent.

Another division of the contract into legal and illegal parts

is insisted upon for the purpose of bringing the claim within the rule that if there is a single legal consideration for two promises, one of which is legal and the other illegal, the lawful promise may be enforced. The rule has been stated as follows: "A distinction must be taken between the cases in which the consideration is illegal in part and those in which the promise founded on the consideration is illegal in part. If any part of a consideration is illegal the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal. But if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated, in which case the whole promise is void." (Parsons on Contracts, 457). When a surety signs a bond the law raises an implied promise by the principal to reimburse the surety for any loss which he may sustain, and when a loss occurs this implied contract of indemnity relates back and takes effect from the time when the surety became responsible. (*Choteau* v. *Jones,* 11 Ill. 300). Under this rule, when the sureties signed the bond of Ramsay the law implied a promise on his part to indemnify and save them harmless from all loss which they might sustain by reason of such signing, and when they made up the deficit this implied promise related back to the date of bond. This implied promise was perfectly lawful and legal, and it is said that if there was a separate promise on the part of Ramsay to keep the money in the banks it would not prevent a recovery by the sureties upon the lawful promise to reimburse them. This argument loses sight entirely of the consideration upon which Ramsay's promise rested. On the one side there was the implied promise of indemnity and the promise to deposit the money with the banks. The consideration on the other side was that the sureties would execute the bond and the banks which they represented would pay the interest. The consideration upon which the implied promise now sought to be enforced was made was the signing of the bond and the payment of interest to the Treasurer. The consideration moving from the sureties was not the single one, free from unlawful taint, but included pecuniary gain and advantage to the Treasurer by an unlawful agreement, under which they paid interest to him. Ramsay would not have wanted the sureties to sign the bond or allowed them to do it except for the unlawful agreement for his

own pecuniary advantage. The arrangement, whether it resulted in gain for the banks or not, was made for that purpose and upon that consideration, and the transaction on the part of Ramsay, on the other hand, was for his benefit, and it involved a violation of the criminal law and the public policy of the state. The promises are connected and so mingled and bound together that they are not separable. The claim cannot be brought within the exception stated. The law will not enforce the lawful implied promise of indemnity resting upon the illegal consideration that the banks would borrow money and pay interest on it. The parties were all engaged in the illegal enterprise and all are equally involved.

It is especially urged that we should adopt the view of the appellees that they did not enter into a contract forbidden by law, but that, at most, they had a mere hope or expectation that the law would be violated by deposits of money with their banks, which did not amount to an agreement to that effect, and it was this hope or expectation which was afterwards realized. It is said that they occupy honorable positions in the business world, and presumption against them should not be lightly indulged. We are slow to impute to any person a violation of the law unless the evidence requires,—and this rule applies to all persons, whether distinguished in the ranks of business life or not. The law is the same for all, and we cannot find these parties guiltless when the facts show the contrary. The whole evidence on the subject of the agreement came from them. They were called as witnesses by the defendant, and the facts we have stated are found in their testimony. We have given the case our best attention, both upon the original argument and the re-argument which was allowed, and are unable to reach any other conclusion.

The judgments of the Appellate Court and the circuit court of Clinton County are reversed and the cause is remanded to the circuit court with directions to enter an order disallowing the claim.

Reversed and remanded.

SECTION 3. EXECUTION AND DELIVERY

64. CHITWOOD v. HATFIELD, et al., 136 Mo. App. 688.
Kansas City Court of Appeals, Missouri, 1909.

Assurer's contract is not binding unless and until it is delivered.

Appeal from Jasper Circuit Court.—Hon. HUGH DABBS, Judge.

Thomas Dolan, for appellant.

Cole, Burnett & Williams, for respondents.

JOHNSON, J.—This is an action on a negotiable promissory note brought by plaintiff against defendants Hatfield, Long, Rozelle and Lortz. Hatfield was the principal maker. The other defendants signed the note as sureties. Among other defenses, the sureties alleged that the note was without a consideration, that it was not delivered to the payee and that it was not endorsed by the payee to plaintiff "for value received."

The cause was tried to the court without the aid of a jury. No declarations of law were asked or given. Judgment was rendered for plaintiff against Hatfield, but in favor of defendant sureties. Plaintiff appealed.

There is no substantial controversy over the facts of the case. Plaintiff was a banker at Carl Junction, a town about nine miles from Joplin. Hatfield was a customer of plaintiff and was indebted to him on a note and overdraft. He applied to plaintiff for an additional loan of $700, and was referred to T. W. Cunningham, a banker at Joplin, with whom plaintiff kept an account. He went to Cunningham's bank, obtained a blank note, filled it out, signed it and procured the signatures of defendants, Long and Rozelle, and of three other sureties, viz., H. S. Bowman, J. W. Jameson and Joseph Story. Afterward, he presented the note to Cunningham, who refused to accept it on the ground that the security was insufficient. A day or two later, Hatfield saw plaintiff at Carl Junction and told him of the refusal of Cunningham to take the note. Plaintiff advised Hatfield to procure defendant Lortz as a surety and said that he "would see that defendant got the money on it." Hatfield induced Lortz to sign the note and then returned to plaintiff who cashed the note which was made payable to the order of Cunningham and would become due six months after its date. At no time did Cunningham promise to lend any money to Hatfield nor had he authorized plaintiff to make such loan. A few days after obtaining the note, plaintiff

took it to Cunningham who endorsed it without recourse at plaintiff's request. It is a general as well as a statutory rule of law that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." By the terms of the note, the sureties undertook to enter into contractual relations with Cunningham, the payee named therein. They did not propose to contract with plaintiff, and it would seem to be too clear for serious discussion that they could become bound only in the event of a delivery of the note to Cunningham and his acceptance thereof. Until he should bring himself into a contractual relation with them and their principal, the contract necessarily remained incomplete and in fact and law, was no contract at all. Plaintiff, who did not act as the agent of Cunningham, did not make him a party to the contract by voluntarily cashing the note, nor could he make himself an original party without the consent of the sureties. We think he could not give life to the contract by subsequently obtaining the indorsement of Cunningham without recourse. Already he had voluntarily parted with his money on his own responsibility. At no time did Cunningham assume any contractual obligations to the makers of the note. There was no delivery of the instrument to him, no acceptance thereof by him, and no consideration from him to the makers. Since he never became a party to the contract, his indorsement without recourse which imposed no obligation on him did not constitute him a party and was ineffective for any purpose.

We conclude that the learned trial judge was right in discharging the sureties. Accordingly the judgment is affirmed. All concur.

65. HAYWOOD, Adm'r., etc., respondent, v. TOWNSEND, et al., appellants, 4 App. Div. 246.

Supreme Court, Appellate Division, New York, 1896.

Delivery of bond by sureties to principal sufficient to make their obligation complete. Verified copy of bond may be delivered in lieu of original, lost or destroyed; intention governs.

The facts are stated in the opinion.

W. J. Palmer, for the appellants.

F. L. Michael, for the respondent.

HERRICK, J.—In the year 1863, one Cynthia Lane made her last will and testament, whereby, amongst other things, she gave

and bequeathed to Cynthia J. Haywood the sum of $500, and to Alice Haywood the sum of $300, to be paid to them by her executor on their arriving at full age, but until that time to be kept at interest for their benefit, and further directed that said executor should "execute good and sufficient surety for the benefit of said children before he shall enter upon the discharge of his trust, conditioned for the safe investment of said money, and the payment thereof, to said children, with interest, on their arriving at full age."

Robert M. Townsend was designated by her as the executor of said last will and testament. Said Cynthia Lane died on or about the 25th day of June, 1864, and letters testamentary were issued to Robert M. Townsend on the 12th day of December, 1864.

On the 15th day of March, 1865, Robert M. Townsend, principal, and the defendants, John J. Townsend and Enoch L. Townsend, as sureties, executed a bond under their hands and seals, conditioned that the said Robert M. Townsend should well and truly discharge the duties of his trust, and keep the said legacies invested for and pay the same to Cynthia J. and Alice Haywood, their attorneys, administrators, executors or assigns, with interest, on their becoming of age, according to the requirements of the said last will and testament.

This bond appears to have remained with Robert M. Townsend, or, if it was ever filed in the surrogate's office, was subsequently taken therefrom. For some two or three years afterwards it was in the possession of Robert M. Townsend, and was taken from him by the defendant John J. Townsend and burned.

After the execution of the bond, and on the 16th day of March, 1865, the said Robert M. Townsend delivered a copy of it to the plaintiff, attached to which was an affidavit stating that the same was a copy of the original bond filed in the office of the surrogate of Otsego county, and received from the plaintiff (the father of Cynthia J. and Alice Haywood) the sum of $800 upon said trust.

The said Robert M. Townsend has not paid over the full amount of said legacies as required under the will, and as provided by his bond. The legatee Cynthia J. Miller, *nee* Haywood, died intestate in the year 1878, and the plaintiff was appointed administrator of her estate. In 1894 an accounting by the said Robert M. Townsend as trustee was had upon the petition of the plaintiff as administrator of the estate of Cynthia J. Miller before the surrogate of Otsego county, and a decree was made by the surrogate and entered on the third day of April, 1894, whereby it

was adjudged that the said trustee, Robert M. Townsend, was indebted to the plaintiff as administrator on account of the said legacy and interest belonging to the estate of Cynthia J. Miller, in the sum of $2,324.80; an execution therefor has been issued and returned unsatisfied to the amount of $1,755.09. * * *

* * * The most serious objection made is, that the bond was never delivered. We are not cited to any authority as to what is necessary to a delivery in a case such as this. Delivery is always a question of intention which must be that the instrument shall be operative. (2 Am. & Eng. Ency. of Law, 458).

The same strict rules do not apply to bonds and undertakings as to deeds.

The defendants, it appears from the testimony, knew what the bond was for; that without it the trustee, Robert M. Townsend, could not acquire possession of the money that was left by the testatrix for the benefit of the legatees; they signed and executed the bond for the purpose of enabling him to get that money; when they delivered it to him and left it with him, after having executed it, it was, so far as any act of theirs necessary to be done to fix their liability upon the bond, complete.

Their obligation was something more than that of an indorser upon a note of a guarantor of the payment of money; they became responsible for the fidelity of the trustee, his integrity. (*Douglass* v. *Ferris,* 63 Hun, 413).

Before he could commence the duties of his trust his faithfulness must be guaranteed; when they placed in his hands the bond signed by them their act was finished; they had guaranteed his fidelity and became responsible for any breach; so far as they were concerned the delivery was complete; they had delivered the instrument to him with the intention that their guaranty should be operative, that it should enable him to enter upon the duties of his trust. At the time he delivered a sworn copy of it as a voucher of his authority and right to receive the trust fund the bond executed by the defendants was in existence, and its subsequent destruction after the trustee, upon the faith of its execution and existence, had secured the legacies, cannot alter the liability of the defendants. If at that time the plaintiff, instead of John J. Townsend, had secured possession of the bond and kept it until this time instead of burning it, can there be any question but that he could recover upon it? Does the fact that after it had partially fulfilled its office, but while its most important function remained unperformed, it was taken and destroyed by one of its signers, change the situation except as to the matter of proof as

to whether such an instrument ever existed? It seems to me not.

It is claimed by both parties that the bond should have been filed in the surrogate's office; I assume that to be the law of the case; that was then the only additional delivery that the bond was capable of; it could not be given to the infant legatees or to their guardians, or to any other persons for them; it was to be left with the surrogate. It was not a thing necessary to be done by the sureties.

The requirement that it should be filed with the surrogate was for the benefit of the legatees, not for the benefit of the principal upon the bond or his sureties; and the fact that it was not filed, that their principal did not do his duty in that respect, cannot be asserted by them as a defense to the bond. Their signing the bond was not conditional upon its being filed; as above stated, the requirement that it should be filed was not for their benefit.

It has been held that the requirement that a bond should be approved by the surrogate is not one for the benefit of the sureties, but of the creditors and legatees, and that the sureties cannot raise the objection that it has not been so approved; that such an objection is in the nature of an objection to their own act, or rather omission to act. (*Mundorff* v. *Wangler,* 44 N. Y. Super. Ct. 495-505).

Having, by signing the bond and giving it to the principal, placed it in the power of the principal to secure the money, and he having done so, it has, so far as the principal and sureties are concerned, served its purpose, and the defendants should not be permitted to repudiate the bond to the detriment of the parties it was apparently given to secure. (*Russell* v. *Freer,* 56 N. Y. 67).

The defendants were bound by the judgment and decree of the surrogate as to the amount due from Robert M. Townsend, the trustee, to the plaintiff.

When sureties go upon the bond of a testamentary trustee, they make themselves privy to all proceedings against the principal, and when he, without fraud or collusion, is concluded, they are concluded also. (*Gerould* v. *Wilson,* 81 N. Y. 573-583; *Douglass* v. *Ferris,* 138 id. 192-201).

The judgment appealed from should be affirmed, with costs.

All concurred.

66. RUSSELL, Adm'r, etc., respondent, v. FREER, et al., appellants, 56 N. Y. 67.

Court of Appeals, New York, 1874.

A surety who signs upon a condition dehors his written contract and empowers his principal to make delivery, is bound thereby, even though the condition be not performed; unless the obligee is put on notice.

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. . . .

This action was brought upon an official bond given by defendant, Charles J. Dolson, upon his appointment as deputy collector of internal revenue.

William Masten, plaintiff's intestate, was collector; proposing to appoint said Dolson as his deputy, he required of him a bond, in substance conditioned that he would pay over and account for all moneys collected by him as such. Two of the obligors, defendants Freer and Hasbrouck, defended upon the ground that, at the time of signing by them, the name of James Dolson appeared in the body of the bond, and that they executed with the expectation that he would also execute it before delivery, but that his name was subsequently erased without their knowledge or consent. * * * Further facts appear in the opinion.

M. Schoonmaker, for the appellants.

P. Cantine, for the respondent.

GROVER, J.—* * * The plaintiff's intestate had been appointed collector of internal revenue by the government of the United States, and proposed to appoint the defendant, Charles J. Dolson, a deputy collector, and required security from him to account for and pay over the money received by him as such deputy. For this purpose the bond in question was prepared for execution; as to which the referee finds the following facts: That at the time the bond was executed by the parties, one James Dolson was named in the bond as one of the obligors therein. Before the defendants, Hasbrouck and Freer (the appellants) signed the bond, they were told by the defendant, Charles J. Dolson, that the said James Dolson was to sign the bond; and at the time they signed said bond they expected that the said James Dolson would sign the bond; that after they signed the bond the name of James Dolson was struck out of the bond, without their knowledge and consent. That the plaintiff's intestate was not present at the time the bond was executed, and that there was no evidence that at

the time the bond was delivered to him he knew or had any information of the above facts; that a few days after its execution it was delivered to the intestate by the defendant Charles J. Dolson; that after the bond was executed it was left with the defendant Charles J. Dolson, without any direction by the defendants, Hasbrouck and Freer, or any of the parties to the bond that it was not to be delivered to the intestate until it should be signed by James Dolson.

The only inference that can be drawn from these facts is that the bond was executed by Charles J. Dolson as principal and by the others as his sureties, and left by the latter with the former, to be delivered to the intestate for the purposes intended, but that the sureties expected that before such delivery it would be executed by James Dolson as co-obligor and co-surety with them. It is clear upon these facts, both upon principle and authority, that the bond was a valid obligation upon those who executed it. Upon principle, for the reason that the sureties knew the purpose of making the bond was the protection of the intestate from loss from the acts of Charles J. Dolson as deputy collector. They left the bond in his hands for delivery to the intestate for that purpose, expecting that he would, before that, procure its execution by James Dolson. The intestate knew nothing of this expectation; he relied upon the bond, and so relying appointed the principal deputy collector; and thus became himself responsible for his acts as such. The appellants by executing the bond and leaving it with Dolson, the principal, placed it in his power to deliver it as a valid and complete instrument. He did so deliver it, and thereby the intestate was induced to appoint him deputy and incur the responsibility consequent upon the appointment. It is a case for the application of the maxim that when one of two innocent parties must sustain a loss from the wrongful act of a third, the loss must be borne by the one who has enabled the wrong-doer to commit the act.

It is insisted by the counsel for the appellant that the bond, upon its face, showed that the name of James Dolson had been inserted in the body as an obligor, and erased therefrom, and that this should have put the intestate upon inquiry to ascertain why it was not executed by him. The case shows that all the names in the body of the bond were written by the justice who took the acknowledgments of those who executed it and by whom the oath to the justification was administered. Under these circumstances the erasure of a name of a person who did not execute, from the body of the bond, would not excite suspicion of wrong

if it would in the absence of these facts. The authorities are conclusive against the defence upon the facts found. (*Dair* v. *The United States,* 16 Wallace 1; *State* v. *Peck,* 53 Maine 284; *State* v. *Pepper,* 31 Indiana 76; *McCormick* v. *Bay City,* 23 Michigan 457).

Chouteau v. *Suydam* (21 N. Y. 179), cited by counsel for the appellants, has no application to this case. The facts do not bring the case within the principle of *The People* v. *Bostwick* (32 N. Y. 445), assuming that that case was well decided; which may well be questioned. (See *Dair* v. *United States,* and other cases, *supra.*) But in that case stress was laid and the judgment was based upon the fact that the agent of the principal was directed by the sureties executing the bond, not to deliver it to the auditor unless it should first be executed by Dickerson as co-surety, and that he did deliver it without doing this. No such fact is found in this case.

The judgment must be affirmed, with costs.

All concur.

CHAPTER III

CONSTRUCTION OF THE CONTRACT

67. STROUGHTON v. DAY, Aleyn 10[16].
Court of King's Bench, Paschal Term, 1647.

At common law the contract of the surety was construed most strongly against the obligee.

In debt upon a Bond with Condition, That whereas the Plaintiff is Sheriff of Surry, and hath made Cornelius Trapp his Bailiff of the Hundred of Brixto, if he should execute his Office, &c., and make true returns of all Warrants directed to him, then, &c. The Defendant upon oyer pleads particularly performance to all; the Plaintiff replies, that process was directed to him to levy Issues upon J. S. and that he made his Warrant to Trapp to execute the same, which Warrant he did not return; and upon a Demurrer Judgment was given against the Plaintiff, because he did not shew that the Issues were to be levied within the Hundred of Brixto; for it was resolved, that though the words of the Condition were general to make return of all Warrants directed to him, yet it was to be understood of such only as were to be executed within the Hundred of which he was made Bailiff.

68. RUSSELL v. CLARK'S EXECUTORS, et al., 7 Cranch 69.
Supreme Court, United States, 1812.

To charge one person with the debt of another the undertaking must be clear and explicit.

Error to the Circuit Court for the District of Rhode Island, in a suit in equity, brought by Russell, against Clark in his life time, as surviving partner of the firm of Clark and Nightingale; to recover from him the amount of sundry bills of exchange, drawn by one Jonathan Russell, for the use of Robert Murray & Co. whose agent he was, upon James B. Murray, in London, and

[16] S. C., Style, 18; sub. nom. Horton v. Day, Rot. 468.

indorsed by the complainant, Nathaniel Russell, upon the faith of two letters written to him by Clark and Nightingale, in the following words:

PROVIDENCE, 20th January, 1796.

"NATHANIEL RUSSELL, ESQ.

Dear Sir: Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice, and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost dependence may be placed; they will write you the nature of their intentions, and *you may be assured* of their complying fully with any contract or engagements they may enter into with you.—The friendship we have for these gentlemen,induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit.

"We are, with sentiments of esteem, dear sir,

"Your most obedient servants,

"CLARK & NIGHTINGALE."

PROVIDENCE, 21st January, 1796.

"NATHANIEL RUSSELL, ESQ.

Dear Sir: We wrote you yesterday, a letter of recommendation in favor of Messrs. Robert Murray & Co.—We have now to request that you will render them every assistance in your power. * * *

"We are, dear sir,

"Your most obedient servants,

"CLARK & NIGHTINGALE."

Dexter, for the Plaintiff in Error. . . . . .

C. Lee, contra.

March 5th, all the judges being present, MARSHALL, ch. justice, delivered the following opinion:

This is a suit in chancery instituted for the purpose of obtaining from the defendants, payment of certain bills of exchange drawn by Jonathan Russell, an agent of Robert Murray & Co. and indorsed by Nathaniel Russell; which bills were protested for non-payment, and have since been taken up by the indorser. The plaintiff contends that the house of Clark & Nightingale had rendered itself responsible for these bills by two letters addressed to him, one of the 20th and the other of the 21st of January, 1796, on the faith of which his indorsements, as he says, were made.

The letters are in these words—(See the preceding statement of the case). * * * The court will proceed to inquire how far Clark & Nightingale were liable to the plaintiff for the debt due to him from Robert Murray & Co.

The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking

manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume. In their letter of the 20th, Clark & Nightingale indicate no intention to take any responsibility on themselves, but say that Mr. Russell may be assured Robert Murray & Co. will comply fully with their engagements. In their letter of the 21st they speak of the letter of the preceding day as a letter of recommendation, and add "we have now to request that you will endeavor to render them every assistance in your power."

How far ought this request to have influenced the plaintiff? Ought he to have considered it as a request that he would advance credit or funds for Robert Murray & Co. on the responsibility of Clark and Nightingale, or simply as a strong manifestation of the friendship of Clark and Nightingale for Murray & Co., and of their solicitude that N. Russell should aid their operations as far as his own view of his interests would induce him to embark in the commercial transactions of a house of high character, possessing the particular good wishes of Clark and Nightingale?

It is certain that merchants are in the habit of recommending correspondents to each other without meaning to become sureties for the person recommended; and that, generally speaking, such acts are deemed advantageous to the person to whom the party is introduced, as well as to him who obtains the recommendation.

These letters are strong, but they contain no intimation of any intention of Clark & Nightingale to become answerable for Robert Murray & Co., and they are not destitute of expressions alluding to that reciprocity of benefit which results from the intercourse of merchants with each other. "The friendship," say they, in their letter of the 20th, "we have for these gentlemen, induces us to wish you will render them every service in your power, at the same time we flatter ourselves this correspondence will prove a mutual benefit."

Mr. Russell appears to have contemplated the transaction as one from which a fair advantage was to be derived. He received a commission on his indorsements.

The court cannot consider these letters as constituting a contract by which Clark and Nightingale undertook to render themselves liable for the engagements of Robert Murray & Co. to Nathaniel Russell. Had it been such a contract, it would cer-

tainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements. * * *

Cause remanded.

69. GATES v. McKEE, 13 N. Y. 232.
Court of Appeals, New York, 1855.

The contract of the assurer is to be construed according to the rules that apply to all contracts.

The action was upon an instrument of which the following is a copy:

"MIDDLEPORT, Feb. 6, 1844.

MR. GATES.—Sir: I will be responsible for what stock M. E. McKee has had or may want hereafter to the amount of five hundred dollars.

CHAUNCEY McKEE."

The cause was tried at the Orleans county circuit, before Justice Mullett, without a jury. The plaintiff read in evidence the instrument above set out, its execution by the defendant being admitted; and proved that at the time it was executed and thence ensuing, the plaintiff was a tanner and currier, and dealer in leather and stock for the shoemaking business at Barre, in the county of Orleans, and that M. E. McKee was a shoemaker and carried on business at Middleport in the county of Niagara. At the time the instrument was executed by the defendant, there was due from M. E. McKee $60.44 for stock, previously sold and delivered to him by the plaintiff. After the instrument was delivered to the plaintiff and prior to January, 1850, he sold and delivered to M. E. McKee stock for the shoemaking business, to the amount of $1,045.65. Prior to the date last mentioned, M. E. McKee paid to the plaintiff the amount due him at the time the instrument was executed, and also sundry amounts from time to time on account of the stock sold after its execution, amounting in all to $525.65, leaving a balance due the plaintiff on the 5th of January, 1850, from M. E. McKee of $520, for which he then executed to the plaintiff his due bill. Subsequently and before the commencement of the action M. E. McKee made further payments to the plaintiff, reducing the amount due the latter to $408.89. The plaintiff claimed to recover of the defendant this amount.

Upon these facts the counsel for the defendant insisted that the plaintiff was not entitled to recover, because: 1. The instrument signed by the defendant did not express, nor did the evidence show a sufficient consideration to uphold it; 2. If valid it was

an absolute contract for the purchase of goods by the defendant to the amount of $500 and not a contract of guarantee; 3. If it was to be regarded as a contract of guarantee, it was not a continuing guarantee; 4. That M. E. McKee having paid more than $500 on the account, which accrued for property sold after the execution of the contract by the defendant, the latter was thereby discharged. The court overruled each of said objections, and decided that the plaintiff was entitled to recover the balance due, being $408.89, and ordered judgment for this amount. The counsel for the defendant excepted. The judgment was affirmed at a general term of the court in the 8th district. The defendant appealed to this court.

Nathan Dayton, for the appellant.

S. E. Church, for the respondent.

DENIO, J. If this were the first time that an instrument of this character had been before a court, and we were now called upon to construe it without the light of adjudged cases, the first inquiry would naturally be whether the limit of $500 related to the amount of purchases to be made by M. E. McKee or to the defendant's ultimate liability; and I think it clearly qualifies the responsibility of the defendant and not the amount of M. E. McKee's future transaction with the plaintiff. It is as if he had said "I will be responsible to the amount of $500 for what stock M. E. McKee has had or may want hereafter," &c. I also think that the words "what stock" in their relation to future purchases, have the force of *whatever stock* or *whatever amount of stock* he may want hereafter; and the word "stock" alone denotes the *supply of materials* for the business of the party spoken of. The word "hereafter" seems to be used in an indefinite sense. It is not at any particular time in the future, but as if it were written *at any time hereafter.* The words "may want" are significant as to the character of the future dealings in contemplation, and they mean the same thing as *may need or require* or *may have occasion for.* M. E. McKee was a shoemaker, and the plaintiff was a leather manufacturer; and reading of the paper as relating to their respective occupations and giving the language the interpretation which I have suggested and leaving out what is said of past indebtedness as immaterial, the following paraphrase would appear to me to express its true meaning: "Sir, I will be responsible to the amount of five hundred dollars for whatever amount of materials in his line M. E. McKee may, at any time hereafter require." This is not a refined or artificial interpretation, but it is

what the plaintiff or any other person to whom such a paper might be addressed, would naturally, and in my opinion, unavoidably understand from it. If this is the meaning which the paper naturally conveys, it is the sense which the court is bound to apply to it. The cases are not entirely harmonious as to the principles of construction which ought to govern in this class of cases, but the weight of authority is altogether in favor of construing guarantees by rules at least as favorable to the creditor as those which courts apply to other written contracts, irrespective of the consideration that the guarantor is a surety. In *Mason* v. *Pritchard* (12 East 227), the court said the words were to be taken as strongly against the party giving the guarantee as the sense of them would admit. The same remark is found in the opinion of the supreme court of the United States in *Drummond* v. *Prestman* (12 Wheat. 515), which was the case of a guarantee. In *Douglass* v. *Reynolds* (7 Peters, 113, 122), Judge Story said, speaking of guarantees, "as these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement." In *Lawrence* v. *McCalmont* (2 Howard 426), the attention of the same learned judge was directed particularly to this question of construction. After remarking that a question had been made on the argument whether the letters of guarantee under consideration should receive a strict or a liberal construction, he said: "We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guarantee are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and aim; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world." Further on he says: "If the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of

the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury." These extracts express so happily my notion of the rules of construction, which ought to prevail in this class of cases, that I need only add, that the same general principle will be found asserted with more or less distinctness in *Bell* v. *Bruen* (1 How. 169, 186); *Haight* v. *Brooks* (10 Adolph. and Ellis, 309); *Mayer* v. *Isaac* (6 Mees. and Welsb. 605); *Dobbin* v. *Bradley* (17 Wend. 422); *Hargreave* v. *Smee* (6 Bing. 244). In the last case C. J. TISDALE said: "There is no reason for putting on a guarantee a construction different from what the court put on any other instrument. With regard to other instruments, the rule is that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." And BRONSON, J., in the case referred to from 17 Wendell, remarks that commercial guarantees are in extensive use, and that he can perceive no reason why they should not receive the same liberal construction for advancing the end which the parties had in view, as is given to other contracts. I am aware that judges have in some few instances spoken of the construction *strictissimi juris* as the one to be applied to all contracts where sureties are sought to be charged, and that Judge Story himself, in an earlier case than the one from which I have quoted, expressed the opinion that where it was doubtful whether a guarantee created a continuing obligation, the presumption should be against it. (*Cremer* v. *Higginson,* 1 Mason 336). There is a sense undoubtedly, in which it may be said that these obligations are to be strictly construed; and it is this: That the surety is not to be held beyond the very precise stipulations of his contract. He is not liable on an implied engagement where a party contracting for his own interest might be, and he has a right to insist upon the exact performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party. I feel no difficulty, therefore, in reading the short instrument which we are called upon to construe in the sense which every person, when informed of the situation of the parties and who had considered the nature of the business it was designed to facilitate, would naturally place upon it. If I am right in the meaning which I have attributed to the several expressions contained in it, it did not look to a single transaction or to dealings be-

tween the parties to a particular amount and its purposes were not fully accomplished when the person whose credit was intended to be aided, had once contracted a debt to the plaintiff to the amount of $500, and had paid that debt. It contemplated a continuous business and a standing credit to the amount mentioned. If I am right in this (and the question is merely one of construction), there is no case or dictum which I have met with, which will exonerate the defendant. The adjudications are very numerous, and although I have examined more than I can conveniently refer to, I will mention the following only, each of which contains principles which will uphold the conclusion which I have arrived at, that this contract is a continuing guarantee. (*Fellows* v. *Prentiss,* 3 Denio 518; *Clark* v. *Burditt,* 2 Hall 197; *Douglass* v. *Reynolds,* 7 Peters 113; *Bent* v. *Hartshorn,* 1 Metc. 24; *Barstow* v. *Bennett,* 3 Camp. 290; *Rapelye* v. *Bailey,* 5 Conn. 149; *Mayer* v. *Isaac,* supra; *Hargreave* v. *Smee,* 6 Bing. 244; *Allan* v. *Kenning,* 9 id. 618; *Hitchock* v. *Humfrey,* 5 Mann. and Gr. 560; *Martin* v. *Wright,* 6 Adolph. and Ellis, N. S. 917). In several of these cases the intention to guarantee a continuous trading was much more distinctly expressed than in the present case; but in others, such as *Mason* v. *Pritchard,* which has repeatedly received the sanction of the courts in this country and has never been disapproved of in any court, and in *Martin* v. *Wright,* which was decided quite recently, the same liberal, or I may rather say natural and reasonable intendment was made, which I have supposed ought to be applied to the instrument under consideration.

The objection that the consideration was not sufficiently expressed to satisfy the requirement of the Revised Statute of Frauds is answered by the judgment of this court in *The Union Bank* v. *Coster's Exrs.,* (3 Comst. 204).

I am in favor of affirming the judgment of the supreme court.

HAND, J., also, delivered an opinion in favor of affirmance.

Judgment affirmed.

70. THE PEOPLE OF THE STATE OF NEW YORK, respondent, v. BACKUS, et al., appellants, 117 N. Y., 196, 22 N. E. 759.

Court of Appeals, New York, 1889.

Promise to answer for default of another. Construction of contract. Change of principal contract.

APPEAL from judgment of the General Term of the Supreme Court in the Third Judicial Department, entered upon an order made February 5, 1889, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by the people against the defendants as guarantors upon the following bond or contract of the National Bank of Auburn, to-wit:

"Whereas certain moneys of the State of New York have been and are proposed to be deposited in the First National Bank of Auburn, under the direction of the comptroller of the state, by the agent and warden of Auburn prison, to the credit of the treasury of the state, for safekeeping and for interest.

"Now therefore, the said First National Bank of Auburn, in consideration of such deposits and for value received, does hereby agree to pay on demand, to the order of the state treasurer, or other officer of the state having lawful authority to demand the same, such deposits, and any and all parts thereof, together with interest on daily balance, at the rate of three per cent.

"Witness the seal of said Bank and the signature of its president and cashier, this 14th day of June, 1880."

The guaranty was as follows:

"In consideration of the making the deposits by the people of the State of New York in the First National Bank of Auburn, in the agreement mentioned, and for value received, we, the undersigned, Clinton T. Backus, Manson F. Backus, James Kerr and William E. Hughitt, do hereby jointly and severally guarantee the full and punctual performance of the condition of said agreement on the part of said bank, and that all such deposits and interest shall be fully paid on legal demand. The said guarantors may serve upon the comptroller a written notice, terminating or limiting their liability under this guaranty, after a date to be specified in said notice, which shall not be less than ten days after the service of said notice."

The agent and warden was by law the official manager of the state prison at Auburn, and was requested to deposit all moneys received by him each week to the credit of the treasurer of the state, in a bank located at Auburn, and send to the comptroller weekly a statement showing the amount so received, and from whom or where received and deposited, and the days on which such deposits were made, such statement to be certified by the proper officer of the bank receiving such deposits. The agent and warden was required to verify by his affidavit that the sum so de-

posited was all the money received by him from whatever source of prison income during the week and up to the time of the deposit, and all moneys so deposited by him were subject to the quarterly drafts of the treasurer of the state. The law required that any bank in which deposits should be made should, before receiving any such deposit, file a bond with the comptroller of the state, subject to his approval, for such sum as he should deem necessary. § 50, Chap. 460, Laws of 1847, as amended by Chap. 58, Laws of 1854, and Chap. 599, Laws of 1860. By section 6 of Chapter 177 of the Laws of 1877, it was provided that "The system of labor in the state prisons shall be by contract or by the state or partly by one system and partly by the other, as shall in the discretion of the superintendent be deemed best." From the time of the execution of the bond until December, 1884, the business of the Auburn state prison was carried on under what was known as the contract system. By chapter 21 of the Laws of that year, the renewal of the then existing contracts, or the making of new contracts for convict labor, was prohibited and after that the prisoners were employed in manufacturing on state account. The bank was incorporated under the National Bank Act of 1863, on the 31st day of December of that year, and by its articles of association it was provided that it should continue until the 25th day of February, 1883, unless sooner dissolved by the act of a majority of the stockholders thereof. By the Act of Congress, passed July 12, 1882, (U. S. Stats. at Large, Vol. 22, p. 162), National Banks were authorized to extend their corporate existence; and in January, 1883, such proceedings were taken under that act as to extend the charter of the bank and its corporate existence until the 24th day of February, 1903. By section 4 of that act it is provided that "any association so extending the period of its existence shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States, and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of existence."

After the giving of the bond by the bank and the guaranty by the defendants, the agent and warden of the prison made deposits in the bank, from time to time, down to February, 1888, on which day there was upwards of $65,000 on deposit in the bank, which it refused and neglected to pay upon the draft of the State Treasurer, it having become insolvent, and this action was brought

against the defendants, as sureties, to recover the amount remaining on deposit.

William F. Cogswell, for appellant.

Charles F. Tabor, attorney-general, for respondent.

EARL, J.—No citation of authorities is needed to show that the contracts of sureties are to be construed like other contracts so as to give effect to the intention of the parties. In ascertaining that intention we are to read the language used by the parties in the light of the circumstances surrounding the execution of the instrument, and when we have thus ascertained their meaning we are to give it effect. But when the meaning of the language used has been thus ascertained, the responsibility of the surety is not to be extended or enlarged by implication or construction, and is *strictissimi juris.*

After the contract system in the state prisons was abolished, and manufacturing therein could be done only on state account, the amount of money deposited in this bank by the agent and warden largely increased, and it is now claimed on behalf of the defendants that their responsibility as sureties was largely extended beyond what was contemplated at the time of the execution of their guaranty, and that they are therefore discharged.

By the statutes in force at the time of the execution of the bond and guaranty, the agent and warden of the prison was required to deposit all the moneys received by him from any source in the bank. It is not reasonable to suppose that the sureties, when they signed their guaranty, had in mind the particular source from which the agent and warden received the money. They must have known that they became responsible for all the moneys, from whatever source, coming into his hands to be deposited. It cannot be supposed that they had in mind that the system of labor then in force at the prison would remain unchanged for an indefinite time, or that they cared anything about it. Much stress is laid upon the words in the bond, "certain moneys," which had been and were proposed to be deposited. We think those words have reference to the moneys to be deposited by the agent and warden of the prison, as distinguished from other moneys of the state. They were intended to point out the source from which the moneys of the state to be deposited should come; and the words "such deposits," used later in the bond, have reference to the deposits to be made by the agent and warden of the prison. So, the bond, in the most general terms, covers and applies to all the money to be deposited in the bank, under the direction of the comptroller

of the state, by the agent and warden of the prison. The words "certain moneys" and "such deposits" do not indicate that the parties then had in mind the source from which the agent and warden should receive his money, or the particular moneys which he had theretofore deposited. But they manifestly have reference to all the moneys which, under the direction of the Comptroller, he might deposit in the bank. The bank desired to get all the deposits it could, and the defendants, who were directors and officers of the bank, desired to secure all the deposits. It cannot be supposed that they contemplated, at the time they signed their guaranty, that their liability was to be limited or restricted to the amounts which had been previously deposited, or that those amounts had any influence whatever upon their action. They must therefore be held to the plain language of their guaranty, and in holding that it covers moneys deposited subsequently to 1884, we do not extend their responsibility by implication or construction, but simply hold them to the responsibility plainly expressed in the language of the bond and the guaranty.

It is still further claimed, on the part of the defendants, that they are discharged from any liability on their guaranty on account of the extension of the existence of the corporation in 1883, before any default on the part of the bank, and for this contention the learned counsel for the defendants cites *Thompson* v. *Young*, 2 Ohio, 334; *Union Bank* v. *Ridgeley*, 1 H. & G. 324; *Bank of Washington* v. *Barrington*, 2 Pa. 27; *Brown* v. *Latimore*, 17 Cal. 93. None of those cases are precisely like this in their circumstances, but so far as they uphold the contention of the defendants we are quite unwilling to follow them. The contrary doctrine was held in *Exeter Bank* v. *Rogers*, 7 N. H. 21; and we think our decision in *National Bank of Poughkeepsie* v. *Phelps*, 97 N. Y. 44, is ample authority for the maintenance of this recovery, notwithstanding the extension of the corporate existence of the bank. In the latter case, under the provisions of the National Banking Act and of chapter 97 of the Laws of 1865, the state bank was transformed into a national bank, and it was held to be but a continuance of the same body under a changed jurisdiction; that between it and those who had contracted with it, it retained its indentity and might, as a national bank, enforce contracts made with it as a state bank; that where a state bank, at the time of its change to a national bank, held a continuing guaranty of loans made by it upon the strength of which it had made loans, and after the change had made further advances, an action was maintainable by the national bank upon the guaranty, and that the

guarantor was liable for the loans made, both before and after the change. Here a new corporation was not formed; but there was a mere prolongation of the existence of the same corporation whose corporate identity was not changed or lost. The bank which defaulted was the same bank for which the defendants became bound. There were not two banks in succession, but all the time one bank. Its charter was amended so as to extend its existence; and in the original national banking act (§ 67), it was provided that Congress could, at any time, "amend, alter or repeal this act." It would certainly be a very inconvenient rule to hold that all the contracts of sureties to the bank, and of sureties by the bank, to other persons should be destroyed by every material change or alteration in its charter. The contract was entered into by the sureties with knowledge of this law, and it became a part of their contract as if they had stipulated that the changes or alterations might be made. The act of 1882 was a mere amendment or alteration of the previous banking act.

We do not deem it important to consider the effect that should be given to the fact that these various defendants, as officers of the bank, procured the extension of its existence, of which they now seek to take advantage.

For the reasons we have already given, and those so well expressed in the opinion of the learned referee before whom the case was tried, we think the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

71. SMITH, respondent, v. MOLLESON, appellant, 148 N. Y., 241, 42 N. E. 669.

Court of Appeals, New York, 1896.

Construction of contracts of suretyship. Same rules applied as in construction of contracts in general.

Strictissimi juris—meaning of term as applied to contracts of suretyship.

Ambiguous language employed by the surety, effect of.

Appeal from Supreme Court, general term. First department.

William C. Beecher, for appellant.

Jacob F. Miller, for respondent.

O'BRIEN, J. The defendant has been held liable as surety upon a bond given to secure the performance, by the contractors,

of a building contract, dated November 1, 1888, in which they agreed to furnish, cut, set and clean all the new granite work for the enlargement of a public building in the City of New York. The plaintiff agreed to pay the contractors for this work the sum of $30,000, in monthly payments of not to exceed 80% of "the estimated value of the work performed on the building," the balance, or final payment, to be made when the work was completed. The work was to be done according to drawings and specifications referred to in the contract, and the payments made upon the certificate of the plaintiff's superintendent. The rights and obligations of the parties are specified in the contract with minute detail, and, among other things, it was stipulated that, in case the contractors failed to perform, the plaintiff might take possession of the work and complete it at the contractors' expense. It is conceded that they failed to perform and that the plaintiff was obliged to complete the work himself at an expense of several thousand dollars more than the contract price. It was agreed between the plaintiff and the contractors that the latter should give to him a bond to insure the faithful performance of the contract, and, in pursuance of this agreement, the defendant, in behalf of the contractors, executed, under seal, and delivered, the instrument upon which this action was brought. It bears date Dec. 27, 1888, and was executed subsequent to the contract, and one of the conditions is that the contractors should well and truly perform the contract referred to, according to its terms, in which case the instrument should be void and of no effect, but in case they failed to so perform, the defendant would pay to the plaintiff his damages sustained by reason of such non-performance, not exceeding a sum named. It is conceded that the plaintiff sustained damages by reason of the failure of the contractors to perform their contract, and the recovery is within the limits of the bond. The defense is that the bond was given without consideration, and that the defendant became released from its obligations by reason of changes in and departures from the contract guaranteed, without the defendant's consent, by the parties thereto. At the trial a verdict was directed for the plaintiff.

The plaintiff entered into the contract and bound himself, according to its terms, upon the faith of the promise of the contractors to give the bond, and it is admitted that if this was concurrent with the execution and delivery of the instrument, it would constitute a sufficient consideration. But, since the bond was given afterwards, and, as the defendant claims, subsequent to the

time that the contractors had entered upon the actual performance of the contract, it is insisted that it required some new consideration. If it be true that the evidence in the case would warrant a finding by the jury that the contractors were engaged in the performance of the contract when the bond was given, it would also be true that this was by the grace and pleasure of the plaintiff, and not by virtue of any right under the contract. Their right to insist upon performance, as against the plaintiff, and to receive the benefit of the contract, was not perfected until the bond was given. Whatever the contractors may have assumed to do before, it was only upon the delivery of the bond that the contract became complete and binding upon the plaintiff, and hence the mutual obligations imposed upon the contractors at one time, and upon the plaintiff at another, furnished a consideration for the bond. *Bank* v. *Coit*, 104 N. Y. 532, 11 N. E. 54.

The other defense rests mainly upon a construction of the contract which the defendant claims to be the correct one. It should be observed at the outset that the contract guaranteed is, by reference, made a part of the bond, and therefore, in order to determine the scope of the defendant's undertaking, the two instruments must be read together. It is true, as the learned counsel for the defendant contends, that the liability of a surety is *strictissimi juris*. But that does not mean that a different rule must be applied in the construction of contracts of suretyship than that which is to be applied in the construction of contracts in general. Like all other contracts, the undertaking of a surety must be construed fairly and reasonably, and according to the intention of the parties. If the surety has used ambiguous language, and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will, ordinarily, prevail, if the instrument is open, reasonably, to such interpretation. It means that a surety shall not be held beyond the precise stipulations of his contract. He is not liable on any implied engagement, where a party contracting for his own interest might be, and he has the right to insist on the strict performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party. In this respect they are ordinary commercial obligations standing upon the same footing as other contracts. *Gates* v. *McKee*, 13 N. Y. 232; *Bennett* v.

Draper, 139 N. Y. 266, 34 N .E. 791. When the terms of the contract guaranteed have been changed, or the contract, as finally made, is not the one upon which the surety agreed to become bound, he will be released. *Page* v. *Krekey,* 137 N. Y. 307, 33 N. E. 311. But in this case there is no claim that the terms of the building contract to which the defendant's bond related, have in any respect been changed by the parties to it. The most that is claimed is that, in its performance, the parties have so far departed from its terms as to change the defendant's condition, to her prejudice, and to deprive her of rights and benefits under the contract, which, otherwise, she would be entitled to by subrogation. Where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is no longer bound. *Phelps* v. *Borland,* 103 N. Y. 406, 9 N. E. 307; *Bank* v. *Streeter,* 106 N. Y. 186, 12 N. E. 706; *Lynch* v. *Reynolds,* 16 Johns. 41; *Brown* v. *Williams,* 4 Wend. 360; *Navigation Co.* v. *Rolt,* 6 C. B. (N. S.) 550; *Calvert* v. *Dock Co.,* 2 Keen 638; *Warre* v. *Calvert,* 7 Adol & E. 143.

The learned counsel for the defendant insists upon his construction of the contract, that the plaintiff paid or advanced to the contractors a larger portion of the contract price than he was required to by the contract, and that it was so paid without any certificate. The contention rests upon the defendant's construction of the building contract, which, in substance, is that the provision for "monthly payments," not to exceed eighty per cent of the estimated value of the work performed on the building," required the estimate to be based only upon the work when actually set in the building, whereas it was in fact based upon the work actually done under or in pursuance of the contract, whether the granite was actually placed in the building or not. This is the alleged departure from the terms of the contract, which constitutes the principal ground of the defense. Before the conclusion of the learned counsel for the defendant can be adopted, we must assent to the premise from which it is sought to be deduced, and that requires us to ascertain and determine the true meaning and intention of the clause of the contract above quoted. It must be given a fair and reasonable construction, and the general situation will throw some light upon the meaning of the written words. It appears that the granite required was to be quarried in Nova Scotia, transported from the quarry to a place in Connecticut, where it was to be dressed, and then transported to New York, and set in the building. The work involved in the preparation and carriage of the material was by far the most expensive part

of the contract, and it appears that the contractors had no means to meet this outlay, except the monthly payments, so that if they could realize nothing until the stone was placed in the building, they would be practically unable to perform the contract at all. This would be an unreasonable construction, and would, if acted upon, operate so oppressively as to place the contractors at the mercy of the owner, a view that is always to be avoided when possible. *Russell* v. *Allerton*, 108 N. Y. 292, 15 N. E. 391. It would deprive them of all right to monthly payments except when and to the extent that granite had actually been placed in the walls, however large their outlay for procuring and preparing the material may have been during the month. The parties had the right to give to the expression "work performed on the building" a broader meaning, which could very properly include the value of any work done or materials procured under the contract toward its erection, although the granite procured and prepared had not yet been placed. Since no payments were made in excess of 80% of the value of the work performed in setting the stone, and in procuring and preparing them, and as all the material so procured and prepared actually went into the building, no advances were made by the plaintiff to the contractors beyond the fair requirements of the contract. It is said that it cannot be supposed that the plaintiff contracted to pay any part of the contract price for material at the quarry, and at the place where it was to be prepared, or for the work performed in preparing the same for use, before it could be known that it would ever actually reach the building. But since the monthly payments were stipulated for the purpose of enabling the contractors to prosecute the work, and as the operation of placing the granite in place when prepared was the least part of it, we do not think that this view would be unreasonable or improbable. It gave to the plaintiff reasonable assurance and protection against loss, and at the same time enabled the contractors to prosecute the work. While the plaintiff is described in the contract as owner, he in fact had no interest whatever in the building, but was the general and immediate contractor from the city for the erection of the whole building, and the defendant's principals were his sub-contractors for a particular and specific part of the work, namely, the granite work. The plaintiff was not entitled to his contract price from the city until the building was completed, though the officers representing it had discretion to make advances. Moreover, by a clause in the contract, the plaintiff, in case the sub-contractors abandoned the

work or failed to perform, could terminate the contract and go on with the work himself, and in that event the material in process of preparation should belong to him for the purpose of completing the work, whether such material was at the building, at the quarry, or at some other place. So that the plaintiff, in stipulating for monthly payments, estimated upon the work actually performed, whether in the building or not, assumed nothing more than the ordinary and usual risks incident to all contracts of that character. We do not think, therefore, that the meaning of the contract should be made to depend upon the use of the words, "on the building," when we can see, from the situation of the parties, the nature of the work and other provisions of the instrument, that the intention was to make the advances as the work progressed. To give to it the other construction would, in practice, disable the contractors at the very outset from performance, and impose upon the defendant a liability, inevitable from the beginning, and possibly in a much larger amount than has followed the construction adopted by the parties themselves.

The objection that the payments were made without the certificate may be answered in the same way. The owner could dispense with it if he so elected, under the terms of the contract, if not upon general principles, and since the payments made without it were not greater in amount than, upon the true construction of the contract, they should have been if it had been exacted, the omission of the owner to insist upon it did not prejudice the surety. We are not dealing, now, with any actual change in the terms of the contract, but with acts or omissions of the plaintiff in the performance, which, in order to operate to release the surety, must be of such a character that it can be said that her position was changed to her prejudice. It should also be observed that there is a clause in the contract the material part of which reads as follows: "Should the owner, at any time during the progress of said work, request any alterations, deviations, additions or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract." The defendant, having, by reference, in effect made the contract a part of the bond, must be deemed to have assented to this provision, and to any changes or deviations in performance from the building contract made under it. She has, in effect, guaranteed the performance of a written contract between other parties, which, by its terms, permitted the parties to change it or deviate from it. While it is not important to consider the real scope of this clause,

since we prefer to dispose of the questions in the case upon the ground that there was no material departure from the contract, when properly construed, it should be noted that she consented in advance to changes of some character which are permitted by the contract in language quite broad and comprehensive. It would not be difficult to show that the plaintiff might, under this provision at least, dispense with the formality of a certificate when called upon by the contractors, from time to time, for some portion of the contract price, without discharging the surety, even though it was more important to the defendant's interest and protection than it appears to be. It is manifest that the provision was intended for the benefit of the owner alone, and he could waive it without affecting the defendant's liability.

The contractors having failed to complete the work, the plaintiff gave the notice required by the contract in order to terminate it. The contract provides when and upon what contingencies the plaintiff could terminate, and the manner of proceeding for that purpose. The final act which was to put an end to the contract was taking possession of the premises by the plaintiff. The notice may have been a necessary step or formality in that direction, but, of itself, it did not operate to bring the contract to an end. It was clearly within the power of the plaintiff to recall it, after given, if not upon general principles, then under the permission contained in the contract. It appears that he was induced, subsequently, to allow the contractors to go on, and they again attempted to complete the work, and again failed. It is said that the loss which the plaintiff sustained, and for which the recovery was had, occurred under this permission, and the defendant's counsel treats this last effort at performance as a new contract in regard to which the surety was not bound. It was manifestly nothing more than a mere waiver or recall of the notice for the termination of the contract, and the work was performed and payment made, not upon a new contract, but upon the old one, up to the time that the final notice was given, when the plaintiff was obliged to take possession of the work. The case was very fully considered in the court below, and, as we have sufficiently indicated the ground of our concurrence in the decision upon points that are controlling, it is unnecessary to notice other and minor questions in the case. The judgment should therefore be affirmed, with costs. All concur.

Judgment affirmed.

CHAPTER IV

SURETYSHIP BY OPERATION OF LAW.[17]

72. SMITH v. SHELDEN, et al., 35 Mich. 42, 24 Am. Rep. 529.[18]
Supreme Court, Michigan, 1876.

A surety is a person who being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him to be indemnified by some other person who ought himself to have made payment or performed before the surety was compelled to do so.

C. & W. N. Draper & C. I. Walker, for plaintiff in error.
Meddaugh & Driggs, for defendants in error.

COOLEY, Ch.J. The legal questions in this case arise upon the following facts:

Prior to June, 1867, Eldad Smith, Isaac Place, and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969 on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his copartners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with

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[17] "An obligation in suretyship will not be implied, and never arises by act of the parties except by express contract. Yet the law will sometimes place persons in the situation of a surety or guarantor, not by imposing the liabilities of these undertakings without their assent, but by extending to persons already bound upon some other contract, the privileges of these relations."—Stearns on Suretyship, page 24.

[18] *Contra*—Rawson v. Taylor, 30 Oh. St. 389.

Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered.

The position taken by the plaintiffs below was, that as they had never received payment of their bill for merchandise they were entitled to recover it of those who made the debt, the giving of the note which still remained unpaid being immaterial.

On behalf of Smith it was contended that, by the arrangement between Place and his copartners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. And it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:

1. Was the note given by Place in the copartnership name for the copartnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the judgment that when a copartnership is dissolved the partner who is entrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due bill or I O U, we are satisfied that there is no good reason for recognizing in the partner who is to adjust the business of the concern any implied authority to execute such a note as was given in this case. This note was something more than a mere

acknowledgment of indebtedness; and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future if the partner entrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in *F. & M. Bank* v. *Kercheval,* 2 Mich. 506-519, that the law was well settled that no such implied authority existed, and we are not aware that this has before been questioned in this state. See *Pennoyer* v. *David,* 8 Mich. 407. We think it much safer to require express authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by the arrangement, had agreed to pay this debt, and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so and made collections from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership,

seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakeley* v. *Pasheller,* 4 Cl. & Fin., 207; *Wilson* v. *Lloyd,* Law R., 16 Eq. Cas., 60; and *Millerd* v. *Thorn,* 56 N. Y., 402.

And it follows as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as was remarked by the vice chancellor in *Wilson* v. *Lloyd,* L. R., 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in *Fellows* v. *Prentiss,* 3 Denio, 512, where the surety was also held discharged. And see *Okie* v. *Spencer,* 2 Whart., 253. But that indulgence beyond the time fixed was contemplated when the note was given is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This

is the legal view of such a transaction, and in most cases it works substantial justice.

The judgment must be reversed, with costs, and a new trial ordered. The other Justices concurred.

73. WILCOX, respondent, v. CAMPBELL, appellant, 106 N. Y. 325.
Court of Appeals, New York, 1887.

Vendor of land subject to mortgage which the vendee agrees to pay is in the position of a surety.

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1885, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 35 Hun 254.)

The nature of the action and the material facts are stated in the opinion.

J. A. Stull for appellant.

Mr. *Quincy* for respondent.

EARL, J. Prior to the 9th day of November, 1874, Barton J. Conklin owned a parcel of land in the city of Rochester, being 187 feet front on North St. Paul street and 420 feet deep; and he had executed a mortgage thereon to a savings bank to secure the payment of $3,000 and interest. On that day he conveyed the land to Jane E. Wilcox, subject to the mortgage to the savings bank, which she assumed and agreed to pay, and at the same time she executed to Conklin a mortgage for $2,000 upon the land to secure a part of the purchase-price. On the 12th day of February, 1877, Mrs. Wilcox executed to the defendant a deed of the northerly 107 feet of the land, she retaining the remaining eighty feet thereof. The deed was subject to the two mortgages which the defendant assumed and agreed to pay as part of the purchase price. On the 26th day of August, 1878, Mrs. Wilcox by a quit-claim deed, making no mention of the mortgages and expressing a consideration of $1, conveyed the eighty feet of the land so retained by her to Lucius C. Bingham. Some time in 1878, the savings bank commenced a foreclosure of its mortgage for $3,000 upon the entire parcel of land, and on February 12, 1879, the foreclosure proceedings resulted in the sale of the whole parcel of land, including the eighty feet deeded to Bingham and the 107 feet deeded to the defendant, and the proceeds of the sale were all used to satisfy the mortgages. Thereafter Bingham, by a writ-

ten instrument, for a valuable consideration, assigned to the plaintiff all his claim for damages and all his causes of action against the defendant by reason of his failure to pay the mortgages. This action was subsequently commenced by the plaintiff to recover damages against the defendant because his assignor's land was sold in consequence of the failure of the defendant to keep his covenant to pay the mortgages; and upon the trial judgment was given for the plaintiff which has been affirmed by the General Term.

After the conveyance by Mrs. Wilcox to the defendant, he became the principal debtor to the mortgagees and she remained simply surety for him, and every one having notice of the relation between them was bound to respect it. The parcel of land conveyed to the defendant was primarily liable for the payment of the two mortgages, and the parcel of eighty feet was secondarily liable and simply remained security for the payment of the defendant's obligations. (*Wadsworth* v. *Lyon*, 93 N. Y. 201.) He, as principal debtor, was bound to protect both her and her land from any liability on account of his debts. After her conveyance of the parcel of land to Bingham, it was still simply security for the defendant's debts, and Bingham obtained the entire title thereto simply encumbered by a mortgage to secure obligations which the defendant was primarily liable to pay. The duty rested upon him, as principal debtor, to protect that land from sale, and when it was sold in consequence of his default, and its value applied in discharge of his obligations, he became liable to Bingham for the damages thus caused to him. That cause of action, by assignment, became vested in the plaintiff, and it does not depend upon any principle of subrogation. It was a direct liability to Bingham growing out of the defendant's default, and of a breach of duty which he owed. Bingham was brought into relations with the defendant by the conveyance to him and the ownership by him of the land bound as surety for the defendant.

Bingham, if aware of the foreclosure action, could have appeared therein and procured a sale of that portion of the land which was conveyed to the defendant first in discharge of the mortgages; and if that portion did not sell for enough, then he could have paid the balance due upon the mortgages to save his land, and the sum thus paid would have been the measure of his damages. Instead of paying such balance, he could have permitted his land to be sold, and certainly to the extent of its proceeds applied in discharge of the foreclosure judgment, he would have had a claim against the defendant.

But, under the circumstances of this case, both mortgages being liens upon the land, Bingham was not under any obligation to the defendant to take any steps in the foreclosure action; and if, by the default of the defendant, he was deprived of his land, the value of the land is the fair measure of his claim against the defendant. He must have been a party to the foreclosure action, and it was his duty to appear therein to protect his own interests as well as those of his surety.

The rule which requires a party exposed to injury or damage to make his loss as small as he reasonably can, did not impose upon Bingham the obligation to raise $5,000 for the payment of the two mortgages for the purpose of protecting himself and his land from the consequences of the defendant's default. * * *

Upon the whole case we see no reason to doubt that the judgment is free from error and that it should be affirmed, with costs.

All concur.

Judgment affirmed.

CHAPTER V

THE SURETY'S RIGHTS.

SECTION 1. THE RIGHT OF INDEMNITY

74. SCOT v. STEPHENSON, 1 Keble 346.
Court of King's Bench, Mich. Term, 1662.

The promise to indemnify is implied.

In action upon the case upon promise if plaintiff would forbear to sue him, being administrator of J. S. for whom the plaintiff was security, the defendant would pay, &c. *Weston* in arrest of judgment, that this is no cause of action, the intestate being not bound, the administrator is not. But by *Windham,* the testator being a surety, it is a sufficient consideration; and by *Twisden,* being co-obligor, there might be cause of action against him, and the particulars need not be shewed. My Lord St. Paul's Case, Rivers' Case, the heir promised on forbearance to pay bond made by the testator, wherein it appeared not the heir was bound, yet (which, *per curiam,* was hard) judgment was against the heir. Jordan against Clerke, and Rosier against Langdale, Stiles 248, Pl. 566. Promise made by the wife in consideration of forbearance against her, to pay debt of her husband, is void; *contra,* if that the promise be for general forbearance, for that is against all persons; and though there be no cause of action, yet there is sufficient remedy in chancery, of which our law will take notice. Also, here it doth appear the plaintiff had paid the debt, which per curiam, is good cause of suit. Adjornatur.

75. KONITZKY, et al., respondents, v. MEYER, appellant, 49 N. Y. 571.
Court of Appeals, New York, 1872.

The law implies a promise on the part of the principal debtor to indemnify the surety.

Appeal from judgment of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover the amount of a judgment obtained against plaintiffs in the upper or superior Court of Appeals of the four free cities of Germany, in an action brought against them by the firm of J. C. Grundmun & Co., upon a contract made with that firm by plaintiffs, by which they agreed to accept and pay, as sureties for defendants, bills for the purchase price of a quantity of chicory, and chicory mixed with acorns, and which contract was broken by plaintiffs under direction of defendant.

Erastus Cooke for the appellant.

John H. Reynolds for the respondents.

GROVER, J. * * * The proof showed that the plaintiffs, at the request of the defendant had entered into a valid contract to accept and pay bills as surety for him. That they had failed to perform this contract by direction of the defendant. That for this breach a suit was commenced against them in the Tribunal of Commerce of Bremen, in which, upon appeal to the Superior Court of Appeals of the four free German cities, the court of last resort, judgment was given in favor of Grundmun & Co. against the plaintiffs, and they were thereby compelled to and did pay for the fifty barrels of mixture. When one party, at the request of another, enters into a contract as his surety, the law implies a promise of indemnity. The plaintiffs gave the defendant notice of the suit of Grundmun & Co. against them. The record under these facts was competent evidence against the defendant in favor of the plaintiffs. A foreign judgment has the same effect in this respect as one of our own courts.) (Note to *Andrews* v. *Herriot,* 4 Cow. 520.) The position of the counsel, that an underwriter is not bound by a suit brought against the party he is bound to indemnify, in the absence of a provision in his contract to that effect, cannot be sustained either upon principle or authority. The law is otherwise. (*Fire Ins. Co.* v. *Wilson,* 34 N. Y. 275). * * * The judgment must be affirmed, with costs.

All concur.

76. RICE v. SOUTHGATE, 16 Gray 142.
Supreme Judicial Court, Massachusetts, 1860.

Indemnity—The contract of a principal with his surety to indemnify him takes effect from the time when the surety becomes responsible for the debt of the principal.

Writ of entry by the tenant's assignee in insolvency to recover a lot of land in Worcester, which the tenant claimed to hold as a homestead.

The case was submitted to the judgment of the court upon the following facts: The lot was bought by the tenant in 1846, and has been since occupied by him with his family as a residence, and is worth at least two thousand dollars above a mortgage thereon. On the 16th of May, 1853, the tenant, with Charles White and Eli Thayer, made a joint and several promissory note for $1,000, which was paid by White on the 14th of May, 1859, and on the 16th of November, 1854 made a note for $1,166.66, which was signed by White and Thayer as sureties, and paid, with interest, by White on the 21st of July, 1859; and White proved the sums so paid, amounting to $1,821.94, against the tenant's estate in insolvency.

T. L. Nelson, for the demandant.

P. C. Bacon, for the tenant.

BIGELOW, C.J. The question in this case is, whether, on the facts stated, there are any debts proved against the estate of the tenant in insolvency to the amount of eight hundred dollars, which were contracted prior to the passage of *St.* 1855, *c.* 238, under which he claims to hold the demanded premises as a homestead. If there are, then it is clear that he cannot avail himself of the exemption secured by that statute; because by the third section it is provided that no property shall be exempted from levy on execution for a debt contracted previously to the passage of the act; and all the estate of the debtor, which might have been taken on execution against him at the time of the commencement of the proceedings in insolvency, vested in his assignee under *St.* 1838, *c.* 163, § 5. *Woods* v. *Sanford,* 9 Gray, 16.

Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No

new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. *Gibbs* v. *Bryant*, 1 Pick. 121. *Appleton* v. *Bascom*, 3 Met. 169. The same principle is adopted in our insolvent law, in which it is provided that, in case of the payment of any sum by any surety of a debtor in any contract whatsoever, the debt shall be considered as contracted at the time when the contract on which such payment has been made was originally entered into. *St.* 1838, *c.* 163, § 3. Gen. Sts. *c.* 118, § 25.

It follows that the real estate occupied by the insolvent debtor was not exempted from levy on execution at the suit of his surety who entered into the contract on which he has been held liable to an amount exceeding eight hundred dollars prior to the passage of the act under which the tenant now claims a homestead right. It therefore vests in his assignee.

Judgment for the demandant.

77. THAYER v. DANIELS, 110 Mass. 345.

Supreme Judicial Court, Massachusetts, 1872.

A surety who has paid the debt of the principal has a claim upon the principal for indemnity. Against such claim the statute of limitations runs from the time when the surety paid it, not from the time when the debt was due.

CONTRACT. The declaration alleged that the defendant as principal, and the plaintiff as surety, signed a note for $500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety without consideration, and for the accommodation of the defendant; that the defendant failed to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allegations of the declaration, and also set up the statute of limitations, and a discharge of the defendant in insolvency.

At the trial in the superior court, before BACON, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the

third meeting of the creditors George proved the note against the defendant's estate; that a small dividend was then declared; that afterwards, in August, 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note $500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due; and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. E. Aldrich, (*S. A. Burgess* with him,) for the defendant.

T. G. Kent, for the plaintiff.

AMES, J. There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by that statute cannot be maintained. *Appleton* v. *Bascom,* 3 Met. 169; *Hall* v. *Thayer,* 12 Met. 130.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying, the note, in whole or in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under the Gen. Sts. c. 118, § 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of *Mace* v. *Wells,* 7 How. 272, which is relied upon by the defendant, arose under the bankrupt act of 1841, a statute which differed from our insolvent law, in allowing sureties and other parties under a contingent liability to prove such contingent

liabilities as claims upon the estate, and "when their debts and claims become absolute," to have them allowed.

The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Two other cases relied upon by the defendant, (*Wood* v. *Dodgson*, 2 M. & S. 195, and *Vansandau* v. *Corsbie*, 8 Taunt. 550,) were decided under English statutes which in express terms make the contingent liability of a surety a provable claim against the bankrupt's estate. In the first of these cases the court say that the statute was intended to benefit the sureties, by allowing them to share in the dividend before the estate is all gone, and before the actual payment of their liabilities. Neither of these decisions is applicable to a case under our insolvent laws.

Exceptions overruled.

78. WESLEY CHURCH v. MOORE, et al., 10 Pa. St. 273.

Supreme Court, Pennsylvania, 1849.

A contract of indemnity given to the surety by a third person does not relieve the principal of liability.

Appeal from the Common Pleas of Philadelphia—in equity.

The case, as it appeared upon the pleadings and evidence, was this. Samuel Curtis and several others having united to erect a church edifice, and needing money for the purpose, the association requested Curtis to borrow $1,000 from the Benezet Society, the association or church agreeing to pay the interest, and the principal when required. Curtis borrowed the money, and gave his own bond and mortgage for it in 1820. Scott and two others, being members of the association, also gave Curtis their mortgage as an indemnity.

In 1824, Curtis died, having devised certain land to the complainants. The land on which the mortgage was given was sold by the sheriff, and the proceeds being insufficient to discharge that debt, the land devised to the complainants was sold under the judgment entered on the bond.

At the time Curtis borrowed the money, he was one of the trustees of the land on which the church was erected. In 1827, the association obtained a charter, and the surviving trustees conveyed the church and the land on which it stood to the corporation. The plaintiffs filed their bill, setting forth these facts, and

praying that the corporation of the church might be compelled to pay so much as would compensate them for the sale of their property by the sheriff.

The bill also prayed a discovery, among other things, of the entries in the books of the corporation, and of receipts in their possession. These were produced, and showed the request to Curtis and others to borrow money of the Benezet Society; that he had applied it to the purposes of the church, and that the church had paid the interest for a long time, and that it was stated on their books as a debt due by the church to the Benezet Society.

The court below decreed for the complainants.

Zantzinger, for the appellant.

J. Clarke Hare, contra.

GIBSON, C.J. The proofs show that the money for which this bill is filed, was borrowed by Curtis at the instance of the congregation and for its use; and that it was laid out by the building committee in the erection of its church. They further show that he mortgaged the property, which he devised to the complainants, as a security for the loan; and, that the congregation, having kept down the interest while he lived, suffered it to be sold at the end of a few years, for the principal and unpaid interest, on a judgment obtained on the bond which accompanied the mortgage, and that being inadequate, the property devised to the complainants was sold to satisfy the debt.

It appears, also, that Curtis took, as counter-security, from some of the congregation's trustees, a mortgage of their individual property, which his executors, or the survivor of them, neglected or refused to put in suit; and one of the questions in the cause is, whether this counter-security was exclusive or cumulative. The law is, that a creditor may take as many securities as he can get, the presumption being, in the first instance, that they are cumulative; and here there is no evidence to rebut it. * * *

The statute of limitations did not begin to run till the property of the complainants had been sold; and, as the proper period had not elapsed before the filing of the bill, that point of defence also fails.

The rest involves a question of jurisdiction; and a subordinate branch of it is, whether the complainants have a remedy at law.

Had Curtis paid the money in the first instance, he might have maintained *indebtitatus assumpsit* against the congregation, strictly at law, and debt against Nicholas, Weeks, and Scott, on their bond, or on a *scire facias* on their mortgage: the complainants, who

are strangers to them, could have neither, and this is conclusive, that, unless they are restricted by the scantiness of the legislative grant of equity powers to the common-law courts, they are entitled to maintain this bill.

Had they, indeed, paid the money before the land was sold, they might have maintained *indebitatus assumpsit* without privity, just as a stranger, who has paid rent to extricate his property from a distress, may maintain it against the tenant. But, it has not been ruled that the action lies for property lost, as an equivalent for money paid. In England, this bill would, consequently, be entertained without hesitation. Here an action would have formerly been maintainable, and would, perhaps, still be; but that is not a consideration to deprive a party of his election. * * *

Decree affirmed.

SECTION 2. THE RIGHT OF SUBROGATION

79. MATHEWS, et al., appellants, v. AIKIN, respondent, 1 N. Y. 595.
Court of Appeals, New York, 1848.

The right of a surety to be subrogated, on payment of the debt, to the securities held by the creditor, does not depend upon contract, but rests upon principles of justice and equity.

Appeal from the supreme court in equity. Abraham Aiken filed his bill in the court of chancery before the vice chancellor of the seventh circuit, against John Mathews and Oliver Orcutt, who appeared and defended, and against Edward Aikin, who suffered the bill to be taken as confessed. The case, so far as material to be stated, upon pleadings and proofs was as follows: On or before the 22d of November, 1837, Edward Aikin, who was the son of the complainant, executed to James Hasbrook a bond secured by mortgage on certain real estate, bearing date December 6, 1836, conditioned for the payment of $1,300 in six equal annual instalments. At the time of the execution of the bond and mortgage, Edward Aikin was indebted to one Theodore Wood in the amount thereof, and Wood being also indebted to Hasbrook, procured the bond and mortgage to be executed directly to him. At the time or soon after the bond and mortgage were given, the complainant, at the solicitation of said Wood and Hasbrook, executed upon the bond a sealed guaranty of the payment thereof. There was no evidence that the complainant executed the guaranty at the desire or request of Edward Aikin, the mortgagor. Ed-

ward Aikin was examined as a witness for the complainant, and on cross-examination testified that he advised his father not to sign the guaranty, informing him that he was under no obligation to procure a guaranty.

On the 27th of August, 1841, the said Edward Aikin executed to the defendant John Mathews a mortgage upon the same premises, conditioned to pay the sum of $663.36. The mortgage to Hasbrook had been previously recorded, and Mathews had also actual notice of the existence thereof. On the 11th of February, 1843, Mathews having caused his mortgage to be foreclosed in chancery, purchased the premises at master's sale under the decree for the sum of $500, and procured the master's deed to himself. After such purchase, and on the 26th day of April, 1843, the personal representatives of James Hasbrook (who had died) assigned the bond and mortgage first above mentioned to the defendant Oliver Orcutt. The consideration for this assignment was paid by Mathews, and such assignment was made in trust for him and for his benefit only. Immediately afterwards, Mathews caused an action at law to be commenced, in the name of Hasbrook's representatives, against the complainant upon the aforesaid guaranty and recovered judgment against him for the sum of $370.76, the amount of the last instalment due upon the bond and mortgage, the other instalments having been previously paid. The complainant thereupon tendered the amount recovered against him and demanded that Orcutt assign the bond and mortgage to him. This was refused; and the complainant then paid absolutely the sum, and demanded an assignment. This was also refused. At the commencement of this suit the defendant Mathews was in possession of the premises under his purchase at the master's sale above mentioned. Edward Aikin was insolvent. The complainant claimed by the bill to be subrogated to the rights of Orcutt or Mathews as the holder of the bond and mortgage for the purpose of reimbursing to himself the sum collected of him by suit on the guaranty; and the prayer of the bill was that such right of subrogation might be declared, and that the premises might be sold, &c.

The vice chancellor decreed in favor of the complainant according to the prayer of the bill. The defendants appealed to the chancellor, and the cause then became vested in the supreme court organized under the new constitution; and that court sitting in the fifth district affirmed the decree of the vice chancellor. The defendants appealed to this court.

B. D. Noxon, for the appellants.

Geo. F. Comstock, for the respondent.

JOHNSON, J. It is a general and well established principle of equity, that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity which the creditor had against any other person or property on account of such debt. The general doctrine, as a rule of equity, is not controverted on the part of the appellants, but is fully conceded. It is insisted, however, by their counsel, that the guarantor in this instance did not become such at the request of the debtor; that as to the debtor, he was a mere volunteer, having no remedy over against him, and never acquiring the character of a surety so as to be entitled to subrogation to the rights and remedies of the creditor.

The objection seems somewhat narrow and technical when addressed to a court of equity whose peculiar province is to mete out substantial justice where the more restricted powers of the common law fail in its administration. But it leads us to examine carefully into the grounds and principles upon which the right of subrogation rests. Does it rest upon the foundation of a contract binding in a court of law between the debtor and his surety? In other words: does it turn substantially upon the question whether or not the surety who has paid the debt to the creditor has a remedy over, on his contract, against the principal debtor for money paid in an action at law? or does it not rest rather upon the broader and deeper foundations of natural justice and moral obligation? Chancellor KENT says, in *Hays* v. *Ward*, (4 John. Ch. 130,) "This doctrine does not belong merely to the civil law system. It is equally a well settled principle in the English law that a surety will be entitled to every remedy which the principal debtor has, to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another." Lord BROUGHAM, in *Hodgson* v. *Shaw*, (3 Mylne & Keene 183,) said: "The rule here is undoubted, and is founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract unless in so far as the known equity may be supposed to be imported into any transac-

tion, and so to raise a contract by implication." Sir SAMUEL ROMILLY, in his argument in *Craythorne* v. *Swinburne*, (14 Ves. 159,) stated the rule to be, that "a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security by all means of payment, to stand in the place of the creditor not only through the medium of contract but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." And this exposition of the rule was fully sanctioned by Lord ELDON in giving judgment in that case.

The equity is certainly as strong, and it seems to me somewhat stronger in favor of substitution, as against the creditor at least, than it is between sureties for contribution where one has paid the whole debt, and it has been likened to the case of contribution between sureties. As between them the rule in equity is clear that the ground of relief does not stand upon any notion of mutual contract express or implied, but arises from principles of equity independent of contract. Story's Eq. sec. 493, and notes, where the authorities are all collected. This is also substantially the rule in courts of law. (*Norton* v. *Coons*, 3 Denio 130.) In that case the circumstances under which the defendant became co-surety were such as to repel the presumption of any promise to make contribution. But the court held that his being a surety on the same contract without qualification in terms was sufficient to fix his obligation to contribute, and that for the purposes of giving the plaintiffs a remedy the court would presume a promise. A promise was therefore imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability; and the legal liability in such cases springs from the equitable obligation; the law courts having borrowed their jurisdiction in these particular cases from the courts of equity. In the present case it seems to me, if it were necessary, a court of equity ought to imply a promise on the part of the creditor to subrogate the surety to all his rights and remedies, in case he resorted to the latter for payment of the debt upon his guarantee. The equitable obligation resting upon him to do so seems to me most manifest.

It is true the case shows that the principal debtor informed the guarantor that he was under no promise or obligation to give security, which seems to have been insisted upon by the creditor, and that he advised his father not to give the guaranty. There is

nothing, however, in the case to show that the debtor did not subsequently assent to it, even at the time the guaranty was executed, or that the money was not paid at his express request afterwards. But the case does not show that the guaranty was executed at the repeated and urgent solicitations of Wood the original creditor, and of Hasbrook to whom Wood proposed to transfer the debt, and to whom, by arrangement between them, the bond and mortgage were executed. As to the creditor Mathews, therefore, who now stands in the place of Hasbrook, Abraham Aikin was not a voluntary surety for the debt of his son, but became so at his express request, or that of the mortgagee under whom he claims, and it seems to me, after Mathews has pursued Abraham Aikin to judgment and fixed his liability as surety for his son in a court of law, it does not lie with him to turn round and say he is a mere volunteer in assuming the obligation and paying the money, and therefore not entitled to the rights and privileges of a surety. The creditor should not be permitted in a court of equity to question the rights of the surety after the obligation has been incurred at his request, and he has fixed the character upon him by suit and judgment in a court of law. As to him at least, Aikin, the father, was surety for the debt of the son, and was compelled to pay that debt, or a portion of it; and it is immaterial as to the creditor what the state of the case is, or the legal rights are, as between the principal debtor and the surety. There is no reason why the creditor should set up a defence for the debtor. It is sufficient for him that he has received his debt of the surety to create the obligation on his part to surrender to the surety the securities in his hands. He is not to litigate the rights of the debtor, and set up defences for the latter which he, peradventure, might be too honest and conscientious to set up against the securities in the hands of a surety who had paid his debt for him.

It might be different if the debtor himself was here urging this defence, and especially if he was able to show that the surety entered into the obligation, not only against his wish or request, but for some purpose of fraud or oppression, or to make him his debtor against his will, or, as suggested by the appellant's counsel, to compel him to pay a debt to which, as between him and the creditor, he had a good defence at law. In such cases a court of equity would not lend the surety its aid, as he would not come before it with clean hands. But this is no such case. The principal debtor is here made a party, and suffers the bill to be taken as confessed against him. He sets up no such defence, nor does he pretend that he is not liable, or that he is not under both a

legal and a moral obligation to his surety to repay the money which the latter has advanced for him. Indeed, he expressly swears that his father was a mere security for him for the payment of the bond, without receiving any consideration for becoming such surety. It is true he also testifies that he advised his father not to sign the guaranty, but it is obvious to my mind that this was in reference to a claim made by the creditor upon the debtor, that he was under some obligation to give some additional security. This appears to me quite evident from the appellant's answer and the course of the examination. It is sufficient, however, as I apprehend, that the debtor sets up no defence of the kind, and, although a party, admits the validity of the respondent's claim and would not afterwards be heard to allege it was illegal or invalid. Could the appellant Mathews be permitted to set up a defence so ungracious as against a surety whom he has compelled to pay his debt, he would be bound in order to make it complete to show, as I think, that the principal debtor resisted the surety's claim, and that the securities in the hands of the latter would be worthless, inasmuch as he could never enforce them against such principal. Otherwise the court would intend that the principal was willing to do what equity required him to perform.

But in addition to the general reasons against the creditor's resisting the claim of the surety to be subrogated, especially when the debtor makes no objection, there is I think in this case a particular reason why the appellant Mathews should not be heard to interpose such an objection. The case shows that he held a junior mortgage upon the same premises which he took with full knowledge of the existence of the present mortgage as an incumbrance upon the premises and subject to it; and that before he became the purchaser of the mortgage in question through Orcutt, his trustee, he had foreclosed such junior mortgage and become himself the purchaser of the equity of redemption. At the time, therefore, that he became the assignee of the present mortgage he was the owner of the premises subject to this mortgage, and held them as a fund for the payment of this debt. (*McKinstry* v. *Curtis,* 10 Paige 503; *Russel* v. *Allen,* id. 249; *Cox* v. *Wheeler,* 7 id. 248; *Tice* v. *Annin,* 2 John. Ch. 125.) It presents, therefore, the case of a creditor with the fund pledged for the payment of the debt in his hand, under circumstances which make it an equitable satisfaction of the debt, collecting the debt over again out of the surety, and then refusing to surrender the fund to him. The legal presumption is that Mathews, when he purchased the premises at the sale under his junior mortgage, only bid to the

value of the equity of redemption, and he must be adjudged to hold them subsequently as a fund for the satisfaction of the prior incumbrance. And he might have been restrained in equity from proceeding to collect the debt afterwards from the mortgagor, or in case the latter had paid it, he would have been entitled to have the mortgage foreclosed upon the premises for his benefit—within the principle of the cases last above cited.

At the time Abraham Aikin was sued upon his guaranty he was ignorant that the assignment of the securities had been made to Orcutt as a mere trustee for Mathews, who was already the owner of the premises. And unless I greatly mistake the case, it exhibits strong marks of contrivance on the part of Mathews to discharge the premises from the incumbrance of the mortgage at the expense of Abraham Aikin. It seems to me quite clear, from the facts of this case, that the defence ought not to prevail.

But upon the general doctrine of subrogation, I agree fully with the learned judge who delivered the opinion of the supreme court that the right of the surety to demand of the creditor, whose debt he has paid, the securities he holds against the principal debtor or to stand in his shoes does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice. And if it were true that the surety in such a case as this could maintain no action at law against his principal for the money paid, I agree with the supreme court that it would furnish a still stronger case for subrogation. A court of equity would never presume that the principal would interpose such a defence. If the creditor has insisted upon the surety's discharging his obligations and liabilities as such, and fastened the character upon him by a judgment, he cannot after receiving from him his debt, turn round and deny him the rights of a surety. The creditor must then fulfil his obligation to the surety, and leave the latter and his principal to adjust or litigate their rights or claims as they may see fit. There is no hardship in this. The surety might have filed his bill and compelled Mathews to collect the debt out of his principal through the mortgage before resorting to him. And in such a proceeding Mathews might with the same propriety have set up as a defence that the surety was a mere volunteer and could have no redress against his principal, and ought not to insist upon his proceeding against the principal in the first instance. The injustice of the defence might be a little more apparent in

that case, but none the more real. Had Abraham Aikin owned the mortgage and assigned it to Mathews or to his trustee with his guaranty upon it at his request, no one, I apprehend, would pretend that Aikin, upon payment on his guarantee, would not be entitled to have the mortgage again from the creditor. How is his equity weakened by the consideration that to enable Wood the mortgagee to sell it to Hasbrook he, at the request of both Hasbrook and Wood, became the guarantor? It seems to me to be considerably strengthened by the fact that he derived no benefit from the transfer—especially as a doubt has been raised as to his remedy over at law for money paid against the mortgagor. If Hasbrook would have been bound to surrender to Wood, had he been the guarantor and made payment, I do not see why he is not, to the representative of Aikin, who became guarantor for the benefit and at the request of both Wood and Hasbrook.

Decree affirmed.

80. MILLER v. STOUT, et al., 5 Del. Ch'y. 259.
Court of Chancery, Delaware, 1878.

Subrogation does not rest in contract, but is an equity resulting from the circumstances of the particular case. It is enforceable in equity tribunals because it is a matter resting in conscience and not in consent.

Bill for subrogation. The facts and questions presented are fully stated in the opinion.

George V. Massey, for the complainant.

J. Alexander Fulton, for the defendants.

THE CHANCELLOR. The complainant is the holder of two several mortgages against Todd,—the first dated September 12, 1860, being for $3,000; and the second dated April 19, 1870, being also for the sum of $3,000.

The premises mentioned in the first mortgage have been sold by the sheriff for the sum of $3,825, and the premises mentioned in the second mortgage have also been sold by the sheriff for the sum of $2,035. Besides the lien of these two mortgages, there was a judgment in the Superior Court in and for Kent County, in favor of Emanuel J. Stout, against William A. Atkinson and Henry Todd, dated September 27, 1866, the real debt whereof was $1,230. Atkinson was the principal, and Todd the surety in the judgment.

The amount realized from the sale of the premises mentioned in the first mortgage satisfied the said mortgage, leaving an excess of proceeds of sale in the hands of the sheriff, of $224.71, applicable, according to priority of lien, to the judgment against Atkinson and Todd; still leaving a balance of said judgment, unpaid, of $1,159.23. This amount, together with other payments mentioned in the bill of complaint, to which the proceeds of the sale of the premises mentioned in the second mortgage are subject, leaves only a sum of $2,263.18 applicable to the said second mortgage of the complainant; so that there will remain due upon the said second mortgage the sum of $1,162.81. It thus appears that but for the application by the sheriff of the said sum of $1,159.23 to the judgment against Atkinson and Todd, the complainant would have received that amount towards satisfaction of his said second mortgage.

The complainant, by his bill, asks that he may be subrogated to all the rights under and in the said judgment against Atkinson and Todd, in which Todd was only a surety, for the reason that said judgment was paid out of the proceeds of the sale of land upon which the complainant had a specific mortgage lien.

It appears, from the written admission of the parties, that Atkinson, after the giving of the Emanuel J. Stout judgment bond mentioned in the bill, became surety for the said Henry Todd at the dates and for the amounts following, respectively, to-wit:

To the Farmers Bank, April 1, 1869, for $1,000, int. from April 1, 1869.

To the Citizens Building & Loan Association, April 12, 1873, for $500.

To the Citizens Building & Loan Association, Oct. 11, 1873, for $1,100.

To the Citizens Building & Loan Association, Dec. 13, 1873, for $400.

It is also admitted that Todd is insolvent, and was when the sheriff's sale mentioned in the original bill took place; and that none of the liabilities in which the said Atkinson is surety for Todd have been paid; and that the Farmers' Bank has issued a *scire facias* upon their judgment, against Todd and Atkinson.

Upon this statement of facts, ought the prayer of the complainant to be subrogated to the judgment of Stout against Atkinson and Todd be granted?

When a surety or guarantor pays a debt of a principal, equity substitutes him in the place of a creditor, as a matter of course, without any special agreement to that effect.

Subrogation does not rest in contract, but is an equity resulting from the circumstances of the particular case.

It is enforceable in equity tribunals, because it is a matter resting in conscience, and not in consent.

Upon the performance, by the surety, of his contract of suretyship, he is entitled to the original evidences of debt held by the creditor, and to any judgment into which the debt has been merged, as well as to all collateral securities held by the creditor.

By performing the contract of suretyship, the principal obligation is discharged as respects the creditor but is kept alive between the creditor, the debtor, and the surety, for the purpose of enforcing the rights of the surety.

Subrogation is a mode which equity adopts to compel the ultimate discharge of a debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay.

Being purely an equitable right, it is limited only by equitable considerations. It is not available or enforceable when there are subsisting and countervailing equities which forbid it.

He who asks it must work out his equities through those of the party to whose equities he seeks to be substituted. He can have no equity if such party has no equity. His equity must be clear, and not doubtful. While, as between him and the person to whose rights and equities he would be subrogated,—as in the case of *Huston's Appeal,* 69 Pa. 485, referred to in the argument, —there may be priority of right or claim or equity, there can be none against the party against whom he seeks subrogation, unless it is equitable as between that party and the party through whom he seeks to be subrogated. In other words, if the equity he seeks would not be enforceable in equity tribunals by the party through whom he seeks its enforcement against the party against whom it is sought to be enforced, then it is not enforceable by him as a party entitled to be substituted to an original equity.

If, but for the superior equity of Miller as against Todd, he, Todd, from the particular circumstances of this case and the subsisting equities between him and Atkinson, could not be subrogated to the judgment of Stout against Atkinson and Todd, so as to enforce its collection from Atkinson, neither can Miller, working out his equites through those of Todd, be subrogated to said judgment so as to enforce its collection from Atkinson. We have seen that, after Todd became surety for Atkinson to Stout, and before the lands mortgaged to Miller by Todd were sold by

the sheriff, Atkinson became surety for Todd to a much larger amount—to the amount of $3,000—to the Farmers Bank and the Citizens Building & Loan Association. These suretyships were as follows: April 1, 1869, for $1,000; April 12, 1873, for $500; October 11, 1873, $1,100; and December 13, 1873, $400.

Now, when Todd became surety for Atkinson, a certain relation arose between him and Atkinson incident to which certain obligations were imposed on Atkinson and certain rights secured to Todd; and when Atkinson became surety for Todd, the same obligations were imposed on Todd, and the same rights were secured to Atkinson. What were those obligations and those rights? Indemnity and reimbursement in case of loss.

The principle applicable to the relation of principal and surety is this: Although the surety cannot, in the absence of expressed contract, sue the principal for indemnity before he actually pays the debt, yet the implied contract for indemnity arises immediately upon the surety becoming bound. In the case of *Appleton* v. *Bascom,* 3 Met. 169, it was said to be well settled that when a surety becomes bound for his principal and at his request the law implies a promise of indemnity by the principal to the surety, to pay the latter all the money he may be compelled to pay the creditor in consequence of his assumed liability. It was further said that the implied promise of indemnity must be considered as made at the time when the surety became responsible to the creditor on the bond.

The surety's liability was the consideration of the principal's implied promise of indemnity, and the promise must be considered as made at the time when the liability was assumed. * * *

Another principle applicable to suretyship, but originally resulting from the foregoing, is this: After a debt for which a surety is liable has become due, he may without paying the debt and without being called upon by the creditor, file a bill in equity to compel the principal to pay the debt; it being unreasonable that he should always be subject to a liability to pay, even though not molested for the debt.

The rule upon this subject, laid down by Lord REDESDALE, and cited with approval by Vice-Chancellor GIFFARD in the case of *Wooldridge* v. *Norris,* L. R. 6 Eq. Cas. 413, is this: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *quia timet,* in analogy to proceedings at the common law where in some cases a writ may be maintained

before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined, to pay the debt when due, whether the surety has been actually sued for it or not; and, upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances."

Now, to apply these principles to the facts of the case before me. Todd was surety for Atkinson in the judgment to Stout. Upon becoming such surety, there was an implied contract between them that Atkinson should pay the debt, and indemnify Todd against loss by reason of the suretyship; and when the debt became due, Todd had a right to file a bill in equity to compel Atkinson to pay it.

Atkinson afterwards, in 1869, became surety to the bank for Todd; and in 1873 he became surety for Todd in the three several debts hereinbefore stated, to the Citizens Building & Loan Association. On becoming such surety there was an implied contract between Todd and Atkinson that Todd would pay the several debts, and indemnify Atkinson from loss on account of the said several suretyships; and Atkinson had the right, when the said several debts became due, to file a bill in equity to compel Todd to pay them. Neither Todd nor Atkinson filed such bills. Several years elapsed, and the farm and millsite of Todd, upon which complainant held the mortgage, and upon which the judgment against Atkinson and Todd was a lien, were sold by the sheriff, and $1,159, a part of the proceeds of sale, was applied by the sheriff to satisfy the judgment of Stout against Atkinson and Todd, in which Todd was only surety; and thereby there was an insufficiency of the proceeds of sale of the premises to pay the mortgage of the complainant thereon, by about the sum of $1,162.

Now, it is clear, if there were no countervailing equities on the part of Atkinson to prevent it, and if the complainant's mortgage had been satisfied, Todd would have had an equity against Atkinson to be substituted in subrogation to the judgment of Stout against Atkinson; or he would have been entitled to an assignment of such judgment, under the Act of Assembly, to enable him to collect the amount thereof from Atkinson. The mortgage of the complainant, however, not having been paid out of the proceeds of sale and the deficiency owing by Todd to the complainant, the complainant's equity to be subrogated to the judgment of Stout against Atkinson would, in accordance with the decision of *Huston's Appeal*, be superior to that of Todd, and

would be available as against Atkinson, unless there were countervailing equities on the part of Atkinson, as between him and Todd, through whose equities the complainant must work out his equity.

Were there such countervailing equities? Suppose the complainant's mortgage had been satisfied, or the complainant had been silent, not asserting any equity to subrogate, and Todd had filed a bill in equity against Atkinson to compel Atkinson to pay him the amount of the judgment against Atkinson and himself, which had been paid out of the proceeds of the sale of his land; and suppose, in answer to such bill, that Atkinson had shown to the court that, long before such payment by sale of Todd's lands, he had become bound as surety for Todd in three times the amount of such payment; that Todd was insolvent; that he would be compelled to pay the amount of such suretyship for Todd; and that Todd's creditor was in the process of collecting the amount of such suretyship from him,—would it be equitable, under such circumstances, that Todd, by being subrogated to the judgment of Stout, should collect the amount of such judgment from Atkinson? If not, it must be for the want of equity in Todd, under the circumstances, as against Atkinson.

Again, suppose Todd had taken an assignment, under the Act of Assembly, from the plaintiff therein, of the judgment of Stout against Atkinson and himself, after it had been paid out of the proceeds of the sale of his land, and had proceeded to collect the amount of said judgment upon execution against Atkinson, and Atkinson had filed a bill of equity to restrain the execution, because of his suretyship for Todd, Todd's insolvency, and the proceedings against him, Atkinson, to compel the payment by him of the amount of his said suretyship,—would not a court of equity under such circumstances have enjoined Todd from collecting the amount of the judgment so assigned to him, until Todd should pay the debt for which Atkinson was his surety? If so, why? Simply for the reason that, under such circumstances, it would be inequitable that Todd should collect from Atkinson the amount of the said judgment until he paid the debts in which Atkinson was his surety.

It is true Atkinson has not paid Todd's debts for which he is surety, but it is equally true, in the light of the admission in this cause, that he will be compelled to pay them; and this fact would be sufficient to prevent the enforcement by Todd of the collection of the amount of the judgment of Stout against himself and At-

kinson, from Atkinson, and to prevent his subrogation to said judgment with a view to such collection.

Now, the complainant has no equity, as against Atkinson, other than that which he must work out through the equity of Todd against Atkinson; and Todd having no such equity enforceable in this court, the complainant can have none.

This opinion is not in conflict with any of the authorities cited by the complainant's solicitor. *Huston's Appeal,* 69 Pa. 485, mainly relied on, does not conflict with, but, so far as it goes, is confirmatory of, the views here presented.

That case was as follows: On the 7th day of May, 1868, a judgment by confession upon warrant of attorney for $271.67 was entered in favor of Conrad Sylvas, against Adam Titherington and F. Hollen,—Hollen being surety for Titherington. On the 17th of October, 1868, Harvey J. Huston and Samuel M. Huston obtained a judgment against Hollen for $2,235. The First National Bank of Indiana, at the April Term, 1869, obtained a judgment against one Clawson, who was indorser on a note for Hollen, for about $1,200, and Clawson's property was levied upon in satisfaction of the judgment. On the 2d of April, 1869, Hollen's real estate was sold by the sheriff. Out of the proceeds of the judgment, the sheriff, on the 17th of April, paid to the attorneys of Sylvas $302.79, in full of his judgment and interest.

It will be observed that this was a case where the lands of a surety were sold by the sheriff to pay the debts of a principal in a judgment. In respect it was like the present case. There was a conflict of claims between the Hustons—who had the first judgment lien against the lands of Hollen, which had been sold subsequent to that of Sylvas—and Clawson, who had no judgment lien against Hollen's real estate, but who claimed to be entitled to subrogation to the judgment of Sylvas, because Hollen had assigned his equity therein to him so as to defeat the right of subrogation of the Hustons. The court decided that Hollen was entitled to be subrogated to the judgment of Sylvas as against Titherington, for whom he was surety. It will be further observed in this case, as distinguishing it from the one before me, that Titherington had himself no equities against any of the claimants,—the Hustons, Clawsons, or Hollen; and in this respect it very materially differs from the present, where Atkinson has equities to a much larger amount against Todd than Todd had against him. The court, in the case referred to, said that Hollen was entitled to subrogation as against Titherington, but that it was not a

mere personal right which could pass to Clawson by the assignment, but a right which in equity passed to the judgment creditors of Hollen; and that as between Hollen and his judgment creditors, who had a judgment lien, their equity was superior to his.

This doubtless is perfectly right; for it would have been inequitable to allow Hollen to deprive his judgment creditors of the benefit of their lien upon his real estate, by pocketing the proceeds himself or by assigning the right to receive such proceeds to another so as to defeat them.

By allowing the complainant to be subrogated to the judgment of Stout against Atkinson and Todd through the supposed equity of Todd, this effect would result: Atkinson would be deprived of an equity not to be asserted by a suit, but consummated and complete in part by law,—the payment and discharge of his equities against Todd to the extent of $1,159 for the benefit of one whose right to subrogation as against Todd did not arise until long after Atkinson's equities as against Todd commenced; for we have already seen that Atkinson's equities as surety for Todd arose when he became such surety. But the complainant's equity against Todd had no existence until Todd's land was sold and a portion of the proceeds applied to the judgment of Stout against Atkinson and Todd.

The complainant asks the active interposition of the court to compel Atkinson, in his behalf, to surrender the benefit of a realized equity (although he has still further equities against Todd) and in effect to pay the amount so realized to the complainant, although the complainant's equity was long subsequent in date to that of Atkinson. "It is true," says the court, "that the appellant's right of subrogation depends on the equity of Hollen, but as between them their equity is superior to his." The meaning of this is that if Hollen had an equity against Titherington, the appellants, as creditors of Hollen, would have a right to subrogation to the judgment against Titherington; but if Hollen had no such equity, his creditors could have no such right.

It results, therefore, from the doctrine held in the case of *Huston's Appeal,* when applied to the present case, that the complainant's right to subrogation to the judgment of Stout against Atkinson and Todd depends entirely upon the question whether Todd himself—not as between him and the complainant, his creditor, but between him and Atkinson—has an equity to be subrogated to said judgment.

I have already considered that question, and shall therefore

decree that the injunction in this case be dissolved, and that the bill of complaint be dismissed, with costs.

81. EMMERT v. THOMPSON, et al., 49 Minn. 386, 52 N. W. 31.
Supreme Court, Minnesota, 1892.

Subrogation is not founded upon contract, but is a creation of equity. It is a mode which equity adopts to compel the ultimate payment of a debt by one who, in justice and good conscience, ought to pay it and is not dependent upon contract, privity or strict suretyship.

Appeal from district court, Nobles county; Brown, Judge.

Action by Joseph Emmert against Peter Thompson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Daniel Rohrer, for appellant.

Warner, Richardson & Lawrence, and *G. W. Wilson,* for respondents.

COLLINS, J. When the loan of money was made by defendant Cornwell to defendant Marr, to secure which, as agreed upon, the latter mortgaged his entire farm, consisting of 240 acres, it was for the stipulated purpose of relieving one tract (160 acres) from the trust deed held by Ormsby, the balance (80 acres) from the Hayes mortgage, and the entire farm from delinquent taxes. The trust deed, the mortgage last referred to, and the taxes were represented to be, and in fact were, first liens upon the premises: and Cornwell believed, and it was implied from what Marr stated when applying for the loan—there were no other incumbrances, and that, with these paid off and discharged, his mortgage would take their place, and become the first and only charge upon the property. The taxes and the amounts due on the incumbrances, aggregating $1,434.82, were paid out of the proceeds of the loan, in accordance with the agreement under which it was made. Proper releases and discharges were procured and at once recorded, in the mistaken belief on the part of Cornwell, and the agents who transacted the business, that there was no other or prior charge upon the premises. For some time thereafter they remained in ignorance of the fact that plaintiff's mortgage was in existence and of record when the one in question was executed, and by their acts had, of record, become the senior lien. As Marr was and is insolvent, and plaintiff's mortgage, with costs and disbursements of foreclosure, now exceeds in amount the value of the farm as

found by the trial court, the seriousness of the situation is quite apparent. The court below subordinated the plaintiff's claim to that of defendant Cornwell, to the extent of the payments made for taxes, and to satisfy and extinguish the incumbrances, reinstating the liens, in effect; and its right and power so to do is the principal question now before us.

It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity—is enforced solely for accomplishing the ends of substantial justice; and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it, and is not dependent upon contract, privity, or strict suretyship. *Stevens* v. *Goodenough*, 26 Vt. 676; *Harnsberger* v. *Yancey*, 33 Grat. 527; *Smith* v. *Foran*, 43 Conn. 244. That in this way a court, under a great variety of circumstances, may relieve one who has acted under a justifiable or excusable mistake of fact, is readily conceded by appellant; but he invokes and seeks to have applied to respondents' case the general rule that the doctrine of subrogation will not be exercised in favor of a volunteer or a stranger who officiously intermeddles, such as a person who pays without any obligation so to do, or one who, without any interest to protect, liquidates the debt of another. There are a very respectable number of cases, several having been cited, in which relief has been refused under circumstances precisely like those now before us, where one who has loaned and used his money in good faith, and for the express purpose of relieving a debtor from a pressing obligation, and his real property from a specific lien for the amount of the same, under a genuine but excusable misapprehension as to the rank and position of security taken by him on the same property, has been treated and characterized as a volunteer, a stranger, and an officious intermeddler, and denied the rights of an equitable assignee. But of late years, with the development of the principles on which the doctrine is founded, the courts have been taking a broader and more commendable view of the situation of such a party, and at this time very little is left of the views expressed in the earlier cases. The better opinion now is that one who loans his money upon real estate se-

curity for the express purpose of taking up and discharging liens or incumbrances on the same property has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing, in good faith, that his security will, of record, be substituted, in fact, in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or incumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor. Of the many authorities on this, we cite *Association* v. *Thompson*, 32 N. J. Eq. 133; *Gans* v. *Thieme*, 93 N. Y. 225; *Sidener* v. *Pavey*, 77 Ind. 241; *McKenzie* v. *McKenzie*, 52 Vt. 271; *Cobb* v. *Dyer*, 69 Me. 494; *Levy* v. *Martin*, 48 Wis. 198, 4. N. W. Rep. 35; *Insurance Co.* v. *Aspinwall*, 48 Mich. 238, 12 N. W. Rep. 214; *Crippen* v. *Chappel*, 35 Kan. 495, 11 Pac. Rep. 453; 3 Pom. Eq. Jur. § 1212; Harris, Subr. 811, 816; Dixon, Subr. 165.

It is contended by appellant that Cornwell must, under the circumstances, be declared culpably negligent when taking his security and discharging of record the Ormsby and Hayes liens; and, further, that, as the plaintiff's mortgage was then of record, he had notice of it, in contemplation of law, and could not have been misled or mistaken. Marr's application for a loan was for the avowed purpose of taking up and discharging the Ormsby and Hayes liens, and was well calculated to convey the impression that these were the only incumbrances. He intentionally or otherwise concealed the truth, omitting to state the existence of a junior incumbrance in a large amount, a knowledge of which would have ended at once all negotiations with Cornwell's agents. It was misleading, and the persons last named were not negligent because they, to some extent, relied upon and were misled by it. See *Newell* v. *Randall*, 32 Minn. 171, 19 N. W. Rep. 972. It is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon the record, and to fully protect them from the consequences of their acts, when such relief will not result prejudicially to third or innocent persons. *Gerdine* v. *Menage*, 41 Minn. 417, 43 N. W. Rep. 91. Paraphrasing slightly a remark made in the opinion therein, it may be said that, considering this case as it stands between the appellant and respondent Cornwell, it is obvious that it would be most unjust and inequitable not to place the parties *in statu quo* with respect to the amounts paid out upon liens which were superior to that held by plaintiff, now being foreclosed. It is true that at the outset the

mistake grew out of an error in the abstract books kept by Cornwell's agents; but later, when examining the records in the office of the register of deeds, the error was unnoticed and the mistake undiscovered. It was a mistake of fact, and, in our judgment, not of such a character as to bar the respondents' claim to equitable relief. That, in a proper case of mistake of fact, such relief may be afforded notwithstanding the intervening mortgage was of record when the error was committed, is well settled. *Geib* v. *Reynolds,* 35 Minn. 331, 28 N. W. Rep. 923. Cornwell misunderstood, and was justifiably ignorant of, the facts, and acted, through his agents, upon the assumption that he and they knew the true state of the title when the liens which his money had discharged were satisfied of record, and plaintiff's mortgage advanced to the position of the senior incumbrance, without a single act of his, and to the very great detriment of the person who had brought it about. The court was right in applying the principle of subrogation, or "equitable assignment," as it is frequently called.

Judgment was entered below, directing that the premises be sold, on foreclosure of plaintiff's mortgage, as one farm, and that out of the net proceeds, there be first paid to respondent Cornwell the sums of money which he paid out as taxes, and to take up and satisfy the incumbrances before mentioned. The appellant's counsel distinctly approves that part of the judgment which requires a sale of the premises as an entirety, but makes the point, in case we affirm the action of the trial court on the main question, that the farm should have been sold subject to the subrogator's lien for a specific sum on the 160 and for another specific sum on the 80 acre tract, and thus there would have been avoided the possibility, which he now suggests, of having shifted over upon one of these tracts, to some extent, a burden which ought to wholly rest upon the other. It is evident from the record that the attention of the trial court was not called to this point, and hence the order that the sale be of the whole as one body of land. But we are unable to see how the result now suggested by counsel would have been avoided by the adoption of his plan without selling the tracts separately, keeping the funds derived from each distinct, and applying the same to the liquidation of the liens, so far as they might go. Counsel does not contend that the two tracts of land should have been sold separately, but, as before stated, indorses the judgment directing a sale *en masse.* He is concluded on this point by his position as to the manner of sale.

Judgment affirmed.

82. BEAVER v. SLANKER, Admr., etc., 94 Ill. 175.
Supreme Court, Illinois, 1879.

A volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor; but, if the person who pays the debt was compelled to do so, for the protection of his own interests and rights, the substitution should be made.

Writ of error to the Appellate Court of the Fourth District.

In the year 1866, Victor Buchanan, as administrator *de bonis non* of the estate of John C. Riley, deceased, in pursuance of an order of the county court of Lawrence county, sold at public sale divers tracts of lands belonging to the estate of said Riley.

Israel A. Powell became the purchaser for the price of $4,178. The order of sale made by the county court required notes, with approved personal security and a mortgage on the lands sold, to be given to secure the payment of the purchase money. Powell accordingly, on July 14, 1866, gave to Buchanan, administrator, his note for the purchase price named, with Johnson and Abernathy as sureties, and also a mortgage on the lands purchased, to secure the payment of the note, the mortgage being duly recorded.

In April, 1869, Buchanan, administrator, obtained a judgment in the circuit court of Lawrence county on the note for a remaining unpaid portion thereof, against Powell, Johnson, and Abernathy. Johnson at that time held land upon which the judgment became a lien.

The judgment was made upon execution out of Powell's property, except about $500, which remained unsatisfied until in 1873. In 1870 Johnson sold and conveyed his land, which was subject to the lien of this judgment, to Gustave Kleinworth, by deed, with full covenants of warranty. In 1873 an execution issued upon the judgment was levied upon this land so sold by Johnson to Kleinworth, as the land of Johnson, a co-defendant in the judgment, bound by the lien of the judgment, and the land was sold under the execution February 2, 1874, to D. L. Gold, for $603.40, and the execution was returned March 1, 1874, as satisfied in full by such sale. Gold was the administrator of the estate of Henrietta Riley, one of the two children and heirs of John C. Riley. On April 20, 1869, Buchanan, administrator of John C. Riley, in settlement of the latter's estate, turned over and assigned to Gold, administrator of the estate of Henrietta Riley, the unpaid portion of said judgment, and at the same time assigned to

Gold the mortgage which had been given by Powell to Buchanan at the administrator's sale by the latter.

In January, 1875, Kleinworth, the previous purchaser from Johnson of the land sold under the execution, bought of Gold his certificate of purchase of the land under the execution, paying him therefor $659, and Gold assigned to Kleinworth the certificate of purchase, as also the said mortgage.

The bill in this case was filed by Kleinworth, asking to be subrogated to the rights of Victor Buchanan, administrator, as the same stood before the said sale of said land under execution, and for the foreclosure of the aforesaid mortgage. Kleinworth died during the progress of the cause, and in his place Gideon Slanker, his administrator, was substituted as a party.

Powell had made sale and conveyance of the several tracts of land described in the mortgage, at different times to different purchasers, Beaver being the last, on May 2, 1868.

The circuit court decreed in favor of the complainant to the extent of the amount he paid Gold for his certificate of purchase of complainant's land, and that the mortgaged lands be sold for satisfaction of such amount in the inverse order of their alienation by Powell. On appeal by Beaver to the Appellate Court for the Fourth District, the decree was affirmed, and Beaver brings the case here on writ of error to the Appellate Court.

Mr. *S. W. Short,* for the plaintiff in error.

Messrs. *Wilson & Hutchinson,* for the defendant in error.

Mr. Justice SHELDON delivered the opinion of the court:

As a mere assignee alone of the mortgage, the complainant might not be able to sustain this decree in his favor, as the judgment for the mortgage debt was satisfied in full by the sale under execution of Kleinworth's land.

But, upon the doctrine of subrogation, we think there is sufficient support for the decree.

It is the undoubted principle of equity, that if, at the time when the obligation of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt, then, if the surety pays the debt, he will be entitled to have an assignment of the mortgage and to stand in the place of the mortgagee, and that the mortgage will remain a valid and effectual security in favor of the surety for the purpose of obtaining his reimbursement, notwithstanding the obligation is paid. The mortgage is regarded as not only for the creditor's security, but for the surety's indemnity as well. 1 Story Eq. Jur.

§ 499; *Rogers* v. *School Trustees,* 46 Ill. 428; *Pharcs* v. *Barbour,* 49 id. 370; *Jacques* v .*Fackney,* 64 id. 87; *City National Bank of Ottawa* v. *Dudgeon,* 65 id. 12; *Bishop* v. *O'Connor,* 69 id. 431.

There can be no question, in the case of Johnson himself, the surety, had the land been sold while he owned it, in satisfaction of the judgment, that he would have been entitled to maintain such a bill as the present. The only doubt is, whether the principle in question, of subrogation, applies in favor of a purchaser of the land from Johnson, the judgment against the latter being a lien upon the land purchased. We are of the opinion it does. Kleinworth did not make the payment which he did for the certificate of purchase of his land, as a mere stranger or volunteer, but he made it standing in privity with Johnson, the surety, as his assignee of land incumbered with the lien of the judgment against Johnson as surety; and he made it compulsorily, to save to himself his land which had been sold as being bound by this judgment lien. In *Hough* v. *Aetna Life Insurance Co.,* 57 Ill. 318, and *Young* v. *Morgan,* 89 id. 199, this court recognized the doctrine that a mere stranger or volunteer could not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor; but that if the person who paid the debt was compelled to pay, for the protection of his own interests and rights, then the substitution should be made.

Further, the present proceeding is in the interest of the surety, Johnson, it being in the indirect assertion of his right of indemnity from the mortgaged premises. Johnson sold and conveyed to Kleinworth with covenant of warranty, and so was responsible to the latter for the goodness of the title. Kleinworth, instead of resorting to Johnson, on the latter's covenant of warranty, and leaving Johnson to have recourse over to the mortgage, proceeds directly against the mortgaged property, which is ultimately liable for the mortgage debt, and in obtaining satisfaction therefrom for the portion of the mortgage debt the sale of his land discharged, secures full indemnity for the surety, Johnson, and thus avoiding circuity of action.

And this meets the suggestion, that, in relief of the appellant and other purchasers from Powell, the recourse of Kleinworth should have been against Johnson on his covenant of warranty. If that had been done, then Johnson himself would have been subrogated to the rights under the mortgage, so that, in the end, the result to appellant would have been the same—the subjecting of

the mortgaged premises. There is, besides, reason to believe that suit upon the covenant of warranty would have been unavailing. Johnson has deceased, and the records of the probate court show his estate to be insolvent. To be sure, this showing is in respect of personalty alone, and there is a possibility of the decedent having left lands which might respond upon the covenant of warranty; nothing appears as to this.

The circumstance of Powell having sold the mortgaged lands, and they now being in the hands of purchasers from him, should make no difference. Such purchasers occupy no better position than Powell himself. The mortgage was upon record, and they bought with notice that the lands were mortgaged; that they stood as security for the payment of this mortgage indebtedness, and as indemnity to the sureties against its payment, and that they were liable to be resorted to and sold for the purpose of such security and indemnity.

They are now proceeded against but for such purpose, and these purchasers have no equitable cause of complaint.

If it be regarded important that they should have had notice that Johnson and Abernathy were sureties only, we think they were chargeable with such notice. The proceedings of the county court under whose order of sale the administrator's sale of these lands of Riley was made, were a link in the chain of title of the mortgaged lands, and purchasers from Powell must be held as having notice of them. These proceedings show that the sale was to be on a credit, and that the purchaser was to give a mortgage on the land purchased, and a note with personal security; they show the sale of the lands to Powell, and Powell alone gives the mortgage on the lands purchased. These circumstances, we think, afford notice that Powell was the principal in the transaction, and Johnson and Abernathy but his sureties. The answer of Beaver, too, admits such suretyship.

There are some minor questions made, which remain to be considered.

The bill alleges, under a *videlicet,* that the judgment was obtained against Powell, Johnson and Abernathy about the —— day of November, 1872. The proof shows it was rendered in April, 1869. It is insisted that in this respect there is a fatal variance between the allegations and proof.

The bill alleges the events correctly; that the judgment became a lien upon this land of Johnson, which he then owned, and that he afterward sold the land to Kleinworth.

The allegations of the bill and the proofs show that the judgment became a lien upon the land while owned by Johnson, and before his conveyance of it to Kleinworth. The allegation as to the time of obtaining the judgment is not one of a descriptive character as respects the judgment, and does not purport to state with exactness the time when it was recovered. We find no merit in this objection.

A further objection is, in respect of a mistake in the mortgage from Powell to Buchanan. In the body of the mortgage, in the granting part, the name of the mortgagor appears written in the blank left for the name of the mortgagee, and the name of the mortgagee in the blank left for the mortgagor, the mortgage in all other respects being correct. It is urged that, although as between the parties to the mortgage, this was a mistake that might have been corrected, yet, as against Beaver, an innocent subsequent purchaser from Powell of the mortgaged land, he not knowing of the mistake, the mortgage could not be reformed; that he, not having such knowledge, would be entitled to hold the land unaffected by the mortgage, and so was not compelled to pay the mortgage debt, for the protection of his title to the land. We think Beaver had notice of the mistake from the recording of the mortgage.

The mortgage was signed by Powell, not Buchanan; it purported to secure a debt from Powell to Buchanan, not one from Buchanan to Powell; and the certificate of acknowledgment expressed that the mortgage was acknowledged by Powell. The mistake in the transposition of the names of the mortgagor and mortgagee was palpable upon the face of the mortgage.

It is objected that there is no prayer in the bill for the reformation of the mortgage, and no decree made therefor. The bill does not ask specifically for the correction of the mistake, nor does the decree by express words order the correction of the mistake; but the bill alleges the mistake, and contains the general prayer for relief; and the decree finds the fact of the mistake, and, if not in terms decreeing its correction, it treats it as corrected, in declaring the mortgage to have been made by Powell, and the mistake in it to be apparent upon reading the whole mortgage, and ordering the sale of the mortgaged land for the satisfaction of the mortgage debt. We find nothing substantial in this objection.

The decree is affirmed.

SECTION 3. THE RIGHT OF CONTRIBUTION

83. LANSDALE'S Admr's and Heirs v. COX, 7 T. B. Mon. 401.
Court of Appeals, Kentucky, 1828.

The right of a surety to contribution from his co-sureties does not arise out of contract, but is purely equitable in nature and origin.

The fiction of a promise to contribute is employed by common law courts to obtain jurisdiction.

Mayes & Chapeze, for plaintiffs.
Hardin & Darby, for defendants.

Opinion of the court by Chief Justice BIBB.

Richard Lansdale and James Cox were the sureties of Shanks, in an injunction bond to Summers, who sued Cox, the surviving obligor, and had judgment for $730.24, beside costs, which was paid by Cox's surety in a replevin bond, and afterward paid by Cox to his surety. These proceedings were in the Nelson circuit court.

Cox thereafter, upon motion against the heirs of Shanks the principal, (stating that there was no executor or administrator of Shanks,) had judgment, and execution, upon which the sheriff made a small part of the judgment, (about $35.19,) and returned that he could find no estate whereof to satisfy the residue.

Cox then sued his motion against the heirs and administrators, jointly, of his co-security, Lansdale, for contribution, and recovered judgment; to which the defendants prosecute this writ of error. * * *

The whole doctrine of contribution between securities originated with courts of equity. There is no express contract for contribution; the bonds, obligations, bills, or notes, created liabilities from the obligors to the obligees. The contribution between co-securities results from the maxim, that equality is equity. Proceeding on this, a surety is entitled to every remedy which the creditor has against the principal debtor; to stand in the place of the creditor; to enforce every security, and all means of payment; to have those securities transferred to him, though there was no stipulation for that. This right of a surety stands upon a principle of natural justice. The creditor may resort to principal to either of the securities, for the whole, or to each for his proportion, and as he has that right, if, he, from partiality to one surety, or for other cause, will not enforce it, the court of equity gives the

same right to the other surety, and enables him to enforce it. Natural justice says that one surety having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. The obligation of co-sureties, to contribute to each other, is not founded in contract between them, but stood upon a principle of equity, until that principle of equity had been so universally acknowledged, that courts of law, in modern times, have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea, that the equitable principle had been so long and so generally acknowledged and enforced, that persons, in placing themselves under circumstances to which it applies, may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time, equity exercised its jurisdiction exclusively and undividedly; the jurisdiction assumed by the courts of law is, comparatively of very modern date; and is attended with great difficulty where there are many sureties; though simple and easy enough where there are but two sureties, one of whom brings his action against the other upon the implied assumpsit for a moiety.

The action at law, then, by one surety against his co-security, arises out of an implied undertaking, not by force of express contract, and consequently the heirs can not have been expressly bound by the ancestor. So that the action at law, by one surety against the representatives of a deceased co-surety, must, by the principles of the common law, be against the executor or administrator. To reach the heirs in a suit at law, the remedy given by our statute in such cases, must be jointly against the executors or administrators and heirs, not against the heirs alone. The remedy in equity by substitution of the co-security in place of the creditor, and so allowing the one surety his redress against his co-surety or co-sureties for contribution, still remains; the remedy at law, by a regular action jointly against the heirs and executors or administrators, by force and operation of the statute of 1792, may be pursued. * * *

Reversed, with directions to lower court to dismiss motion.

84. MOORE v. BRUNER, 31 Ill. App. 400.
Court of Appeals, Illinois, 1889.

At law each co-surety is liable to contribute only his proportionate share of the sum paid; in equity the solvent sureties must divide the loss between them.

Mr. *C. L. Mulkey,* for plaintiff in error.
Messrs. *Courtney & Helm,* for defendant in error.

GREEN, P. J.—It is averred in the declaration in this case that plaintiff, Bruner, and Moore, the defendant together with McCammon and Gray, became sureties on the bond of the guardian of Barnes; that the guardian died owing his ward, and afterward judgment was rendered in Massac probate court against the estate of the guardian in favor of the ward for $500, but the estate being insolvent no part of this judgment was paid; that afterward suit was brought in the Massac circuit court upon the bond against Bruner and McCammon, and judgment was there recovered against them for $500 and costs; that McCammon is insolvent and Gray died insolvent; that plaintiff Bruner discharged said judgment in full, wherefore defendant became liable to pay him $269.45 by way of contribution. A count for money paid out by plaintiff for defendant is added. The cause was tried by the court. Judgment was rendered in favor of the plaintiff for $260 and costs, to reverse which defendant sued out this writ of error.

The cause of action set out in this declaration, is the payment made by Bruner in satisfaction of the judgment recovered against himself and McCammon as sureties upon said guardian's bond, *one-half* of which amount so paid, instead of one-fourth, Bruner insists is the proportion plaintiff in error as a co-surety is legally liable to contribute, because of the insolvency of the two other co-sureties, McCammon and Gray. This was the view of the trial court and in accordance therewith the judgment against plaintiff in error was rendered. The court erred in so holding. At law the amount of damages which plaintiff was entitled to recover from defendant as a co-surety was one-fourth of the whole debt paid, with interest from the time of payment. There were four sureties, each of whom, as between themselves, became liable at law to contribute an aliquot portion of the sum paid by Bruner, and this aliquot portion is to be ascertained upon the basis of the number of sureties, without regard to their solvency. Such we understand to be the law in this state.

It is said in the opinion in *Sloo* v. *Pool,* 15 Ill. 48, "Sureties are individually liable to the creditor, but one is as much bound to discharge the debt as another. If the creditor endeavors to enforce payment from them, it is, as between themselves, the duty of each to pay an aliquot portion of the debt. If that is not done, and one is compelled to pay the whole, he is entitled to contribution from the others in the same proportion. The law implies an agreement between them when they become responsible to the creditor, that if one shall be compelled to pay the debt the others will contribute so as to make the burden equal. If one pays the whole debt he has a cause of action against the others to recover their just proportion, as so much money paid to their use. His right to contribution is complete as soon as he pays the debt, and he may at once call on his co-sureties to bear the common burden with him. At law he can not sue two or more jointly, but he must sue each separately, and he can only recover from one an aliquot portion of the debt, to be ascertained by the number of sureties, without regard to their solvency. In equity, if one is insolvent the loss is apportioned among the others." In 1 Parsons on Cont., 35, the rule is stated thus: "At law a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of either of the co-sureties, but in equity it is otherwise." We have examined the case of *Golden* v. *Brand,* 75 Ill. 148, cited on behalf of appellee, and do not understand the court either did, or intended to, abrogate or modify the rule announced in *Sloo* v. *Pool, supra.*

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

85. EASTERLY v. BARBER, 66 N. Y. 433

Court of Appeals, New York, 1876.

Parol evidence is admissible to prove an agreement to be liable as co-sureties among parties who, prima facie, have no right to demand contribution. Distinction between legal and equitable remedies.

There were two appeals in this case, the one by plaintiff from an order of the general term of the supreme court in the fourth judicial department denying motion for a new trial and directing judgment on a verdict, the other by defendant from the judgment entered upon such order.

The action was brought by plaintiff as third indorser of a promissory note to recover the amount thereof of the second indorser.

The note in question was made by the Stevenson Manufacturing Company, payable to the order of one Knight, who indorsed it. Defendant was second indorser, plaintiff third, and one MacDougall the fourth. Defendant alleged in his answer that the note was given and discounted for the benefit of the maker, in which company all the four indorsers were stockholders; that they indorsed for the accommodation of the company under an agreement that as between themselves they should be co-sureties, and share and contribute equally to the amount all or either should be obliged to pay thereon.

Upon a former trial plaintiff recovered a judgment for one-fourth the amount of the note. It appeared on such trial that the two other indorsers were insolvent. The general term reversed the judgment and ordered a new trial on the ground that plaintiff was entitled to judgment for one-half the amount. 3 N. Y. S. C. (T. & C.) 421.

Upon the second, parol evidence was received to prove the allegations of the answer, which was received under objection and exception. The evidence tended to show that the note in suit was a renewal of a former note; that the agreement was made in reference to the original note, which was renewed from time to time. The testimony was conflicting as to whether anything was said in reference to the liability as co-sureties at the time of the indorsements of the note in suit.

Plaintiff was allowed to prove, under objection and exception, the insolvency of the other two indorsers, Knight and MacDougall. Evidence was given on the part of defendant tending to show that the bank which discounted the note brought suit

thereon against plaintiff alone at defendant's request upon his giving security to indemnify the bank.

As to the agreement, the court charged, in substance, that if the jury found that the agreement was made as claimed by defendant, plaintiff was entitled to judgment for one-half the amount of the note, to which defendant's counsel duly excepted.

E. H. Avery, for the plaintiff.

Francis Kernan, for the defendant.

MILLER, J.—The first question presented upon these appeals is, whether it is competent in an action by one indorser against a prior indorser for the defendant to prove by parol an agreement between all the indorsers that they were, as between themselves, co-sureties where they are accommodation indorsers. In *Barry* v. *Ransom,* (12 N. Y. 462) it was held that an agreement made between parties prior to or contemporaneously with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation, and it may be proved by parol evidence. It was said by DENIO, J., in the opinion, that an agreement among the sureties, arranging their eventual liabilities among themselves in a manner different from what the law would prescribe, in the absence of an express agreement, would not contradict any of the terms of the bond. It was also held, that the engagement among themselves had no necessary place in the instrument between them and the other contracting parties. The case cited referred to a joint and several bond, where the obligors were equally liable upon its face. No reason exists, however, why the same principle is not applicable to notes and bills of exchange. The terms of the contract contained in instruments of this character, which are within its scope to define and regulate, cannot be changed by parol; but the understanding between the indorsers is a distinct and separate subject, an outside matter, which may be properly proved independent of and without any regard to the instrument itself. This rule is distinctly established in reference to joint makers of promissory notes; and although the previous decisions had been somewhat uncertain it has been recently determined by the decision of this court that where a person signed, as surety, a joint and several promissory note, and it did not appear by the instrument itself that such relation existed, he might prove such fact by parol, and that such proof did not tend to alter the terms of the contract. *Hubbard* v. *Gurney,* 64 N. Y. 457. It is not apparent that any such difference exists between the two

classes of cases which prevents the application of the same principle to both of them.

An attempted distinction is sought to be maintained because the relation of indorsers to each other are fixed by law; while the relations and obligations of sureties and obligors are not fixed. As between the principal and the sureties they are fixed quite as much as between indorsers, and can only be settled as between sureties where the contract does not show the fact by parol proof of the same. In support of the same views is the case of *Philips* v. *Preston,* (5 How. [U. S.] 278, 292), where the doctrine is laid down that proof of a collateral contract, by parol, may be given to show the liability of indorsers as between themselves. See, also, *McDonald* v. *Magruder,* 3 Peters, 470; *Aiken* v. *Barkley,* 2 Speers, 747; *Edelen* v. *White,* 6 Bush. (Ky.), 408; *Davis* v. *Morgan,* 64 N. C. 570. The indorsements upon bills of exchange or promissory notes rest upon the theory that the liability of indorsers to each other is regulated by the position of their names, and that the paper is transferred from the one to the others by indorsement. But this rule has no practical application to accommodation indorsers, where neither of them has owned the paper and no such transfer has been made. It is easy to see that the application of the rule contended for, in many cases, would work the most serious injustice. Suppose a person sign as accommodation maker of a promissory note, and the payee for whose benefit it is made indorses it and pays the note, and afterwards sues the maker to recover back the money, would it be seriously contended that proof could not be given to show that he was merely an accommodation maker? Clearly not; and yet such evidence would contradict the written instrument quite as much as it would to prove an agreement between indorsers in regard to their liability as between each other. Cases frequently arise where it is competent to prove that the indorsement is made for the accommodation of the maker; and a drawee may show, after acceptance, that he has no funds (3 N. Y. 423) in his hands, and that he was merely an accommodation accepter. *Griffith* v. *Reed,* 21 Wend. 502. The cases to which we have been referred by the plaintiff's counsel do not, we think, sustain the position contended for; that parol proof cannot be given to show an arrangement between accommodation indorsers different from that which appears by the legal effect of the instrument, and a particular examination of them is not required. The uniform practice in this State has been in conformity to the views expressed in reference to proof

of this character, and it would be establishing a new rule at this time to hold that such testimony was incompetent. There was, therefore, no error committed by the judge in the admission of the evidence to which objection was taken.

* * * It is claimed that an action at law by a surety for contribution must be against each of the sureties separately for his proportion, and that no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the co-sureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the amount will be adjudged among the solvent parties in due proportion. The principle stated is fully sustained by the authorities. It is thus stated, in Parsons on Contracts (vol. 1, page 34): "At law, a surety can recover from his co-surety an aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; but in equity it is otherwise." See, also, *Browne* v. *Lee*, 6 Barn. & Cress. 689, 13 Eng. C. L. 394; *Cowell* v. *Edwards*, 2 B. & Pull. 268; *Beaman* v. *Blanchard*, 4 Wend. 432, 435; Story's Eq. Juris., § 496; 1 Chitty on Con. (5th Am. ed.), 597, 598; Willard's Eq. Juris., 108. There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity and when they are parties to the action. The action here was not of this character; nor were all the proper parties before the court. It was clearly an action at law, and in that point of view, as we have seen, the plaintiff could only recover for one-fourth of the debt for which all the sureties were liable. The distinction between the two classes of actions is recognized by the decisions.

The remedies, the parties and course of procedure are each different. In the one, a jury trial is a matter of right; while in the other the trial is by the court. The costs are also in the discretion of the court. (Code §§ 253, 306; 13 N. Y. [*supra*], 498). As the judgment could not require each of the parties to pay his aliquot share and furnish a remedy over against those who were insolvent and the rights of the parties be finally determined and fixed, it was under the facts proven clearly erroneous. Although in many cases under the Code the pleadings, if neces-

sary, may be made to conform to the facts, and the case disposed of upon the merits, the defects here are so radical as to strike at the very foundation of the action, and cannot thus be remedied. Besides, the proper parties are not before us, and cannot be brought in, except on motion in the court below. As the claim was alleged in the complaint, there was no such defect of parties apparent as required the defendant to take the objection by demurrer or answer.

It follows that the judgment must be affirmed upon the plaintiff's appeal, with costs of appeal to be paid by the plaintiff upon the final termination of the action, if the defendant succeeds; and if the plaintiff succeeds, to be set off against the plaintiff's costs. And the judgment must be reversed upon the defendant's appeal, with costs of the appeal in this court, and costs in the supreme court to abide the event.

All concur, except CHURCH, Ch. J., dissenting.

Ordered accordingly.

86. DEERING v. EARL OF WINCHELSEA, 1 Cox Chy. Cas. 318.

In the Exchequer, 1787.

Contribution among co-sureties is not founded on contract, but is the result of a general equity on the ground of equality of burden and benefit. Sureties bound on distinct and separate obligations for the same transaction are co-sureties.

THOMAS DEERING, ESQ. having been appointed collector of some of the duties belonging to the customs, it became necessary upon such appointment for him to enter into bonds to the crown with three securities for the due performance of this office. Sir Edward Deering, his brother, the Earl of Winchelsea, and Sir John Rous, having agreed to become sureties for him, a joint and several bond was executed by Thomas Deering and Sir Edward Deering to the crown in the penalty of 4000*l.*, another joint and several bond by Thomas Deering and the Earl of Winchelsea, and a third by Thomas Deering and Sir John Rous in the same penalty of 4000*l.*, all conditioned alike for the due performance of Thomas Deering's duty as collector. Mr. Deering being in arrear to the crown to the amount of 3883*l.* 14*s.*, the crown put the first bond in suit against Sir Edward Deering, and judgment was obtained thereon for that sum: whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause had been argued at length, in Michaelmas Term last, and now stood for judgment.

LORD CHIEF BARON.—This bill is brought by one surety against his two co-sureties, under the circumstances above mentioned. Mr. Deering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted. The demand is resisted on two grounds: 1st, that there is no foundation for the demand in the nature of the contract: and 2ndly, that the conduct of Sir Edward Deering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection which I shall take notice of hereafter. I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money, and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this court under these circumstances: be might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the court, but these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in this court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor, of Mr. Deering, may be said to be the author of the loss, but to legal purposes, Mr. Deering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the court can take cognizance of. Cases indeed might be put in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if

the plaintiff had actually bored a hole in the ship, he would in that case be certainly author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech as applied to Sir Edward Deering in this case. The real point is whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted that if there had been only one bond in which the three sureties had joined for 12,000*l.* there must have been a contribution amongst them to the extent of any loss sustained; but it is said that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connection with each other, and it is added, that the contribution can never be *eodem modo,* as in the three joining in one bond for 12,000*l.*, for there, if one of them became insolvent, the two others would be liable to contribute in moieties to the amount of 6,000*l.* each, whereas here it is impossible to make them contribute beyond the penalty of the bond. Mr. Maddocks has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond; if this means only that there is no contract, then it comes back to the question, whether the right of contribution is founded on contract. If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in *Swain* v. *Wall,* 1 Ch. Rep. 149. In the *Register,* 176 b. there are two writs of contributions, one *inter-cohaeredes,* the other *inter-cofeoffatos;* these are founded on the statute of *Marlbridge;* the great object of the statute is to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in *Fitz. N. B.* 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page *Fitzherbert* takes notice of contribution between co-heirs and co-feoffees, and as between co-feoffees he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "*ex eorum assensu,*" and yet this seems to contravene the express provision of the statute: as to

co-heirs the statute is express; it does not say so as to feoffees, but it gives contribution in the same manner. In *Sir William Harbert's* case, 3 *Co.* 11 b., many cases of contribution are put; and the reason given in the books is, that in *equali jure* the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. *Contract* is never mentioned. Now the doctrine of equality operates more effectually in this court than in a court of law. The difficulty in *Coke's Cases* was how to make them contribute; they were put to their *audita querela,* or *scire facias.* In equity there is a string of cases in 1 *Eq. Ca. Abr. tit.* "Contribution and average." Another case occurs in *Harg. Law Tracts* on the right of the King on the prisage of wine. The King is entitled to one ton before the mast, and one ton behind, and in that case a right of contribution accrues; for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely; but the contribution is given of course on general principles which govern all these cases. Now to come to the particular case of sureties; it is clear that one surety may compel a contribution from another, towards payment of a debt to which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What, if they are jointly and severally bound? What difference will it make if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common interest, and a common burthen; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute, whereas if they had joined in one bond, it must have depended on other circumstances. In this case the three sureties are all bound that Mr. Deering shall account for the moneys he receives; this is a common burthen; all the bonds are forfeited at law; and in this court, as far as the balance due; the balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now who ought to pay this? The one who is sued must pay it to the crown, as in the case of prisage, but, as between themselves, there shall be a contribution, for they are in *equali jure.* This is carried a great way, where they are joined in one obligation, for if one should pay the whole 12,000*l.*, and the second were insolvent, the third

shall contribute a moiety, though he certainly never meant to be liable for more than a third: this circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the same principal and the same engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted: if, as in the common case of a joint bond, no distinction is to be made, why shall not the same rule govern here? As in the case of average of cargo in a court of law, *qui sentit commodum sentire debet et onus.* This principle has a direct application here, for the charging one surety, discharges the other, and each therefore ought to contribute to the *onus.* In questions of average there is no contract or privity in ordinary cases, but it is the result of general justice from the equality of burthen and benefit: then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute; for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but in substance the insolvency of Mr. Deering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declare that the balance due from Thomas Deering being admitted on all hands to amount to the sum of 3883*l.* 14*s.* 8½*d.* the plaintiff Sir Edward Deering, and the two defendants the Earl of Winchelsea and Sir John Rous ought to contribute in equal shares to the payment of that sum, and direct that the said plaintiff and defendants do pay in discharge thereof each of them the sum of 1294*l.* 11*s.* 7*d.* And that on payment thereof the Attorney-General shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous, be delivered up to them respectively. But this not being a very favorable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

87. CITY OF DEERING v. MOORE, 86 Me. 181, 29 Atl. 988.
Supreme Judicial Court, Maine, 1893.

Sureties bound severally for the payment of the same debt are liable to contribution so that all shall fare alike.

Geo. C. Hopkins, for plaintiff.
C. P. Mattocks and *L. Barton,* for defendants.

HASKELL, J.—Debt by an obligee against a surety upon two bonds, given by a collector of taxes for the years 1884 and 1885, respectively. The last bond was not signed by the principal. Each surety bound himself severally, and not jointly, in the sum of $5,000. The obligee received from two sureties a sum of money, "in full discharge from liability upon each bond." Two questions are presented: * * *

II. Did the discharge of two sureties release the defendant, another surety? No. The defendant was one of six sureties, who bound themselves severally and not jointly, each in the sum of $5,000. Their relations to each other are precisely the same as if each one had executed a separate bond. They are neither necessarily joint debtors, nor joint sureties. Had the principal executed the bond, he would have bound himself in the sum of $30,000. The sureties, instead of standing in jointly for that amount, divided it equally among them, and each one became severally bound for his aliquot share. They are sureties for the principal, and may or may not be called upon to bear a common burden, as circumstances may require. If they are, (that is, if the whole liability be less than the aggregate amount assumed by all of them, it becomes a common burden, not by reason of any contract or engagement to indemnify each other, but on the principle of equity, that a common burden shall be equally borne by all), they become co-sureties, and stand in relation to each other as joint debtors, and are bound to contribute to each other, so that they shall all fare alike. In cases of this sort, of course, none can be charged beyond the amount that he has stipulated for. *Warner* v. *Morrison,* 3 Allen, 567. It follows, therefore, that the release of one would work the release of all. That is based upon the presumption of payment, the seal being conclusive evidence of complete and ample consideration. To work the discharge of a debtor, the agreement must be made upon sufficient consideration, and that pays the debt. At common law, the part payment of a debt is not sufficient consideration for its discharge. *Bailey* v. *Day,* 26 Maine, 88; *Potter* v. *Green,* 6 Allen, 442. If the discharge be by a sealed instrument, it is of no

consequence what the actual consideration may be, for the seal is conclusive evidence of sufficient consideration. By the statute of this State, passed in 1851, c. 213, R. S., c. 82, § 45, the settlement of a demand upon the receipt of money or other valuable consideration, however small, will bar an action upon it. It should be observed that the demand must be settled, in order to effectuate that result. The discharge of a debtor from liability upon a demand that is to remain outstanding will not so operate. This distinction applies where one or two joint debtors is discharged upon the consideration of part payment, leaving the demand outstanding against the other, Such discharge will not bar an action against both; nor can it be pleaded by the other in an action against him, if the liability be served. *Bank* v. *Marshall,* 73 Maine, 79; *Drinkwater* v. *Jordan,* 46 Maine, 432; *McAllester* v. *Sprague,* 34 Maine, 296.

In the case at bar, the attempted discharge of some of the sureties is not pretended to have been by a sealed instrument. Had it been, it would have worked a discharge of all the sureties, for they stand in the relation to each other of joint debtors, being co-sureties for the payment of the same debt. Nor does it pretend to have discharged the whole debt, as provided for by statute. It simply presumes to discharge some sureties from a liability or debt that was to remain outstanding, and, therefore, not being upon sufficient consideration that would have paid the debt, or so much of it as they had engaged to pay by their covenant, nor evidenced by a sealed instrument, it was ineffectual to discharge any one.

The result is, damages upon the last bond should be assessed in a sum equal to the existing default of the principal, with interest from the time it accrued, leaving the defendant to such claims for contribution as shall prove just.

Defendant defaulted. Damages to be assessed below.

SECTION 4. THE RIGHT OF EXONERATION

88. DOBIE v. FIDELITY & CASUALTY CO., 95 Wis. 540, 70 N. W. 482.

Supreme Court, Wisconsin, 1897.

A surety can, in equity, compel his principal to exonerate him from liability, by extinguishing the obligation, without having first paid it himself.

Suit by David Dobie against the Fidelity & Casualty Company of New York to compel defendant to exonerate plaintiff from liability on an appeal bond. From a judgment for plaintiff on the pleadings, defendant appeals. Affirmed.

One Knute Anderson obtained a judgment against M. C. Burke and John Burke. The action was for personal injuries. The Fidelity & Casualty Company was an insurer of the Burkes against such claims, and was defending the action. It procured Dobie and Tennis to become sureties on the appeal, and gave them its own bond in the sum of $7,000 to indemnify them, conditioned to "answer for all damages, interest and costs, if any, that shall be adjudged" against the defendant, and "to save said Tennis and Dobie harmless from all costs and damages on account of their obligation as sureties." Judgment went against the defendant on the appeal, and Tennis and Dobie became liable on their undertaking. No part of the judgment has been paid. The plaintiff brings this action to compel the defendant, the Fidelity & Casualty Company, to pay the judgment, and so exonerate the plaintiff from liability. The plaintiff had judgment upon the pleadings, according to the demand of his complaint, and the defendant appeals.

Ross, Dwyer & Hanitch, for appellant.

Thorson & Crawford, for respondent.

NEWMAN, J.—(After stating the facts). The question presented is whether the complaint states a cause of action. The action is by a surety to compel his principal to pay the debt for which both are liable, for the exoneration of the surety. It is ultimately the defendant's liability. That party is the principal debtor, who is ultimately liable for the debt. The question is whether a surety can, in equity, compel his principal to exonerate him from liability, by extinguishing the obligation, without having first paid it himself. It seems to be well settled that a surety against whom a judgment has been rendered may, without making

payment himself, proceed in equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety. 2 Beach, Eq. Jur. § 903; 3 Pom. Eq. § 1417; Will. Eq. Jur. 110; *United New Jersey Railroad & Canal Co.* v. *Long Dock Co.*, 38 N. J. Eq. 142; *Beaver* v. *Beaver*, 23 Pa. St. 167; *Gibbs* v. *Mennard*, 6 Paige, 258; *Warner* v. *Beardsley*, 8 Wend. 194; 7 Am. & Eng. Enc. Law, 486, cases in note. The judgment of the Circuit court of Douglas county is affirmed.

89. LOOSEMORE v. RADFORD, 9 Meeson & Welsby 657.
Court of Exchequer, 1842.

In an action for breach of a covenant whereby the principal covenanted with the surety to pay the amount of a note on a given day, the surety is entitled to recover the full amount of the note, although he had not paid the note.

COVENANT.—The declaration stated, that whereas the defendant, before and at the time of the making of the indenture hereinafter mentioned, was indebted to H. D. and G. B. in the sum of 400l., secured to them by a promissory note made by the defendant, and by the plaintiff as the defendant's surety, and in 95*l.* 5*s.* 9*d.* for interest thereon; and thereupon, by a certain endorsement bearing date, &c., made between the defendant of the one part, and the plaintiff of the other part, the defendant covenanted with the plaintiff, that he the defendant would well and truly pay to the said H. D. and G. B. the sum of 400l., with interest as aforesaid, on the 13th day of August then next. Breach, that the defendant did not pay to the said H. D. and G. B., or either of them, the said sum of 400*l.* and interest, or any part thereof, on the said 13th day of August, or at any other time.

The defendant pleaded payment into Court of 1*s.* and no damages ultra, which latter averment was traversed by the replication.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after Hilary term, it appeared that the defendant being in embarrassed circumstances, the payees had informed the plaintiff that they should hold him liable upon the note, whereupon he obtained from the defendant the deed mentioned in the declaration. The note was still unpaid at the time of the trial: and it was objected that the plaintiff was therefore entitled to recover nominal damages only. The Lord Chief Baron overruled the objection, and under his direction the plaintiff had a verdict, damages 500*l.*

Erle now moved for a new trial, on the ground of misdirection. The plaintiff, not having actually paid any money on the note, has suffered no substantial injury, and is entitled to nominal damages only. The money might have been paid by the defendant after the day of payment mentioned in the covenant. The action is prematurely brought. In *Hambleton* v. *Veere*, 2 Saund. 169, where the plaintiff declared for an injury in procuring his apprentice to depart from his service, and for the loss of his service for the whole residue of his term of apprenticeship, and the jury assessed the damages generally, the judgment was arrested on the ground that the term had not expired when the action was brought. Here the plaintiff had no substantial cause of action until after payment of the note by him. There is nothing to prevent the payees of the note from suing the defendant, in which case he will have to pay the money twice over.

Parke, B.—I think there ought to be no rule. This is an absolute and positive covenant by the defendant to pay a sum of money on a day certain. The money was not paid on that day, nor has it been paid since. Under these circumstances, I think the jury were warranted in giving the plaintiff the full amount of the money due upon the covenant. If any money had been paid in respect of the note since the day fixed for the payment, that would relieve the plaintiff *pro tanto* from his responsibility. The defendant may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt; but at law the plaintiff is entitled to be placed in the same situation under this agreement, as if he had paid the money to the payees of the bill.

Alderson, B.—The question is, to what extent has the plaintiff been injured by the defendant's default? Certainly to the amount of the money that the defendant ought to have paid according to his covenant. The case resembles that of an action of trover for title-deeds, where the jury may give the full value of the estate to which they belong by way of damages, although they are generally reduced to 40*s.* on the deeds being given up.

Gurney, B., and *Rolfe, B.*, concurred.

Rule refused.

90. WOLMERSHAUSEN v. GULLICK, L. R. 2 Ch. Div. 514.
Court of Chancery, 1893.

A surety whose liability to pay more than his proportion of the debt has been fixed, may, in equity, compel the co-sureties to exonerate him to the extent of their aliquot shares.

The plaintiff was the widow and executrix of George Wolmershausen, whose estate was being administered by the court, and this action was brought by leave of the court against Thomas Gullick and John Patton as co-sureties with the deceased for contribution. The facts appear in the opinion.

Farwell, Q. C., *and Birrell*, for the Plaintiff.

Haldane, Q. C., and *Curtis Price*, for the Defendant Gullick.

Whitehorne, Q. C., and *T. L. Wilkinson*, for the Defendant Patton.

WRIGHT, J., at the conclusion of the arguments, dismissed the action as against the Defendant Patton with costs, but reserved judgment as between the Plaintiff and the Defendant Gullick.

WRIGHT, J. This case raises an important question with respect to which there is a remarkable absence of express authority. The Plaintiff is the executrix of a person who became surety with four others for a large sum of money advanced by a bank to a company. The surety's estate is being administered in the Court, and the bankers put in a claim as creditors for the whole amount of the guarantee. The Plaintiff resisted the claim and succeeded in reducing it from £6000, but it has been finally allowed for a sum of about £4500. The Plaintiff is now called upon to pay that sum, and brings this action against co-sureties for contribution. The Plaintiff has not yet paid anything. One Defendant I have dismissed from the action on the ground that he is discharged by a composition under sect. 18 of the *Bankruptcy Act*, 1883, inasmuch as it appears to me that his liability to contribute, although not ascertained at the time of the bankruptcy proceedings, nor included in his schedule of liabilities or in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained, was a liability within the meaning of sect. 37 of the Act, and therefore a debt provable in the bankruptcy: *Hardy* v. *Fothergill*, 13 App. Cas. 351.

The principal defence of the other Defendant is that the Plaintiff is not entitled to maintain this action until she has paid more than her proportion, or at any rate until she has paid

her proportion. The Plaintiff is willing to pay her proportion, but she insists that the actual payment of it is not a condition precedent to her right to sue, and says that at any rate she is not obliged to pay the whole in the first instance and then sue for reimbursement. If she is obliged to pay the whole before actual contribution from the co-surety, the business in which the testator's assets are invested will be embarrassed by the withdrawal of so much of the capital even for a short time. Obviously if a man were surety with nine others for £10,000, it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9000 until he could recover the £9000 by actions or debtor summonses against his co-sureties.

The questions are whether the action can be maintained, and what is the precise extent of the relief (if any) which can be given. By the Roman law, as it stood in the time of *Justinian*, sureties had, generally speaking, a right to compel the creditor to enforce payment against them *pro rata* only. The superior Courts of common law in this country have never entertained any action for contribution by a surety against his co-surety, except the action for money paid, and from the time of *Davies* v. *Humphreys*, 6 M. & W. 153, which was decided in the year 1840, it has been treated as settled law that the surety cannot maintain this action until he has actually paid more than his own proportion, because this action assumes a debt due and payable to the Plaintiff, and there is no legal debt due and payable, and the creditor may yet enforce payment of the whole balance from the co-surety. Nor did the Courts of common law ever give in the case of co-sureties the equitable relief which they were accustomed to give in many other cases of joint or common liability, by compelling contribution after judgment and before execution by means of a writ of *auditâ querelâ* or *scire facias* to limit the creditor's execution to the proper share payable by the particular defendant. This will be seen from the collection of ancient cases in 3 Rep. pages 12 and following.

By the custom of the City of London an equitable action lay in the City Courts by a surety before he had paid anything to have it ordered that he and his co-sureties should be charged *pro ratâ* only—"*ut uterque eorum oneretur pro ratâ*". *Offley and Johnson's Case*, (26 Eliz.), 2 Leon. 166. * * *

In 1868, in *Wooldridge* v. *Norris*, L. R. 6 Eq. 410, executors of a surety obtained an order for indemnity and payment by a per-

son who had covenanted to indemnify the testator against his liability as surety, although the executors had not paid or been sued. The judgment, however, proceeded on the particular terms of the covenant.

In the same year, in *Cruse* v. *Paine*, L. R. 6 Eq. 641; 4 Ch. 441, where a vendor of shares was entitled to be indemnified by his vendee against calls, Lord *Hatherley* declared the liability of the vendee for future calls, and ordered him to indemnify the vendor's estate, and to procure its release or discharge "either by payment of the calls or otherwise, with liberty to apply in Chambers, &c."

In 1872, in *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372, 377, WILLES, J., said:—"The surety, * * * as soon as his obligation to pay is become absolute, has a right in equity to be exonerated by his principal."

In 1874, in *Lacey* v. *Hill*, L. R. 18 Eq. 182, 191, upon a creditor's claim in an administration, *Jessel*, M. R., said:—

"Whatever may be the case at law * * * it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him. * * *

The preceding cases from *Cruse* v. *Pain, supra,* downwards have been referred to, not as having any direct bearing on the rights of co-sureties, but as throwing some light on the nature and extent of the relief which can be given in equity in analogous matters. There are only two remaining authorities. In 1881, in *Ex parte Snowden,* 17 Ch. D. 44, 46, 47, a surety who had paid his own share and no more, and who had not been called upon to pay more, issued a debtor's summons against his co-surety for half of what had been paid, and he obtained an adjudication of bankruptcy, which the Court of Appeal annulled on the ground that, until a surety had paid more than his share, there is no legal or equitable debt to sustain bankruptcy proceedings. Lord Justice JAMES is reported to have said:—"I think your proper remedy is to call on *Snowden* to pay the bank £541 * * * I believe the proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his co-sureties to compel them to contribute to pay the

debt to the creditor, just as he would be entitled to call on them for contribution if he had been sued by the creditor, asking that he should be indemnified by his co-sureties against paying the whole debt, or whatever risk he ran." The report in the *Law Journal* is as follows:—"The proper course when a surety is called upon to pay the whole debt, for which he is liable with his co-surety, is to call upon his co-surety for contribution and to indemnify him against paying the whole; and the only mode in which in equity you can compel a co-surety to pay his proportion of the debt is to show that you have paid your proportion, or more than your proportion, of the debt, and are liable for the residue." In the *Weekly Reporter* it is, "The proper course when a surety is called upon to pay the whole debt for which he is liable would be to call upon his co-sureties for contribution, just as he would be entitled to have done if a bill had been filed against him by the principal creditor, asking that he should be indemnified against paying the whole." In 1883, in *Macdonald* v. *Whitfield,* 8 App. Cas. 733, 750, Lord Watson, *pro cur.*, declared the right to contribution of a surety who had not paid, but had had judgment against him, in this form—"Entitled and liable to equal contribution *inter se.*" In Lord Justice LINDLEY'S work on Partnership, 5th Edition, page 374, it is observed that "before the passing of the *Judicature Acts,* a right to contribution or indemnity, arising otherwise than by special agreement, was only enforceable at law by a person who could prove that he had already sustained a loss. But in equity it was very reasonably held, that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all divisions of the High Court. Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been indemnified; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent the full amount provable against his estate, and not only the

amount of dividend which such estate can pay. In strict conformity with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their co-partners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid. So a trustee of shares liable to calls is entitled to be indemnified by his *cestui que trust* against them before they are paid." This statement of law is an authority in favour of the view that some relief can be given, but it does not specify the form or limit of the relief; nor do any of the authorities cited in the notes throw any further light on the matter. Nor have I been able to obtain assistance from English or American writers on equity or on the law of suretyship. The Plaintiff's difficulties have been increased by this, that an application by her for leave to use the third party procedure ordinarily applicable in cases of contribution or indemnity was refused in the administration action on the ground that the procedure is not available in an administration action. And even if the question had arisen upon third party procedure, nearly the same difficulties would have occurred.

In this state of the authorities I think that, if the Plaintiff had made the creditor a Defendant to the present action, I ought to have held that the allowance of the principal creditor's claim in the administration action was equivalent to a judgment against the Plaintiff for the whole amount of the guarantee and that on the precedents of *Morgan* v. *Seymour*, 1 Ch. R. 120, and *Deering* v. *Earl of Winchelsea*, 1 Cox 318, the Plaintiff would have been entitled to a declaration of her right to contribution and to an order upon the solvent co-surety to pay his proportion to the principal creditor. The principal creditor not being a party, I think that I cannot order payment to him or directly prevent him from enforcing his judgment against the Plaintiff alone. Nor can I at present order the co-surety to pay his half to the Plaintiff, for the Plaintiff cannot give him a discharge as against the principal creditor, and this case is not like the case of a Plaintiff who merely claims indemnity, as in the cases referred to by JESSEL, M.R., in *Lacey* v. *Hill*, *supra*, in which no question arises as to any other party. But I think that I can declare the Plaintiff's right, and make a prospective order under which, whenever she has paid any sum beyond her share, she can get it back, and I therefore declare the Plaintiff's right to contribution, and direct that, upon the Plaintiff paying her own share, the Defendant *Gullick* is to indemnify her against further

payment or liability, and is, by payment to her or to the principal creditor or otherwise, to exonerate the Plaintiff from liability beyond the extent of her own share. The Plaintiff must have liberty to apply in Chambers and generally to apply.

A point was made as to the *Statutes of Limitations*. The principal creditor's claim was put in 1879. But I think that I must hold that, even if the statute can begin to run before the surety has paid more than his proportion, at any rate it does not run until his liability is ascertained, and that did not occur until 1890.

There was another point made that the Plaintiff ought to have proved against the estate of the co-surety Patton, but if that were so, so might the Defendant Gullick. It is agreed that, if such proof could have been and had been made, it is to be taken that £200 would have been received. I think that the Plaintiff and Defendant should each bear half of this, and the Defendant's liability to the Plaintiff will be reduced accordingly by £100. I think that the Plaintiff acted reasonably and in the interest of all parties in resisting and reducing the principal creditor's claim, and that the Defendant ought in equity to contribute half the costs of those proceedings: see *Kemp* v. *Finden*, 12 M. & W. 421; *Lawson* v. *Wright*, 1 Cox 275; *Hole* v. *Harrison*, 1 Ch. Ca. 246. I therefore give judgment in that form in favour of the Plaintiff with costs.

CHAPTER VI

THE SURETY'S DEFENSES

SECTION 1. DEFENSE FOUNDED UPON A MATERIAL ALTERATION OF THE CONTRACT

OF THE PRINCIPAL CONTRACT.

91. WHITCHER v. HALL, 5 B. & C. 269, 11 E. C. L. 458.
Court of King's Bench, Hilary Term, 1826.

Any material alteration of the principal contract without the consent of the assurer is sufficient to discharge him. The question is not whether the alteration is slight, but whether the contract performed is the original contract which the surety undertook should be performed.

Assumpsit for the recovery of a quarter's rent for the milking of thirty cows, which by the terms of the agreement had become due.

Plaintiff had verdict for 40*l.*, but liberty was reserved to defendant to move to enter nonsuit. A rule *nisi* for that purpose having been entered at last Michaelmas term. [19]

Merewether & *E. Lawes* now showed cause.

C. F. Williams and *J. Bagley* contra.

The facts are sufficiently stated in the opinions.

BAYLEY, J.—I think that the rule for entering a nonsuit ought to be made absolute. By the agreement which is set out in the declaration, the plaintiff agreed to let, and Joseph Hall agreed to take, the milking of thirty cows, (not more nor less,) for the sum of 7*l.* and 10*s.* per cow per annum, to commence on the 14th of February, 1824, and on the conditions therein mentioned. The agreement was, that Joseph Hall was to have the milking of thirty cows, and the benefit was to enure to Joseph not to James, but the latter stipulated that he would pay the whole rent. One question is, whether that is an entire contract as to the

[19] The statement of the case is materially abridged.

number of cows. If it be, Joseph was entitled to have the milking of thirty cows during the continuance of the term. If it was not an entire contract, but a contract to pay for so many cows as the plaintiff should supply, and the plaintiff supplied twenty-nine or any other number, he would be entitled to payment for so many. I am of opinion that this was an entire contract for the purchase of thirty cows; and if at the commencement of the term the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. I do not enter into the question whether there was a performance of the contract at the commencement of the term. It is sufficient to say that there was a new agreement, without the knowledge of James; that Joseph was to have the milking of twenty-eight cows during one part of the year, and thirty-two during the other part. That, as it seems to me, was not a continuance of the original bargain, which was for the milking of thirty cows, but a new agreement. The new agreement was binding only on those persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then James is bound by it, otherwise he is not. There is no hardship upon the plaintiff, for he knew that James stipulated to pay the rent upon his, the plaintiff's, fulfilling the terms of the original bargain, and that he, James, was not bound to consent to the substitution of a new contract. In *Heard* v. *Wadham,* 1 East, 619, and *Campbell* v. *French,* 2 H. Black, 163; 6 T. R. 200, it was held that the performance of a contract, substantially the same as that originally made, did not give a right of action against a surety who had not consented to the alteration. Here the plaintiff attempts to maintain his action by proving the performance not of the contract declared on, but of a subsequent agreement. But he has averred, and was bound to prove performance of the original agreement. That he has not proved; and, upon that ground, I am of opinion that he was not entitled to recover, and that the rule for entering a nonsuit ought to be made absolute.

HOLROYD, J.—I am also of opinion that this action is not

maintainable, and that the rule for entering the nonsuit should be made absolute. The defendant stands in the situation of a surety, inasmuch as the plaintiff agrees to let, and Joseph Hall to take. If the agreement had stopped here, Joseph Hall would be liable to pay the rent, but then there is an additional agreement that James also should pay rent. Joseph still, however, continues liable for the rent, and James is liable only by reason of his special agreement. This seems to me an entire agreement for the letting of the entire number of thirty cows, neither more nor less. The term *at so much per cow* is introduced only to measure the rent payable. Supposing there was no stipulation that the rent should be paid in advance, it would be incumbent on the plaintiff, if he sought to recover rent, to aver and prove that the rent had accrued due; and that could only be done by showing that Joseph Hall had had the milking of thirty cows during the period in respect of which the rent was claimed. It is stipulated in this case, indeed, that the rent should be paid before the quarter commenced. But still the plaintiff would be bound to aver and prove that he was ready at all times, during the time that the contract continued, to perform his part of the contract. It seems to me that the original agreement was at an end, and that a new agreement was substituted in its stead, and that James, not being a party to it, is not liable for the breach of it. This is very similar to the case of a surrender of a lease by operation of law. In Comyn's Dig. tit. Surrender, (I. 1,) it is laid down, if a lessee for years accepts a new lease by parol when the first lease was by indenture, it operates as a surrender in law. So here, the new agreement by parol varying from the first entered into by the plaintiff and Joseph Hall, operated as an abandonment of the first agreement. The first agreement having been put an end to by the principal parties, the surety is discharged. For these reasons I am of the opinion that the rule for entering a nonsuit ought to be made absolute.[20]

[20] The dissenting opinion of Littledale, J., is omitted.

92. CAMBRIDGE SAVINGS BANK v. HYDE, et al, executors, 131 Mass. 77.

Supreme Judicial Court, Massachusetts, 1881.

Alteration—If the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged.

MORTON, J.—This is a suit against the executors of one of the sureties upon a promissory note held by the plaintiff. By the note, which is dated October 16, 1871, the maker promises to pay to the plaintiff $6000 on demand, with interest at the rate of seven and one-half per cent. per annum, payable semi-annually. At the trial, it appeared that the treasurer of the plaintiff, some years after the date of the note, having authority to do so, wrote upon the back of the note the memorandum, "Rate of interest to be 6½ per cent. from Oct. 10, 1876." The defendants asked the court to rule "that any change in the rate of interest of the note, whether made on the face of the note or by a memorandum in the margin or upon the back of the note, was a change in the terms of the contract, and a material alteration of the note such as would discharge the defendant's testator, if made without his consent, and that the indorsement upon the back of the note in suit was such an alteration;" which ruling the court refused.

The defendants contend, in the first place, that this memorandum thus made was a material alteration, in the sense of a mutilation, of the note, which avoided it, as to all parties not consenting to it. In the cases where it has been held that a material alteration of a note or other contract avoids it, there has been some change by erasure or interlineation in the paper writing constituting the evidence of the contract, so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground of the decisions is that the identity of the contract is destroyed. *Wade* v. *Withington,* 1 Allen, 561. *Commonwealth* v. *Emigrant Savings Bank,* 98 Mass. 12. *Belknap* v. *National Bank of North America,* 100 Mass. 376. *Hewins* v. *Cargill,* 67 Maine, 554. But in the case at bar it is clear that, using the word in this sense, there has been no alteration of the note. The original note remains intact . It is in no respect altered or made different. The memorandum on the back is evidence of an independent collateral agreement, and has no more effect than if it had been written on a separate paper. *Stone* v. *White,* 8 Gray, 589.

The defendants also contend that, if the memorandum is to

be treated as an independent collateral agreement, yet it makes such a change in the terms of the contract as to discharge the sureties, who did not consent to it. It is clear that, if a creditor makes any agreement with the principal debtor, or does any other act which is prejudicial to the rights of the surety, the surety is discharged from his liability. Thus, if the creditor, by a valid agreement founded upon a sufficient consideration, extends the time of payment of the debt, the surety is discharged. The reason is, that such an agreement materially affects the rights of the surety, since it prevents him from paying the debt and having an immediate remedy against the principal debtor. *Hunt* v. *Bridgham,* 2 Pick. 581. *Agricultural Bank* v. *Bishop,* 6 Gray, 317. Mr. Justice STORY states the rule to be, "that if a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged." I Story Eq. Jur. Sec. 325. The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him. Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that, if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged. *Smith* v. *United States,* 2 Wall. 219. *Appleton* v. *Parker,* 15 Gray, 173. *General Steam Navigation Co.* v. *Rolt,* 6 C. B. (N. S.) 550. *Bowmaker* v. *Moore,* 7 Price, 223. *Holme* v. *Brunskill,* 3 Q. B. D. 495.

In the case at bar, the new agreement was, that, after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of six and a half instead of seven and a half per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that

this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any time. The plaintiff could at any time have sued on the note, and the sureties could at any time have paid the note and have had a right to sue their principal at once. The agreement was merely a stipulation to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change; and that the ruling of the Superior Court to that effect was correct.

Judgment on the verdict for the plaintiff.

M. F. Dickinson, Jr., & H. R. Bailey, for the defendants.

G. S. Hale, (*C. F. Walcott* with him) for the plaintiff.

93. THE NATIONAL MECHANICS' BANKING ASS'N., appellant, v. CONKLING, et al., respondents, 90 N. Y. 116.

Court of Appeals, New York, 1882.

Sureties on the bond of the obligee's employe are released by a total change in the position and duties of the employe. Construction of surety's engagement. Liability of surety is strictissimi juris.

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made May 10, 1881, which reversed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 24 Hun, 496.)

This action was upon a bond executed by the defendants, the material portion of which is set forth in the opinion, wherein also are stated the material facts.

Eugene H. Pomeroy for appellant.

John H. Bergen for respondents.

EARL, J.—In September, 1863, the plaintiff employed the

defendant Joseph C. Conkling as a book-keeper in its bank, at a salary of $400. At the time of his employment, and to secure his fidelity, a bond in the penalty of $10,000 was executed to the plaintiff, which contained the following recitals and conditions:

"Whereas, the above-named, the Mechanics' Banking Association, have appointed the above-named Joseph C. Conkling to the office of a book-keeper of the said association, and the said Joseph C. Conkling hath accepted the same and consented to perform the duties thereof, now the condition of this obligation is such that if the above-named Joseph C. Conkling shall faithfully fulfill and discharge the duties committed to and the trusts reposed in him as such book-keeper and shall also faithfully fulfill and discharge the duties of any other office, trust or employment relating to the business of the said association which may be assigned to him, or which he shall undertake to perform, and shall also, without neglect or delay, inform the president and cashier of the said association of any embezzlement of the money, property or goods belonging to, and of any fraud whatever committed upon, the said association, of any false entry, error, mistake or difference of accounts in the books thereof which he may discover, or which shall come to his knowledge as such book-keeper as aforesaid, or whilst engaged in any other office, duty or employment relative to the business thereof, and which he may discover, or which shall come to his knowledge, in any matter or thing whatever appertaining thereto; and shall also faithfully keep all the secrets of the said association; then the above obligation to be void, otherwise to remain in full force and virtue."

The salary of Joseph as book-keeper was subsequently increased and he continued to be book-keeper until 1870. In that year he was appointed the receiving teller of the bank at an increased salary, and he continued to be and to act as such teller until October 10, 1879, when he resigned. After his resignation it was discovered that while acting as teller he had embezzled $2700 of the funds of the bank. This action was brought against all the obligors upon the bond to recover the amount thus embezzled. The respondents are the sureties upon the bond and they alone defended.

There was no breach of the condition of the bond while Joseph held the employment of book-keeper, and the question to be determined is whether, according to the conditions of the bond, the sureties are liable for the embezzlement committed by their principal while acting as teller. We have come to the conclusion, not without some hesitation and doubt, that they are not.

The recital in the condition of the bond shows that Joseph had been appointed to the office of book-keeper; that he had accepted that office and consented to perform the duties thereof. That was the office brought to the attention of the sureties and which they had in mind when they executed the bond. The recital in such bonds, undertaking to express the precise intent of the parties, controls the condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key, and so it has been held in many cases. In London *Assurance Co.* v. *Bold* (6 Ad. & El. [N. S.] 514), WIGHTMAN, J., said: "In truth the recital is the proper key to the meaning of the condition." In *Hassell* v. *Long,* (2 M. & S. 363) ELLENBOROUGH, Ch. J., said that the words of the recital of a bond afforded the best ground for gathering the meaning of the parties. In *Pearsall* v. *Summersett* (4 Taunt. 593), it was held, as expressed in the headnote, that "the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate." (See, also, *Peppin* v. *Cooper,* 2 B. & A. 431; *Barker* v. *Parker,* 1 T. R. 287; *Liverpool Water-works Co.* v. *Atkinson,* 6 East, 507; *The Trademen's Bank* v. *Woodward,* Anthon's N. P. [2d ed.] 300).

Here the sureties undertook for the fidelity of their principal only while he was book-keeper; but if while book-keeper the duties of any other office, trust or employment relating to the business of the bank were assigned to him, their obligation was also to extend to the discharge of those duties. While book-keeper he might temporarily act as teller or discharge the duties of any other officer during his temporary illness or absence, or he might discharge any other special duty assigned to him, and while he was thus engaged the bank was to have the protection of the bond. There are no words binding the sureties in case of the appointment of their principal to any other office. They might have been willing to be bound for him while he was book-keeper or temporarily assigned to the discharge of other duties, but yet not willing to be bound if he should be appointed teller or cashier, and as such placed in the possession or control of all the funds of the bank. This is a case where the general words subsequently used must be controlled and limited by the recital. A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris* and must not be extended by construction. His contract must be construed by the same rules which are used in the construction of other contracts. The extent of his obligation must be determined from the language used,

read in the light of the circumstances surrounding the transaction. But when the intention of the parties has thus been ascertained, then the courts carefully guard the rights of the surety and protect him against a liability not strictly within the precise terms of his contract. (*Ludlow* v. *Simona*, 2 Cains' Cases, 1; *Crist* v. *Burlingame*, 62 *Barb.* 351; *McCloskey* v. *Cromwell*, 11 N. Y. 593; *Gates* v. *McKee*, 13 id. 232; *Rochester City Bank* v. *Elwood*, 21 id. 88; *Pybus* v. *Gibb*, 38 Eng. L. & Eq. 57).

The order should be affirmed and judgment absolute entered against the plaintiff with costs.

All concur.

Order affirmed and judgment accordingly.

94. THE STATE, use of Holmes County, v. SWINNEY, et al., 60 Miss. 39.

Supreme Court, Mississippi, 1882.

The surety is not released by the enactment, subsequent to the making of his contract, of a statute altering the contract of the principal.

Appeal from the circuit court of Holmes county.

Hon. C. H. CAMPBELL, J. On the 13th day of March, 1882, an action was brought in the name of the State, suing for the use of Holmes County, against J. S. Hoskins and his sureties, on his bond as tax collector of that county, for two several sums of money, for the years 1876 and 1877 respectively, which, it was declared, he had collected and failed to pay over to the treasurer of the county as the law required of him and as he was bound by the terms of his bond to do.

The third plea set up the defense that, "after the signing of said bond by said defendants, the said plaintiff, without the consent of the said defendants, on the twelfth day of January, 1877, by an act of the Legislature of the State of Mississippi, approved on said day and entitled 'An act to provide for the collection of the outstanding revenue for the fiscal year 1876,' altered, changed and extended the time for the collection of taxes due the State of Mississippi and the county of Holmes, and the time for the payment thereof by the said Hoskins to the State and county treasuries; whereby said defendants were released as sureties on said bond."

The fourth plea contained the same defence as the third, except that the act of the legislature relied upon in the latter as

releasing the defendants as sureties on the bond was an act entitled: "An act in relation to the public revenue and for other purposes," approved February 1, 1877. To the third and fourth pleas demurrers were filed and they, too, were overruled. The plaintiff declined to plead over and appealed to this court.

C. V. Gwin, for the appellant.

H. S. Hooker, for the appellees.

CAMPBELL, C. J., delivered the opinion of the court.

We decline to follow the courts of Illinois, Tennessee and Missouri, in their views that sureties on the bond of a tax collector are discharged by an act of the legislature passed after the execution of the bond, without their consent, giving further time for the collection of taxes and settlement by the officer, and we embrace and declare the more just and politic doctrine of the courts of Virginia, Maryland, and North Carolina, and hold that the official bond of the tax collector is given with a full knowledge of the right of the legislature to alter the dates fixed by law for the collection of taxes and the settlement of the collector, and subject to the exercise of that right at the pleasure of the legislature, without the assent of the sureties. *The Commonwealth* v. *Holmes,* 25 Gratt. 771; *Smith* v. *The Commonwealth,* 25 Gratt. 780; *The State* v. *Carleton,* 1 Gill, 249; *Prairie* v. *Worth,* 78 N. C. 169. See also *Smith* v. *Peoria,* 59 Ill. 412; *Bennett* v. *The Auditor,* 2 W. Va. 441; Cooley on Tax. 502.

The demurrer to the third and fourth pleas should have been sustained.

95. McCONNELL v. POOR, 113 Iowa 133, 84 N.W. 968, 52 L.R.A. 312.
Supreme Court, Iowa, 1901.

Alterations specifically provided for by the contract, if made, do not release the surety.

Statement by LADD, J. Evans entered into a contract with plaintiff, July 14, 1891, to construct a dwelling house for him, and on the same day executed a bond with defendant as surety conditioned "that, if the said Evan F. Evans shall duly perform said contract, then this obligation is to be void, but, if otherwise, the same to be and remain in full force and virtue." The house was built and in 1892 Evans began an action against the plaintiff for a balance due. McConnell filed a cross petition in which he averred several breaches of the contract and prayed for damages.

The result was a judgment against Evans for $943, to recover which this action was brought against the defendant as surety on the bond. By way of defense, he pleaded alterations in the contract in four particulars: (1) That the work was done under the direction of McConnell, instead of Sunderland, the architect, as agreed; (2) the broken ashlar work was constructed with close joints, instead of being tuck pointed, as stipulated; (3) the inincreased cost occasioned by this change was not estimated at the rate at which the work was taken, and added to the amount to be paid as exacted by the terms of the contract; and (4) other changes were made without estimating the increased cost, as required in the agreement. To these defenses the plaintiff pleaded adjudication in Evans against McConnell as an estoppel. The defendant also answered that he had advanced, in payment of labor and material, with McConnell's knowledge and consent, a large amount of money, and was released from liability on the bond to that extent. Trial to jury and from judgment on a verdict against him, the plaintiff appeals.

Kelley & Cooper and *Blake & Blake,* for appellant.

A. M. Antrobus and *Seerley & Clark* with *C. L. Poor,* in *propria persona* for appellee.

LADD, J., delivered the opinion of the court:

* * * The appellant insists the contract permitted changes, and this is true. But the manner of making them is specifically pointed out. "The value of such changes or alterations, without additions or deductions, will be estimated according to the rate at which the work has been taken, and the amount added to or deducted from the amount hereinafter specified." This precluded the parties from entering into arrangements for additional work, or that of a different character, without compensation corresponding relatively to the contract price. If this were not so, an entirely different building from that stipulated might have been erected at the surety's cost. Thus, the alleged change in the broken ashlar work alone occasioned an additional expense of $1600 or more,—more than the balance claimed. While the plaintiff had the option of making alterations, he might not do so without paying therefor at the rate fixed by the contract.

Affirmed.

96. MORRISON, et al., v. ARONS, et al., 65 Minn. 321, 68 N. W. 33.
Supreme Court, Minnesota, 1896.

Non compliance with or departure from the essential terms of the principal contract constitutes an alteration of such contract, whereby the surety is released from his undertaking.

Action in the district court for Ramsey county. The case was tried before Kelly, J., who ordered judgment against defendant Arons for $801.43, and against defendants Williams and Hall for $559.50, with interest. From an order denying a motion for a new trial defendants Williams and Hall appealed. Reversed.

Fred N. Dickson, for appellants.

Frank A. Hutson and *Warner, Richardson & Lawrence,* for respondents.

COLLINS, J. Plaintiffs entered into business as co-partners, and employed defendant Arons as general manager, salesman, and collector. According to the written contract, the employment was to continue as long as mutually agreeable. Arons was to receive as compensation for his services a sum equal to one-half the net profits of the business, and these profits were to be ascertained as follows:

"During the existence of the employment of said party of the second part, once each month, commencing with December 1, 1892, a just and true inventory of the assets and liabilities of said firm shall be taken, and all accounts which are considered bad shall be charged to profit and loss, and from the residue of the accounts due said firm shall be deducted five per cent. of the aggregate amount thereof as a reserve to cover bad debts, and the excess of the assets over the liabilities and the capital stock of said firm shall be determined and agreed upon as the net profits of said business, and a sum equal to one-half of such excess shall then and there be credited to said party of the second part as and for his compensation, and be considered an expense of said business. That when the relation between said firm and said party of the second part is extinguished, then the actual amount of profit or loss, as the case may be, of the business of said firm, shall be determined, and, if there has been a net profit, a sum equal to one-half thereof shall be allowed said party of the second part, and any errors in estimating the net profits at the previous stated periods shall then and there be rectified, and, if said party of the second part shall have withdrawn more money from said firm than he is entitled to, he shall then and there forthwith repay the same; and, if there is any amount due him on account of his compensation, it shall then and there forthwith be paid him."

Arons, as principal, and defendants Williams and Hall, as sureties, entered into a bond, in which plaintiffs were obligees, which, after reciting that Arons was about to enter plaintiffs' employ as general manager, salesman, and collector, provided, and was conditioned, that:

"If the said Charles T. Arons shall faithfully and honestly perform all the duties of his said employment, and shall keep just and true accounts of all moneys received and expended and all property bought and sold for or on account of said firm by him or under his direction, and shall faithfully and fully, and as often as required, account for and pay over to said firm any and all moneys belonging thereto collected or received by him, or which in any manner come into his hands in the course of his employment by said firm; and shall forthwith and on demand repay to said firm any and all moneys he shall have withdrawn therefrom for his own use in excess of the compensation due him for his services under the terms of his agreement with said firm in that behalf (whether such moneys shall have been so withdrawn with the consent of said firm or otherwise), as often as it shall be determined that such overdraft has been made, then the above obligation to be void; otherwise to remain in full force and virtue."

This action was brought to recover an amount of money said to be due on the bond, and the trial was by the court. No evidence was introduced tending to show any other settlement or accounting than that had when Arons' term of employment ended. In fact plaintiffs admitted that they never ascertained, and could not, at the time of the trial ascertain, what the respective monthly profits of the business had been. At the conclusion of the plaintiff's case and again at the conclusion of the entire case, the defendant sureties moved the court to dismiss the same as to them upon the ground that, as it affirmatively appeared from the evidence and admissions that no monthly settlements or accounting had been had as provided for in the contract of employment, the sureties upon the bond had been released from liability. These motions were denied, and the court made its findings of fact and conclusions of law ordering judgment in plaintiffs' favor.

The court found the allegation in the complaint that no settlement or accounting was had between the parties until after Arons' employment ceased, to be true. We agree with the court below in its construction of the contract, but we cannot concur in its holding that the sureties were not discharged by the failure and omission to have monthly accountings and settlements between Arons and plaintiffs. The former was to have advanced to him $100 each month for personal expenses and on account of his compensation under an agreement that, if this amount, with other sums of money which came into his possession, exceeded one-half of the net profits of the business, the excess should be promptly refunded. What the profits were, and the sum due to plaintiffs, if anything, were to be provisionally ascertained each month; and, had this been done, it is quite certain that plaintiffs would have discovered before the expiration of 13 months that the business was not profitable, while Arons would have learned that he was far from earning a living out of it. The natural result would have been

for both parties to terminate their contract relation, and avoid further loss. It is evident that there would be much less hesitation on the part of a person called upon to become a surety upon a bond given for the faithful performance of a contract with such conditions than if the real situation was not to be ascertained for months. The condition in the employment contract whereby monthly accountings and settlements were agreed upon was an exceedingly beneficial one for all concerned. It was an essential feature of the contract whereby Arons agreed to conduct plaintiffs' business enterprise for an indefinite period of time, his compensation to be determined by the net profits. The contract of suretyship was departed from and varied when this provision was wholly disregarded, and the case is brought directly within the rule that, if an essential condition of such a contract is not complied with, a surety is not bound. A new trial must be had.

Order reversed.

Of the Assuring Contract.

97. DAVIDSON v. COOPER, et al., 13 Meeson & Welsby 342.
Court Exchequer Chamber, 1844.

Alteration of surety's contract by the addition of seals thereto without surety's knowledge or consent operates to discharge surety.

Assumpsit on a guaranty. Defendant had judgment.

The facts are sufficiently stated in the opinion.

Knowles, for the plaintiff in error.

Watson, for the defendant.

Lord Denman, C. J.—This was a declaration in assumpsit on a written guarantee, to which one defendant pleaded, that, while the guarantee was in the plaintiff's hands, it was, without the defendant's consent or knowledge, materially altered by the addition of two seals opposite the names of the defendant and the other party to it, whereby its apparent nature and effect were wholly altered. Issue being taken on this plea, the jury found it was so altered; and judgment has been given by the Court of Exchequer for the defendant, after having discharged a rule for judgment, *non obstante veredicto*, upon argument.

After much doubt, we think the judgment right. The strict-

ness of the rule on this subject, as laid down in *Pigot's case,* can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part. To say that *Pigot's case* has been overruled is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed.

Judgment affirmed.

98. ELLESMERE BREWERY COMPANY v. COOPER, et al., [1896] 1 Q. B. 75.

High Court of Justice, Q. B. D., 1895.

If the obligee accepts an assuring contract which varies in any material part from that which the obligors consented to execute, the sureties are released from liability.

Appeal from county court judge of Shropshire.

The plaintiff company, having appointed the defendant Joseph Cooper as their traveller and agent, required him to give security for the faithful discharge by him of his duties. He accordingly procured the other defendants, Walter Nunnerley, Thomas Em-

berton, John Pay, and Arnold Bromfield to become sureties for him, and to join him in making a bond whereby they bound themselves jointly and severally to the plaintiffs in a sum of 150*l.* The condition of the bond was that if Cooper should duly account for all moneys received by him as such traveller or agent and faithfully discharge his duties in such capacities, the bond should be void; and it was thereby provided that the liability of Nunnerley and Emberton should be limited to the sum of 50*l.* each, and that of Pay and Bromfield to 25*l.* each. After Cooper, Emberton, Pay, and Bromfield had executed the bond, Nunnerley executed it, but when doing so added to his signature the words "25*l.* only." The plaintiffs' manager, who witnessed all the defendants' signatures, accepted the bond so executed without protest. Subsequently Cooper failed to account to the plaintiffs for a sum of 48*l.*, and the plaintiffs sued Cooper and his four sureties upon the bond. The county court judge gave judgment against Cooper; but he gave judgment for the other four defendants on the ground that the addition of the words "25*l.* only" to the signature of Nunnerley was an alteration of the bond which materially affected the position of the sureties, and that they were consequently all, including Nunnerley himself, discharged from liability. The plaintiffs appealed.

A. T. Lawrence, for the plaintiffs.

Hansell, for the defendants.

1895, Dec. 5. The judgment of the Court (Lord Russell of Killowen, C. J., and Cave, J.,) was read by

LORD RUSSELL of KILLOWEN, C. J. This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper. At the trial before the learned county judge, judgment was given for the plaintiffs as against Cooper, and judgment was given for the four remaining defendants as sureties.

The facts were that Cooper, having become agent and traveller for the plaintiffs, was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants.

The bond was dated April 30, 1894. By its terms the five defendants were jointly and severally bound to the plaintiffs in the sum of 150*l.* It then recited that Cooper had been appointed agent for the company, and stated the condition of the bond to be that, if Cooper duly accounted for all moneys received by him for the plaintiffs, and otherwise performed the duties of his

agency, the bond should be void. It then provided that the liability of Nunnerley and Emberton (two of the defendants) should be limited to 50*l.* each, and that of Pay and Bromfield (two other of the defendants) to 25*l.* each. The effect, therefore, of the bond, as drawn, was that the principal and the sureties were jointly and severally bound in the sum of 150*l.*, but that liability could not be enforced against any of the sureties beyond the limit of the sum specified as to each of them. Nunnerley was the last to sign, and his signature thus appears on the bond: "Walter Nunnerley, twenty-five pounds only." The witness to the execution of each of the signatures was Mr. Bruce, the plaintiffs' manager, who, so far as appears, took the bond without making any objection to the manner of Nunnerley's execution; nor was it suggested that Nunnerley had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point, it cannot be assumed that Nunnerley in bad faith sought by the form of his execution of the bond to limit any liability he had previously agreed to undertake. The probability is that in giving particulars of his sureties Cooper had erroneously stated that Nunnerley had agreed to undertake liability to the extent of 50*l.*, whereas he had done so only to the extent of 25*l.* Subsequently Cooper, the principal, received moneys of the plaintiffs to the amount of 48*l.* for which he had failed to account; and judgment was given him at the trial for that amount. The contested question was the liability of the other defendants, the sureties. The learned county court judge held that no one of them was liable, and gave judgment for them accordingly. The present appeal is against that judgment.

It was argued for the plaintiffs (1) that the form of Nunnerley's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties; (2) that, if an alteration, it was not a material alteration, and therefore did not discharge such sureties; and, lastly, (3) that in any case Nunnerley was liable to the extent of 50*l.*, or if not of 50*l.*, at least to the extent of 25*l.*

In my judgment, no one of these contentions is well founded. I think the effect of Nunnerley's mode of execution, on the facts of this case, is substantially the same as if the proviso in the body of the bond had been altered by him before execution by him by striking out 50*l.* and inserting instead 25*l.* It was, therefore, an alteration. Its effect I shall presently discuss.

The argument of the learned counsel for the appellant was, that the loss in question was to be divided into fourths, and that so

long as each fourth did not exceed the sum for which each surety had become liable, each of them was bound to pay, and without any right to contribution from his co-sureties, whether the fixed limit of his liability was for the greater or the smaller amounts. Here it was said the one-fourth of the loss was 12*l.*, and as Nunnerley had clearly intended to make himself liable, as also had Pay and Bromfield, for 25*l.* each, it was immaterial whether Nunnerley signed for 25*l.* or for 50*l.* Each, it was contended, was bound to pay 12*l.*; and Emberton was bound to bear no more of the loss than the others.

In my judgment, this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties *inter se* rests. That principle is, that sureties for the same principal and for the same engagement, even although bound by different instruments and for different amounts, have a common interest and a common burthen; so that if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligation to the creditor he has discharged. But how is the amount of the claim to be determined? According to the argument of the learned counsel for the plaintiffs, it is to be determined by the number of the sureties. Thus, if there are four sureties and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum paid. But how is the amount to be determined, where, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that where the full amount of the bond is due and payable to the creditor, that liability can only be enforced against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each would have paid to the limit of his liability. But suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties, who has fixed the limit of his liability at one-half the amount of his bond. Could it be said that he had no right to any contribution from his co-sureties? Surely not. The burthen is a common burthen of all, but unequally distributed. By

his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties up to the fixed limit. It would be against all equitable principles that in such a case the other sureties should go free because it happened that the creditor had enforced payment against one only. Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was 1000*l.*, has realized 1000*l.* from such security being bound with three other sureties with a limit of liability of 2000*l.* each, making in all 7000*l.* It is clear that that 1000*l.* must be taken into account for the benefit of all such sureties *inter se*. But upon what principle? Surely upon the only principle which will secure its equitable division, namely, proportional distribution. Thus the surety for 1000*l.* would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burthen has to be distributed. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but where the claim is less than such full amount, and is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid.

What I have so far said is, I think, to be gathered from the principles laid down in *Deering* v. *Winchelsea*, 1 Cox 318; but in *Pendlebury* v. *Walker*, 4 Y. & C. (Exch.) 424, Alderson B. expressly states the rule thus: "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equally, then proportionately to the amount for which each is a surety." In *Steel* v. *Dixon*, 1 Ch. D. 825, Fry J. cites with approval the language I have quoted; and, later, Pearson J., in *In re Arcedeckne*, 24 Ch. D. 709, adopts the language of Fry J. (See also *Ellis* v. *Emmanuel*, 1 Ex. D. 157, and *Evans* v. *Bremridge*, 2 K. & J. 174.

Apply this principle to the present case. I assume the bond to have been executed according to its original tenor without qualification or alteration. The total loss being 48*l.*, Emberton, having subscribed for 50*l.* out of the total of 150*l.*, would be liable for one third; and if he paid no more he would have no

claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscription. Stated as a sum in proportion, Emberton's liability would be arrived at thus: As 150 is to 50 so is 48 to the result. So worked out, Emberton would be liable for 16*l.* only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for 8*l.* each, and Nunnerley for 16*l.* Now, to appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerley. He explicitly says, "I execute the bond only on the terms of my liability being limited to 25*l.*" He could not, therefore, in any case be made liable for more. Whether he can be made liable even for 25*l.* I shall presently consider. What ,then, is the effect of the altered limitation to 25*l.* by Nunnerley upon the position of the other three sureties? Take Emberton's position. For simplicity, assume that the total liability to the plaintiff company for 48*l.* has been paid by Emberton. According to the tenor of the bond without the alteration, Emberton would have to bear two-sixths—equal to one-third of the loss; Nunnerley two-sixths —equal to one-third; and Pay and Bromfield one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerley, and if Nunnerley is not bound at all, would have no right of contribution against him. The alteration was then clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield. The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond . Each of them is entitled to say, "The contract into which I entered was on the basis of Nunnerley being a party to it with a liability of 50*l.* That is not the contract as it now appears from the bond, and I am, therefore, not bound by it." Their position would be still stronger if Nunnerley is not bound by the bond at all. The remaining question is—is Nunnerley bound at all? I have already intimated, that as he has expressly said, "I shall be liable only for 25*l.*", he cannot be made liable for the 50*l.*; but is he liable even for the 25*l.*? I think he is not. He, in good faith, expressly limits his liability to 25*l.*; but he undertakes that liability not as a separate or independent liability, but as a part of a contract in which three other sureties are joining him, against whom in certain eventualities he will have rights to recourse, between whom and himself a common burthen is to be borne, although unequally distributed. But if in fact such sureties are not bound by the contract (and we have adjudged that they are not), Nunnerley is

entitled to say, "This is not the contract into which I have entered and I am not bound by it."

The judgment of the learned county court judge must stand, and the appeal will therefore be dismissed with costs.

Appeal dismissed.

SECTION 2. DEFENSE FOUNDED UPON AN ABSENCE OF LIABILITY OF THE PRINCIPAL DEBTOR TO THE CREDITOR

99. SWIFT, et al., v. BEERS, 3 Denio 70.
Supreme Court, New York, 1846.

If the principal contract is illegal, the assuring contract is equally illegal. The latter partakes of the character of the former.

ASSUMPSIT tried at the New-York circuit in February, 1844, before KENT, late C. Judge. The plaintiffs gave in evidence a promissory note with a guaranty written under it, signed by the defendant, in the following words:

New York, 30th June, 1841.

"Sixty days after date the North American Trust and Banking Co. promise to pay to the order of Messrs. Swift & Co. thirty-seven hundred dollars, for value received, with interest having deposited with them as collateral security seven bonds of this company, secured under the Yates trust—three for one thousand dollars," (giving the amounts and numbers of the bonds.)

THOMAS G. TALMAGE, Pres't.

"For value received, I guarantee the payment of the above note at the time mentioned. J. D. Beers."

It was admitted that the North American Trust and Banking Company was a banking association, organized under the general banking law.

The defendant's counsel moved for a nonsuit, insisting that the note and guaranty were illegal and void; and the circuit judge being of that opinion, directed a nonsuit to be entered.

D. Graham, Jr., for the plaintiffs, now moved to set aside the nonsuit, and for a new trial. He denied that by the true construction of the 4th section of the act of May 14, 1840, amendatory of the general banking law, (*Stat.* 1840, *p.* 306,) all notes on time or on interest, were forbidden to be issued by the banking associations—but only such as were intended to be issued or put into circulation as money. He referred to *Stat.* 1838, *p.* 246, *sec.* 3;

Safford v. *Wychoff,* (1 Hill, 11;) *Smith* v. *Strong,* (2 id. 241;) and *Safford* v. *Wychoff,* (4 id. 442.) He also insisted that if the note were void, the guaranty was valid: and that a recovery could be had against the defendant either as a sole or a joint maker; and cited 17 Wend. 40; 19 John. 60; 1 Hill, 256; 4 id. 420; 19 Wend. 202; 17 id. 214.

S. Sherwood, for the defendant.

By the Court, BRONSON, Ch. J. We have no doubt about this case. The note is directly within the terms of the prohibition of the act of 1840; and we do not doubt but that it was equally within the intention of the legislature. That act has no reference to the circulation of such notes as money, but was designed to prohibit them altogether for any purpose.

The guaranty partakes of the character of the principal contract. It was intended to reinforce and secure it—and is equally illegal. The circuit judge was right in nonsuiting the plaintiffs.

New trial denied.

100. RUSSELL v. ANNABLE, 109 Mass. 72

Supreme Judicial Court, Massachusetts, 1871.

The sureties on a bond are not holden, if the instrument is not executed by the person whose name appears as principal therein.

Contract, brought August 3, 1870, against one of the sureties in the following bond given under the Gen. Sts. c. 123, sec. 104, to dissolve an attachment:

"Know all men by these presents, that Erastus Dennett and Chas. R. Pottle, of Boston in the county of Suffolk, as principal, and George M. Stevens, of Cambridge, and John F. Annable, of Somerville, in the county of Middlesex, as surety, are holden and stand firmly bound and obliged unto Arthur W. Russell, of Cambridge in said Middlesex, in the full and just sum of two hundred dollars, to be paid unto the said Russell, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the twenty-second day of July in the year of our Lord one thousand eight hundred and sixty-nine. The condition of this obligation is such, that, whereas the said Russell has caused the goods and estate of said Dennett & Pottle, to the value of two hundred dollars, to be attached on mesne process in a civil action, by virtue of a writ bearing date the 21st day of July, A. D. 1869, and returnable to the superior court for civil business to be holden at said Boston within and for the county of Suffolk on the first Tuesday of October next, in which said writ the said Arthur W. Russell is plaintiff, and the said Erastus Dennett and Charles R. Pottle the defendants, and whereas the said defendants wish to dissolve the said

attachment according to the provisions of the General Statutes in such cases made and provided; Now, therefore, if the above bounden Russell shall pay to the plaintiff in said action the amount, if any, which he shall recover therein, within thirty days after the final judgment in said action, then the above written obligation shall be null and void, otherwise to remain in full force and virtue.

"DENNETT & POTTLE, [seal]
"GEORGE M. STEVENS, [seal]
"JOHN F. ANNABLE, [seal]"

"Signed, sealed and delivered
in presence of
"EDWARD RAYMOND."

The declaration alleged that the plaintiff at said October term 1869 of the superior court duly entered the action named in the bond, and such proceedings were had therein that he obtained judgment against said Dennett & Pottle at April term 1870 for $110 damages and $21.49 costs, and no part of said judgment had been paid, though the defendant had often been requested to pay the same, and the defendant owed him the amount of said judgment and the costs subsequently accrued thereon. The answer denied each and every allegation of the plaintiff.

Trial in the superior court before Scudder, J., who by consent of the parties reported the following case before verdict: "This was an action on a bond, of which a copy is annexed. It appeared that Erastus Dennett and Charles R. Pottle were copartners, under the firm name of Dennett & Pottle, and that the execution of the bond, as to the principal, was by one of them. It was contended by the defendant that the bond was void upon its face; also that there was no legal execution of it by the principals, and therefore it was void as to the defendant. If these objections are valid, then judgment is to be for the defendant; if invalid, then judgment for the plaintiff for $138.83, with interest from June 24, 1870, being the date of original judgment and costs. The officer's return on the original writ and judgment may be referred to. The execution of the bond by the defendant was admitted." The return of the officer thus referred to, certified that the property attached by him for dissolution of which attachment the bond was given, was property of Dennett & Pottle, and that he took the bond "of said Dennett & Pottle, with George M. Stevens and John F. Annable as sureties."

J. S. Abbott, for the plaintiff.

C. C. Read, for the defendant.

AMES, J. It is well settled that one partner cannot bind his associates by affixing his signature, in the name and style of the firm, to an instrument under seal. To make such a transaction

binding it must appear that there was either a previous authority, or a subsequent ratification on the part of the other partners, adopting the signature as binding upon them. *Cady* v. *Shepherd*, 11 Pick. 400; *Van Deusen* v. *Blum*, 18 Pick. 229; *Swan* v. *Stedman*, 4 Met. 548; *Dillon* v. *Brown*, 11 Gray, 179. The report in this case presents no evidence of any previous authority or subsequent ratification, and it follows that the bond is not so executed as to bind the members of the firm.

The bond purports to be the joint and several contract of certain persons named therein as principals, and the defendant and George M. Stevens as sureties. The defendant's undertaking is only that the principal obligors shall fulfill the obligation which by the terms of the bond they have assumed. But if the bond was not binding upon both Dennett and Pottle, (as it was not, for want of due and proper execution of the instrument on their part,) they assumed no obligation, and it was not binding upon the sureties. It was essential to the bond that the principals should be parties to it; it is recited that they are so, and the instrument is incomplete and void without their signature. The remedy of sureties against their principals might be greatly embarrassed, if such an instrument as this should be held binding. There is nothing to estop any member of the firm, who did not sign it, from denying that he was a party to it, and it was no part of the defendant's contract that he should be surety for one member of the firm, and not for both. The instrument is incomplete without the signature of each partner, or proof that the signature affixed had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties. *Bean* v. *Parker*, 17 Mass. 591; *Wood* v. *Washburn*, 2 Pick. 24. * * *

The instrument, being found incapable of taking effect as a specialty, cannot operate as a simple contract. Cases have indeed arisen, in which a bond, duly executed, expressing a contract which the parties had a right to make, has been held to be valid at common law, although not made with the formalities, or executed in the mode, provided by a statute under which it purports to have been given. See *Sweetser* v. *Hay*, 2 Gray, 49, and cases there cited. But we find no case in which it has been held that a written instrument, purporting to be a specialty, and plainly intended by the parties to have all the incidents and characteristics of a bond in the strict and technical sense of that word, has ever been transmuted by the court into a simple contract, for the reason that

it has not been properly executed to take effect as a contract under seal.

It is therefore held by a majority of the court, that there should be judgment for the defendant.

101. WEARE v. SAWYER, 44 N. H. 198.

Supreme Judicial Court, New Hampshire, 1862.

A surety upon a promissory note, given by a school district as principal, is liable, in the absence of fraud, notwithstanding the name of the district was signed without authority.

ASSUMPSIT upon a promissory note of which the following is a copy: (*Weare* v. *School District,* 44 N. H. 189.)

"$725.

WEARE, Nov. 14, 1855.

For value received, we, John Jepson, prudential committee, and Paige E. Gove, clerk of School District No. 16 in Weare, duly authorized to hire money in the name of said district, for the purpose of building a schoolhouse, and John W. Chase, Moses Sawyer, Allen Sawyer, Daniel Sawyer, Peter C. Gove, L. W. Gove, Lewis Greenleaf, J. P. Adams, Amos Chase, M. F. Currier, D. G. Chase, A. H. Emerson, and D. S. Stanley, as sureties, jointly and severally promise to pay the town of Weare, or order, seven hundred and twenty-five dollars, on demand, with interest annually, it being a part of the ministerial fund belonging to said town of Weare, now in the hands of Hiram Simonds, to take care of said fund in behalf of the town.

JOHN JEPSON, Prudential Committee.
PAIGE E. GOVE, Clerk.
JOHN W. CHASE (and others), sureties."

Morrison, Stanley & Clark, for defendant.
Fowler & Chandler, on same side.
I. W. Smith, for plaintiffs. *Perley,* on same side.

BELLOWS, J. It has already been decided, in *Weare* v. *School District,* and *Weare* v. *Gove,* reported in this volume, that the vote to borrow money was not passed at a meeting duly called for that purpose; and, therefore, as the agents of the district had no authority to put its name to the note, they are themselves bound; and the remaining ground of defense proposed to be set up is, in substance, that at the time of the making of the note it was agreed that the defendants' undertaking should extend no farther than to insure the performance of such contract as had been legally entered into by the school district, whereas the defendants' contract to pay the money is on its face absolute.

The general rule would, undoubtedly, exclude such parol

evidence; and we are not aware of any exception by which it could be admitted.

It is true that parol evidence may be received to prove that one of the makers is but a surety; although nothing of the kind appears upon the face of the instrument. *Bank* v. *Kent,* 4 N. H. 221. This, however, is not for the purpose of varying the obligation as originally entered into, but is admitted in connection with proof of indulgence to the principal, to show a subsequent discharge of such surety, by substituting a new contract, to which he was no party.

The case of *Hoyt* v. *French,* 24 N. H. 198, is in point. There it was proposed to show by parol that when the surety signed the note it was agreed that the first money paid by the principal should be applied thereon, and that money had been so paid, but not applied; and it was held that the evidence was not admissible, as the effect would be to vary the terms of the note. Of the same character is *Lang* v. *Johnson,* 24 N. H. 302.

It is said, also, that the liability of the surety is coextensive only with that of the principal, and that the school district must be regarded as the principal here. As a general proposition it may be true that, in the contract of guaranty, there must be a principal who is also liable. It would be true in all cases where the guarantor stipulated to guaranty the performance of the principal's engagement.

But in that large class of cases where the contract is to pay a specific sum of money, there, we apprehend, the guarantor or surety is, in the absence of fraud, bound by the terms of his contract, although his principal, by reason of coverture, infancy, or want of authority in the person assuming to act for him, is not bound.

So it is laid down (Chit. on Cont., 9 Am. Ed. 441) in respect to infants, married women, and other persons incompetent to contract; and we see no reason why the same doctrine does not apply to the case of a want of authority. In fact it appears to have been so applied in the case of a surety for a partnership, where the name of the firm was affixed to the note without authority. *Stewart* v. *Boehm, 2 Watts,* 356; 3 U. S. Dig. 496, sec. 154.

The same principle is recognized in *Conn* v. *Coburn,* 7 N. H. 368-373, where a surety for an infant upon a promissory note, given for necessaries, having paid the note, was permitted to recover the amount of the infant; Parker, J., holding, that as the surety was bound, as the debtor, to pay the note, he had a right

to do so, and call upon the infant. Such, also, is the doctrine of *St. Albans Bank* v. *Dillon*, 30 Vt. 122, where the principal was a married woman. Pars. on Cont. 194.

Beside, in the case before us, the agents, who used the name of the district without authority, are themselves bound as principals, and it is not competent to show as a defense that the sureties supposed the district to be the principal. Had they been misled by fraudulent representations of the town, a remedy might be found for them; but as the case stands, they, acting upon their own understanding of the law and the facts, have promised to pay the sum loaned, and we think they are bound by it.

It is suggested, also, that, in case of a mistake in this respect, it may be shown and corrected, but we think it can not be done in this form, but only by bill in equity.

In accordance with the agreement of the parties, there must therefore be

Judgment for the plaintiffs.

102. LEE, appellant, v. YANDELL, et al., appellees, 69 Tex. 34.
Supreme Court, Texas, 1887.

One who signs, as surety, a void contract of an insane person, is nevertheless bound, unless fraud is shown.

This suit was brought by appellant against Yandell, appellee, and W. A. Gray and A. M. Waldrup, on a promissory note, joint and several upon its face, but which it was alleged in the answer that Gray and Waldrup signed as sureties. The answer alleged that Yandell was *non compos mentis* when the note was made and that there was no consideration therefor.

Charles I. Evans, for appellant
W. H. Cowan, for appellees.

MALTBIE, J. The third charge is as follows:

"If you find from the evidence that the defendant, Yandell, at the time he signed the note sued on, was of unsound mind to such an extend as to be unable to comprehend the nature, meaning and effect of his act in signing such note, you will return a verdict for defendants."

This was also assigned as error; and, being the only instruction given in reference to Yandell's sanity, it should be considered in the light of all the facts proven on the trial in reference to that subject. While it must be regarded as an imperfect presentation

of the law of the case, as a general proposition it can not be said to be incorrect; and the plaintiff not having called the attention of the court to other phases of the question by asking appropriate instructions, ordinarily there would not be error in the omission. (*Farquhar* v. *Dallas,* 20 Texas, 200; *Gallapher* v. *Bowie,* 66 Texas, 265.) In this case, however, two other persons signed said note as sureties, and, under the charge, the jury found in favor of said sureties as well as the principal, Yandell.

As a general proposition, whenever a principal on a note is discharged, his sureties will be also; but to this rule there are certain well established exceptions. For instance, the note of a married woman is generally held to be void; but if persons, not themselves under disability, sign the note of a married woman, without the payee having been guilty of fraud or deceit in procuring the signature of such married woman, the sureties would be liable though the principal be discharged. (2 Daniel on Neg. Inst., par. 1306a; *Davis* v. *Staaps,* 43 Ind. 103; *Allen* v. *Berryhill, 27* Iowa 531; *Hicks* v. *Randolph,* 3 Baxter 352.)

The same principle has been extended to sureties on notes executed by infants; and it is believed that no valid reason can be given why sureties of a person of unsound mind should not be held liable under like circumstances, though the principal be discharged, especially so, when the payee of the note is ignorant of the fact that the principal is a lunatic; as in such case a recovery might be had even against the lunatic, if the payee acted in good faith. (Pomeroy's Equity, volume 2, page 946.) The contract of a surety is, that if the principal does not pay, he will, and sound policy as well as the plainest principles of justice demand, that when there is a valid consideration, and the payee has done nothing to deceive or mislead either principal or surety, and the principal is held to be not liable, on account of some disability existing at the time of the making of the contract, whether such disability be coverture, infancy or unsoundness of mind, the surety should be held to the terms of his contract. The reason given in some of the cases why the surety of a married woman is held, is that the payee and the surety knew at the time that the contract was made that the married woman might refuse to pay, or that the contract was made in reference thereto, the surety binding himself to pay in case she should avail herself of her legal rights. In case of a lunatic it might be presumed that if the payee knew of the disability, the sureties being his close friends, would also know of it, and that the contract was made in reference to that state of facts. There was no evidence that Lee had in any manner deceived, overreached

or defrauded Yandell in procuring him to sign the note. Hence we are of opinion that the charge of the court should have been limited to Yandell, and the question submitted as to the liabilities of the sureties on the principles herein enunciated. * * *

Reversed and remanded.

Opinion adopted November 1, 1887.

103. KIMBALL v. NEWELL, 7 Hill 116.

Supreme Court, New York, 1845.

A surety is liable on his covenant for the faithful performance of the principal's covenant to pay rent, notwithstanding the covenant of the principal is void for coverture.

On error from the superior court of the city of New York, Newell brought an action of covenant against Kimball in the marine court of the city of New York, claiming to recover certain rent due on a lease to one Theodosia Knowlton, for whom the defendant had become surety. On the trial, the plaintiff gave in evidence the following instruments:

"This is to certify that I have hired and taken from Daniel Newell the house in Nassau street, etc., for one year, to commence on the first day of May next, at the yearly rent of four hundred and fifty dollars, payable quarterly. And I do hereby promise to make punctual payment of the rent, in manner aforesaid, and quit and surrender the premises, at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. Given under my hand and seal the 3rd day of March, 1840.

MRS. T. KNOWLTON, [L. S.]"

"In consideration of the letting of the premises above described, and for the sum of one dollar, I hereby become surety for the punctual payment of the rent, and performance of the covenants, in the above written agreement mentioned, to be paid and performed by Mrs. Theodosia Knowlton, and if any default should be made therein, I do hereby promise and agree to pay unto the said Daniel Newell such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment, or proof of demand being made. Given under my hand and seal the 3rd day of March, 1840.

"M. T. C. KIMBALL, [L. S.]"

It appeared that Mrs. Knowlton occupied under the lease, and that a balance of rent, amounting to $31.94, remained due the plaintiff. It further appeared that Mrs. Knowlton was a married woman at the time the lease was executed; and the defendant contended that, inasmuch as her covenant was void by reason of coverture, his was also void. The marine court held otherwise, however, and rendered judgment in favor of the plaintiff, which

was afterwards affirmed by the superior court on certiorari, and the defendant brought error.

R. H. Shannon, for the plaintiff in error.

Howard & Onderdonk, for the defendant in error.

NELSON, Ch. J. The defendant having consented to become bound as surety for the rent of the premises leased to Mrs. Knowlton, it is but reasonable to presume that, if he was not well acquainted with her situation before, he then made some enquiries into her circumstances and condition, and thus became fully possessed of the facts which he now sets up as a ground of discharge.

But conceding that the defendant had no knowledge of the social condition of Mrs. Knowlton, and that he supposed she would be legally holden for the rent as it accrued, I am still of the opinion that he is liable on his contract. The doctrine for which his counsel contends is thus stated by Theobald: "The obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obligation necessarily induces the nullity of the accessory." (Theob. Prin. & Sur. 2.) This is undoubtedly correct as a general rule; but it has its exceptions, and the case before us is one of them.

Mr. Chitty says: "The rule that a party can not be liable upon a contract of guarantee, unless the principal has incurred a legal responsibility, is true, in some instances, in form or words, rather than in substance." (Chitty on Contr., 499.) He adds: "In the case of a guarantee to answer for the price of goods to be supplied to a married woman, or goods (not necessaries) to be sold to an infant, or other persons incompetent to contract, no doubt the party guaranteeing, though professedly contracting only in the character of surety, would be responsible." (Id.) He refers to the case of *Maggs* v. *Ames* (4 Bing. 470), which was an action against the defendant as surety for a married woman. There the question was whether the undertaking of the defendant was an original one, so as not to require it to be in writing. The court held that it was collateral, and therefore should have been in writing. But neither the counsel nor court supposed that the defendant would not have been bound, if the contract had been in writing. On the contrary, that was assumed. In the case of *White* v. *Cuyler* (6 T. R. 176), it was impliedly at least conceded by Lord Kenyon, that a guarantor or surety for a *feme covert* would be liable on his contract. (See also Chitty on Contr., 515; Pitman on

Prin. and Surety, 13; *Buchmyr* v. *Darnall* (2 Ld. Raym. 1085); *Harris* v. *Hunchback* (1 Burr. 373); *Chapin* v. *Lapham* (20 Pick. 467).

The doctrine of the civil law is very clear and satisfactory on this subject. It is as follows: "Although the obligation of a surety be only an accessory to that of the principal debtor, yet he who has bound himself surety for a person who may get himself relieved from his obligation, such as a minor, or a prodigal who is interdicted, is not discharged from his suretyship by the restitution of the principal debtor: and the obligation subsists in his person; unless the restitution were grounded upon some fraud, or other vice which would have the effect to annul the right of the creditor." (Dom. B. 3 tit. 4 § 1, art. 10, Strahan's ed.) Again: "If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if it was a minor, who, in consideration of his being under age, got himself relieved from an engagement by which he suffered some prejudice, and that there had been no fraud on the creditor's part; the restitution of the minor would have indeed this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's obligation to the creditor. For it was only to make good the obligation of the minor, in case he should be relieved from it on account of his age, that the creditor took the additional security of a surety." (Id., B. 3, tit. 4 § 5, art. 2; and see 1 Ev. Poth. on Obl. 237.)

I am satisfied that the decision of the court below was right, and that the judgment should be affirmed.

BEARDSLEY, J. | I think the defendant was estopped from denying the competency of Mrs. Knowlton to bind herself by the covenant she assumed to execute. The defendant by his covenant admits she was thus bound, and he shall not be allowed to gainsay it by alleging her incapacity to make a legal contract. Had she been induced to enter into this engagement by fraud or imposition, or upon a usurious consideration, the case might have been otherwise; but the defendant, although a surety, cannot be permitted, on the ground now set up, to deny the legal existence of a covenant which is explicitly conceded by his own deed. (Co. Litt. 352, a, note 306; 1 Stark. Ev. 302, Am. ed. of 1830; Greenl. Ev. §§ 22 to 26, and the notes.)

The judgment of the court below is right, and should be affirmed.

Judgment affirmed.

104. HAZARD, et al, v. GRISWOLD, 21 Fed. 178.
United States Circuit Court of Appeals, 1884.

Duress of the principal is no defense to the surety, unless he became bound in ignorance of the facts constituting the duress.

Action of Debt on Bond.
Edwin Metcalf, for plaintiffs.
Sam'l R. Honey and *Arnold Greene,* for defendant.
Before GRAY and COLT, JJ.

GRAY, Justice. This is an action of debt, commenced in the Supreme Court of the State of Rhode Island, on March 3, 1883, by four citizens of Rhode Island against a citizen of New York, on a bond dated August 24, 1868, and executed by Thomas C. Durant as principal, and the defendant and S. Dexter Bradford as sureties, binding them jointly and severally to the plaintiffs in the sum of $53,735, the condition of which is that Durant "shall on his part abide and perform the orders and decrees of the Supreme Court of the State of Rhode Island in the suit in equity of Isaac P. Hazard and others against Thomas C. Durant and others, now pending in said court within and for the county of Newport."

The breach assigned in the declaration is that Durant has not performed a decree by which that court, on December 2, 1882, ordered him to pay into its registry the sum of $16,071,659.97. (That part of the opinion preceding consideration of fifth plea is omitted.)

The fifth plea alleges that Durant, at the time and place of the making of the supposed writing obligatory, "was unlawfully imprisoned by the said plaintiffs and others in collusion with them, and then and there detained in prison, until, by the force and duress of imprisonment of him, the said Thomas C. Durant, he, with the said defendant as surety, made the said writing, signed and sealed and delivered the same to the said plaintiffs as their deed." To this plea the plaintiffs have demurred, because it does not allege that the writing was executed by the defendant under force and duress of imprisonment of himself, nor that he did not voluntarily execute it as surety with knowledge that it was executed by Durant as principal under force and duress of imprisonment, as alleged in the plea. This plea does not set forth facts enough to make out a defense. Duress at common law(where no statute is violated, is a personal defense, which can only be set up by the person subjected to the duress; and duress to the principal will not avoid the obligation of a surety; at least, unless the surety, at the time of executing the obligation, is ignorant of the circum-

stances which render it voidable by the principal. *Thompson* v. *Lockwood,* 15 Johns. 256; *Fisher* v. *Shattuck,* 17 Pick. 252; *Robinson* v. *Gould,* 11 Cush. 55; *Bowman v. Hiller,* 130 Mass. 153; *Harris* v. *Carmody,* 131 Mass. 51; *Griffith* v. *Sitgreaves,* 90 Pa. St. 161. The case of *Hawes* v. *Marchant,* 1 Curtis 136, in this court, was not a case of duress at common law, but of oppression by the illegal exercise of official power in excess of statute authority, and was decided upon that ground. * * *

Demurrers sustained.

SECTION 3. DEFENSE FOUNDED UPON EXTINGUISHMENT OR SUSPENSION OF LIABILITY OF THE PRINCIPAL DEBTOR TO THE CREDITOR

105. AUCHAMPAUGH, Adm'r., v. SCHMIDT, 70 Iowa 642, 27 N. W. 805.

Supreme Court, Iowa, 1886.

A claim barred as against the principal by the statute of limitations is barred as against the surety also.

Action upon a promissory note purporting to be executed as a joint note by one Charles Leipold and the defendant. The note was executed in Illinois, where Leipold lived, and still lives. It became due May 23, 1871, and this action was commenced January 28, 1885. The defendant pleaded that he signed the note merely as surety; that under the law of Illinois the note became barred as against Leipold by the statute of limitations; and that, being barred as against Leipold, the principal, it was barred as against his surety, the defendant. There was a trial to a jury, and a peremptory instruction was given to find for the plaintiff. Verdict and judgment were rendered accordingly, and the defendant appeals.

Woodward & Cook, for appellant.

E. E. Hasner and Daniel Smyser, for appellee.

ADAMS, J. The note was executed to one Schneider, the plaintiff's intestate. The fact that the note was signed by the defendant as surety was proven only by the defendant's wife. An objection was raised to her testimony on the ground that she was an incompetent witness to prove such fact as against an administrator. The court overruled the objection, and the evidence was admitted, and no question is now raised as to the correctness of

that ruling. If we should be of the opinion that she was incompetent, and that there was no proper evidence that the defendant's relation to the note was that of surety, we could not affirm upon that ground, because we do not know that the defendant might not have introduced other evidence upon the point if his wife's testimony had been excluded.

We come, then, to the question raised by the answer and the admitted evidence of suretyship, and that is as to whether a claim which is barred by the statute of limitations, as against the principal debtor, is *by reason thereof* barred also as against a surety. In answer to this question, we have to say that we think that it is. No authority has been cited upon either side which is directly in point. Ordinarily, we may presume that, where the statute has fully run as against the principal, it would happen that it had fully run as against the surety. But the case before us has this peculiarity: The defendant, when the note was executed, resided in Illinois. Before the note was barred by the statute of that state he removed to Iowa, and before the statute of this state had fully run the action was commenced. If, then, the defendant were a principal debtor, the note would not be barred as against him, however it might be as against Leipold. He must therefore rely solely upon the fact that he is surety upon the note, and upon the bar as against Leipold. Such being the case, it is perhaps not surprising that no authority should be cited that is precisely in point. It becomes our duty, therefore, to attempt to determine the case on principle. It would not be denied that a surety upon a note may set up any meritorious defense which the principal, if sued, might set up in his own behalf. Now, when the statute of limitations has run as against the principal, the law excuses him from setting up any meritorious defense which he may have, and allows him to rely upon the technical defense of the statute alone. The theory is that he was not under obligations to preserve any longer the evidence of his meritorious defense if he had any, and so the court will not inquire whether he had such defense or not. The statute has been very properly denominated the statute of repose. As the surety is allowed to set up any meritorious defense which the principal might have set up, we are not able to see why he should be required to preserve the evidence of such defense after the principal was not bound to do so. Again, when a surety pays a debt, it is his right to look to the principal for reimbursement. But a surety paying a debt, after it had become barred as against the principal, would be remediless. Now, we do not think that a creditor, by his own dilatoriness, should be allowed to put the

surety in such position. It is not a full answer to say that a surety might have protected himself. It may be conceded that he might. But, practically, sureties often overlook their obligations if their attention is not called to them, and we do not think that the just protection of the rights of the creditor requires that we should hold so strict a rule against them as that for which the plaintiff contends.

It is said, however, that the defendant, if he is allowed to plead the bar of the statute at all as against the principal, should have averred and shown that no judgment in fact had been rendered against the principal. But we think that we would be justified in assuming, from the plea made, that judgment had not been rendered until it was averred and shown by the plaintiff to the contrary.

Reversed.

106. VILLARS v. PALMER, Adm'r, et al., 67 Ill. 204.

Supreme Court, Illinois, 1873.

A claim barred as against the principal by the statute of limitations is not necessarily barred as against the surety.

This was a bill in chancery, by William Villars, against Levin T. Palmer, administrator of the estate of Guy Merrill, deceased, and John G. Leverich, to enjoin proceedings at law by Palmer as administrator of the estate of Merrill, for the use of Leverich, upon a promissory note, given by one George W. Taylor as principal, and signed by the complainant as surety, and payable to said Guy Merrill as master in chancery. The bill showed that the estate of Taylor was solvent, and that the debt could have been made if the claim had been presented before it was barred by the two years limitation. The court below dismissed the bill, and the complainant appealed.

Messrs. *Townsend & Young,* and Mr. *E. S. Terry,* for the appellant.

Mr. *O. L. Davis* and Mr. *J. B. Mann,* for the appellees.

SHELDON, J. The claim on the part of the surety in this case is, that, as by the neglect of the creditor to present his claim against the estate of Taylor, the principal, all remedy in respect to the debt has been lost against the estate of the principal, that should operate to discharge the surety.

The complaint is of mere delay, not of any affirmative act on the part of the creditor, whereby the surety has been affected.

But it is the well established principle, that mere delay on the part of the creditor to proceed against the principal does not discharge the responsibility of the surety.

In cases of this sort, there is not any duty of active diligence incumbent on the creditor. All that the surety has the right to require of the creditor, in the absence of any statute provision, is, that no affirmative act shall be done that will operate to his prejudice. It is his business to see that the principal pays.

The law furnished the surety here with ample remedies for his protection. He might have paid the debt according to his undertaking, and have sued the principal himself; or he might have gone into a court of equity after the debt became due, and obtained a decree that the principal should pay it; or he might, under the statute, have given to the creditor written notice to put the note in suit, and thus have compelled him to sue the principal.

If he has seen fit to lie by, and the neglect to proceed against the principal in his life time, or against his estate after his decease, has been the means of depriving the surety of his indemnity, he must abide by the loss, and cannot throw it upon the creditor.

Without more, we need but to refer to the cases of *The People* v. *White et al.* 11 Ill. 342, and *Taylor* v. *Beck,* 13 id. 376, where the subject is fully considered and the authorities cited. In the former case, the very point made by the surety here is decided adversely to him.

Under the statute of March 4, 1869, Sess. Laws 1869, p. 305, where the principal maker of a joint note has departed this life, it is made the duty of the holder of the note to present the same against the estate of the decedent for allowance, to the proper court, within two years after the granting of the letters of administration. But that statute is too late to affect the present case.

The decree of the court below dismissing the bill is affirmed.

Decree affirmed.

107. EISING v. ANDREWS, Executor, 66 Conn. 58, 33 Atl. 585, 50 Am. St. R. 75.

Supreme Court of Errors, Connecticut, 1895.

If the running of the statute of limitations is suspended as to the principal it is suspended as to the surety also.

Action on a bond given by the defendant's testator as surety, brought to the Superior Court in Fairfield county and tried to the court, THAYER, J.; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors of the court. No error.

The case is sufficiently stated in the opinion.

Howard B. Scott, for the appellant (defendant).

Lyman D. Brewster and *John H. Perry,* for the appellee (plaintiff).

ANDREWS, C. J. The plaintiff is the only living partner of the late firm of E. Eising & Co. The defendant is the sole surviving executor of the will of Thomas F. Fay, late of Danbury, deceased. In his lifetime, Fay had become obligated in a bond as surety for one Thomas F. Rowan, as principal, for which he bound himself, his heirs, executors and administrators, jointly and severally with the said Rowan, in the penal sum of two thousand dollars to the said E. Eising & Co., conditioned that the said Rowan, who had been employed by the said firm as salesman and collector, "shall well and faithfully discharge his duties as such collector and agent, and shall also account for all moneys, property and other things which may come into his possession or control by reason of his appointment and employment as such agent and collector." Fay died on the 25th day of June, 1892. On the fifth day of July next thereafter, the Court of Probate for the District of Danbury limited and allowed six months from said date for the presentation of claims against his estate. After Fay's death , and between June 25th, 1892, and August 26th, 1893, Rowan received as such collector and agent from the customers of E. Eising & Co. more than two thousand dollars of money which belonged to the plaintiff, but which he appropriated to his own use—of which amount the sum of $739.41 was misappropriated by Rowan after May 26th, 1893. This defalcation of Rowan was by him fraudulently concealed from the plaintiff, and was not discovered by the plaintiff until the first day of September, 1893. He then made demand of Rowan that he should account for and pay over to the plaintiff the said amount which he had misappropriated, but Rowan has at all times neg-

lected and refused so to do. He was then and at all times since continues to be wholly insolvent.

The plaintiff notified the defendant of such defalcation on the 26th day of September, 1893, and presented to him, as such executor, the claim of said partnership on said bond; and on the 18th day of November, 1893, made demand on him for the amount of the said bond, but the defendant refused to pay it. This suit was brought on the 21st day of November, 1893.

The defendant claimed as matter of law, that upon these facts the plaintiff was barred by the statute of limitations from recovering in this action for any sums of money misappropriated by Rowan prior to May 26th, 1893. And that the fraudulent concealment by Rowan of his misappropriation did not prevent the statute of limitations from running in favor of the defendant, nor postpone the time of the arising of the cause of action upon the bond until the plaintiff discovered the misappropriation. The court did not so hold, but rendered judgment for the plaintiff for the amount of the bond with interest from the date of the demand. The defendant appealed to this court.

The bond on which this suit is brought contains two conditions: first, that Rowan should faithfully discharge his duty as agent and collector for the said co-partnership; and second, that he should account for all moneys, property, or other thing that should come into his hands, possession, or control, by reason of his employment as such agent and collector. A breach of each of these conditions is alleged in the complaint, and the facts found by the court show that each had been broken by Rowan.

Section 581 of the General Statutes—being a statute concerning the estates of deceased persons—provides that "when a right of action shall accrue after the death of the deceased, it shall be exhibited within four months after such right of action shall accrue"; and that unless exhibited within such time the creditor shall be forever debarred of all right to recover the claim. .

The breach of the second condition named in the bond took place, and the right of action thereon accrued, not earlier than the first of September, 1893, and within four months next before the claim was exhibited to the defendant. The Superior Court might well have rendered its judgment entirely on the breach of that condition in the bond. *McKim* v. *Glover*, 161 Mass. 418. And there is nothing in the case to show that it did not. Counsel for the defendant does not dwell on this part of the case.

Under the statute above recited the defendant admits that the plaintiff is entitled to recover the sum of $739.41, that being the

amount of money misappropriated by Rowan within the four months next before the claim was exhibited to him. And he insists that because of that statute the plaintiff cannot recover for any moneys wrongfully appropriated by Rowan prior to the said four months. If that statute stood alone it is more than likely that this action would never have been contested. It is another statute which causes the dispute. Section 1389 enacts that: "If any person, liable to an action by another, shall fraudulently conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against said person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence." Applied to a cause of action, the term to accrue means to arrive; to commence; to come into existence; to become a present enforcible demand. And the true meaning of this statute is, that in cases to which it is applicable, the cause of action does not come into existence until it is discovered by the person entitled to sue thereon. (The effect of this statute upon the present case is that no cause of action came into existence by reason of Rowan's defalcation until it was discovered by the plaintiff.)

It is admitted by the defendant that this is the effect of the statute, if limited to Rowan himself. But the defendant says that the fraudulent concealment by Rowan does not prevent the accruing of a cause of action against him, the defendant. He says that fraudulent concealment of a cause of action prevents the running of the statute of limitations only in favor of the very party who commits the fraudulent concealment. He cites Wood on Limitations (2d Ed.), page 139, and the cases there referred to, as authority. Stated in somewhat different language the claim of the defendant is, that although the accruing of a cause of action was by reason of the last quoted statute suspended, as against Rowan, until the defalcation was discovered, yet the accruing of a cause of action was not suspended against this defendant; that as against him, this defendant, the cause of action arose when Rowan committed the defalcation, and as it appears by the case that all of the defalcation, except the sum of $739.41, was committed more than four months before the claim was exhibited to him, he cannot be made liable for that part.

It seems to us that there is a fallacy—or rather it is a fatal error—in this argument. It conflicts with the most essential feature of the law relating to surety and principal. The plaintiff seeks to recover damages on account of the defalcation of Rowan. The argument of the defendant assumes that a cause of action for such defalcation could exist against him before any cause of action

therefor against Rowan had accrued. But the law relating to principal and surety forbids this. The rule is that a cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. Ordinarily the liability of such a surety is measured precisely by the liability of the principal. Brandt on Suretyship, § 121; *Seaver* v. *Young,* 16 Vt. 658; *Boone County* v. *Jones,* 54 Iowa 709; *Patterson's Appeal,* 48 Pa. St. 345; *McCabe* v. *Raney,* 32 Ind. 309. So long as no cause of action existed against Rowan, the principal, no cause of action existed against the defendant or his surety. And the statute of limitations does not begin to run in favor of any person, until there is a cause of action. The obligation of a surety is an obligation accessory to that of a principal debtor, and it is of the essence of this obligation that there should be a valid obligation of some principal. Thus, where one agrees to become responsible for another the former incurs no obligation as surety, if no valid claim ever arises against the principal. Chitty on Contracts (11th Ed.), 788. If the principal is not holden, neither is the surety; for there can be no accessory if there is no principal. De Colyar on Principal and Surety, Amer. Ed. 39; Addison on Contracts, § 1111. The existence of a principal debtor is a condition precedent to the operation of the contract of a surety. *Hazard* v. *Irwin,* 18 Pick. 95; *Swift* v. *Beers,* 3 Denio 70; *Mountstephen* v. *Lakeman,* L. R. 7 Q. B., 202; *Mallet* v. *Bateman,* L. R. 1 C. P., 163. This is only in accordance with the general law of contracts, which prevents a contract from becoming operative unless and until all conditions precedent are fulfilled. Brandt on Suretyship, § 214; *Farmers and Mechanics' Bank* v. *Kingsley,* 2 Doug. (Mich.) 379. So too, whatever discharges the principal debtor discharges the surety. The liability of a surety on a claim which is good as against the principal, ceases as soon as the claim is extinguished against the principal. The nature of the undertaking of a surety is such that there can be no obligation on his part, unless there is an obligation on the part of the principal. "It is correctly laid down, in Chitty on Contracts, that the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act; and, as stated in Theobald on Principal and Surety, * * * it is a corollary from the very definition of the contract of suretyship, that the obligation of the surety, being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal, there

can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal. * * * It would be most unjust and incongruous to hold the surety liable, where the principal is not bound." STORRS, J., in *Ferry* v. *Burchard,* 21 Conn. 603. The same general doctrine is held in many other cases in this State. *Willey* v. *Paulk,* 6 Conn. 74; *DeForest* v. *Strong,* 8 id. 522; *Bull* v. *Allen,* 19 id. 101, 106; *Glazier* v. *Douglass,* 32 id. 393; *Candee* v. *Skinner,* 40 id. 464.

It follows, then, that the fraudulent concealment by Rowan, the principal, as it prevented the statute of limitations from running in his favor, also stopped it from running in favor of the defendant, his surety. *Bradford* v. *McCormick,* 71 Iowa 129; *Boone County* v. *Jones,* 54 id. 669; *Charles* v. *Hoskins,* 14 id. 471.

There is no error.

In this opinion the other judges concurred.

SECTION 4. DEFENSE FOUNDED UPON THE PRINCIPAL DEBTOR'S RIGHT OF SET-OFF OR COUNTER-CLAIM AGAINST THE CREDITOR.

108. MAHURIN v. PEARSON, et al., 8 N. H. 539.
Superior Court of Judicature, New Hampshire, 1837.

The surety is entitled to set off against a demand by the creditor a cause of action existing in favor of the principal.

ASSUMPSIT on a note for $100, dated November 3, 1834, payable to the plaintiff, in sixty days, with interest. The defendant, Bellows, signed the note as surety for Pearson. The defendants pleaded the general issue, with notice of set-off of demands in favor of said Pearson. The plaintiff objected to receive said set-off, and the evidence offered in support thereof, on the ground of want of mutuality of the parties, the set-off being in favor of one of the defendants only; whereupon the court rejected the set-off, and the evidence offered. The defendant, Bellows, in order to show a discharge from any liability on said note, offered the testimony of a witness, that the last of December, 1834, or the first of January, 1835, Bellows and Mahurin had a conversation about a $100 note which Bellows had signed with Pearson. Bellows told Mahurin he wished the note sued as soon as it was out, as he did not wish to stand surety to Pearson any longer. Mahurin said part of the note had been paid, and arrangements

had been made with Pearson for the remainder. Mahurin also said that he would not call on Bellows for the note, but the witness could not tell the words made use of by Mahurin.

On the above evidence the court directed a verdict for the plaintiff, which the defendants moved to set aside.

Wells, for the defendants.

Young, for the plaintiff.

PARKER, J. The evidence offered is not sufficient to discharge the surety. Mere delay by the creditor to collect the debt, after a request to that effect from the surety, will not operate as discharge, (3 N. H. R. 231,) and we are of opinion that the evidence does not show such a renunciation of all claim upon the surety, as can avail to discharge him without any consideration paid, or evidence of loss sustained. 2 *Stark. Rep.* 228, *Parker* v. *Leigh; ditto* 531, *Adams* v. *Gregg;* Doug. 247, *Dingwall* v. *Dunster;* 1 Camp. 35, *Whately* v. *Tricker;* 8 Pick. 122, *Baker* v. *Briggs;* 2 Johns. Ch. Rep. 557, *King* v. *Baldwin.* Whether evidence of the latter description is admissible in such case may perhaps admit of question.

But the court erred in rejecting the set-off. It being shown that Bellows is a mere surety, we are of opinion there is sufficient mutuality in a debt due from the plaintiff to Pearson, to authorize it to be allowed in set-off, under our statute. 6 *N. H. R.* 27, *Woods* v. *Carlisle;* 4 Bing. 423, *Bourne* v. *Bennett;* 12 Ves. 349. *ex parte Hanson;* 18 Ves. 232, *S. C.* The cases in Vesey are cited without disapprobation by Chancellor Kent, 4 Johns. Ch. R. 15, *Dale* v. *Cooke,* although he held as a general principle "that joint and separate debts cannot be set off against each other in equity any more than at law."

There are several considerations which show the propriety of allowing the set-off in this case. If the debt from the plaintiff to Pearson, which was offered in set-off, was contracted after that now in suit, it very probably might have been regarded by the parties as in effect a payment thus far. It is at least but equitable that it should so operate, whether contracted before or after. The rule in equity is, that if a creditor have security, the surety, on payment by him, is entitled to be substituted, and to have the benefit of that security. 8 Pick. 122: 4 Johns Ch. R. 129, *Hayes* v. *Ward;* 4 Ves. 829, *Law* v. *The East India Company;* 7 Wend. 326, *Everenghim* v. *Ensworth.* If, instead of having security, the creditor owes the principal part of the amount, and the principal is willing to put it in set-off, it is equally reasonable that the surety

should have the benefit of the credit which the creditor has obtained of the principal. And, moreover, it will tend to prevent multiplicity of actions; for, should the plaintiff collect his debt of Bellows. the latter must have an action against Pearson to recover the amount, and Pearson will have a right of action on the claim now offered in set-off.

Whether any thing can be set off in this or any other case beyond the balance due from the plaintiff, on an adjustment of all demands between the parties which are not comprehended in the suit, is a question not settled by this decision.

New trial granted.

109. GILLESPIE, et al., v. TORRANCE, 25 N. Y. 306.
Court of Appeals, New York, 1862.

When sued upon his contract the surety cannot set up, by way of counterclaim, a cause of action existing in favor of the principal against the plaintiff creditor.

Appeal from the Superior Court of the city of New York. Action upon a promissory note against the indorser only. Defense, that the indorsement was for the accommodation of the maker; that the note was one of several given for oak timber sold to the maker by the plaintiffs; that the timber was a raft in the Hudson river, opposite the city of New York, and that, on making the sale, the plaintiffs produced certificates of inspection showing that there were 29,441 feet of first quality oak, for which Van Pelt, the maker of the notes, agreed to pay 27½ cents per foot, and 5,523 feet of second quality or refuse oak, for which Van Pelt agreed to pay 13¾ cents per foot; that, by the usage of the timber trade in New York, the seller is deemed to warrant that the timber sold corresponds in quantity and quality with the description in such inspection certificates; that Van Pelt gave his notes, indorsed by the defendant, for various sums, amounting in the aggregate to $9,000, the price of the timber as computed from the inspection certificates, and all of which notes had been paid except the one in suit; that after the delivery of the timber it was discovered that the inspection certificates were erroneous in this, that of the timber of first quality there was 15,000 feet less than the certificates stated, and an equal excess in the refuse timber; that if the prices had been correctly computed according to the fact, instead of being computed according to the certificate, it would have amounted to less than $5,000; that the plaintiffs had, there-

fore, been overpaid, and there was no consideration for the note in suit. On the trial, the judge, under exception by the defendant, excluded evidence as to the quantity of the timber of the different qualities; declined to permit an amendment of the answer alleging an express warranty; and excluded evidence of the usage set up in the answer, making a sale by certificate equivalent to a warranty. The other facts stated in the answer were substantially proved or admitted. The plaintiffs had a verdict and judgment, which having been affirmed at general term, the defendant appealed to this court.

Charles A. Rapallo, for the appellant.

William A. Stanley, for the respondents.

SELDEN, J. The defense in this case is not founded on a failure of the consideration of the note, otherwise than by a defect in the quality of the timber for which it was given. That being so, if there was neither warranty nor fraud in the sale of the timber, the defect in quality constitutes no defense. *Seixas* v. *Woods,* 2 Cains, 48; *Sweet* v. *Colgate,* 20 Johns. 196; *Welsh* v. *Carter,* 1 Wend. 185, *Johnson* v. *Titus,* 2 Hill, 606. The answer does not allege fraud in the transaction, and unless it shows a warranty of the quality of the timber, it presents no defense to the note, either partial or total. The argument of the appellant's counsel, to maintain the position that the defense rested upon a failure of consideration, and not upon a claim for damages on a breach of warranty, is very ingenious; but the answer and the proof show that all the timber contracted to be delivered to Van Pelt, and for which the notes were given, was in fact delivered, and the real ground of complaint is, that a much larger proportion of it than was shown by the inspector's certificates, upon the faith of which the purchase was made, proved to be of inferior quality. The law being well established that such defect of quality, in the absence of fraud or warranty, constitutes no defense to the note, or to any part of it, and there being no pretense of fraud, it follows that the defense, if there is any, rests upon a breach of warranty.

The question then arises, whether the plaintiff, an accommodation indorser upon a note given by Van Pelt to the plaintiffs for the timber, can avail himself of a breach of the contract of warranty in regard to the quality of the timber, made by the plaintiffs to Van Pelt, on the sale to him. To decide this question, it is necessary to ascertain the ground upon which such defenses, by way of recoupment, as they were denominated prior to the adoption

of the Code, now, partially, if not wholly, merged in the much broader term, counter-claim, were admitted. If we regard such defenses as resting upon a failure of the consideration of the contract on which the plaintiff's action is founded, then unquestionably the defendant could avail himself of the breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defenses are regarded as the setting off of distinct causes of action, one against the other, then it is clear, as will be shown hereafter, that this defendant could not avail himself of such defense.

The subject of the precise ground on which a defendant is allowed to reduce a recovery against him, in an action upon a contract, by alleging and proving fraud, or breach of warranty—whether the contract where there is fraud, is regarded as destroyed, and the recovery had on a *quantum meruit*, or whether the reduction of the plaintiff's claim rests upon a partial failure of consideration, or upon the setting off of distinct claims against each other—has often been discussed, but without any general concurrence of opinion on the question. *Reab* v. *McAllister*, 4 Wend. 90 *et seq.*, *S. C.* in error, 8 id. 109; *Batterman* v. *Pierce*, 3 Hill 171, 177; *Ives* v. *Van Epps*, 22 Wend. 155; *Nichols* v. *Dusenbury*, 2 Comst. 286; *Van Epps* v. *Harrison*, 5 Hill 66; *Barber* v. *Rose*, id. 78; *Baston* v. *Butler*, 7 East. 479; *Withers* v. *Greene*, 9 How. U. S. 213.

A careful examination of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. *Ives* v. *Van Epps*, 22 Wend. 157; *Batterman* v. *Pierce*, 3 Hill, 171; *Britton* v. *Turner*, 6 N. H. 481; *Halsey* v. *Carter*, 1 Duer, 667; *Barber* v. *Rose* 5 Hill, 81; *Stever* v. *Lamoure*, Lalor's Supp. 352, note a.

In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms; he has, how-

ever, arising from the fraud a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by *Bronson, J.*, in *Van Epps* v. *Harrison*: "When sued for the price, the vendee may in general *recoup* damages; but while he retains the property he cannot treat the contract as wholly void, and refuse to pay anything. By retaining the property he *affirms the validity of the contract,* and can be entitled to nothing more than the damages which he has sustained by reason of the fraud." The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind, unless there is an express contract to that effect. *Street* v. *Blay,* 2 Barn. & Ad. 456; *Voorhees* v. *Earl,* 2 Hill, 288; *Cary* v. *Gruman,* 4 id. 625; *Muller* v. *Eno,* 14 N. Y. 597; *Thornton* v. *Winn,* 12 Wheat. 183; *Lattin* v. *Davis,* Lalor's Supp. 16. In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent, and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The "cross-claims arising out of the same transaction compensate one another, and the balance is recovered." 8 Wend. 115; 22 id. 156; 3 Hill, 174; 2 Comst. 286.

It has always been optional, as is suggested above, since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup he could not, under the Revised Statutes, have a balance certified in his favor, nor could he maintain a subsequent action for such balance. *Sickles* v. *Pattison,* 14 Wend. 257; *Batterman* v. *Pierce,* 3 Hill, 171; *Wilder* v. *Case,* 16 Wend. 583; *Stever* v. *Lamoure,* Lalor's Supp. 352 note, a; *Britton* v. *Turner,* 6 N. H. 481.

Under the Code of Procedure, doubtless a balance might be recovered (Code §§ 150-274; *Ogden* v. *Coddington,* 2 E. D. Smith, 317); but the right of election to set up a counter-claim in defence, or to bring a cross-action for it, still exists. *Halsey* v. *Carter,* 6 Duer, 667; *Welch* v. *Hazleton,* 14 How. Pr., 97. Now it is not easy to reconcile with these established principles, the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him. Code § 150; *Lemon* v. *Trull,* 13

How. Pr., 248; 16 id. 576, note . 2. Van Pelt has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed, in this action it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but $100 instead of $1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defence, how would the conflicting claims be reconciled?

In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note cancelled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly to a greater, extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment; especially if the insolvency of the parties renders that course necessary for his protection. 14 Johns., 63, 17 id., 389; 2 Cow., 261; 2 Paige, 581; 6 Dana, 32; 8 id., 164; 2 Story's Eq. Jur., §§ 1446, a, 1437. My conclusion is, that the court below was right in holding that the defendant could not set up the breach of warranty in defence, partial or total, to the suit on the note; and as the warranty presented the only ground on which there could be a claim of defence under the answer, there is no necessity for considering the other questions presented in the case.

The judgment should be affirmed.

All the judges concurring.

Judgment affirmed.

SECTION 5. DEFENSE FOUNDED UPON SURRENDER OR LOSS OF SECURITIES BY THE CREDITOR.

110. PEARL v. DEACON, 24 Beav. 186.
Chancery, the Rolls Court, 1857.

Release by the creditor of his lien upon another security discharges the surety pro tanto. Lack of knowledge by the surety of the existence of such other security is immaterial to this defense.

Mr. *R. Palmer* and Mr. *Bevir,* for plaintiff.
Mr. *Selwyn* and Mr. *W. R. Ellis,* for defendants.

The MASTER OF THE ROLLS:

I retain the opinion expressed by me yesterday. The facts are shortly these:—Mr. Pearson applied to the defendants, who are brewers at Windsor, for a loan of 250*l.*, to enable him to take a public-house, called the Carpenters' Arms. They said we will do so if you will get a good surety for the amount, and assign over your pension and furniture. That was agreed to; Pearson offered the plaintiff as his surety for half the amount, and Castles as surety for the other half; the defendants accepted them, and on the 16th of November, 1852, two joint and several promissory notes were given to the defendants, one by Pearson and the plaintiff, and the other by Pearson and Castles. Six days afterwards, viz., on the 23rd of November, Pearson assigned his pension and all the goods and chattels to secure this debt of 250*l.* On this transaction, the first point which was raised by the plaintiff, in my opinion, fails. He says that this arrangement was a variation of the contract of suretyship, and that it discharged the plaintiff, because the money was made payable on the 16th of November, 1858, or six years after the date of the mortgage. If the case had rested here, the plaintiff would probably have been successful, but the deed goes on, "or at such earlier or other time" as the defendants should appoint for the payment thereof "in and by a notice in writing." I do not think that this was such a variation in the terms of the security as to discharge the surety; but the question is of little importance, as I am of opinion, on the evidence, that the plaintiff had notice of this assignment and of the terms of it.

The only other facts important to be stated are these:—The defendants were landlords of The Carpenters' Arms, and in the year 1856, four years after this transaction, Pearson's rent being

considerably in arrear, the defendants distrained and put a broker in possession of the furniture under the distress; on this, by arrangement, instead of selling the goods, they took them at a valuation for 116*l.*

The question is this:—The furniture having been expressly mortgaged for the 250*l.*, was it within the power of the defendants, to the injury of the surety, to give up the security on the furniture for the 250*l.*, and take it in discharge of another and different debt due to themselves? I am of opinion that they could not do so. It was said, that this security was not within the scope of the Plaintiff's contract, and that a surety cannot go beyond it. That is a mistake with respect to the relation between a principal and surety. Lord ELDON expressly stated, in *Craythorne* v. *Swinburne,* 14 Ves. 169, that the rights of a surety depend rather on a principle of equity than upon contract; there may be a *quasi* contract, but it arises out of the equitable relation between the parties, to be inferred from the knowledge of an established principle of equity. The same doctrine is also stated in *Mayhew* v. *Crickett,* 2 Swan. 191, and it is laid down distinctly that sureties are entitled to the benefit of every security which the creditor has against the principal debtor, and that whether the surety knows of the existence of those securities or not is immaterial. If the creditor makes available any of his securities, the surety is entitled to the benefit of it.

The case of *Capel* v. *Butler,* 2 Sim. & S. 457, is a distinct authority for this proposition. Mr. Ellis sought to distinguish that case by saying, that, in that case, there was a recital of all the securities, but that here there was none. The answer, however, is this:—That there was notice to the surety of the whole transaction, and being so, the reciting it is immaterial. Lord ELDON distinctly laid down in *Mayhew* v. *Crickett,* 2 Swan. 185, that it is a matter of perfect indifference, whether the surety is aware of another security having been taken by the creditor or not.

In the judgment of Vice-Chancellor WOOD in *Newton* v. *Charlton,* 10 Hare 651, there is a statement, in every word of which I concur. He says, as regards, the creditor, "He is bound to give to the surety the benefit of every security which he holds at the time of the contract,—every security which he then holds; and he is not allowed, in any way, to vary the position of the surety with reference to those securities; that has been decided most distinctly in *Mayhew* v. *Crickett* by Lord ELDON, where there was a warrant of attorney in the hands of a creditor put into operation by the creditor, and a judgment obtained, from which he after-

wards discharged the principal debtor. Lord ELDON held it utterly immaterial, whether the warrant of attorney was known to the surety at the time he entered into the contract or not. The surety had a complete right to the benefit of it, and if the benefit were lost to him, he was at once discharged."

It is argued that this was a security for a separate and distinct debt; but I am of opinion that it was not taken for a separate and distinct debt, but for the debt of 250*l.*

I am of opinion, therefore, that if the defendants enforce payment of the rent due to them out of the furniture, and then seek to compel the plaintiff to pay the debt for which he became surety, the plaintiff is entitled to say to them, "you must give me the benefit of the security on the furniture and pension which were mortgaged to you for this debt."

What the defendants have done is this:—They have thought fit to apply the produce of the furniture to a different and distinct debt, contrary to the original arrangement, on the terms of which, it is to be assumed, the surety consented to become liable. I am therefore of opinion, that whatever the defendants have received ought to be applied rateably in the discharge of the whole debt, and that the plaintiff is only liable to pay half of the balance.

If it were otherwise, the result would be this:— That if a man advanced 1,000*l.* to another on a mortgage of an estate, and had the security of ten sureties, each of whom was liable for 100*l.*, he might release or reassign the mortgage, and then sue the ten sureties. This is a proposition impossible to be sustained.

If the defendants have received anything from Castles, it must not be taken into account; but with respect to the money received from Pearson, it ought to be taken as a discharge for the debt.

As to the pension, either they have received it or they have not; if they have, it was distinctly applicable to the payment of their debt; if they have not, they must show why they did not make that security available.

III. BOSTON PENNY SAVINGS BANK v. BRADFORD, 181 Mass. 199.

Supreme Judicial Court, Massachusetts, 1902.

Release by the creditor of part of his security discharges the surety only to the extent of the loss which such release causes him.

CONTRACT against a surety for the balance due on a promissory note of the Assabet Manufacturing Company, originally for $25,000. Writ dated January 2, 1900.

At the trial in the Superior Court, AIKEN, J. directed a verdict for the plaintiff in the sum of $8,145.21, apparently the full amount claimed; and the defendant alleged exceptions.

The instrument of release, relied upon by the defendant in the manner stated by the court, was as follows:

"I hereby acknowledge that I have received from Edward N. Fenno, Arthur B. Silsbee and Jeremiah Williams, assignees of the Assabet Manufacturing Company, a third dividend, being twelve per cent of the amount of my claim, as presented to the said assignees, to-wit: $3,032.08, and in consideration thereof I hereby release the said assignees, and each of them, and the estate of the Assabet Manufacturing Company in their hands, from all claims and demands which I have against them or either of them.

"Witness my hand and seal: Provided that this release shall not affect in any way the claim of the Boston Penny Savings Bank against the directors or shareholders of the Assabet Mfg. Co., and that if it shall have such effect it shall be void. Boston Penny Savings Bank, by its Treasurer, Wm. H. Durkee." (Corporate seal).

F. L. Norton, for the defendant.

P. Keyes, for the plaintiff.

KNOWLTON, J.—The defendant signed the note in suit as a surety, and his defence is that he has been discharged from liability by the plaintiff's execution of an instrument under seal running to the assignees of the Assabet Manufacturing Company, the principal on the note, releasing them from all claims and demands against them or either of them. The assignees held under a voluntary assignment of this corporation for the benefit of creditors, and this release was made and delivered for the payment to the plaintiff of three dividends, amounting in all to sixty-seven per cent of the note, and the payment of like dividends to other creditors who were parties to the assignment, the whole amount received and disbursed by the assignees in the execution of their trust being $1,660,000.

It is not contended that the defendant was discharged from liability by the plaintiff's becoming a party to the assignment, for the sixteenth article of the assignment expressly saves all rights of creditors to any security held by them, and also their rights against sureties. The defendant treats the release of the trustees as if it were a release of the corporation that made the assignment; but it does not affect the liability of the corporation for the unpaid balance of the note. It purports only to release the assignees from liability on account of the property that came into their hands. It is not like the release of a principal, which, if made without reservation, releases the surety also. It is merely an acknowledgment of satisfaction as to certain property held by the trustees for the security of the plaintiff. It cut off the right of the plaintiff and also of the surety afterward to resort to any part of that property. If the defendant was prejudiced by the plaintiff's giving up of the security which should have been held for the payment of the balance of the note, his liability is diminished to the extent of the loss from the release of the property, but it is not affected beyond that. *Baker* v. *Briggs,* 8 Pick. 122. *American Bank* v. *Baker,* 4 Met. 164, 177. *Guild* v. *Butler,* 127 Mass. 386. This rule of law disposes of the defendant's requests for rulings, which were all founded on a different view of the decisions.

The only remaining question is whether the defendant can take anything by his exception to the ruling given. The judge directed the jury to return a verdict for the plaintiff. This we understand to have been for the full amount remaining unpaid. There was evidence that at the time of making the last dividend the trustees "retained in their hands about two thousand dollars to cover such legal and incidental expenses as might come in closing the accounts." There was nothing to indicate that this sum was more than was reasonably necessary for that purpose. It also appeared that they then had in their hands some old claims which they considered of no value, and that they subsequently received on account of one of these twelve or fifteen dollars. Beyond this sum it does not appear that there was any valuable property or assets in their hands which was applicable to the claims of creditors. The plaintiff might have been entitled to such proportional part of this sum of twelve or fifteen dollars as its debt was of the whole indebtedness of about $1,600,000. To say nothing of the impracticability of making a new dividend for such a small sum, the plaintiff's share would be insignificant. To have been strictly accurate, the judge should have left to the

jury the question whether the defendant was prejudiced, and if so how much, by the plaintiff's release of its interest in this property; but it is obvious that the attention of the judge was not directed to any such subject, and that the defendant's loss, if any, from the error, is too trifling to be of consequence. We are of opinion that the entry should be,

Exceptions overruled.

112. SALINE COUNTY v. BUIE, et al., 65 Mo. 63.

Supreme Court, Missouri, 1877.

Release by a creditor of part of the land mortgaged to him as security for payment of a bond, does not discharge a surety in the bond, though made without his consent, if the remainder of the land is sufficient to indemnify him against loss.

Error to Saline Circuit Court.—HON. WM. T. WOOD, Judge.

Samuel Boyd, for plaintiff in error.

Samuel Davis, for defendant in error.

HOUGH, J.—On the 15th day of August, 1868, Thomas M. Smith, as principal with the defendants, D. D. Buie, Samuel Yates and Zebman Smith, as sureties, executed to the county of Saline, for the use of the general fund, and the swamp land fund, a bond for the sum of $1,000, payable on or before the 31st day of December, 1868. At various times prior to the institution of the present suit, payments were made on said bond, aggregating the sum of $864, and this suit was instituted on November 20th, 1873, to recover of the sureties the balance due thereon. Smith was not served and Yates made default. The defendant, Buie, filed a separate answer, alleging that on the same day on which the bond sued on was executed, Thomas M. Smith, the principal therein, for the purpose of securing the payment of said bond, executed and delivered to the County of Saline, a mortgage on two hundred acres of land, conditioned that, in default of payment of either principal or interest, the sheriff of the county should, without suit, proceed to sell the said mortgaged premises. That, on the 10th day of February, 1870, the County Court of Saline County, by an order entered of record, without the knowledge or consent of said defendant, Buie, released from the operation of said mortgage, one hundred and twenty acres of said land, and that said defendant was thereby released and discharged from all liability on account of said bond. To this answer the plaintiff

filed a demurrer, which was sustained by the court, and final judgment rendered thereon against said defendant.

We perceive no error in the judgment of the Circuit Court. The demurrer was properly sustained. Conceding that the County Court had authority to release a portion of the mortgaged premises, which we do not decide, the defendant could not complain, unless he was injured thereby, and he failed to allege in his answer any such injury. For aught that appears in the pleadings, the remaining portion of the land mortgaged may be amply sufficient to indemnify him. A surety is entitled to the benefit of all securities held by the creditor for the payment of the debt of the principal; but when the creditor surrenders or releases a portion only of such securities, the surety is not absolutely discharged, but only to the extent to which he is thereby actually injured. If the securities retained by the creditor are sufficient to pay the debt, the surety is not injured and cannot complain.

The judgment of the Circuit Court will be affirmed. The other Judges concur, except Judge SHERWOOD, absent.

Affirmed.

113. HOLT v. BODEY, 18 Pa. St. 207.
Supreme Court, Pennsylvania, 1852.

Release by the creditor of part of the security for the debt discharges the surety to the extent of the part released whether the creditor retains enough to pay the debt or not.

Error to the Common Pleas of Montgomery County.

This was a *scire facias* to revive the lien of a judgment entered in favor of Jesse Holt 1. Joseph H. Bodey and Henry Bodey, Senior. * * *

KRAUSE, J., instructed the jury—"This action is a *sci. fa.* on a judgment entered in this Court for $800, 1st July, 1844, on bond and warrant of attorney, dated 1st April, 1842. The defendant has given evidence that Holt released some property from the lien of his judgment; and that he had other property, which Joseph H. Bodey sold, and as to which the lien of the judgment in question was supposed to have run out for the want of *sci. fa.* in time to revive it. This neglect to revive it is set up by defendant, but the Court instructs the jury that it is no defense in this action.

"There is evidence that Henry Bodey, sen., was surety in this judgment in question, in the testimony of Joseph H. Bodey,

and Allen W. Corson, which it is the duty of the jury to consider. As to Corson's testimony, however, the jury must see whether he had facts on which he based his impressions that Henry Bodey was merely a surety; for naked impressions alone are not evidence. A witness's impressions are evidence only where he has facts on which they may be founded; but where he has no such facts for a foundation, they are not to be regarded by the jury.

"Joseph H. Bodey is a competent witness. The jury, however, will take into consideration his credibility, and whatever is disclosed in the testimony to affect it.

"The Court then instructs the jury, that if Henry Bodey was not surety in this bond, the defense wholly fails, and there must be a verdict for plaintiff for the whole of his demand. But if he was surety merely, then the law is as stated in 9 *W.* & *S.* 43, Neff's Appeal, provided it is found that plaintiff released property on which his judgment in evidence was a lien. [The rule of law in such case is that the surety is discharged in whole or in part, according to the proof he advances. If the evidence shows to the satisfaction of the jury, that the plaintiff gave such release, and Henry Bodey was merely a surety in the bond and judgment upon it, then the next question for the jury is, to what extent did the release take away property in land, which was necessary to satisfy the judgment?] In other words, if Henry Bodey, as surety, had paid the judgment, and taken an assignment of it from plaintiff, what deficiency, in virtue of said release, would be found in Joseph H. Bodey's real estate, according to its value, and its liability to the payment of said judgment, in the sum required to satisfy it? If the release swept away all the property on which the judgment was a lien and Henry Bodey was but surety, he is wholly discharged; but if but a part of it was released, he is discharged to the extent of such part only, or *pro tanto* to the amount it took from the grasp of the judgment.

"It remains to answer points submitted by plaintiff's counsel. * * * As to the sixth, the question is, did the release so operate as to discharge from the lien of the said judgment property which before such release was available for satisfaction of the judgment, and to what extent? To the extent that said release did not discharge such property, the plaintiff may recover."

Exceptions were taken on part of plaintiff to the charge.

Verdict was rendered for the defendants.

The case was argued by *J. R. Britenbach* and *T. S. Bell,* for Holt, the plaintiff in error.

Powell and *Fornance,* for defendants.

The opinion of the Court was delivered, April 5, by

LOWRIE, J.—To get at the principles of this case by the nearest road, it may suffice to state that here was a bond by two, and a judgment entered upon it, and now on a *scire facias* to revive the judgment, one of them suffers judgment by default, and the other takes defence on the ground that he was surety in the bond, and that the plaintiff released from the lien of the judgment, property of the other defendant of sufficient value to secure the debt.

Principles of equity are law with us because we receive them as rules of right, and accommodate our forms of procedure to the admission of them. They are distinguished from principles of law elsewhere, because their force is acknowledged only in peculiar Courts, and the forms of what are called their common law Courts do not furnish the means of enforcing them. We have adopted as law the equitable principle, that, where a creditor has the means of compelling payment from the principal debtor, and by his own act gives it up, he thereby discharges the surety, and this even when the debt is secured by a joint mortgage or judgment against both: *Neff's Appeal,* 9 W. & Ser. 36.

It is therefore apparent that this defence must be permitted; and we must so far change the ordinary rules of this procedure as to let it in. For this purpose we must allow these defendants to sever in their defence, so that each may present the case on his own grounds. But the plea of payment by the surety is utterly incongruous; for if it be found in his favor, it makes an absurd record, with a judgment against one defendant, when the other has proved that the debt was paid. The defence is purely an equitable one, and it should be pleaded specially, and then, on the plea being found true, the record will show that, on equitable principles, the judgment against one defendant and in favor of the other is right. This matter has not been assigned for error, and we mention it only that such blunders may not be repeated. Such a plea should aver the suretyship, and set out the facts necessary to show that in equity the surety is released.

The parties having severed, the plea of the surety stands in the place of a bill in equity to enjoin proceedings as to him, in which this plaintiff and the other defendant would be the defendants, and both would be interested to defeat the bill of the surety. Such are their respective positions, in another forum, on the issue tendered by this plea. Joseph Bodey is, in effect, a party to the issue on the opposite side to Henry Bodey's administrators, and is not bound for the costs which they incur by such an adversary

position, and on equitable principles, and under our decisions is a competent witness for them: *Mevey* v. *Matthews,* 9 Penn. St. Rep. 112; *Talmage* v. *Burlingame,* Id. 21.

In this adaptation of a common law form to the principles of equity, we do nothing more than carry out a principle which has the sanction of innumerable precedents. There should be no forms of proceeding so inflexible as not to yield to the necessary demands of unforeseen circumstances; otherwise they will often cross the purposes which they were intended to serve.

There can be no kind of business without its forms, and they all have two elements of adaptation, that are to be taken into the account in estimating their value: first, that they may secure the purposes for which they were designed, without which they would be in a measure useless: and second, that they be conformable to the education, habits, and custom of those by whom the business is to be conducted, without which the business must suffer by frequent mistakes and delays. Those forms, which are the product of long experience, and have grown up with a particular business, are generally the best, in their place, because they have adapted themselves, by a sort of spontaneous development, to the business to which they apply, and constitute the habits of those engaged in it; and great and sudden changes in such customary forms must always be attended with serious evils.

On the other hand, such forms may, in the hands of unskillful and over-methodical practitioners, assume a fixedness of character that will prevent the improvement and development of the business to which they belong, in which case they become an encumbrance demanding a sweeping reform. Of this character were many of the forms of the English common law. They very early became fixed to such a degree that they refused to yield to the demands of common justice, and the rule, that for every wrong there is a remedy, became a mere mockery; and from this arose the immense jurisdiction of the English Chancellor. The generous infusion of equity principles that pervades our law, demands that our forms should be more flexible, while it does not release us from the caution, with which all changes should be made, where the customs and rights of many are concerned.

This bond was originally given by [to] one Samuel Thomas, and the plaintiff holds it by assignment, and the defendants, Joseph and Henry Bodey, appear on its face to be both principal debtors. From these facts the plaintiff raised two questions; first, that there was not sufficient evidence that Henry was a mere surety, as

to the plaintiff; and second, that, if the fact be so, the plaintiff did not know it. As we think there was not sufficient evidence to justify a finding of these facts against the plaintiff, it becomes necessary to inquire whether they were material to the defendant's case. Elsewhere it has been considered material under some circumstances, 3 Paige 650.

The general principle is, that a surety, on paying the debt, is entitled to be substituted to all the liens and other securities which the creditor holds against the principal debtor; a right, which is enforced, whether the surety is bound in one instrument with the principal or not; which is transmitted to the surety's creditors, where the claim is used so as to disappoint their liens; and which, if not enforced, leaves the liability of joint defendants to be controlled by the caprice of the creditor, and not by rules of law. *Neimcewicz* v. *Gahn*, 3 Paige, 614; *Davenport* v. *Hardeman*, 5 Georgia Rep. 580; *Morris* v. *Evans*, 2 B. Monroe R. 84; *Neff's Appeal*, 9 W. & Ser. 43; *Ebenhardt's Appeal*, 8 Id. 327; *Neff* v. *Miller*, 8 Penn. Rep. 348; *Moore* v. *Bray*, 10 Id. 519; *Watts* v. *Kinney*, 3 Leigh 372.

From the surety's right of substitution, his right of discharge, when the substitution has been rendered fruitless by the act of the creditor, follows as a corollary. We give up our own right against him, whose countervailing right we have destroyed.

Now it matters not whether the instrument shows that the debtors stand to each other in the relation of principal and surety or not. The object of the instrument is to show their relation to the creditor, and ordinarily it imports no more. The question of their relation to each other remains an open one; and hence, the admission of parol evidence to answer it does not violate the rule by which such evidence is not allowed to vary the legal import of a written instrument. It is the fact of this relation, with or without the creditor's knowledge of it, that gives the right of substitution. The right is inherent in the transaction, if the relation exists. If it does not appear, the creditor is expected to be ignorant of it, and should act accordingly. While the law enforces the payment of his claim, it does not make his will the law of the contract, and allow him to shift the burden from the property of one defendant to that of the other at his pleasure. Nor may he blindly act so as to affect the rights of others, and then excuse himself by saying he did not know. He should not in any way discharge one of his joint debtors without the consent of the other; for that other has an interest in that act.

The knowledge of the plaintiff of the fact of suretyship was therefore immaterial.

The Court below could not properly affirm the sixth point of the plaintiff; but they instructed the jury that the question was, did the release so operate as to discharge from the lien of the judgment, property which was then available for the satisfaction of the judgment, and to what extent? This was quite as favorable as the plaintiff had a right to ask; and, when the Court added, "to the extent that said release did not discharge such property, the plaintiff may recover," when they added this, they conceded too much to the plaintiff; for it was telling the jury that, though the property released would have satisfied the judgment, yet if there is any which can still be made available, the surety is *pro tanto,* not discharged. Such a rule throws all the risks arising from the plaintiff's act, and the uncertainty of the evidence and the fallibility of the jury, on the surety, instead of on the party whose act gave rise to them. If there be still enough of the principal's property left, the creditor need not care that the surety is discharged. If this is doubtful, it was the creditor that made it so, and he should take the risk of it. If he has discharged any of the principal's property, the very least that can be expected of him is, that he should make it perfectly clear that it could not have been made available at all, or not beyond a certain amount; for, by his act, he has prevented the application of the certain test afforded by judicial process.

Judgment affirmed.

114. JENKINS v. NATIONAL VILLAGE BANK OF BOWDOINHAM, 58 Me. 275.

Supreme Judicial Court, Maine, 1870.

The creditor is bound to exercise only ordinary care to prevent loss of securities pledged to the payment of the debt.

On report.

Assumpsit on a receipt, a copy of which may be seen in the opinion.

The time of payment of the note was extended by the defendant to Jan. 12, 1867, upon payment of $11.16 interest for the extension; and on the latter day the note was paid, and a return of the bonds demanded and refused.

The remaining facts appear in the opinion.

S. & J. W. May, for the plaintiff.

A. Libby, for the defendant.

KENT, J.—This case is referred to the court, on report of the evidence, with jury powers. We find the material facts to be these: The bank discounted a note of the plaintiff for $588 on four months, on the 9th of May, 1866, and at the same time, and as part of the transaction, received from the plaintiff as a pledge or collateral security two United States 10-40 bonds, amounting to six hundred dollars on their face. This transaction was assented to by the directors. The cashier on the same day gave to the plaintiff a receipt, in his official capacity, of the following tenor:

"NATIONAL BANK OF BOWDOINHAM, May 9, 1866.

"Received of Shelden F. Jenkins, United States 10-40 bonds, one of $500, and one of $100, amounting to six hundred dollars, to be returned to him on the payment of his note for $558 in four months, dated May 9, 1866. (Signed) R. BUTTERFIELD, Cashier."

These bonds were kept by the bank, with the other bonds and papers and valuables of the bank and of depositors, in the safe, and with the same care as their own, and with reasonable care and oversight. The bank was entered by burglars on the night of the 21st of June, 1866, and the contents of the vault, including these bonds, removed and carried off. The bank used reasonable diligence in attempts to recover the property thus removed, but without success. The note has since been paid to the bank. This action is brought against the bank to recover the value of the bonds. The declaration does not allege any want of care on the part of the bank, but is based upon an alleged promise, in consideration of the delivery of the bonds, to return the bonds upon payment of the note. It does not set up a liability of a general nature, arising from the relation of bailor and bailee, but declares on a special promise to redeliver, at all events, upon payment of the note.

The counsel invokes the receipt of the cashier to sustain this action, and claims that it is a special contract, distinct and different from the one made by the directors, and shown by their signature on the book of the bank, wherein this note is entered in the list of "bills offered and discounted," and under the head of "first surety" is this entry, "10-40 bonds collateral." The receipt of the cashier, it is contended, is an absolute agreement to keep, at all events, and to return on payment of the note. In other words, that thereby the bank became insurers, and bound to keep and return the bonds, whatever might happen. The counsel also contends that the cashier had a right thus to bind the bank by virtue of the powers conferred upon him by his office.

The last question is immaterial if the first proposition is not maintained. And we think it is not. The receipt amounts to no more than would be implied by law, on the facts which appear on the discount book. It is the simple case of a pledge of collateral securities, to secure the payment of a particular note, and that is all that the receipt imports. The collaterals are to be given back when the debt is paid. That is all.

The case of *Field* v. *Brackett,* 56 Maine 121, is in point. In that case, the plaintiff alleged that the defendant received his (plaintiff's) wagon, the same to be kept and used by defendant for one month, and the defendant promised to return the wagon to him at the expiration of the month, in good order, but did not. The defendant admitted the truth of these allegations, but replied that the wagon, during the month, was stolen, without any fault or want of due care on his part. It was held by the court that there was nothing more intended by the promise than the law implies in such a case of bailment, viz., "to return at the time appointed in as good order as when received, ordinary wear and tear and casualties for which no blame could attach to the hirer excepted." In these and like contracts, by which property is delivered under a contract of bailment, without the legal title passing, the law fixes the liability to keep with proper care, but does not make the bailee an insurer against robbery or casualties, when no fault attaches to him. And it does not fix such liability of an insurer, if in the contract, written or verbal, there are no words assuming such undertakings.

The bank was held to the common-law liability by the action of the directors. The receipt of the cashier merely expresses in more words, what the discount book sets out in a condensed form.

If it had undertaken to do more, and to charge the bank as insurers, we are by no means ready to say that such a contract would have come within the powers of a cashier.

The liability of a pledgee is well settled. Mr. Justice Story (Bailments, 197) defines a pledge as "a bailment of personal property as security for some debt or engagement." Kent says, "In general, the law requires nothing extraordinary of the pawnee, but only that he shall take ordinary care of the goods; and if they should happen to be lost, he may, notwithstanding, resort to the pawnee for his debt." 2 Kent's Com. 579.

This has been the law ever since the celebrated case of *Coggs* v. *Bernard,* 2 Lord Raymond. Indeed it is not denied by the learned counsel for the plaintiff, who places his claim upon the receipt of the cashier, as a contract to deliver absolutely on pay-

ment. And as before stated, the declaration does the same, and is silent as to any want of care. If it had alleged, as the case is presented by the proof, we see but little difficulty in sustaining the proposition that all due and reasonable care was used by the bank under the circumstances.

According to the agreement of the parties, we must order Judgment for the defendant.

SECTION 6. DEFENSE FOUNDED UPON THE FAILURE OF THE CREDITOR TO USE MONEY WITHIN HIS CONTROL IN LAWFUL PAYMENT OF HIS CLAIMS

115. SULLIVAN v. STATE, 59 Ark. 47.

Supreme Court, Arkansas, 1894.

Failure of creditor to file for record mortgage given by the principal debtor until it became worthless as a security by reason of the prior filing of a second mortgage, exonerates the surety from liability.

Appeal from Scott Circuit Court in Chancery.

EDGAR E. BRYANT, Judge.

Action by the State for the use of the sixteenth section school fund against J. O. A. Sullivan. The facts are stated in the opinion.

The appellant *pro se.*

James P. Clarke, Attorney General, for appellee.

BATTLE, J. According to the abstract of appellant, which is not controverted by the appellee, the facts in this case, are, in part, as follows:

"On the 9th of January, 1885, H. E. Collum executed his note to T. M. Evart, treasurer of Scott county, for the sum of one hundred dollars, payable one year after date, with 10 per cent. interest, with J. O. A. Sullivan as his surety. The money for which the note was given was part of the sixteenth section school fund, and was loaned as directed by section 6288 of Mansfield's Digest. On the same day (January 9th, 1885), and at the same time, Collum, in order to better secure the payment of the note, and in order to comply with the law, executed his mortgage to the treasurer for the following described real estate: (Description).

"Although the mortgage was executed and delivered to the treasurer on the 9th day of January, as stated, he failed and refused to have the same recorded, or to file the same for record, until the 25th day of March following.

"On the 17th day of March, 1885, H. E. Collum executed to George H. Lyman a mortgage on the same property, for the expressed consideration of five hundred dollars. This mortgage was filed for record on the 23rd day of March, 1885, two days previous to the filing of the mortgage executed by Collum to the county treasurer.

"At the maturity of the second mortgage the land was sold to Green, in accordance with the terms of the mortgage, for the sum of five hundred and seventy-five dollars, that being the amount of interest and principal."

The value of the property mortgaged to the county treasurer greatly exceeded the amount due on the note of Collum and Sullivan.

At the commencement of this action Collum was insolvent, and a non-resident of this State.

A decree was rendered by the court below, in chancery sitting, in favor of the plaintiff, the appellee, against Sullivan, the appellant, for the full amount of the Collum note, and Sullivan appealed.

When Collum executed the mortgage to secure the note executed by him, as principal, and Sullivan, as surety, it was the duty of the county treasurer to file the same for record, in order to preserve the security which he had thereby acquired. Having failed to do so until some time after its execution, and until it had become worthless as a security by reason of a second mortgage being filed prior to it, he should suffer the loss occasioned thereby; and Sullivan should be exonerated from all liability to pay the note, the value of the land mortgaged exceeding the amount due on the same. *Grisard* v. *Hinson*, 50 Ark. 229; *Hubbard* v. *Pace*, 34 Ark. 80; *Burr* v. *Boyer*, 2 Neb. 265; *Wulff* v. *Jay*, 7 Q. B. 756; *Straton* v. *Rastall*, 2 Durn. & East, 366; *Teaff* v. *Ross*, 1 Ohio St. 469; *Capel* v. *Butler*, 2 Sim. & Stu. 457; 2 Brandt on Suretyship and Guaranty (2nd Ed.), sec. 445.

The decree of the court below is, therefore, reversed, and the complaint is dismissed.

116. O'CONOR as receiver, etc., v. E. W. MORSE, et al., defendants, J. H. BRALY, appellant, 112 Cal. 31.

Supreme Court, California, 1896.

A surety is relieved of liability if the creditor refuses a tender of the amount of the debt for which the surety is liable, and is not required to keep the tender good.

Appeal from a judgment of the Superior Court of San Diego County. George Puterbaugh, Judge.

J. W. Hughes, for appellant.

V. E. Shaw, for respondent.

BELCHER, C.—This is an action upon a non-negotiable promissory note for thirteen hundred and eight dollars and ninety-five cents, bearing interest at the rate of one per cent per month, compounding monthly.

The case was tried by the court without a jury and the findings were in substance as follows: On October 31, 1890, the defendants, E. W. Morse, C. E. Heath, and J. H. Braly, executed and delivered the said note to one F. W. Stewart, to be used as collateral security for his own note, to be given to the Consolidated National Bank of San Diego. Thereafter, Stewart executed his own non-negotiable note for the same sum to the said bank, and as collateral security for the payment thereof duly indorsed, assigned and delivered to the bank the said note. On the day of its date defendant Braly paid on said note one-third of the amount due thereon, to wit: Four hundred and thirty-six dollars and thirty-two cents. The interest on the note was paid up to October 30, 1891, but no other payments on account of interest or principal were ever made.

On May 11, 1893, the bank was still the owner and holder of the said note. On that day the defendant Braly, through his duly authorized agent, J. C. Braly, called at the bank and offered to pay the said note, but stated that he did not want it stamped "paid" upon its face, but wanted such an indorsement made as would show the amount paid, and that it had been paid by J. H. Braly. In answer to a question by the cashier as to what he intended to do with the note, he replied that he was instructed to turn it over to attorneys to bring suit on it. From what was said the cashier understood that he wanted the note so indorsed that J. H. Braly could sue upon it, and he referred the matter to Mr. Howard, the president of the bank, and stated to him that accepting payment "would result in a suit against Heath and Morse." Mr. Howard replied to the cashier, in the absence of

Mr. Braly, "that is a matter we must consider." He further said that "the relations of Mr. Morse and Heath to the bank were such that the matter must be considered before suit could be allowed." The cashier then told Mr. Braly to call the next day, and at that time or later the president stated to the cashier that he didn't care to have Mr. Stewart and Mr. Morse sued. Braly went back to the bank the next day, as requested, and Mr. Howard, the then president of the bank, stated to him "that they had concluded to hold the note and make it out of the other parties."

Defendant Braly offered to prove by defendants Morse and Heath that they were solvent at the time he offered to pay the bank, but that on the twenty-fifth day of August, 1893, they, and each of them, became insolvent and have continuously since been insolvent; which offered evidence the court excluded upon the ground that it was irrelevant, incompetent, and immaterial, to which ruling defendant Braly duly excepted.

And, as conclusions of law, the court found that the effect of the offer to pay, on May 11th, was to stop the running of interest and to release said defendant Braly from the obligation to pay attorney's fees, but that he was not released from his obligation to pay the note, and that plaintiff was entitled to judgment against the three defendants for the principal due on the note, with interest thereon to May 11, 1893, amounting to one thousand and sixty-eight dollars and twenty-five cents.

Judgment was accordingly so entered, from which the defendant Braly appeals on the judgment-roll alone.

The Civil Code, section 2831, declares a surety to be "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor."

In *Montgomery* v. *Sayre,* 91 Cal. 206, the action was upon a promissory note given as collateral security under circumstances similar to those found here, and it was held that the maker of the note was, in law, a surety.

The note in suit was executed to be used as collateral security for the payment of Stewart's note, and was accepted and held by the bank as such collateral securety. The appellant must, therefore, be regarded as only a surety, and the question is, was he exonerated from liability on the note by the refusal of the bank to accept payment thereof, because it would result in a suit

against the co-makers, and "they had concluded to hold the note, and make it out of the other parties."

"A surety is exonerated: 1. In like manner with a guarantor; 2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety, or inconsistent with his rights, or which lessens his security; or 3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do." (Civ. Code, sec. 2840).

In *Hayes* v. *Josephi*, 26 Cal. 535, the action was to recover from a surety on an undertaking, given for the release of an attachment, the amount of the judgment subsequently recovered. The defense was that subsequent to the recovery of the judgment the surety tendered to the creditor the full amount of the judgment and he refused to receive it, and that at that time the judgment debtor was solvent, but afterward, and before the commencement of the action, became, and ever since had been, wholly insolvent.

At the trial the court refused to admit evidence in support of the allegations of the answer, and gave judgment for the plaintiff on the pleadings. On appeal it was held that the offered evidence should have been admitted, and that if the facts alleged were established the surety was discharged from his obligation on the undertaking. In the opinion of the court rendered by SAWYER, J., it is said: "The law requires the creditor to act in the utmost good faith toward the surety, and will not permit him to do anything that will unnecessarily tend to prejudice his interests. The creditor will certainly not be permitted to place obstacles in the way of the surety, which tend to hinder him in the pursuit of such remedies as are guaranteed to him by the law. The surety is entitled to pay the debt, and thereby at once acquire the right to proceed against the principal. * * * If it is the legal right of the surety to pay the debt, and at once proceed against the principal debtor, it necessarily follows that he is entitled to have the money accepted by the creditor in order that he may proceed. It is the duty of the creditor to receive it, and a gross violation of duty and good faith on his part to refuse, thereby interposing an insurmountable obstacle in the way of the pursuit by the surety of his most prompt and efficient remedy. * * * If the creditor refuses to receive the money when tendered, he as effectually prevents the surety from promptly pursuing his most efficient remedy as he would by entering into a valid contract with the debtor to extend the time of payment. The reason why a

valid contract between the creditor and principal to extend the time of payment discharges the surety is, as we have seen, because the creditor by his further contract places an obstacle in the way of prompt and efficient action on the part of the surety to protect his interest. The principle applies here with equal force."

In *Sharp* v. *Miller,* 57 Cal. 415, this court said: The plaintiff "refused to accept the money which was offered. Having tendered the money the defendants, as sureties, did all they contracted to do. The tender made, although it was refused, was equivalent to a payment by them. (*Solomon* v. *Reese,* 34 Cal. 36). And by it they were discharged from their obligation as sureties upon the appeal bond. *Hayes* v. *Josephi,* supra)."

The note in suit was held by the bank as collateral security, and appellant was liable thereon as principal for one-third which he paid, and as co-surety with Morse for one-third, and as co-surety with Heath for one-third. (*Chipman* v. *Morrill,* 20 Cal. 136). He had a right to pay the balance due on the note, and to look to his co-makers for their *pro rata* shares thereof. The bank refused to accept the money because it did not want the co-makers sued. But this the bank had no right to do, and, as said in *Hayes* v. *Josephi,* supra, the refusal was a gross violation of duty and good faith on its part.

It is objected, however, that it does not appear that appellant was prejudiced by the refusal, since there is nothing to show that Morse and Heath subsequently became insolvent, the finding to the effect that appellant offered to prove their solvency and subsequent insolvency, which evidence was excluded, having no place in the record.

It is true that findings should be of the ultimate facts, but this finding cannot be disregarded on the ground urged. It is found in the record, and, so far as appears, was made and accepted without objection on either side. It must be assumed, therefore, for the purposes of this appeal, that the facts were as appellant offered to prove them to be.

It is further objected that appellant was not discharged from liability on the note, because he did not comply with the provisions of section 1500 of the Civil Code, which reads as follows: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor."

A similar objection was made and overruled in *Randol* v. *Tatum,* 98 Cal. 390. On page 395 it is said: "E. A. Billings

did not, when plaintiff refused to receive her money in payment of rents, deposit the same, or any part of it, in a bank or elsewhere, in compliance with the provisions of section 1500 of the Civil Code." And, after a full discussion of the question, it is said at the close of the opinion: "Even if the obligation of defendants must be regarded as that of sureties for the payment of a debt, still I think the tender sufficient to discharge the sureties."

As the case is presented on the record here, we think it clearly appears that the appellant was exonerated from liability on the note, and that the court erred in rendering judgment against him.

The judgment should be reversed and the cause remanded.

VANCLIEF, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

MCFARLAND, J., TEMPLE, J., HENSHAW, J.

117. NATIONAL MAHAIWE BANK v. PECK, 127 Mass. 298.

Supreme Judicial Court, Massachusetts, 1879.

The creditor is not obliged to satisfy his claim out of other funds of the solvent debtor, which he controls, and may, if he chooses, pursue the surety instead.

Contract on a promissory note for $500, dated December 29, 1875, signed "Jos. A. Benjamin, Treas." payable to the order of the defendant in forty-five days after date at the plaintiff bank, and indorsed by the defendant. Trial at June term 1878 of the superior court, without a jury, before ROCKWELL, J., who reported the case for the determination of this court, in substance as follows:

Benjamin kept an ordinary banking account with the plaintiff bank. At the time of giving the note in suit, he was treasurer of the town of Egremont, and the bank gave him for this note a draft to be used for the payment of a tax due from the town. The note and the proceeds of it were not made a part of his account with the bank, and the bank regarded the note as an official or town matter.

On February 15, 1876, when this note matured, all things necessary to charge the defendant as indorser were done. On that day, and ever since, the bank held a note, made by Benjamin, which it had discounted, signed "Jos. A. Benjamin," dated November 13, 1875, for $1500, payable in three months after

date at the plaintiff bank to one Callender, and indorsed by Callender. And on said February 15, there stood to the credit of Benjamin, as his balance of account, the sum of $381.10, and the same continued so to stand on the books of the bank until about six weeks before the trial, when it was indorsed as of February 16, 1876, on the note for $1500.

On February 16, 1876, the day of the maturity of the note for $1500, the president of the plaintiff bank and its principal financial manager, during business hours, told the cashier, if the $381.10 standing to Benjamin's credit was not drawn out by his checks before the close of business hours, to apply it on the $1500 note; and at the close of the bank for that day, it being found that Benjamin had drawn no checks on said balance, he again directed the cashier to apply it on the $1500 note.

On February 19, 1876, during business hours, the defendant brought to the bank a check of Benjamin, made and handed to defendant on that day, and which was as follows:

"South Egremont, Mass., Feb. 15, 1876. $381. National Mahaiwe Bank pay to the order of J. A. B., Treas., note 15th inst., three hundred and eighty-one dollars. Jos. A. Benjamin."

The defendant at the same time, acting at the request of Benjamin, tendered to the cashier of the plaintiff bank this check and $120 in money in payment of the note in suit, and demanded the note. The money had been furnished the defendant by Benjamin, but it did not appear that he informed the cashier of the bank of this fact. The cashier declined to receive the check, and money, and told the defendant he could not accept the check, because he had been directed to apply the balance of Benjamin's account on another claim held by the bank, meaning the $1500 note. After this refusal, the cashier did, at the request of the defendant, receive the $120 and indorse the same on the note in suit, it being at the time understood that neither party intended thereby to waive his rights in reference to the check. The $120 have been retained by the bank.

It is not the practice of the bank to charge over-due notes held by it to the account of a depositor until he has sufficient credits to pay the note. Benjamin became a bankrupt in the spring of 1876, and died in July or August of that year.

Upon the foregoing facts, the defendant contended, as a matter of law, that the plaintiff was not entitled to recover; and the judge so ruled, and found for the defendant. If this ruling was correct, judgment was to be entered for the defendant; but if the plaintiff was entitled to recover, judgment was to be entered

for him for the sum of $381.10, and interest from February 16, 1876.

J. Dewey, for the plaintiff.

M. Wilcox, for the defendant.

GRAY, C. J. Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. *Foley* v. *Hill*, 1 Phillips, 399, and 2 H. L. Cas. 28; *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Carr* v. *National Security Bank*, 107 Mass. 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in *Baker* v. *Briggs*, 8 Pick. 122, and *American Bank* v. *Baker*, 4 Met. 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety. *Glazier* v. *Douglass*, 32 Conn. 393; *Field* v. *Holland*, 6 Cranch, 8, 28; *Brewer* v. *Knapp*, 1 Pick. 332; *Upham* v. *Lefavour*, 11 Met. 174; *Bank of Bengal* v. *Radakissen Mitter*, 4 Moore P. C. 140, 162.

The general rule accordingly is, that where moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but where by express agreement, or by a course of dealing, between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the

banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker. *Clayton's case,* 1 Meriv. 572, 610; *Bodenham* v. *Purchas,* 2 B. & Ald. 39, 45; *Simpson* v. *Ingham,* 2 B. &. C. 65; S. C. 3 D. & R. 249; *Pemberton* v. *Oakes,* 4 Russ. 154, 168; *Pease* v. *Hirst,* 10 B. & C. 122; S. C. 5 Man. & Ryl. 88; *Henniker* v. *Wigg,* Dav. & Meriv. 160, 171; S. C. 4 Q. B. 792, 795; *Strong* v. *Foster,* 17 C. B. 201; *Martin* v. *Mechanics Bank,* 6 Har. & Johns. 235, 244; *State Bank* v. *Armstrong,* 4 Dev. 519; *Commercial Bank* v. *Hughes,* 17 Wend. 94; *Allen* v. *Culver,* 3 *Denio,* 284, 291; *Voss* v. *German American Bank,* 83 Ill. 599. In the decision in *McDowell* v. *Bank of Wilmington & Brandywine,* 1 Harringt. (Del.) 369, and in the *dicta* in *Dawson* v. *Real Estate Bank,* 5 Pike, 283, 298, cited for the defendant, this distinction was overlooked or disregarded.

In many of the cases, indeed, the money appears to have been deposited after the debt to the bank matured, so that the case was analogous to the ordinary one of a payment, which, not being appropriated by the debtor, might be appropriated by the creditor. But where the balance of account is in favor of the depositor when his debt to the bank becomes payable, it is a case of mutual debts and credits, which, except in proceedings in bankruptcy or insolvency, neither the depositor nor his surety has the right to require to be set off against each other. Judge LOWELL, in allowing money on deposit to the credit of a bankrupt to be set off in bankruptcy against the aggregate debt due from him to the bank, said: "This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor." *In re North,* 2 Lowell, 487. See, also, *Demmon* v. *Boylston Bank,* 5 Cush. 194; *Strong* v. *Foster,* 17 C. B. 217.

In *Strong* v. *Foster,* a depositor gave to his bankers a promissory note with a surety, which was not entered in his general banking account; and it was held, that the surety, when sued by the bankers on the note, could not set up, either as payment or by way of equitable defense, that shortly after the note matured the balance of account was in favor of the depositor to a greater amount, and the plaintiff's did not apply that balance in discharge of the note, or inform the defendant for three years afterwards that the note remained unpaid. But the reasoning of the court applies quite as strongly when the balance in favor of the depositor exists at the time when his debt becomes payable, as when it is created by subsequent deposits. Chief Justice Jervis said: "Here the

note was never entered in the account at all; the rule as to adjusting balances therefore does not apply." "It would be essentially altering the position of parties, to establish that, because a banker, who holds a note of a third person for a customer, has a balance in his hands in the customer's favor at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety. There is no authority in equity for any such position, and none certainly in law." 17 C. B. 216, 217. And Mr. Justice Willes observed: "As to what was said on the part of the defendant, that, if a set-off arises between the creditor and the principal debtor, the liability of the surety on the note is extinguished; that doctrine would lead to singular results. These securities are often given to increase credits of bankers to their customers. If the liability of the maker were to depend upon the state of the customer's account at any one moment, he might never undergo the liability contemplated at all. The security is given without any reference to the other side of the account. This is the first time, I believe, that it has ever been suggested, that when a note given under circumstances like these falls due, and there is a balance in favor of the customer at the time, that balance must of necessity be applied to the discharge of the note." 17 C. B. 224. Even the usual inference from the entry of such a note in the account may be controlled by other circumstances. *City Discount Co.* v. *McLean*, L. R. 9 C. P. 692.

In the case at bar, it appears that the consideration received by Benjamin from the plaintiff bank for the note in suit was to be used by him in his official capacity as town treasurer, the note was regarded by the bank as an official or town matter, and neither the note nor its consideration was ever made part of his general banking account; and that, when the check in favor of the defendant was drawn by Benjamin and presented at the bank, the bank held a personal note of Benjamin, overdue and exceeding in amount the balance of account in his favor at the time, the president of the bank had directed the cashier to apply this balance to the latter's note, and the cashier so informed the defendant when he presented the check. Under these circumstances, neither Benjamin, the maker, nor the defendant, the indorser, has the right to insist that this balance of account should be applied to the satisfaction of the note in suit, rather than of the other note of Benjamin; and, according to the terms of the report, there must be

Judgment for the plaintiff.

SECTION 7. DEFENSE FOUNDED UPON THE FAILURE OF THE CREDITOR TO SUE THE DEBTOR AT THE SURETY'S REQUEST

118. PAIN v. PACKARD, et al., 13 Johns. 174.
Supreme Court, New York, 1816.

If the creditor neglects to sue the principal, upon request to do so by the surety, the latter is discharged.

This was an action of *assumpsit* on a promissory note made by Packard & Munson, in which Packard alone was arrested, the other defendant being returned not found. The defendant, Packard, pleaded: 1. *Non assumpsit.* 2. That he signed the note which was for $100, payable on demand, as surety for Munson; that he urged the plaintiff to proceed immediately in collecting the money due on the note from Munson who was then solvent; and that, if the plaintiff had then proceeded immediately to take measures to collect the money of Munson, he might have obtained payment from him; but the plaintiff neglected to proceed against Munson until he became insolvent, absconded and went away out of the state, whereby the plaintiff was unable to collect the money of Munson. 3. The third plea was like the second, except that the defendant alleged a promise, on the part of the plaintiff, that he would immediately proceed to collect the money of Munson, and a breach of that promise, by which the defendant was deceived and defrauded, and prevented from obtaining the money from Munson, etc.

There was a demurrer to the second and third pleas and a joinder in demurrer, which was submitted to the court without argument.

Per Curiam. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of *The People* v. *Jansen* (7 Johns. 336) will warrant and support this plea. We there say a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicitly laid down by the court in the case of *Tallmadge* v. *Brush.* But this is not such a case. Here is a special request, by the surety, to proceed to collect the money from the principal; and an averment of a loss of the money as against the principal in consequence of such neglect. The averments and facts stated in the plea are not repugnant, or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only is fairly to be presumed to

have been known to the plaintiff. He was, in law and equity, therefore bound to use due diligence against the principal in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety might have paid the note and prosecuted the principal; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal and choose to rest on that, he might do so. In the case of *Trent Nav. Co.* v. *Hartley* (10 East 34) the plea was similar to the present and not demurred to.

The defendant must, accordingly, have judgment upon the demurrer.

Judgment for the defendant.[20]

119. INKSTER v. FIRST NATIONAL BANK OF MARSHALL, 30 Mich. 143.

Supreme Court, Michigan, 1874.

The surety is not discharged because of the creditor's refusal, on the surety's request, to sue the principal debtor.

Error to Wayne Circuit.

Plaintiff in error (who was sued in this case in the Wayne circuit) signed with C. H. White, the following note:

"3000. MARSHALL, MICH., Oct. 7, 1871.

"Three months after date, for value received, I promise to pay to the order of the First National Bank of Marshall, three thousand dollars, at the First National Bank of Marshall, Michigan, with interest at ten per cent. after date.

"C. H. WHITE.
"ROBERT INKSTER, Surety."

The only defense set up by Inkster was, that on the 24th day of February, 1872, he made a request in writing of said plaintiff to proceed and collect the note of said White; that a few months

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[20] In the courts of some states the doctrine of this case is followed without qualification; in others, with these qualifications:

a. The request of the creditor that he sue the principal debtor must be accompanied by notice that the surety will not continue to be liable if his request be ignored.

b. The request must be accompanied with an offer on the part of the surety to pay the costs of the suit or to indemnify the creditor for such costs.

c. If made before the maturity of the debt, the request will be ineffective.

The doctrine of this case is, however, repudiated by the courts of most of the states.

after, he again, in writing, requested the plaintiff to do so, saying that it was for White to pay the same: that, at the same time of making the first request, White was solvent, and the amount of the note could have been collected of him; that afterwards White was doing business with the bank; that no suit or other proceedings had ever been commenced by the bank against White to collect the note, and that at the time of the commencement of this suit White had become utterly insolvent, and no execution could be collected of him. Evidence was introduced tending to establish these facts, and the defendant's counsel requested the court to charge the jury, that, if they found these facts proved, the defendant was not liable.

This charge was refused, and the court charged that the facts stated constituted no defense to the action.

To this, exception was taken, and this constituted the only question in the case.

George V. N. Lothrop, for plaintiff in error.

C. I. Walker, for defendant in error.

CHRISTIANCY, J.

Without expressing any opinion upon the case of a mere guaranty, and without undertaking to decide whether the plaintiff in error might or might not, in a court of equity, by giving proper indemnity, have called upon the bank to proceed against White for the collection of the note; and treating the question now before us as one of common law only (which it is) we think the circuit court was right in holding that the facts relied upon by the defendant below constituted no defense to the action.

As between him and the bank, so far as the right of action was concerned, he was a maker of the note, and a principal. As between him and White he was but a surety; and though the bank was apprised of this by his signature upon the face of the note as surety, this did not, in reference to the question here involved, change the nature of his liability to the payee or holder, or make it any more the duty of the latter to proceed against White, at his request, than if he had signed as a principal maker without adding to his signature the word "surety."

His liability to the holder was absolute and not conditional, and his duty was to pay the note; and, though as between himself and White he was but a surety, he cannot complain of any hardship because the holder would not, at his request, proceed to bring suit against the principal, as it was in his own power, at any moment after default, to pay the note, take it up, and proceed

himself against his principal for the amount. This was the duty which his contract imposed upon him by the common law, and such was the remedy which the common law gave him upon the performance of that duty. Such we understand to be the well settled general rule as to the obligation and rights of sureties, and we see nothing in this case to take it out of the general rule.

The case of *Pain* v. *Packard,* 13 Johns. 174 (which has been followed in New York, not without some vigorous protests, and to some extent in some other states), was, we think, a clear departure from the common law; and we find nothing in the English decisions to warrant the qualifications of a surety's liabilities there recognized.

The judgment of the circuit court must be affirmed, with costs.

The other Justices concurred.

SECTION 8. DEFENSE FOUNDED UPON NON-DISCLOSURE BY OBLIGEE OF FACTS WHICH HE OUGHT TO REVEAL TO THE SURETY.

120. RAILTON v. MATHEWS, 10 Clark & Finnelly 934.
House of Lords, 1844.

A surety on a bond for the fidelity of an agent to his employer, the obligee, is not bound if the obligee conceal from him facts materially affecting the trustworthiness of the agent. The motive inducing the concealment is immaterial.

The respondents, Mathews and Leonard, carried on business in partnership at Bristol: their business extended to Scotland, and was conducted by their agents in Glasgow. Messrs. Rowley and Hickes acted as such agents from January, 1832, to February, 1834, when they dissolved partnership, and it became necessary for the respondents to make a new appointment of agency. Hickes and Rowley then severally applied for the appointment. The respondents gave it to Hickes. The appointment was by letter, dated Bristol, 25 January, 1834, in these terms: "Sir,—We appoint you as our agent for the sale of dye wares, and to collect all our monies; you finding us security for 3,000*l.*, as proposed."

Hickes, upon being so appointed entered upon the agency, or rather, continued the agency held before by him and Rowley.

Being afterwards required by the respondents to find the security, he proposed his brother, who resided in England, and the appellant, who was a writer in Glasgow. The respondents agreed to accept the proposed sureties without any communication with either of them; and the necessary bond having been prepared and transmitted to the agent, was subscribed by him and by the appellant at Glasgow in September, and by the other surety in October, 1835. The bond was in the English form, and in the penal sum of 4,000*l.*, conditioned that the agent should faithfully conduct himself as the clerk and commission agent of the respondents, and satisfactorily account to them for all monies received on their account.

In May, 1837, the respondents discovered that Hickes had acted unfaithfully in the agency, and had contrived to apply their monies to his own use to a large amount. They gave notice of this discovery to the sureties; and subsequently, by the third respondent, their mandatory in Scotland, raised an action against all the obligors in the bond, concluding for count and reckoning of the whole of the agent's actings, and for payment of the 4,000*l.*, or such part thereof as might be found to be due by the agent.

The appellant alone defended the action; but before any final judgment was pronounced, he raised an action against the respondents for reduction of the bond, upon various grounds, principally on this: "that the bond was obtained fraudulently by the respondents, and on the procurement thereof they were guilty of a fraudulent concealment of material circumstances known to them, and deeply affecting the credit and trustworthiness of the said Hickes." The libel then, after stating various circumstances importing the respondents' knowledge of Hickes' misconduct and irregularities in the agency during the period of his partnership with Rowley, summed up the whole statement to this effect: That although at and prior to the time of receiving the bond, the respondents had been made acquainted with the misconduct of Hickes in misapplying the funds of the firm of Rowley & Hickes to his own private purposes; and although, from their own experience of his gross irregularities under their agency, they were perfectly aware that he was unworthy of trust, they totally failed to communicate (to the sureties) the said circumstances of either of them, or the existence of a balance on the agency accounts then standing against Hickes; on the contrary, while they accepted and took possession of the bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of Hickes, and the state of his ac-

counts, which circumstances were wholly unknown to the appellant and the respondents, by their whole conduct in the premises, deceived and misled the appellant into the belief that Hickes was in every respect trustworthy, while they well knew the reverse; whereby the bond was obtained by them through fraud and deceit, and the undue concealment of material facts, which they knew, if communicated, would have prevented the appellant from undertaking the said obligation or subscribing the bond; or the respondents were guilty of fraudulent concealment of material circumstances in obtaining the bond, and the same was therefore null and void. The two actions were afterwards conjoined, and issues were directed: the first issue, which was in the appellant's action and was first tried, being, "Whether the pursuer, E. Railton, was induced to subscribe the bond by undue concealment or deception on the part of the defenders, or either of them?

The Lord Justice CLERK, who presided at the trial, in the course of his charge to the jury, directed them that under this issue, "the concealment must be, first, of things known to the defenders, or which they had strong and grave ground to suspect; secondly, that the concealment therefore being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive."

The jury found a verdict in favour of the respondents, and, in effect, sustaining the bond; whereupon the appellant's counsel took an exception to the learned judge's direction to the jury.

The bill of exceptions was argued before the Lords of the Second Division, who, by an interlocutor of the 31st of January, 1844, disallowed the same, and refused to grant a new trial, and appointed judgment to be entered upon the verdict.

The appeal was against that interlocutor.

Mr. Sergeant *Talfourd* and Mr. *Fleming*, for the appellant.

Mr. *F. Kelly* and Mr. *Anderson*, for the respondents.

Lord CAMPBELL.—This case has been very satisfactorily argued on both sides; with great brevity, but everything has been urged which could be for the advantage of the clients or the assistance of your Lordships; and having listened to all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the bill of exceptions ought to be allowed, and that there must be a new trial.

The question really is, what is the issue which the Court directed in this case? "Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by

undue concealment or deception on the part of the defenders, or either of them?" The material words are, "undue concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond: there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because, to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond, appears to me preposterous; for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial.

Then we come to the direction given by the learned judge. He says, "The concealment, therefore, being undue, must be wilful and intentional, with a view" (and that is with reference to the motive) "to the advantage they were thereby to receive." Now, according to my notion of the issue, that is an entire misconception of it: according to this direction, although the parties acquiring the bond had been aware of the most material facts which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them, that is to say, if they had forgotten them, or if they thought by mistake that in point of law or morality they were not bound to disclose them, then, according to the holding of the

learned judge, it would not be a concealment. But the learned judge does not stop there; he goes on, "with a view to the advantage they were thereby to receive;" introducing those words conjunctively, and, in effect, saying that it was not an undue concealment unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hickes; to keep back from those who, it was material to him, should continue to have a good opinion of him, the knowledge of those facts; that it was a pure kindness on their part, to prevent those parties entertaining a bad opinion of him, and not from any selfishness, this concealment took place. Although that might be the motive, yet the fact that he was in arrear and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If those were held back merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect in point of law would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional with a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Interlocutor complained of reversed; bill of exception allowed; and a new trial directed.[21]

121. SAVINGS BANK, etc., v. BODDICKER, et al., 105 Ia. 548.
Supreme Court, Iowa, 1898.

If the creditor withholds information, or knowingly gives false information, respecting the principal, to the surety, he, and not the surety, must suffer the resulting loss.

Action at law on a bond given to secure the payment of money. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal. Reversed.

Heins & Heins, for appellants.

Tom H. Milner, for appellee.

[21] The concurring opinion of Lord Cottenham is omitted.

ROBINSON, J.—In January, 1881, the plaintiff was organized as a corporation by virtue of chapter 60 of the Acts of the Fifteenth General Assembly, for the purpose of transacting business as a savings bank at Norway, in Benton county. Its capital stock, at first but ten thousand dollars, was, in the year 1887, increased to fifteen thousand dollars. The firm of G. A. Miller & Sons was engaged at Norway in selling coal, lumber, and agricultural implements, and borrowed money of the plaintiff. In the first part of the year 1891 the firm was indebted to the plaintiff to the amount of about six thousand dollars, and upon the demand of the plaintiff executed and delivered to it the instrument in suit, of which the following is a copy: "Know all men by these presents that we, G. A. Miller & Sons, as principals, and Joseph Boddicker and V. A. Thoman, as sureties, of Benton county, Iowa, are held and firmly bound unto the Benton County Savings Bank of Norway, Benton county, Iowa, in the sum of five thousand ($5,000) dollars, to be paid to the said Benton County Savings Bank or its assigns; to the payment of which we bind ourselves, and each of us, our heirs and legal representatives, firmly by these presents. It is the intention and purpose of this instrument or obligation to fully protect and indemnify the said Benton County Savings Bank or its assigns against any and all losses by reason of the failure of the said G. A. Miller & Sons to pay their indebtedness now owing (or which may be contracted hereafter) to the said Benton County Savings Bank. The condition of the above obligation is such that, if the said G. A. Miller & Sons shall pay in full amount of their indebtedness to the said Benton County Savings Bank, then this obligation to be void and of none effect; otherwise to remain in full force and virtue. G. A. Miller & Sons. Joseph Boddicker. V. A. Thoman." On the thirty-first day of January, 1896, the plaintiff commenced this action against the firm of G. A. Miller & Sons and its members to recover the amount due on certain promissory notes, and against the sureties to recover the amount of the bond. The action was aided by attachment which was issued against the property of the firm and its members. In April, 1896, judgment was rendered against all the defendants excepting the sureties on the bond, for the sum of fourteen thousand, six hundred and twenty dollars and fifty-five cents, an attorney's fee, and costs, and a special execution was ordered against certain town lots. Thereafter, by order of the court, a separate petition setting out the claims of the plaintiff upon the bond was filed, and to that the sureties Boddicker and Thoman filed an answer. The verdict

and judgment against them were for the full amount of the bond. * * *

The defendants state that, being ignorant of the financial standing of G. A. Miller & Sons, they applied to the plaintiff, a short time before this action was commenced, for information, and were then assured by the plaintiff that the firm was solvent, and in good financial condition; that the plaintiff knew that the statements were false; that the defendants believed them to be true, and relied upon them, and in consequence refrained from taking measures to secure themselves which they would have taken but for the false representations made as stated. In view of the fact that what evidence will be given on another trial of this case is uncertain, we content ourselves with saying on this branch of the case that as the contract of suretyship is, as a rule, for the benefit of the creditor, he is, in dealing with the surety, to observe the utmost good faith, and if he fail to do so, without a sufficient excuse for his neglect, the surety will be discharged to the extent to which he suffers by reason of the lack of good faith on the part of the creditor. If the surety applies to the creditor for information respecting the principal which the creditor has, and may properly give, but which he withholds without sufficient cause, or if he knowingly give false information, he, and not the surety should suffer the loss occasioned by the wrong. See *Bank of Monroe* v. *Anderson Bros. Min. & Ry. Co.*, 65 Iowa 692; *Rowley* v. *Jewett*, 56 Iowa 492; *Auchampaugh* v. *Schmidt*, 77 Iowa 13; *Wolf* v. *Madden*, 82 Iowa 114; *Harris* v. *Brooks*, 21 Pick. 195; *Brandt on Suretyship*, 611. * * *

Judgment reversed.

122. TAPLEY v. MARTIN, 116 Mass. 275.

Supreme Judicial Court, Massachusetts, 1874.

A surety on the bond of an employee who had previously defrauded his employer cannot avoid liability on the bond because of non-communication of the facts, if unknown to the obligee.

Contract on an agreement made by the defendant to indemnify the plaintiff for any loss or damage sustained by him as surety on the bond of James D. Martin, as cashier of the Hide and Leather National Bank, Boston. At the trial, before WELLS, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The nature of the case appears in the opinion.

A. A. Ranney, as *amicus curiæ* in support of the exceptions.

G. O. Shattuck & O. W. Holmes, Jr., for the plaintiffs.

MORTON, J. * * * The court ruled "that there was no evidence in the case, as tendered, which showed such knowledge by the officers of the bank, of frauds or defalcations by Martin before the date of his bond as cashier, that the failure to communicate the information to the sureties would discharge them from the obligation of their bonds;" and the defendants excepted.

To understand this question it is necessary to state the facts bearing upon it. James D. Martin, a son of the defendant, was appointed cashier of the Hide and Leather National Bank, in January, 1867. The plaintiff, at the request of the defendant, became one of his sureties, and the defendant gave the bond in suit to indemnify him against any loss by reason of his so becoming surety. Martin had been a bookkeeper in the bank before he was appointed cashier, and the defendant introduced evidence tending to show that while he was bookkeeper he was guilty of frauds and defalcations similar to those of which he was guilty after he became cashier, and for which the plaintiff, as his surety, was liable. She also introduced evidence tending to show that while Martin was bookkeeper, the attention of the directors was called to the fact that there were errors and inaccuracies in his books. But there was no evidence that the officers of the bank had knowledge that Martin, while bookkeeper, was guilty of frauds or defalcations.

The defendant contended at the trial that the officers were guilty of gross negligence in not examining the books, and that the sureties were thereby discharged. But the court ruled, that unless the defendant proved actual knowledge by the officers of previous fraud, the sureties would not be discharged; that negligence in failing to examine, however gross, would not discharge the sureties, and as before stated, that there was no evidence of such knowledge by the officers of the bank.

We are of the opinion that these rulings were sufficiently favorable to the defendant.

Upon examining the evidence reported in the bill of exceptions, it is clear that there is no evidence which would justify the jury in finding that the officers of the bank had actual knowledge of Martin's frauds while he was bookkeeper. We are not, therefore, called upon to decide whether, if they had such knowledge and failed to communicate it to the sureties on Martin's bond as cashier, the bond would be thereby avoided as to the sureties. The only question is, whether their negligence in failing to examine the books discharges the obligations of the sureties.

We can see no principle upon which it can be held to have this effect. The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the other officers or agents of the bank, and such negligence does not discharge his sureties. In *Amherst Bank* v. *Root,* 2 Met. 522, which was similar to the case at bar, Chief Justice SHAW says: "The idea that the cashier is excused by the act or negligence of the directors arises from considering the board of directors as the corporation, and then applying a very equitable principle, that one ought not to recover of a surety damages caused by himself. We think the principle does not apply." In the case at bar the plaintiff was not induced to sign the bond by any fraud of the directors, and the court correctly ruled that he would not be released from his obligations as surety by their alleged negligence in failing to examine the books and affairs of the bank. *Minor* v. *Mechanics' Bank of Alexandria,* 1 Pet. 46; *United States* v. *Kirkpatrick,* 9 Wheat. 720; *Franklin Bank* v. *Stevens,* 39 Me. 532; *Farmington* v. *Stanley,* 60 Me. 472.

It appeared that the plaintiff paid the amount of his bond to the bank without a suit; and the court instructed the jury that if he made this payment without the assent of the defendant, he must show that he was legally liable; but if he procured her assent, and made the payment in good faith upon that assent, she could not put the plaintiff to proof that he was legally liable; to which the defendant excepted. This ruling was correct, accompanied, as it was, with the further instruction, that good faith, in the sense intended in the ruling, required that the plaintiff should inform the defendant of all facts known to himself bearing upon his liability. The plaintiff had only a nominal interest in the question of his liability on the bond. The defendant was the real party interested in this question. It was her right and duty to judge whether any defence should be made to the claim of the bank. After she had requested him to pay, or assented to his paying, he could not properly defend against the claim. If he did so, it would be at his own risk and expense, and he could not recover of the defendant any of the expenses of such unauthorized defence; he had the right to act upon her assent, and pay the claim without a suit; such payment was made at her request, and she is liable for the amount paid, and cannot defend upon the ground that there was a defence to the claim of the bank which she neglected to make before the payment.

We have considered all the questions raised by this bill of exceptions, although some of them have become immaterial by the special finding of the jury in the case. In answer to a special question submitted to them, they have found that the plaintiff made the payment to the bank with the assent of the defendant and in good faith. It was within the discretion of the court to submit this question to them, and their finding upon it is conclusive, and renders immaterial all questions as to the liability of the plaintiff on his bond.

Exceptions overruled.

SECTION 9. DEFENSE FOUNDED UPON RETENTION OF THE PRINCIPAL IN SERVICE AFTER KNOWLEDGE OF HIS DISHONESTY.

123. PHILLIPS v. FOXALL, L. R. 7 Q. B. 666.
Court of Queen's Bench, Trinity Term, 1872.

On a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

The facts sufficiently appear in the opinion.

The judgment of Cockburn, C.J., Lush, and Quain, JJ., was delivered by

QUAIN, J.—This is an action brought by the plaintiff on a contract whereby the defendant guaranteed the honesty of one John Smith, a servant in the employ of the plaintiff, to the extent of 50*l*. The contract is set out in the declaration, and recites the employment of Smith, and that it was his duty to collect money for the plaintiff, and account to her for all sums of money so collected, and that the plaintiff had before the giving of the guarantee held in her hands a sum of money belonging to Smith as a security for the proper performance by Smith of his duty, which sum the plaintiff had agreed to pay back to Smith on receiving the defendant's guaranty. The declaration then pro-

ceeds to allege that in consideration that the plaintiff would pay over to Smith the money so held, and continue him in the service of the plaintiff in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss, not exceeding 50*l.*, which she might at any time sustain through any breach by Smith of his duty during the continuance of such service; and it alleges a breach, in the usual form, that Smith failed to pay over sums of money to the amount of 50*l.* which he had collected on behalf of the plaintiff.

In answer to this declaration the defendant divides the time during which the service lasted, and during which the loss was sustained into two periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; and, secondly, from the last-mentioned day to the 4th day of April, 1871, when the service terminated. As to the first period the defendant admits his liability for loss incurred by the acts of the servant during that period, and he has paid 10*l.* into court, which he alleges is sufficient to reimburse the plaintiff for such loss. As to the second period he pleads a plea on equitable grounds, which is to this effect:—that the servant had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff had discovered on the latter day, and that the plaintiff then, without communicating such discovery to the defendant, and while the defendant was ignorant of the servant's dishonesty, agreed with the servant to continue him in her employ as before, and the servant on the other hand agreed to pay the plaintiff 3*l.* a month on account of the previous defalcations. The plea then alleges that the servant was continued in the plaintiff's service accordingly on those terms. The plea then goes on to state, that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by the servant during the continuance of the service, as so agreed on, after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant of the previous defalcations of the servant; and that by reason of the plaintiff not having given the defendant notice of such defalcations he was prevented from revoking the guaranty.

To this plea the plaintiff has demurred, and the question argued before us was whether the plea afforded a good defence to so much of the cause of action as it was pleaded to, namely,

the loss occasioned by the defalcations of the servant committed between the 20th of November and the end of the service.

We are of opinion that the plea is good.

We think that in a case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Suppose that the state of facts, which has arisen here in the course of the service, had existed before or at the time when the guaranty was given, in other words, that the servant had previously committed defalcations in the plaintiff's service, and had agreed to repay them at the rate of 3*l.* a month, and that this fact had been concealed by the master from the defendant when he gave the guaranty, it cannot, we think, be doubted that a fraud would have been committed on the surety which would have relieved him from all liability on the contract. This we think is established by the judgments of the House of Lords in *Smith* v. *Bank of Scotland,* 1 Dow. 272, 292, and in *Railton* v. *Mathews,* 10 Cl. & F. 934, 943. In the former case Lord Eldon says, "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct even with a view to security against future transactions of the agent." In the latter case Lord Cottenham cites with approbation the opinion of Lord Eldon in *Smith* v. *Bank of Scotland,* and Lord Campbell adds, "If the defenders had facts within their knowledge which it was material the sureties should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts—the undue concealment of those facts—discharges the surety."

We do not think that the principles of law as laid down in these cases have been materially altered by the decision of the

House of Lords in the subsequent case of *Hamilton* v. *Watson*, 12 Cl. & F. 109, or by that of the Court of Exchequer in the *North British Insurance Co.* v. *Lloyd*, 10 Exch. 523, 24 L. J. (Ex. 14.) In the former case the principle above mentioned was not denied, but the question that arose was as to its application to the facts of that particular case, and Lord Campbell states that the criterion for the necessity of voluntarily disclosing any particular fact in cases of this kind may be whether the fact not communicated was one that could "not naturally be expected to have taken place between the parties who were concerned in the transaction." In *North British Insurance Co.* v. *Lloyd*, the Court of Exchequer held that the rule, as to the effect of concealment in marine insurance cases, did not apply to contracts of suretyship, and that in the latter cases the concealment must be fraudulent in order to avoid the contract. In *Lee* v. *Jones*, 17 C. B. (N. S.) 482, 506, the majority of the judges in the Exchequer Chamber held that a concealment by the creditor—that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount, of which the surety was ignorant—was evidence to go to the jury of such a fraud on the surety as would discharge him from liability. It must depend (as observed by Blackburn, J., in the case last cited) "upon the nature of the transaction in every case, whether the fact not disclosed is such that it is impliedly represented not to exist." We cannot doubt but that previous acts of dishonesty by the servant in the same service, known to the master, would be such a fact, and if concealed from the surety would avoid the contract: vide Story's Equity Jurisprudence, vol. i, ss. 215 and 324.

If, therefore, it is correct, as we think it is, on these authorities, to say that such a concealment as is here pleaded, if it had been practiced at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guaranty a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety, unless his assent has been obtained, after knowledge of the dishonesty, that his guaranty should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligations, is, that it is only reasonable to suppose that such a fact if known to him must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner

it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guaranty should continue to apply to his future conduct, when the master chose for his own purposes to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination.

If the guaranty at its inception was founded, as suggested by Lord Eldon in *Smith* v. *Bank of Scotland,* on the trustworthiness of the servant, so far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master, the whole foundation for the continuance of the contract as regards the surety fails; and it seems to us in accordance with the plainest principles of equity and fair dealing, that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself stand the risk of loss arising from any future dishonesty. "It is the clearest and most evident equity" (says Lord Loughborough in *Rees* v. *Berrington,* 2 Ves. 540, 543) "not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." Thus in the present case, the conduct of the master in retaining the servant in his employ, when he might have discharged him for dishonesty, seems, in the words of Lord Loughborough, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged from further liability in cases of this kind will vary according to the circumstances of each case; but we intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service, after he becomes aware of the dishonesty and without the assent or knowledge of the surety.

No case directly in point, either in favour of this plea or

against it, has been cited before us. In *Peel* v. *Tatlock,* 1 B. & P. 419, 423, a question arose how far the concealment of the servant's embezzlement for three years after the termination of the service would affect the liability of the surety. No decision was, however, given on that point, and the case contains only a dictum of Eyre, C.J., that an industrious (by which we presume he meant an intentional or fraudulent) concealment might have an effect on the liability of the guarantor. In *Smith* v. *Bank of Scotland,* there is an observation of Lord Redesdale made in the course of the argument, which has a closer bearing on the present question. In that case Paterson, the bank agent, seems to have given security to the bank, apparently at the commencement of his service; afterwards, and while the service continued, and after his accounts had been inspected and reported on by an officer of the bank, he was called on to give additional security, and Smith, the appellant, gave a bond as such additional security. Smith raised an action of reduction of this bond, and in that action insisted on his right to inspect the above report of the officer of the bank. On this Lord Redesdale observed, "Supposing the report showed that Paterson was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties." The cases to which Lord Redesdale alludes are not mentioned, but it seems pretty clearly to have been his opinion that if the master discovers the dishonesty of his servant during the service, and afterwards continues to trust him notwithstanding, the surety for the servant would be discharged from all liability for subsequent losses. In the case of *Shepherd* v. *Beecher,* 2 P. Wms. 288, 290, before Lord Chancellor King, a father, on binding his son apprentice, gave a bond for his fidelity. Some years afterwards the apprentice embezzled 200l. of the master's money of which the master gave notice to the father, and demanded the money. The father paid the amount, but sent a letter requesting the master not to trust the apprentice with cash in the future, or at least to do so very sparingly. The apprentice continued afterwards with the master for several years, and committed further embezzlements of which the father had no notice until two years after the expiration of the apprenticeship, when the bond was put in suit. The Lord Chancellor held that the father continued bound, stating apparently as

the ground of his judgment, "that the father ought not to have satisfied himself with sending the letter and taking no further care of the matter, but should have endeavored to make some end with the master, and to have got up the bond." This decision seems to us to rest on the fact that the father, instead of taking measures to have the bond delivered up, as he might have done, assented to continue bound after he had notice of the first embezzlement, and that the other embezzlements were not actually ascertained until after the expiration of the apprenticeship.

It is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his liability by a subsequent promise or assent: *Mayhew* v. *Crickett,* 2 Swan 185; *Smith* v. *Winter,* 4 M. & W. 454. In the present plea it is alleged as a conclusion of law that, by reason of the concealment, the defendant was prevented from revoking the guaranty and compelling Smith to pay the money for which the defendant was liable. The discharge of the surety in the present case seems to us to arise rather out of the nature and equity of the contract between the parties, than upon any assumed right of revocation. We think the surety is discharged unless he assents or agrees, after he has had knowledge of the dishonesty, that the guaranty shall hold good for the subsequent service; but, as a revocation of the guaranty as soon as the dishonesty has come to his knowledge will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation, or want of assent after notice of the dishonesty, seems rather a question of words than of substance.

In Parsons on Contracts, vol. ii. p. 31, the rule as to the right to revoke a guaranty like the present is thus stated: "If the guaranty be to indemnify for misconduct of an officer or servant, the promise is revocable, providing the circumstances are such, that when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." No judicial authority is cited in support of this proposition, and therefore it can only be cited as the opinion of the writer. It will be seen that he confines the right of the surety to revoke his guaranty to those cases where the master may, on the revocation being made, dismiss the servant without injury to himself. The present case is distinctly within the limitation, and there can be no doubt but that the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in *statu quo,* is a most material

ingredient in the consideration of the question. * * * For these reasons we think that the plea is good, and that the defendant is entitled to our judgment.

BLACKBURN, J.—This was a demurrer to a plea which was argued before my Lord and my Brothers Lush, Quain, and myself in last term, the decision of which involves a question of some difficulty. I have with some hesitation come to the same conclusion as the rest of the court, but as I do not quite agree in all the reasons given by them, I prefer stating my own reasons.

The declaration is on a contract of guaranty to the plaintiff to an amount not exceeding 50*l.*, as surety for one Smith during the course and continuance of his employment by the plaintiff. I must first observe that I think on this declaration the defendant must be taken to have agreed to be surety during the employment, and cannot withdraw from his guaranty, unless something new occurs to give him that right.

The defendant pays money into court to cover Smith's defalcations up to a particular date, viz., the 20th of November, 1869; and as to the defalcations subsequent to that date pleads, on equitable grounds, that on that date the plaintiff became aware that Smith had embezzled moneys for which the defendant was responsible, that she, without informing the defendant of this, allowed Smith to continue in her service, and to pay off the amount of his defalcation, and that the defendant was wholly ignorant of Smith's guilt. The plea then states, as conclusions of law, that owing to the non-disclosure of this fact by the plaintiff, the defendant was prevented from immediately revoking his guaranty, and in consequence is in equity discharged.

I think that the first question to be considered is, what would be the right of the surety on being informed that the servant had committed a fraud; for, if his knowledge of that fact would have given him no rights, the concealment could not prejudice him. I still adhere to the opinion that I expressed in *Lee* v. *Jones*, that if such a transaction as is alleged in the plea had taken place before the defendant entered into the contract of suretyship, and had been concealed from him, it would have furnished evidence of a false representation to the surety that no such thing existed, made by the plaintiff to the surety for the purpose of inducing him to enter into the contract of suretyship, and would therefore afford evidence in support of a plea of fraud. Further than this I am not prepared at present to go, and it is to be remembered that a minority in the Exchequer Chamber refused to go so far.

Still I act on that as being established law; but I cannot concur in the conclusion from these premises that therefore there is a condition implied by law on every contract of suretyship for a servant that it shall become void if the servant afterwards commits a fraud, and the principal on hearing of it does not inform the surety of it. It is quite clear that misconduct of the servant does not alone put an end to the contract, for the very object of the suretyship is to afford protection against the misconduct of the person whose good conduct is guaranteed. And I find no authority for saying that there is such an implied condition. *Shepherd* v. *Beecher* is a distinct authority that even in equity the effect is at most to render the contract voidable at the option of the surety: for it was there decided that the father, who, on becoming aware of the misconduct of his son for whom he was surety, took no steps to get rid of the suretyship, remained liable.

But there is a ground on which I think he may have a ground for being discharged in equity, which I will now state. A surety as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against the debtor; and as a consequence, if the creditor has by any act of his deprived the surety of the benefit of any of those remedies, the surety is discharged. The authorities for this, as far as known to me, are collected in the judgment to *Baily* v. *Edwards,* 4 B. &. S. 770; 34 L. J. (Q. B.) 41; and this equitable principle has, at least in the case where time has been given to the principal without the consent of the surety, been adopted to some extent at least, although whether to its full extent has been doubted: see *Pooley* v. *Harradine,* 7 E. & B. 431; 26 L. J. (Q. B.) 156. But it is not now material to decide that. Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for the surety's protection, it seems to follow that, by waiving the forfeiture and continuing the employment without consulting the surety, the principal has discharged him. It never has been determined, as far as I can find, in any case in equity, that the surety has this right.

There are dicta tending that way. In *Shepherd* v. *Beecher* Lord Chancellor King says the surety "ought not to have satisfied himself with sending the letter, but should have endeavored to have made some end with the master, and to have got up the bond"—expressions which seem to show that the Lord Chancellor thought he might have got up the bond. In *Smith* v. *Bank of Scotland* Lord Redesdale is reported to have said during the argument, when considering whether the appellants had, according to the law of Scotland, a right to inspect a report from the agent of the bank to the directors, "Supposing the report showed that Paterson " (the person for whom the appellants became sureties) "was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions, as contrary to the faith of the contract." But no such decided cases are now to be found, and the dictum is not again noticed in the judgments either of Lord Eldon or Lord Redesdale. No other authority was cited during the argument, nor, as far as we are aware, was there any then in print. And at the close of the argument I was much inclined to say that no such equity was established. But, singularly enough, the case of *Burgess* v. *Eve,* L. R. 13 Eq. 450, 457, has been printed since the argument, and there Malins, V. C., says: "But if there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guaranty because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying 'I now withdraw the guaranty I gave you; I give you full notice not to trust him any more.' Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guaranty, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guaranty when that person has been proved guilty of dishonesty." He afterwards proceeds: "My opinion is—and I have no hesitation in expressing it—that a person who gives a guaranty would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guaranty, provided that the clerk or other person has been guilty of embezzlement or gross

misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guaranty for him. If the employer under such circumstances refused to give the guaranty up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the court would direct the bond to be delivered up to be cancelled. And I think that is only what good sense, propriety, and fair dealing between man and man would dictate." These expressions are singularly closely in point; they, though by no means irrelevant to the point then before the Vice-Chancellor, were not part of his decision. What he says is not therefore, perhaps, strictly binding upon us as a decision would be. But it seems to me consistent with justice; and without determining whether we should have ventured to lay down such an equity ourselves, I think we should follow the opinion of the Vice-Chancellor on a subject with which he is so much more conversant than we are. I therefore agree on this ground, and on this ground only, that judgment should be given for the defendant.

Judgment for the defendant.

124. AETNA INS. CO. v. FOWLER, et al., 108 Mich. 557, 66 N. W. 470.
Supreme Court, Michigan, 1896.

Failure of the principal to impart to the surety its knowledge of an actual defalcation by the agent will discharge the surety of liability accruing after the principal became possessed of such knowledge.

Error to Saginaw; WILBER, J. Submitted January 15, 1896. Decided March 11, 1896.

ASSUMPSIT by the Aetna Insurance Company against Charles G. Fowler, Chester Brown, and Gustavus H. Fuerbringer upon an indemnity bond. From a judgment for plaintiff on verdict directed by the court, defendants Brown and Fuerbringer bring error. Reversed.

Wood & Joslyn, for appellants.

Weadock & Purcell, for appellee.

MONTGOMERY, J.—Action on the bond of an insurance agent. Defendant Fowler was employed as the agent of the company at Saginaw, and in December, 1883, executed a bond, with his co-defendants as sureties, the conditions being as follows:

"The condition of this obligation is such that whereas the above-named Charles G. Fowler has been appointed agent of the Aetna Insurance Company in Saginaw, Saginaw county, State of Michigan, who will receive as such agent sums of money for premiums, payments of losses, salvages, collections, or otherwise, for goods, chattels, or other property of the said insurance company, and is to keep true and correct accounts of the same, pay over such money correctly, and make regular reports of the business transacted by him, to the said Aetna Insurance Company, and in every way faithfully perform the duties as agent, in compliance with the instructions of the company through its proper officers, and at the end of the agency, by any cause whatever, shall deliver up to the authorized agent of said company all its money, books, and property due from or in possession. Now, then, if the aforesaid agent shall faithfully perform all and singular the duties of the agent of the Aetna Insurance Company, then this obligation shall be null and void."

The instructions to agents were to send statements of all business transacted during the previous month as early as the 12th of each month. The testimony shows that for three months prior to September 1, 1893, the defendant Fowler failed to send remittances, and it was shown that it was not the custom of the company to insist upon absolute promptness in remittance, but that after three months' delay it was the custom of the company to discharge the delinquent agent. The testimony further shows that in the latter part of July or the first of August, 1893, the special agent of the company, a Mr. Neal, visited Saginaw, and, as he described it, found the agency in a "rocky condition;" and, while counsel were disagreed as to the effect of his testimony, we think it is at least open to the construction that he then learned that Fowler had misappropriated the funds of the company, and invested them in realty. The circuit judge directed a verdict for the plaintiff. The recovery included a shortage in accounts before August 1st, and a shortage of $344.16 arising from the August business.

Two contentions are made: *First*, that it was the duty of the company to notify the sureties of any delay in the remittance, at once, and that the continuance of the agent after failure to remit in accordance with the instructions of the company to agents released the sureties as to future transactions; and, *second*, that the company, on the discovery of the misappropriation of funds, August 1st, was bound to discharge the agent, or, at least, the sureties were not bound to respond for his future defalcations, unless, after being informed of his previous acts of dishonesty, they consented to his retention.

We think that the court below correctly ruled that the mere fact that the company had knowledge that the agent had failed to remit did not impose upon it the duty to notify the sureties or discharge the agent. *Watertown Fire Ins. Co.* v. *Simmons*, 131

Mass. 85 (41 Am. Rep. 196); *Atlantic, etc., Tel. Co.* v. *Barnes,* 64 N. Y. 385 (21 Am. Rep. 621). The duty which the company owed to the sureties was not a duty of active vigilance, to ascertain whether the agent had been guilty of fraud (the sureties' undertaking was a guaranty of his fidelity), but what was due from the employer was good faith to the sureties. Just as it would have been a fraud to withhold knowledge of previous dishonesty of the agent presumably not known to the sureties, but possessed by the company, so it would be a breach of good faith for the company to continue the agent in a place of trust after discovering his dishonesty or defalcation, which is presumptively and in fact unknown to the sureties, and without notifying the sureties of the facts, and giving them an opportunity to elect as to whether they will continue the risk. This is the doctrine of the leading case of *Phillips* v. *Foxall,* L. R. 7 Q. B. 666. The cases of *Watertown Fire Ins. Co.* v. *Simmons* and *Atlantic, etc., Tel. Co.* v. *Barnes* are not inconsistent with this. The substance of the holding in each of these cases is that the mere failure of remittance does not necessarily amount to notice of dishonesty on his part, and that applies to the present case as regards the charges occurring before August. There is no evidence that prior to August the company had actual notice that Fowler had converted any of the funds to his own use, or was more than negligent in remitting or collecting the premiums; but as to the transactions in August the case is different. Under section 9191, 2 How. Stat., it is made an offense for an insurance agent to receive and invest money of the company without its assent; and, as we before stated, we think there was testimony tending to show notice to the company about the 1st of August that Fowler had invested the funds of the company in realty. If the company, through its special agent, then knew this fact, it cannot be said not to have had notice of the dishonesty of the agent; and, if it had such notice, it was the duty of the company not to longer trust its funds with the agent until the sureties had consented, with knowledge of the facts, to be held responsible for the acts of a dishonest agent. See, further 2 Brandt, Sur. § 423; *Connecticut Mut. Life Ins. Co.* v. *Scott,* 81 Ky. 540.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

SECTION 10. DEFENSE FOUNDED UPON FRAUD OR MISCONDUCT OF THE PRINCIPAL TOWARD THE SURETY

125. STONER v. MILLIKIN, et al., 85 Ill. 218.
Supreme Court, Illinois, 1877.

The fraud of the principal in securing the contract of the surety cannot be set up by the latter as a defense against the obligee, if he has no notice of the fraud.

Appeal from the circuit court of Macon county, the Hon. C. B. SMITH, Judge, presiding.

Mr. *Harvey Pasco,* for the appellant.

Mr. *A. B. Bunn,* for the appellees.

MR. CHIEF JUSTICE SHELDON delivered the opinion of the Court:

At the February term, 1874, of the county court of Macon county, a judgment was entered by confession, in favor of Millikin & Co., against Thomas Lee, John Lee and Andrew J. Stoner, for $453.33, upon a promissory note with a warrant of attorney attached, purporting to be executed by the three latter, dated the 24th day of June, 1873, payable ninety days after date to H. Crea, and assigned by him without recourse.

An execution, issued upon the judgment, was levied upon personal property of John Lee, sufficient in value to satisfy it. Afterward, by direction of Millikin & Co., the sheriff released the property of John Lee from the levy, and levied the execution upon certain real estate of Stoner, and the bill in this case was filed by Stoner to enjoin the sale of his property under the execution.

The court below, upon final hearing on proof, dismissed the bill, and the complainant appealed.

The chief ground relied upon in support of the bill is, that the signature of the name of John Lee to the note is a forgery. The note is a joint and several one, the signature of Stoner being last upon the note. He testifies that Thomas Lee applied to him to sign the note as his security; that he refused to do so unless Lee would first get his brother, John Lee, to sign the note; that Lee went away saying he would go and get John to sign it; that the next day he came back, saying that he had got John to sign it, and presented the note with the signature of John Lee appearing to it, and witness then signed it, supposing the signature of John Lee to be genuine, knowing him to be responsible, and had he not supposed the note to have been signed by John Lee, he would not have executed it. Thomas Lee had made the arrangement before-

hand with Millikin & Co., to lend him the money. H. Crea, the payee of the note, was but nominally such, Millikin & Co., being the real payees, and on presentment of the note, with Crea's indorsement on it, by Thomas Lee to Milliken & Co., who were bankers, they discounted the note, paying the proceeds to Thomas Lee.

The bill alleges, the way John Lee's property came to be released was, that he made an affidavit that he never signed the note and that his signature to the same was a forgery, and that upon the making of such affidavit Milliken & Co. caused his property to be released from the levy. Although it is this forgery which is mainly relied on for the discharge of Stoner, it is yet objected, as against the release of John Lee's property and the levy on Stoner's, that there is no proof of the forgery, more than this affidavit. Upon an examination of the bill, we take that, as alleging the fact of the forgery; and the answer of Milliken & Co. and the sheriff admits the same. By the pleadings, the forgery must be considered an admitted fact in the case. The confession of judgment, then, against John Lee, was unauthorized, and a nullity, and his property was rightly released from the levy under the execution.

Why should this forgery operate in discharge of Stoner, and entitle him to have his property exempted from sale on the execution?

It may have been a wrong toward him, and have caused him to incur a greater extent of liability than he expected; and the supposed obtaining of the execution of the note by John Lee may have been the sole condition upon which he signed his name to the note. Yet, on satisfactory evidence to himself, in that respect, he did place his name unconditionally to the note as a maker thereof, and left it with Thomas Lee to deliver to Milliken & Co., knowing that on the faith of his, Stoner's, promise to repay it, they would part with their money to Thomas Lee. There is no just reason why this promise to Milliken & Co. should not be kept.

Whatever of wrong there was to Stoner, was perpetrated by his co-maker, Thomas Lee. Millikin & Co. were wholly innocent in the matter; they had no notice of anything which had been transpiring among the makers of the note, as between themselves. Nor was it incumbent upon Millikin & Co. to exercise care over the interest of the surety in the note, look to the inducement which led him to become such, and see that it should not fail. They had but to watch over their own interest, and see that the security offered was a sufficient protection for them. For the lack of the vigilance they failed to exercise in this respect, they suffer the full conse-

quence in the loss of the security of the name of John Lee. Whatever of fraud and deception the co-makers of the note practiced toward one another, was their own sole concern, and the consequence, so far as may affect them in their relation to each other, should be borne by themselves alone. There is no justice in requiring Millikin & Co. to assume the risk of such conduct, and no sound principle upon which they should be made to suffer loss because of it, not being privy thereto.

York County M. F. Insurance Co. v. *Brooks,* 51 Me. 506, and *Selser* v. *Brock,* 3 Ohio St. 302, are direct authorities to the point that such a forgery of the name of a prior surety will not discharge a subsequent surety. See *Young et al.* v. *Ward,* 21 Ill. 223.

We regard the language of LORD HOLT, in *Hern* v. *Nichols,* 1 Salk. 289, as applicable, that "Seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser, than a stranger."

The case of *Seeley* v. *The People,* 27 Ill. 173, is departed from so far as it conflicts with the principle of the present decision.

We are satisfied with the decree, and it is affirmed.

Decree affirmed.

126. BUTLER v. UNITED STATES, 21 Wall. (88 U. S.) 272, 22 L. Ed. 614.

Supreme Court, United States, 1874.

Unless the obligee has notice or knowledge of misconduct practiced by the principal toward the surety, the latter cannot rely on such misconduct as a defense.

In error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action of debt in the court below, on a joint and several internal revenue bond executed by Benjamin B. Emery, as principal, and by Roderick R. Butler, Ethan A. Sawyer and William Choppin as sureties, in the sum of $15,000. Butler defended on the ground that, at the time he signed and affixed his seal to the bond, it was a mere printed form, with blank spaces for the names, dates and amounts to be inserted therein; and that the blanks were not filled, and there was no signature thereto, except Emery's; that Emery promised, if Butler would sign the bond, he would fill up the blanks with the sum of $4,000, and would procure two additional securities in the District of Columbia, each of whom was to

be worth $5,000; and that the bond was delivered to Emery with the understanding and agreement that the bond otherwise was not to be binding on the defendant, but was to be returned to him; that the defendant never after ratified or acknowledged the validity of the bond; that the other sureties did not reside in the District of Columbia, and were wholly insolvent and worthless; and that Emery obtained the signature by false and fraudulent representations. The circuit judge ruled that this was no defense to the action; a verdict was taken for the plaintiffs, and the defendant excepted and brought this writ of error.

Messrs. *S. Shellabarger, H. Maynard* and *J. M. Wilson,* for plaintiff in error.

Mr. *C. H. Hill,* Asst. Atty.-Gen., for defendant in error.

Mr. Chief Justice WAITE delivered the opinion of the court:

We cannot distinguish this case in principle from *Dair* v. *U. S.,* 16 Wall., 1 (83 U. S.). The printed form, with its blank spaces, was signed by Butler and delivered to Emery, with authority to fill the blanks and perfect the instrument, as a bond to secure his faithful service in the office of Collector of Internal Revenue. He was also authorized to present it, when perfected, to the proper officer of the Government for approval and acceptance. If accepted, it was expected that he would at once be permitted to enter upon the performance of the duties of the office to which it referred.

It is true that, according to the plea, this authority was accompanied by certain private understandings between the parties, intended to limit its operations, but it was apparently unqualified. Every blank space in the form was open. To all appearances, any sum that should be required by the Government might be designated as the penalty, and the names of any persons signing as co-sureties might be inserted in the space left for that purpose. It was easy to have limited this authority by filling the blanks, and the filling of any one was a limitation to that extent. By inserting, in the appropriate places, the amount of the penalty or the names of the sureties or their residences, Butler could have taken away from Emery the power to bind him otherwise than as thus specified. This, however, he did not do. Instead, he relied upon the good faith of Emery, and clothed him with apparent power to fill all the blanks in the paper signed, in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the Government as security for the performance

of his contemplated official duties. It is not pretended that the acts of Emery are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agreements. He acted in good faith, and the question now is, which of two innocent parties shall suffer. The doctrine of Dair's case is that it must be Butler, because he confided in Emery and the Government did not. He is, in law and equity, estopped by his acts from claiming, as against the Government, the benefit of his private instructions to his agent.

Judgment affirmed.

127. FIRST NATIONAL BANK v. TERRY, 135 Fed. 621.

United States Circuit Court, Eastern District Pennsylvania, 1905.

If the obligee has knowledge that the surety's signature was secured by the fraud of the principal, the surety is released.

Dismissing rule for judgment for want of a sufficient affidavit of defense.

Wm. Y. C. Anderson and *Wm. Jay Turner* for plaintiff.

Hampton L. Carson for defendant.

HOLLAND, District Judge.—On February 5, 1901, the Blue Mountain Iron & Steel Company, of which the defendant was a large stockholder, was indebted to the plaintiff in the sum of $12,000, with interest thereon from October 22, 1900, and there was pending and undetermined in the superior court of Baltimore City a suit by said plaintiff against said Blue Mountain Iron & Steel Company for the recovery of said indebtedness. On said date an agreement in writing was entered into by and between said Blue Mountain Iron & Steel Company, as party of the first part, Charles R. Elliott and Henry C. Terry, the defendant, as parties of the second part, and the plaintiff, as party of the third part, wherein it was provided that the pleas theretofore filed by said Blue Mountain Iron & Steel Company in said suit in the superior court of Baltimore City should forthwith be withdrawn, and the aforesaid indebtedness be liquidated by the payment of $500 upon the delivery of said agreement and further payments of $500 at consecutive intervals of 30 days until the full debt, with interest and costs, should have been paid; the parties of the first and second parts to said agreement obligating them-

selves jointly and severally to make said payments, and authorizing the plaintiff to enter judgment in said suit upon the failure of said parties to make said payments or perform the other stipulations of said agreement. By November 7, 1901, there was paid upon this agreement by Elliott $500 and by Terry $4,500. The balance was $7,000, which, with interest to date, is $7,667.11, after which date nothing was paid on account of this agreement either by Elliott or the defendant Terry, except the cost in obtaining judgment in Baltimore against the steel company, which was paid by Terry on March 12, 1902. He also paid the interest on that judgment to April 1, 1903, since which time neither the defendant nor Elliott nor the steel company has paid anything to the plaintiff on account of either the judgment in Baltimore or interest thereon. At the time the agreement was executed by Elliott and Terry to the plaintiff in this case, Elliott was president of the steel company and Terry was a stockholder. Suit was brought against Terry on his agreement with plaintiff, and, among other things, he sets up in his affidavit of defense:

"That the defendant was induced to sign the agreement upon which this suit is brought by reason of certain false and fraudulent representations verbally made to the defendant by Charles R. Elliott, one of the parties to the agreement, said statements being made in the year 1901, at and before the signing of the agreement and in the presence of the plaintiff. That said representations were that the said Blue Mountain Iron & Steel Company was then possessed of sufficient assets under all circumstances to pay all its debts, including the debt due by it to the plaintiff in the present action; whereas in truth and in fact the said company was not possessed of sufficient assets to pay its debts, including the debt due by it to plaintiff in the present action, but was insolvent, and utterly unable to pay its debts. That the said Charles R. Elliott knew that the said statements and representations were false and fraudulent at the time that the same were made, and made the said statements in order to induce the defendant to sign the agreement; and the defendant, relying upon said false and fraudulent representations, and believing the same to be true, signed the agreement. That said false and fraudulent representations were made by the said Charles R. Elliott with a knowledge of their falseness, and were made in the presence of the plaintiff, and the plaintiff well knew at that time that the said representations were false and fraudulent, and that they were made with intent to deceive the defendant, and to induce him to

sign the agreement; and that, but for the defendant's belief in the truth of the said false and fraudulent representations, the defendant would not have executed the contract; and the plaintiff, at the time of the execution of said agreement attached to its statement of claim, fraudulently suppressed and concealed from the defendant its knowledge of the false and fraudulent character of said representations, which were made for the purpose of inducing the defendant to sign the said agreement, and which said agreement was for the further advantage and protection of the plaintiff, the plaintiff knowing full well that, had it informed the defendant of the false and fraudulent character of the said statements, the defendant would not have executed the said agreement. That it permitted the said defendant to act upon said false and fraudulent representations because it would gain an advantage thereby, in that the defendant would sign the said agreement."

The plaintiff in this case stood by in silence and permitted the defendant, by false and fraudulent representations on the part of the president of the steel company, to be induced to sign an agreement for plaintiff's benefit, and at the time, as alleged in the affidavit of defense, the plaintiff knew these representations to be false. If this defense be established, it is a bar to a recovery. Among the numerous authorities for this proposition, the case of *Hartranft* v. *Fussell,* 180 Pa. 552, 37 Atl. 1118, is cited as almost identical with the case at bar.

The rule for judgment for want of a sufficient affidavit of defense is dismissed.

SECTION 11. DEFENSE FOUNDED UPON ABSENCE OF NOTICE OF ACCEPTANCE OF GUARANTY AND OF DEFAULT OF PRINCIPAL.

128. DAVIS SEWING MACHINE COMPANY v. RICHARDS, et al., 115 U. S. 524, 29 L. Ed. 480.

Supreme Court, United States, 1885.

Notice—Guarantor not liable without notice of acceptance by the guarantee.

In error to the Supreme Court of the District of Columbia.

Mr. *James G. Payne,* for plaintiff in error.

Mr. *W. A. Cook* and Mr. *C. C. Cole,* for defendants in error.

GRAY, J.—This was an action, brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the Counties of Prince George and Montgomery, in the State of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the corporation under the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in a certain manner; and that either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company, of Watertown, New York, the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of Three Thousand ($3,000) Dollars.

"Dated Washington, D. C., this 17th day of December, 1872.

"A. ROTHWELL.

"A. C. RICHARDS."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, Dec. 19, 1872. J. T. STEVENS."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties, to the plaintiff at Watertown in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract, or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The court instructed the jury as follows: "It appearing, at the time the defendants signed the guaranty on the back of the contract between plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, New York, to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the General Term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of *Davis* v.

Wells, 104 U. S. 159, in which the earlier decisions of this court upon the subject are reviewed.

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of a guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantor from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterward, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.

129. GANO v. FARMERS' BANK OF KENTUCKY, 103 Ky. 508, 45 S. W. 519.

Court of Appeals, Kentucky, 1898.

Notice of Acceptance.—One who offers his name as guarantor to whomsoever may accept the offer is entitled to notice, and is not bound to inquire as to the acceptance of his proposal.

Appeal from the Circuit Court, Scott county.
Jas. Y. Kelly and *Geo. E. Prewitt,* for appellant.
Owens & Finnell, for appellee.

HAZELRIGG, J.—The appellant, Gano, and nine others executed a writing to the end that one P. T. Pullen might obtain the sum of $10,000 with which to run a milling business in Georgetown, Kentucky. The appellee bank, on the strength of this writing, furnished $5,000, which was used to pay off a debt then owing the bank by Pullen, and also $5,000 which was used in the business. After a time, Pullen being insolvent, the bank called on the obligors in the writing for a discharge of their undertaking. All seemed to have paid their respective shares demanded by the writing, except the appellant, who tendered certain issues of law and fact in defense of the action which followed his refusal to pay his share. The writing which forms the basis of action is as follows:

"P. T. Pullen, of Georgetown, Kentucky, contemplating the leasing of the Thompson mills, and carrying on the milling business, and being in need of capital with which to buy stock and run the same as it should be run successfully: Now, in order to aid him, we, W. E. Pullen, George Carley, George V. Payne, T. T. Hedger, J. M. Penn, James W. Craig, Buford Hall, Daniel Gano, S. B. Triplett, and Warren C. Graves, whose names are hereto signed, agree to become his surety to an amount not exceeding ten thousand dollars in the aggregate. After this instrument of writing has been signed by all of us (ten in number), it may be used by the said P. T. Pullen in the nature of a collateral for a sum or sums not exceeding ten thousand dollars in the aggregate, and we, the said signers, shall be bound jointly and severally as sureties upon any note or notes not exceeding in the aggregate said sum to which said Pullen shall sign his name and deposit this as collateral. In case the money is borrowed of more than one party, the lenders can agree upon who shall hold this writing for the benefit of all. Said Pullen agrees to mortgage all property he now has to us in order to secure us by virtue of obligations assumed in this instrument, and renew said mortgage from time to time when required, upon any and all property he may have. This instrument of writing to continue in force for three years from the first day of July, 1891, and no longer, and if at any time any one or more of the signers hereto should die or become insolvent, said Pullen is to either pay off his or their portion of the money that may be borrowed, or furnish other good and solvent surety or sureties in his or their stead. Said Pullen agrees to keep all grain and flour he may have on hand insured in some good in-

surance company for the benefit of the signers hereto, and his books are at all times to be open to the inspection of any one or all of the said signers, either in person or by an expert of their selection. Given under our hands this 15th day of July, 1891.

(Signed) "GEORGE V. PAYNE,"
And others named in the writing.

The paper, as we have already indicated, was taken by Pullen to the appellee, to whom Pullen was then indebted in the sum of $5,000, evidenced by Pullen's note with his brother as surety. A new note was then executed to the bank for $5,000, and this note was then discounted by the bank, and the proceeds taken to pay off this pre-existing debt. It is therefore insisted for the appellant that the principle announced in *Russell* v. *Ballard,* 16 B. Mon. 205, is applicable here and, when applied, the surety stands discharged. It was there said: "If a note be purchased by a party, with notice that one of the obligors is surety merely, and that the sale and purchase will defeat the purpose for which it was executed by him, or will violate any understanding or agreements between him and his principal, then the purchaser will be affected by such notice, and cannot hold the surety liable on the note to compel him to pay it." Here the bank had notice that Gano was surety merely on the writing taken as collateral by the bank to secure the new note, and it had notice that the sale and purchase of this new note and application of its proceeds to pay off the old debt would defeat the sole purpose for which the writing was executed by the surety, namely, "to raise the sum of ten thousand dollars, buy stock and run the same." This would seem sufficient to bring the case within the principle announced in the cited case, for it is manifest that, if one-half the capital needed to carry on the milling business and "run the same successfully" was to be taken to pay off an old debt, the business must suffer, and likely not be run successfully. But this is not all. The bank had notice that the sureties looked to the property which this money—all of it—would buy as an indemnity by way of mortgage; and by whatever amount the actual cash furnished Pullen for his business was lessened, by that amount the value of their indemnity would be lessened. This is also in line with the general doctrine so often announced by the textwriter and by this court for the protection of sureties. We might assume without proof—but the evidence is conclusive on the point—that appellant would not have entered into this contract had it been disclosed to him that this "letter of credit," as the writing may be termed, was to be used to pay off the large debt due the bank, and therefore it was incumbent on the bank to disclose to the surety all the facts material to the risk

before it could divert the fund intended to be raised by the collateral to purposes of its own. The rule is thus stated by Mr. Story in his Equity Jurisprudence: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any expressed or implied misrepresentation of facts, or any undue advantage taken of a surety by his creditor, either by surprise or by withholding proper information, will undoubtedly permit sufficient grounds to invalidate the contract." Section 324. And further: "Thus if a party taking a guaranty from a surety conceals from him facts which increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." Sections 214, 215. See *Com.* v. *Berry*, 95 Ky. 443, 26 S. W. 7, and cases cited. Other obligors, who lived in or about Georgetown, the scene of this transaction, seem either to have had knowledge of these material facts at the time, or obtained it shortly afterwards, and, having that knowledge, still paid off their shares; but the appellant was an old man, some 85 years of age, living quite a distance from the town, and visiting there only a few times within a year. There is no doubt of his entire ignorance of the material facts indicated. He was not even apprised of the fact that the writing had been used by Pullen with the bank or anyone else, and money obtained thereby. It seems to be clear that he was entitled to this notice. He had merely offered his name with that of others as surety to whomsoever might accept the offer and loan the money. He was therefore entitled to notice of acceptance. In *Steadman* v. *Guthrie*, 4 Metc. (Ky.) 148, it was held that: "When the offer is to guaranty a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor; but the creditor must notify the guarantor of his acceptance of the offer or of his intention to act upon it." That the guarantor might, by inquiry from the person in whose favor the guaranty was given, have learned what had passed between the guarantees and himself, will not dispense with notice. A person thus proposing to become surety for another is not bound to inquire as to the acceptance of his proposal. The creditor who intends to hold him responsible for the debt of another must show reasonable notice of such inten-

tion. See, also, *Kincheloe* v. *Holmes,* 7 B. Mon. 5; *Lowe* v. *Beckwith,* 14 B. Mon. 189; *Thompson* v. *Glover,* 78 Ky. 195. It is true in this case that the record does not show that the bank's old debt on Pullen was in danger of being lost. It was secured by the brother of the debtor, who was solvent, although his property was in the main covered by mortgages, and he was already indebted to the bank in a considerable sum. Still it may be said he was insolvent. We think this, however, makes no difference. It may show more conclusively—what is already apparent enough—that there was no actual fraud intended by the bank, or any of its officers, in the transaction; but this does not change the legal status of the parties on the point involved. It further appears that the brother of the principal debtor, who was surety on an old debt, had a mortgage on certain stock and property belonging to the debtor to indemnify him in his suretyship; and this was released, and a mortgage taken in favor of the obligors in the writing in question. But it further appears that the value of this property was quite insignificant, and that appellant had no knowledge even that this had been done. The writing, the contents of which the bank had notice of, because they accepted and acted on it, entitled the obligors to have a mortgage on all the property the debtor had or might acquire; and we do not see that, because one was in fact executed of which no notice whatever was given to the appellant, can take the place of the notice to which we have said appellant was entitled when his offer was accepted and acted on by the bank. Actual notice is what the law requires, and notice or knowledge of this new mortgage might have been sufficient, but this the appellant did not have. We think the plaintiff's petition should have been dismissed, and the judgment is reversed for proceedings consistent with this opinion.

130. HUNGERFORD v. O'BRIEN, impleaded, etc., 37 Minn. 306, 34 N. W. 161.

Supreme Court, Minnesota, 1887.

Notice of default of the principal is not essential to recovery from the surety.

The plaintiff brought this action in the district court for Otter Tail county upon a promissory note made by the defendant Charles J. Sawbridge, the payment of which was guarantied by the defendant O'Brien. The action was tried before BAXTER, J., and a jury, and a verdict directed for plaintiff. Defendant O'Brien appeals from an order refusing a new trial.

Rawson & Houpt, for appellant.

E. E. Corliss, for respondent.

DICKINSON, J.—The defendant Sawbridge made his negotiable promissory note, which was indorsed to one Gage, who indorsed it in blank to the defendant O'Brien, and he, before maturity, transferred it for value to the plaintiff, indorsing upon the note and signing this guaranty: "For value, I hereby guaranty the payment of the within note to Cassie Hungerford or bearer." The note was not paid. Nothing was done by the plaintiff at the maturity of the note to fix the liability of the indorser Gage. The defendant O'Brien had no notice of the non-payment of the note until more than a year after its maturity. Upon the trial of the issue raised by the answer of the defendant O'Brien, evidence was presented tending to show that the maker of the note was solvent at the time of its maturity, but has since become insolvent; and that the indorser, Gage, was also solvent. The court directed a verdict for the plaintiff.

The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expressed the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of "the payment of the within note" imported an undertaking, without condition, that, in the event of the note not being paid according to its terms,—that is, at maturity,—the guarantor should be responsible. The non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid, and the time when payment

should be made,—all of which was known to the guarantor, and appears upon the face of the contract. The liability of the guarantor thus becoming absolute by the non-payment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-payment have such effect. *Brown* v. *Curtiss,* 2 N. Y. 225; *Allen* v. *Rightmere,* 20 John. 365, (11 Am. Dec. 288); *Newcomb* v. *Hale,* 90 N. Y. 326; *Read* v. *Cutts,* 7 Greenl. 186, (22 Am. Dec. 184); *Breed* v. *Hillhouse,* 7 Conn. 523; *Campbell* v. *Baker,* 46 Pa. St. 243; *Roberts* v. *Riddle,* 79 Pa. St. 468; *Bank* v. *Sinclair,* 60 N. H. 100; *Heaton* v. *Hulbert,* 3 Scam. 489; *Dickerson* v. *Derrickson,* 39 Ill. 574; *Penny* v. *Crane Mfg. Co.,* 80 Ill. 244; *Clay* v. *Edgerton,* 19 Ohio St. 549; *Wright* v. *Dyer,* 48 Mo. 525. See, also, *Vinal* v. *Richardson,* 13 Allen 521, modifying former decisions of the same court.

If follows that the fact that the maker had become insolvent since maturity, or that a mortgage security had become impaired by depreciation in the value of the property, was no defence; nor was it a defence that the guarantor was not notified of the non-payment of the note. We are aware that the position here taken is opposed by some decisions. No valid agreement was shown between the maker and the plaintiff extending the time of payment. From the position above taken, it logically follows that the neglect of the guarantee to take the steps necessary to fix the liability of the indorser, Gage, did not discharge the guarantor. The latter, by his unqualified guaranty of the payment of the note, took it upon himself to see that the note was paid, and was therefore not entitled to notice of its non-payment. (Authorities above cited.) For the same reason, the plaintiff did not owe to the guarantor the duty of taking the steps necessary to fix the contingent liability of the indorser by demand and notice of dishonor. *Philbrooks* v. *McEwen,* 29 Ind. 347; *Lang* v. *Brevard,* 3 Strob. Eq. (So. Car.) 59; *Pickens* v. *Finney,* 12 Smedes & M. 468; 2 Lead. Cas. Eq., notes to *Recs* v. *Berrington.* No such obligation is involved in this contract of guaranty. Even in the case of an ordinary indorsement, the holder, at maturity, is under no obligation to his indorser to give notice of dishonor to prior indorsers or parties. The last indorser becomes liable when he alone is notified, and he in turn may fix the liability of prior parties by giving notice to them.

Order affirmed.

MITCHELL, J., (*dissenting*). I am unable to concur in the proposition that the plaintiff owed no duty to O'Brien to take steps, at the maturity of the note, to fix the liability of Gage, the indorser. It does not seem to me that the fact that O'Brien's guaranty of payment was unconditional and absolute is at all decisive of the question. As between the parties to this action, O'Brien occupied the position of surety, who, in case he had to pay the note, would have recourse against Gage, the indorser, *provided* steps were taken to fix the liability of the latter. The question, therefore, is to be determined by the equitable principles which govern the relative rights and duties of creditor and surety.

It is a well-settled rule of equity that any laches by the creditor in the care or management of collateral remedies or secureties, if loss ensues, will discharge the surety *pro tanto*. *Nelson* v. *Munch*, 28 Minn. 314, 322 (9 N. W. Rep. 863). As a surety, on payment of the debt, is entitled to all the securities of the creditor, if, through the negligence of the creditor who has them in his possession and under his control, a security, to the benefit of which the surety is entitled, is lost or not properly perfected, the surety, to the extent of such security, will be discharged. *Wulff* v. *Jay*, L. R. 7 Q. B. 756. And we can see no difference in this respect whether the security is chattel or personal. This is not a case of mere passiveness by the creditor in not taking steps to enforce collection of the debt at maturity, but an omission to take steps to perfect and fix the liability of the indorser, which amounted to positive negligence. He had possession and control of the note on the day of its maturity, and consequently was the only person who could present it for payment, or who would know whether or not it was paid, and hence was the only person in position to give notice to the indorser in case of its non-payment. To require him to do this, would, I think, be both good business morals and good law.

CHAPTER VIII

THE CREDITOR'S RIGHT OF SUBROGATION TO THE SURETY'S SECURITIES.

131. Re WALKER; SHEFFIELD BANKING COMPANY v. CLAYTON, 66 L. T. (N.S.) 315, L. R. [1892] 1 Ch. 621.

High Court of Judicature, Chancery Division, 1892.

Counter-security given by debtor to surety—right of creditor to benefit of such security.

The following are the only facts material to the present report:—

The testator in the year 1886 gave to the London and Yorkshire Bank two guarantees for the sum of 1000*l.* each to secure the overdraft of Arthur Spencer and Reuben Spencer trading as Spencer Brothers.

At the same time Agnes Spencer, the wife of Arthur Spencer, gave to the testator as security for anything he might be called upon to pay under the guarantees, two equitable mortgages created by memoranda of deposit of title deeds. The memoranda were dated respectively the 5th July and the 18th Aug., 1886.

Subsequently to these transactions Spencer Brothers transferred their account from the London and Yorkshire Bank to the Sheffield Banking Company.

On the 9th Sept., 1887, the testator gave to the Sheffield Banking Company a guarantee to secure the repayment of all moneys then owing, or which might become owing to them by Spencer Brothers either on their current account or on any other account to the extent of 2000*l.*

In the month of May, 1889, Spencer Brothers went into liquidation.

The testator died on the 4th Nov., 1888, leaving a will by which he appointed the defendants his executors. The will was proved by the defendants on the 24th Jan., 1889.

The plaintiff company then commenced a creditor's action for the administration of the testator's estate. An administration judgment was given in that action on the 25th April, 1890.

The testator's estate was insufficient for payment of debts, including the liability of the testator under the guarantee given to the plaintiff company.

The plaintiff company now claimed to be entitled to the benefit of the equitable mortgages given to the testator by Agnes Spencer.

The defendants, on the other hand, contended that the plaintiffs were not so entitled, but could rank only as creditors *pari passu* with the other creditors of the estate.

Graham Hastings, Q. C., and *Curtis Price* for the plaintiffs.

Buckley, Q. C., and *Ingle Joyce* for the defendants.

STIRLING, J., stated the facts and continued:—The plaintiffs' contention was founded upon two cases. The first is an old case of *Maure* v. *Harrison* (1 Eq. C. Ab. 93). It is reported very shortly as follows: "A bond creditor shall in the Court of Chancery have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A owes B money and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt." That case was decided in Michaelmas, 1692. The plaintiff also relied upon a dictum of Sir William Grant in *Wright* v. *Morley* (11 Ves. 22) which runs thus: "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to the surety, the surety has fully as good an equity to the benefit of all the securities the principal gives to the creditor." As to the latter portion of the sentence, there is no question at all. It is well established at this date that the surety, on paying the debt, is entitled to stand in the place of the principal creditor, and to have the benefit of all the securities which the principal creditor had. Now these two cases were very much discussed in the well-known case of *Ex parte Waring* (2 G. & J. 404), before Lord Eldon. That case is most fully reported perhaps in Glyn & Jameson's Reports. It appears from that report that, in the course of the argument, Lord Eldon spoke somewhat disparagingly of the case of *Maure* v. *Harrison*. He said this: "I have never heard this case relied upon as a governing case at this day." In the judgment as reported in 19 Vesey, p. 348, he puts it thus: "The prayer of the first of these petitions has been supported upon this ground, that the short bills and the mortgage * * * having been placed with Brickwood and Co. as a security against their acceptances, the holders of those bills have an equity to have that security applied specifically to the

discharge of those acceptances upon the general ground that, upon a transaction of this kind, a person holding the bills which are the subject of indemnity has a right to the benefit of the contract between the principal debtor and the party indemnified, and, though not himself a party to that contract, to say that he, who has contracted for the payment of certain debts out of those pledges, is liable in equity to the demand upon the part of those whose demands are to be so paid for that application, and a case was cited (*Maure* v. *Harrison*) which goes that length. With regard to that case, or cases in general, I desire it to be understood that I forbear to give my opinion upon that point." Then he goes on to say that he decides not on *Ex parte Waring* but on another ground. The result of these two cases, namely the dictum of Sir W. Grant in *Wright* v. *Morley* and the judgment and observations of Lord Eldon in *Ex parte Waring,* seems to me to be that Sir W. Grant and Lord Eldon were not of the same mind on the point. Under these circumstances I was very anxious to discover what was really done in the case of *Maure* v. *Harrison,* which is so shortly reported in Eq. Cas. Abr. The registrar has been kind enough to make search for that case. No decree was drawn up, but the entry of the case has been found in the registrar's book, and the pleadings have been discovered, and I am indebted to the learned reporter of this court, Mr. Knox, for having made a summary of them for my use, the pleadings themselves being somewhat lengthy. From them and the notes in the registrar's book it is tolerably easy to discover what the case was. The plaintiff was Thomas Maure, the defendants were William Harrison and William Morley and Mary his wife. Thomas Maure was the father of the first wife of William Harrison, the father of William Harrison the defendant. By that first marriage William Harrison the father had three children, viz., William, the defendant, Thomas, and Margaret. The first wife having died, William Harrison, the father, married his second wife Mary, the defendant, then the wife of William Maure, and afterwards he died intestate leaving this widow and three children by the first wife the persons entitled to his personal estate under the statute of distribution. Administration was taken out by his widow, and the shares of the three children in the intestate's property amounted to 120*l.* It appears that the plaintiff, Thomas Maure, the grandfather of William Harrison the defendant, was very anxious that William Harrison, his grandson, should continue the business of a farmer which had been carried on by William Harrison the father, but for that purpose it was necessary that

the sum of 120*l.* which formed the portion of the intestate's estate belonging to the three children should be paid over to William Harrison the son, and that was accordingly done. The two other children being infants, Thomas Maure the father and the plaintiff in the action gave a bond to the defendant Mary Morley, the legal personal representative of the intestate, to indemnify her against all claims by those children. It appears that at this time William Harrison, the defendant, was an infant, but the money was paid to him. He attained twenty-one, and carried on the farm for some time. After attaining twenty-one he repudiated the transaction and began to press William Morley and Mary his wife for payment of his share of his father's estate, which he had already received in point of fact, though apparently an infant. Thereupon William Morley gave him a bond for payment of his share, and William Morley and Mary his wife began to sue the plaintiff Thomas Maure in the Court of Exchequer for payment under the bond which had been given by him. Thereupon the plaintiff instituted this suit in equity to restrain the action, and to obtain delivery up of the bond which had been given by him. Now, of the other children who were interested in the intestate's estate, Thomas had died an infant and intestate, and Margaret was still an infant, and was not a party to the suit. The argument is stated in the registrar's book. It is to be observed that the bill is by the person who gave the bond to be relieved of it, and the result is thus stated in the registrar's book: "By the Court: Do declare that the defendant William is well paid, and he must deliver up the bond to the other defendant." That is the bond (as I read it) which had been given by William Morley to the defendant William Harrison for payment of his share. Whether that relief ought to have been inserted in the decree may be a question, because that would be relief between co-defendants. Then it goes on, "stay all proceedings at law on the plaintiffs' 100*l.* bond"—that is a mistake, for 120*l.* as clearly appears from the previous passage in the registrar's note, where it is corrected in the margin, but the correction is omitted here—"till Margaret doth release, and when the plaintiff hath procured Margaret, who is not a party to the action, to release that bond, then that bond to be delivered up" and so forth "but then the plaintiff's bond to be at suit for the recovery of Margaret's moiety of 120*l.*" So that all was decided in that action was that the plaintiff, who had given his bond of indemnity, was not entitled to have it delivered up to be cancelled till all claims had been settled. Under these circumstances it appears that the point

for which it was cited in Eq. Cas. Abr. could not have been decided in that case, and that at most the reported statement amounts to a dictum in the course of the argument. It is now nearly two hundred years since this case was decided, and the sole authorities on a point which must have been of frequent occurrence are a dictum in 1692, a dictum early in this century by Sir William Grant in the year 1805, and what appears to me to be the contrary opinion of Lord Eldon a little later. Under those circumstances it seems to me that there is no authority for the proposition in question. Upon principle I cannot see why a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that for the principal creditor. That is really the contention of the plaintiffs. Of course the other doctrine is well established, viz., that the surety who pays the debt is entitled to stand in the place of the principal creditor; but this doctrine rests entirely on those dicta which I have mentioned. It seems to me that under these circumstances I cannot give effect to the contention of the plaintiffs, and that they must simply be left to prove against the estate of the testator for what is due, without having the exclusive benefit of these securities in respect of which payments have been made to the estate.

Solicitors for the plaintiff company, *Pilgrim* and *Phillips.*

Solicitors for the defendants, *Few* and *Co.*, agents for *John James,* Wirksworth.

132. VAIL, et al., v. FOSTER, et al., 4 N. Y. 312.
Court of Appeals, New York, 1850.

A creditor is in equity entitled to the benefit of any collateral securities which the debtor has given to the surety, or person standing in the situation of a surety.

Varick & Eldridge, for appellants.
W. J. Street, for respondents.

BRONSON, Ch. J.—The case is shortly this. The plaintiffs sold land to Morgan, who, instead of giving his bond and mortgage to the plaintiffs to secure the purchase money, got Flagler to give his note to the plaintiffs for the amount, payable in one year; and Morgan gave a bond and mortgage to Flagler for his indemnity, for the same amount, and payable at the same time with the note. Before the credit expired Flagler became insolvent; and the plaintiffs seek relief, either on the ground of an equitable lien on

the land for the purchase money, or by reaching the mortgage to Flagler, and having it foreclosed for the payment of the debt.

By taking the security of a third person for the purchase money the plaintiffs have lost their equitable lien on the land, and can not have relief in that form, as has been very clearly shown by the vice-chancellor in his opinion. And I agree in most that he has said upon the whole case. But there is one point on which I think the supreme court was right in reversing the vice-chancellor's decree, and directing a foreclosure of the mortgage for the benefit of the plaintiffs.

It is a settled rule in equity, that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor. *Maure* v. *Harrison*, 1 Eq. Cas. Ab. 93, K. 5; *Curtis* v. *Tyler*, 9 Paige, 432; *Wright* v. *Morley*, 11 Ves. 22; *Bank of Auburn*, v. *Throop*, 18 John. 505; 4 Kent, 307, 6th ed.; 1 Story's Eq. §§ 502, 638. This principal covers the case; and the plaintiffs are entitled to the mortgage which Morgan, the principal debtor, gave to Flagler, the surety, for his indemnity.

But it is said that Morgan is not a debtor to the plaintiffs, and consequently that the relation of principal and surety does not exist between him and Flagler. It is true that Morgan did not unite with Flagler in making the note, nor did he come under any other express obligation to the plaintiffs. But he was originally a debtor to the plaintiffs for the price of the land; and although the plaintiffs afterwards took the note of Flagler in lieu of the bond and mortgage of Morgan, they took it as a security only for the purchase money, without agreeing to receive it in satisfaction of the debt. Taking the note of a third person for an existing debt is not payment, unless the creditor agrees to receive it in payment; and I find no such agreement in this case. Morgan is still liable to the plaintiffs for the purchase money, and must of course be regarded, as the principal debtor; for it is entirely clear, upon the pleadings and proofs, that Flagler gave the note at the request, and as the surety of Morgan, without having any personal interest in the matter. We have then the ordinary case of creditor, principal and surety, to which the rule in question has been applied; and the mortgage which the principal debtor has given to the surety must be considered as a trust for the better security of the debt, which a court of equity will enforce for the benefit of the creditor.

Foster & Co. under their creditor's bill, took the effects of Flagler subject to this equity; and there is no bona fide purchaser in the case.

I am of opinion that the decree of the supreme court is right, and should be affirmed.

Decree affirmed.

133. HAMPTON, Adm'r., et al., v. PHIPPS, 108 U. S. 260.
Supreme Court, United States, 1883.

Creditors are not entitled to be subrogated to mortgages given by co-sureties, each to the other to indemnify him from any claim beyond his assumed proportion. Such mortgages not being, in equity, securities for the payment of the principal debt.

Bill in equity by a creditor to obtain the benefit of securities held by sureties of the principal debtor.

The appellee, who was complainant below, was the holder, and filed his bill in equity, on behalf of himself and the other holders of bonds, executed and delivered by Theodore D. Wagner and William L. Trenholm, to the amount of $710,000, and paid to creditors in settlement of the liabilities of two insolvent firms, in which they were two of the copartners. These bonds were dated January 1st, 1868. The payment of the principal and interest of each of these bonds was guaranteed, by writing indorsed thereon, by George A. Trenholm and James T. Welsman, who were sureties merely. These sureties entered into a written agreement each with the other, dated May 3d, 1869, in which it was recited that, in becoming parties to said guaranty, they had agreed between themselves that the said George A. Trenholm should be liable for the sum of $400,000, and the said Jas. T. Welsman for the sum of $310,000, of the aggregate amount of the bonds, and no more, and that each would be respectively liable to the other for the full discharge of the said sum and proportion by them respectively undertaken, and that each would save and keep harmless and indemnify the other from all claim, by reason of the said guaranty, beyond the amount or proportion respectively assumed, as stated; and it was thereby further agreed, that at any time when either of them should so require, each should, by mortgage of real estate, secure to the other more perfect indemnity, because of the said guaranty. Thereupon, and on the same date, each executed to

the other a mortgage upon real estate of which they were respectively the owners, the condition of which was that the mortgagor should perform on his part the said agreement of that date. The guarantors, as well as the principal obligors, had become insolvent before the bill was filed.

It also appeared that, of the sum of $573,300 due on account of outstanding bonds, George A. Trenholm, one of the guarantors, had paid $108,454, leaving still due from his estate to make good the proportion assumed by him, $214,532; and that the proportion for which the estate of James T. Welsman, the other guarantor, was liable, was $250,314, of which nothing had been paid. The appellees claimed that the mortgages interchanged between the guarantors inured to their benefit as securities for the payment of the principal debt, and prayed for a foreclosure and sale for that purpose.

This was resisted by the appellants, one of whom, Hampton's administrator, as a judgment creditor of George A. Trenholm and James T. Welsman, claimed a lien on the mortgaged premises; the others, executrixes of James Welsman, deceased, being subsequent mortgagees of the same property.

A decree passed in favor of the complainants, according to the prayer of the bill, from which appeal was taken.

Mr. Theodore G. Barker and *Mr. W. G. De Saussure* for appellants.

Mr. James Lowndes for appellee.

Mr. Justice MATTHEWS delivered the opinion of the court. After reciting the facts in the above language, he continued:

The ground on which the court below proceeded seems to have been that the mortgages given by the co-sureties, each to the other, were in equity securities for the payment of the principal debt, which inured to the benefit of the creditors upon the principle of subrogation.

The application of the principle of subrogation in favor of creditors and of sureties, has undoubtedly been frequent in the courts of equity in England and the United States, and is an ancient and familiar head of their jurisdiction.

It was distinctly stated, as to creditors, in the early case of *Moure* v. *Harrison*, 1 Eq. Ca. Abr. 93, where the whole report is as follows:

"A bond creditor shall, in this court, have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A owes B money, and he and C are bound for it, A

gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt."

And the converse of the rule was stated by Sir Wm. Grant, in *Wright* v. *Morley*, 11 Vesey, 12, where he said:

"I conceive that as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor."

And it applies equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all.

Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made.

It follows that the present case cannot be brought within either the terms or the reason of the rule; for, as the property, in respect to which the creditors assert a lien, was not the property

of the principal debtor, and has never been expressly pledged to payment of the debt, so no equitable construction can convert it by implication into a security for the creditor.

It is urged that the logic of the rule would extend it so as to cover the case of all securities held by sureties for purposes of indemnity of whatsoever character and by whomsoever given. But this suggestion is founded on a misconception of the scope of the rule and the rational grounds on which it is established. Of course, if an express trust is created, no matter by whom, nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a *cestui que trust;* but the question concerns the creation of a trust, by operation of law, in favor of a creditor, in a case where there was no duty owing to him, and no intention of bounty. A stranger might well choose to bestow upon a surety a benefit and a preference, from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. In such a case, neither co-surety nor creditor could, upon any ground of privity in interest, claim to share in the benefit of such a benevolence.

There may be, indeed, cases in which it would not be inequitable for the debtor himself to make specific pledges of his own property, limited to the personal indemnity of a single surety, without benefit of participation or subrogation; as, when the liability of the surety was contingent upon conditions not common to his co-sureties, and which may never become absolute. *Hopewell* v. *Cumberland Bank,* 10 Leigh, 206.

We are referred by counsel to the case of *Curtis* v. *Tyler,* 9 Paige, 432, as an instance in which the rule has been extended to securities in the hands of a surety not derived from the principal debtor. But the fact in that case is otherwise. The question was as to the right of an assignee of a mortgage to the benefit of the guaranty of one Allen to make good any deficiency in the mortgaged property to pay the mortgage debt. This bond had been given to one Murray, a prior holder of the mortgage, who had assigned it to the complainant. The court say, in the opinion, p. 436:

"In the case under consideration, Murray had assigned the bond and mortgage given to him, and had guaranteed the payment thereof to the assignee. He, therefore, stood in the situation of a surety for the mortgagor, when the latter procured the bond of

Allen as a collateral security, or as a guaranty of the payment of his original bond and mortgage. The present holders are, therefore, in equity entitled to the benefit of this collateral bond, in the same manner and to the same extent as if it had been given to Murray before he assigned his bond and mortgage, and had been expressly assigned by him to Beers, and by Beers to the complainants."

It thus distinctly appears that the bond of Allen, which was the collateral security in controversy, was procured by and derived from the original mortgagor, the principal debtor. We have been referred to no case which forms an exception to the rule as we have stated it.

But the claim of the complainants fails for another reason. The right of subrogation, on which they rest it, is merely a right to be substituted in place of each of the co-sureties in respect to the other, in order to enforce the mortgages given by them respectively according to their terms. But the conditions of these mortgages have not been broken, and the very fact, which is supposed to confer the right upon the creditor to interpose—the insolvency of the sureties—has rendered it impossible for either to fasten upon the other a breach of the condition of his mortgage. As neither can pay his own proportion of the liability they agreed to divide, neither can claim indemnity against the other for an over-payment. It is entirely clear, therefore, that neither of the sureties could be, under the circumstances as they appear, entitled, as mortgagee, to foreclose the mortgage against the other. The condition of each mortgage was, that the mortgagor would perform his part of the agreement and indemnify the mortgagee against consequences of a failure to do so. Unless one of them had been compelled to pay, and had in fact paid, an excess beyond his agreed share of the debt, there could have been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. And the amount which the mortgagor could be required to pay, as a condition of redeeming the mortgaged premises, in case of foreclosure, would be, not the amount which the mortgagee, as between himself and the common creditor, was bound to pay on account of the debt, but the amount which, as between himself and his co-surety, the mortgagor, he had paid beyond the proportion which, by the terms of the agreement between them, was the limit of his liability. The mortgages were not created for the security of the principal debt, but as security for a debt possibly to arise from one surety to the other.

As to which of them has there been as yet any default? Plainly none as to either. And yet the complainants assert the right to foreclose them both—a claim that is self-contradictory, for, by the very nature of the arrangement, it is impossible that there should be a default as to both. The fact that one mortgagor had failed to perform his part of the agreement could only be on the supposition that the other had not only fully performed it on his part, but had paid that excess against which his co-surety had agreed to indemnify him. There is, therefore, no right to the subrogation insisted on, because there is nothing to which it can apply.

It results, therefore, that the complainants were not entitled to participate in the benefit of the mortgages in question, nor to share in the proceeds of the sale of the mortgaged premises; but that the same should have been applied to the payment of the other judgment and mortgage liens upon the premises, in the order of their priority. The decree of May 29th, 1879, therefore, being the one from which the appeal was taken, is reversed, and the cause remanded with directions to take such further proceedings therein, not inconsistent with this opinion, as justice and equity require.

Decree reversed.

CHAPTER VIII

COMPENSATED SURETYSHIP

SECTION. 1 NATURE AND CONSTRUCTION OF THE CONTRACT.

134. LAKESIDE LAND CO. v. EMPIRE STATE SURETY CO., 105 Minn. 213, 117 N. W. 431.

Supreme Court, Minnesota, 1908.

Contracts of surety companies are contracts of insurance, and are to be construed by the rules applicable to such contracts.

Action in the district court for St. Louis county to recover from defendant as surety on two bonds certain sums of money paid by plaintiff to protect itself from liens filed against its property. Upon the pleadings and stipulated facts the case was submitted to DIBELL, J., who found in favor of the plaintiff in the sum of $1,075.79. From a judgment entered pursuant to the findings, defendant appealed. Affirmed.

E. P. Towne and *Edmond Ingals,* for appellant.

Stearns & Hunter, for respondent.

LEWIS, J.—Respondent and a contractor entered into agreements in writing whereby the contractor agreed to furnish the necessary material and labor and to construct two dwelling houses, to be completed within a certain time. Appellant company, as surety for the contractor, executed a bond to respondent as obligee, conditoned as follows:

"Now, therefore, the condition of this obligation is such that, if the said principal shall faithfully perform said contract on his part according to the terms, convenants, and conditions thereof, (except as hereinafter provided) then this obligation shall be void; otherwise, to remain in full force and effect: Provided, however, and upon the following further express conditions: First, that in the event of any default on the part of the said principal in the perfomance of any of the terms, covenants, or conditions of said contract, written notice thereof with a verified statement of the particular facts, showing such default and the date thereof, shall within fifteen days thereafter be delivered to the Empire

State Surety Company, at its office, No. 34 Pine street, in the city of New York, New York."

The contractor thereupon entered upon the construction of the houses, but failed to complete them within the time limited by the contracts, and also failed to pay for a portion of the material and labor used in the construction of the buildings, and respondent, in order to protect itself against mechanics' and materialmen's liens, which had been filed against the premises, paid the same and then commenced this action to secure reimbursement for the sum so expended.

Appellant concedes that respondent waived all claim of damages for delay in completing the buildings, and concedes its liability for the amount of the liens paid by respondent, provided it was not wholly released by the failure to give the notice above stated. Appellant cites *Simonson* v. *Grant,* 36 Minn. 439, 31 N.W. 861; *Morrison* v. *Arons,* 65 Minn. 321, 68 N. W. 33; and *Fidelity Mutual Life Ass'n.* v. *Dewey,* 83 Minn. 389, 86 N. W. 423, 54 L. R. A. 945, and relies upon the rule of strict construction there applied.

The first case bears some resemblance to the one before us, and yet is essentially different. Simonson and others furnished building material to contractors to be used in the erection of a house for the owner, and also became the sureties for faithful performance by the contractor. The terms of the contract were departed from, and the owner made payments to various parties on the order of the contractor, and in some instances paid out money in excess of the instalment due and in anticipation thereof. It was held that the departure in the method of payment from the terms of the contract so varied its terms as to release the sureties, although it did not appear that they were directly damaged by such change. In the other two cases cited the facts were entirely different from those under consideration, and there is no necessity for calling particular attention to the distinction.

Appellant also refers to *National Surety Co.* v. *Long,* 125 Fed. 887, 60 C. C. A. 623; and *United States Fidelity & Guaranty Co.* v. *Rice,* 148 Fed. 206, 78 C. C. A. 164, both from the Circuit Court of Appeals, Eighth Circuit. Those cases are to be distinguished, however, in this particular: In the first it was provided that, if at any time it appeared that the contractor had abandoned the work, the obligee should immediately notify the surety company in writing, and the company should have the right, at its option, to assume such contract and sublet or complete the same, and if it so elected, to receive all moneys payable under

the terms of the contract. In the second case the bond provided that, in event of default on the part of the contractor, the surety should have the right, if it so desired, to assume, or complete, or procure the completion of the contract, and be subrogated and entitled to all the rights and properties of the principal arising out of the contract.

In the present case there is no such condition, either in the bond or contract. On the contrary, the contract recites that the obligee shall retain fifteen per cent, of the money due on estimates, and, if at any time there should be evidence of any lien or claim for which the owner might become liable, then the owner should have the right to retain, out of any payment then due, or thereafter to become due, an amount of money sufficient to indemnify it againt such liens or claims, and if there prove to be any claims after all payments are made by the owner, the contractor shall then refund to it all moneys paid in discharging the lien. The contract also provided that, should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or material of the proper quality or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements therein contained, then the owner should be at liberty, after three days' written notice to the contractor, to provide such material and labor, and also be at liberty to terminate the contract and take possession of the premises and complete the work. There is no provision in either the bond or contract by which the surety is subrogated to the rights of the contractor, and there is no provision for giving the surety notice of default by the contractor, except the general one already quoted.

This particular question, in bonds of this character, has not often been presented to the courts, but in every instance to which our attention has been called the rule of strict construction was not applied. Thus in *Monro* v. *National* (Wash.) 92 Pac. 280, it was held that the failure to give notice of the expiration of the time prescribed for completing the building did not release the surety from its obligation to pay lien claims for labor and material; no claim having been made for damages arising out of the delay. Attention was called in the opinion to several preceding decisions of that court on the same subject. The supreme court of Oklahoma reached the same conclusion in the case of *American* v. *Scott*, 18 Okl. 264, 90 Pac. 7. That the strict rule of construction is not applicable with reference to bonds issued by surety companies has become very well settled in the courts of the United States.

A surety company, in the business of issuing bonds of this character, furnishes its own forms, and is presumed to be acting advisedly in the selection of the language used, and the intention of the parties will be ascertained by the rule applicable to insurance contracts.

This rule has been recognized several times in our own court, for instance: *White* v. *Standard Life & Accident Ins. Co.*, 95 Minn. 77, 103 N. W. 735; *Bader* v. *New Amsterdam Casualty Co.*, 102 Minn. 186, 112 N. W. 1065. See also *American Surety Co.* v. *Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. When it fairly appears from the face of the contract what the parties intended, a strict construction of general statements or of particular clauses will not be indulged in to vary the evident purpose to be accomplished by the instrument.

We regard the omission to serve notice upon the surety company of the failure to complete the buildings within the time specified to constitute no substantial variance from the terms of the bond. The contract provided what course should be taken in such event, and appellant was not prejudiced thereby.

Affirmed.

135. THE UNITED STATES FIDELITY AND GUARANTY CO. v. THE FIRST NATIONAL BANK, 233 Ill. 475, 84 N. E. 670.

Supreme Court, Illinois, 1908.

The contract of the compensated surety is essentially one of insurance, controlled by the principles of insurance law, and not by those of ordinary suretyship.

Appeal from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. G. A. CARPENTER, Judge, presiding.

We adopt the following statement made by Mr. Justice FREEMAN in the Appellate Court:

"The bond in question is known as an 'employer's schedule bond.' In it the guaranty company covenanted and agreed with the bank, in respect to those of the bank's employees 'whose name or names appear in the schedule hereto attached (which is hereby referred to and made a part of this bond) in respect to whom the employer requires indemnity of the kind and nature hereinafter provided, * * * that it will, at the expiration of three months after proofs of loss shall have been furnished to the com-

pany, pay to the employer the amount of any loss or damage that shall happen to the employer in respect of any funds, property or estate belonging to or in custody of the employer through the dishonesty of any of the employees or through any act of omission or commission of any of the employees done or omitted in bad faith, and not through mere negligence, incompetency or any error of judgment, and whether such dishonesty or such act of omission or commission occurs in the performance of any duty or trust especially assigned to such employee or occurs otherwise.' The liability, under the terms of the original bond, began January 25, 1901, and terminated one year thereafter unless renewed. It is provided in the bond, among other things, that in case the employer be a corporation, 'the knowledge of its board of directors or trustees, or of any executive officers, such as president, vice-president, cashier or assistant cashier of a bank,' shall be deemed the knowledge of the employer, 'unless such officer be in collusion with the employee through whom the loss occurs.' The bond was subject to renewal from year to year by agreement. The schedule attached to the bond contained the name of the cashier of the bank, one Francis B. Wright, on account of whose defalcation the bank is seeking to recover on the bond. . . . . .

"When the term of the original bond was about to expire at the end of the first year the guaranty company notified the bank, requesting it to fill in, sign and forward a form of certificate which accompanied the letter, and stating that thereupon 'a renewal receipt will be sent to you and remittance for premium can then be made.' The certificate which was so signed and forwarded by the bank was as follows:

"'*To the United States Fidelity and Guaranty Company*:— This is to certify that the books and accounts of the persons in our employ, as per schedule attached, were examined by us from time to time in the regular course of business, and we found them correct in every respect, all moneys handled by them being accounted for. They have performed their duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued.

FIRST NATIONAL BANK,
Delos Dutton, Pres., Employer.

Dated at Dundee, Ill., Jan'y 22, 1902.'

"A renewal receipt or agreement was thereupon executed by the guaranty company and forwarded to the bank, which continued in force from January 25, 1902, to January 25, 1903. When, at the

end of the second year, the bond so renewed was about to expire, the bank was again notified, again executed a certificate as before, and again received a renewal agreement continuing the bond in force until January 25, 1904, 'subject to all the covenants and conditions set forth and expressed in said schedule bond heretofore issued on the 25th day of January, 1901.'

"It appears from the evidence, and is not disputed, that the cashier, Wright, named in the schedule of the bond, embezzled the sum of $3000 belonging to the bank during the first year, while the original bond was in force. During the second year the sum embezzled was $24,513.75, and the third year, up to the time of the discovery, the sums misappropriated aggregated $36,050, making, according to these figures, a total during the three years of at least $63,563. The discovery was made in November, 1903, and in August, 1904, the bank brought suit against the guaranty company, seeking to recover as much of the defalcation as was covered by the bond, the penalty of which was $10,000. In April, 1905, while that suit was pending, the guaranty company filed its bill of complaint now under consideration, on the ground that its defense to the suit of the bank was not available at law. Appellee answered and filed a cross-bill, praying that the amount due it on the bond be ascertained and for a judgment or decree for such amount. The guaranty company offers to pay for so much of the defalcation as occurred the first year, while the original bond was in force, but it seeks to avoid liability for losses which occurred during the two subsequent years covered by renewals."

Judah, Willard, Wolf & Reichman, for appellant.

Newman, Northrup, Levinson & Becker, and *Chester E. Cleveland,* for appellee.

Mr. Justice VICKERS delivered the opinion of the court:

Appellant contends that the two certificates made by the bank to obtain a renewal contain false representations which render the certificates void, and that therefore the bond was not in force except for the first year. The charge of false representations raises an issue of fact. The burden of proof upon that issue is upon appellant.

In the two renewal certificates in question, both of which were alike in form, the president of the bank certifies to the company that the books and accounts of the cashier "were examined by us from time to time in the regular course of business, and we found them correct in every respect, all moneys handled by them (him) being accounted for." Appellant's contention is, that the

statement that the books and accounts of Wright had been examined was not true; that if an examination had been made the embezzlements of the cashier would have been discovered, and that the fact that they were not discovered is proof that no examinations were made. Appellant further contends that the renewal certificates extending the original bond for the second and subsequently for a third year were issued by appellant in reliance upon the representations contained in the certificates in question.

The bond in question must, we think, be regarded as an insurance contract(and as such subject to the rules of construction applicable to insurance policies generally, and not the rules applied to ordinary sureties for accommodations. (*People* v. *Rose,* 174 Ill. 310.) In this case this court, on page 313, said: "Guaranty insurance is, in its practical sense, a guaranty or insurance against loss in case a person named shall make a designated default or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employee or officer, though sometimes against the breach of a contract. This branch of insurance is so much more modern in origin and development than fire, marine, life and accident insurance that there are few decisions upon the subject, but the business is gradually increasing and is doubtless destined to take an important place in the commercial world. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus, the general doctrine of warranty, representation and concealment, as applied to fire, life and marine insurance, is applicable also to the subject of guaranty insurance."

Contracts of guaranty insurance are made for the purpose of furnishing indemnity to the assured, and they should be liberally construed to accomplish the purpose for which they were made. (*American Surety Co.* v. *Pauly,* 170 U. S. 133; *Guaranty Co.* v. *Mechanics' Savings Bank and Trust Co.,* 80 Fed. Rep. 766.) The law is well settled, in its application to insurance contracts, that a misrepresentation of a material fact, in reliance upon which a contract of insurance is issued, will avoid the contract, and it is not essential in equity, that such a misrepresentation should be known to be false. A material misrepresentation, whether made intentionally and knowingly or through mistake and in good faith, will avoid the policy. (May on Insurance, sec. 181.) We think there can be no doubt that the representations upon which appellant relies were material. The points covered by the certificate of the president were particularly required by appellant's letter. The

request of appellant for information upon these points makes the answer material. (May on Insurance, sec. 185.) The rights of the parties therefore depend upon whether the representations were true or false.

By reference to the certificates in question it will be seen that the statement "that the books and accounts * * * were examined by us" is followed by the qualifying phrase, "*from time to time in the regular course of business.*" There is here no statement of the character of the examinations or the frequency with which they were made. There is nothing in the original bond or in the renewal certificates that required appellee to make examinations at stated times or in a particular manner. The character of the examinations and the frequency with which they were made are governed by "the regular course of business" of appellee. The evidence shows that the bank was opened for business about the first of January, 1901, with a capital stock of $50,000. Soon after the bank opened it was examined by Mr. Cook, national bank examiner for Illinois, and he testifies that the bank was duly and properly organized and that the books of the bank were properly kept. The examiner testifies, also, that on the occasion of his first examination he made careful inquiry concerning the character of the cashier and his fitness for the position, and received nothing but favorable information. It is shown that the bank was examined, under the direction of the comptroller, subsequently, in the years 1901, 1902 and 1903. The bank examiner testifies that he made a careful and thorough investigation in accordance with the usual custom and practice of national bank examiners, and found nothing irregular until the defalcation was discovered, in the latter part of 1903. It was also shown that the bank had a discount committee, composed of three members of its board of directors, and that this committee performed the usual duties devolving upon such committees. The discount committee held frequent meetings in the bank, examined the books and the notes and found no irregularities. During the first year the bank discounted 739 items that were entered upon the books. All of these items were *bona fide* transactions and regularly entered, in due course of business, on the books of the bank, except one item of June 6, 1901, which was Wright's personal note, which he discounted and entered on the discount register correctly as a note for $300. The cash book, however, showed that the bank had paid out on that day $3,000 by a draft on Chicago, payable to the order of E. Lynn. This was the first embezzlement committed by the cashier, and the only one during the first year. It appears

that the note for $300 was paid in April, 1902, after the first certificate in question was made by the bank. The method adopted by Wright to conceal his embezzlement in this instance was subsequently followed in all of his later embezzlements. He would make his own note to the bank for a small sum and enter it correctly on the discount register; then he would draw a draft on Chicago or New York for ten times the amount of the note and enter the draft on the cash book corresponding to the number in the discount register of the note discounted. By this method the cash book would balance correctly and the discrepancy would not appear unless the cash book and the discount register and the notes discounted were compared with each other.

The only irregularity in the entire year's business of 1901 consists in one additional cipher being added to the figures "300" on June 6. Appellant insists that the failure of the bank to discover this discrepancy is conclusive proof that no examination was, in fact, made. This conclusion is not warranted by the facts and circumstances in this record. If it be assumed that an examination of the bank's books means only such a thorough and exhaustive examination as would necessarily discover the slightest irregularity that might exist, however cunningly covered up, then, of course, appellant's contention would be sound; but this is manifestly not the meaning of the word "examination" in the certificates in controversy. If bank officers are to be held to such a rigid method of examination and supervision over the accounts of their employees there would be but little necessity, if, any, for purchasing fidelity insurance. When a trusted employee conceives a scheme of criminal misappropriation of his employer's money, he at the same time matures his plans for covering up his wrongdoings. He has many advantages over his employer, since he knows what the real facts are and is therefore always on his guard to allay suspicion, while the employer is ignorant of the real facts and therefore unsuspecting. In this case the evidence shows that the defaulting cashier had an unquestioned reputation for honesty and fidelity, and not the least suspicion existed that he was not entirely honest and worthy of the confidence reposed in him. The bank examiner for the government had examined this bank time and again and found nothing to arouse his suspicions. Under these circumstances the fact that the officers of the bank failed to discover the additional cipher added to the figures "300" among 738 other items on the same book falls very far short of proving, or even tending to prove, that there was no examination, in fact, made by the officers

of this bank within the meaning of the certificates in controversy.

We have so far confined our discussion of this subject to the conditions as they existed when the first certificate was made, in January, 1902. If the certificate made at that time contained no false representations entitling appellant to the relief sought, it is not necessary to consider the evidence relating to the certificate made in January, 1903. If the renewal certificate of 1902 is binding upon appellant and had the effect of continuing the bond in force for that year, then appellant is liable for the full amount of the decree below, since it is admitted that Wright's embezzlements during the year 1902 were largely in excess of the face of the bond. If appellant's contention as to the construction of the certificates be sustained, the result would be that the making of such a certificate would be an acquittance and release of the insurance company of all liability that existed on account of the infidelity of the employee prior to the date of the certificate. That such is not the construction put upon these certificates by the parties is shown by the limitation clause, which allows one year after the expiration of the bond in which to discover the misconduct of the employee for whose fidelity the insurance policy is procured. It is probably true that an expert accountant, in making a thorough and detailed examination into the affairs of this bank, might have discovered the irregularity of June 6, 1901; but the officers of this bank were not required by any clause in the contract to make any such examination as above supposed, and the certificate to the effect that the books and accounts of Wright had been examined from time to time, in the regular course of business, and found correct, carried no assurance to appellant that such examinations had been made. That the president and discount committee had from time to time, in the regular course of business, examined the books and accounts of the bank and found them correct cannot be disputed under the evidence in this record. We therefore agree with the conclusion of the trial court and the Appellate Court that the certificate of January 22, 1902, was substantially true. It results from this conclusion that the decree below and the judgment of the Appellate Court should be affirmed unless the court erred in not awarding appellee a decree for $20,000.

We do not think that the cross-errors can be sustained. The renewal certificate contains this provision: "Provided the aggregate liability of the United States Fidelity and Guaranty Company from the date of the issuance of said schedule bond to the date of the expiration of this certificate, for or on account of any

act or acts of any one of said persons, shall not exceed the sum written opposite that person's name upon the attached schedule." Appellee contends that each renewal of the bond was equivalent to the issuing of a new contract, and that it is entitled to recover $10,000 on the renewal for the year 1902 and $10,000 on the renewal for 1903. Appellee and appellant occupy a novel situation in respect to the $3000 embezzled in 1901. Appellant's contention is that there is but one contract, and that the renewals merely continued that contract in force for the time covered by the renewal certificates. This being true, appellant concedes that each renewal would extend the limitation in which the liability was to be discovered, one year from the time when the renewal expired. Appellant therefore admits its liability to the extent of $3000 and offers to pay that amount. On the other hand, appellee contends that each renewal constitutes a new contract and that the limitation commenced to run on the bond of 1901 at the date of its expiration, and that the embezzlement of June 6, 1901, not having been discovered by the bank until November, 1903, the company is not liable to appellee for that item. Thus we have the appellant admitting its liability and offering to pay $3000 to appellee, and appellee trying to convince us that appellant is mistaken about its liability under the contract of 1901 for this item. Under the view we take of this case it is not necessary for us to decide which of these parties has made the better case for the other. In our opinion the clause above quoted from the renewal certificate precludes appellee from recovering more than the face value of the original bond, together with the interest thereon.

The judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

SECTION 2. COMPARED WITH THE CONTRACT OF INSURANCE

136. UNITED STATES FIDELITY AND GUARANTY CO. v. RIDGLEY, 70 Neb. 622, 97 N. W. 836.

Supreme Court, Nebraska, 1903.

The contract of the compensated surety on a fidelity bond may be not only between the insurer and insured, but also between the insurer and the employee.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, Judge. Reversed.

Mockett & Polk, for plaintiff in error.

Lionel C. Burr and *Elmer E. Spencer,* contra.

ALBERT, C.—Harry B. Ridgley, whom we shall call the plaintiff, for present purposes, may be said to have been the owner of several stores and engaged in selling goods on the instalment plan, with headquarters at Des Moines, Iowa; one whom we shall call the employee was in his employ as manager of such stores in the city of Lincoln. The plaintiff required the employee to furnish a fidelity bond, in the sum of $500, whereupon the employee made application therefor to the defendant company, whose home office is in the city of Baltimore, through its agents at Lincoln. The application was supported by certain statements in writing made by the plaintiff, in response to questions propounded by the defendant, as to the nature of the employee's duties, extent of his authority in the conduct of the business, etc. The questions were on a printed blank furnished by the defendant and were preceded by these words: "The company desires to have answers to the following questions, and these answers will be taken as the basis of the bond if issued."

Among such questions and answers are the following:

Q. What will be the title of the applicant's position?

A. Manager Branch Store.

Q. Will he be authorized to pay out of the cash in his custody any amounts on your account?

A. Commission to agents, and his salary, and salary of his collector, and remit balance to me.

Q. Is he required to make deposits in bank; if so how often?

A. Yes.

Q. State whether he is allowed to indorse check, drawn to your order and for what purpose.

A. Only for remittance to me.

Q. Will he be authorized to sign checks on your behalf?
A. No, sir.
Q. How frequently will he make settlement?
A. Every Saturday.
Q. What means will you use to ascertain whether his accounts are correct?
A. A perfect report system.
Q. How frequently will they be examined?
A. Every Monday morning.

The defendant accepted the application and forwarded the bond, duly signed and sealed, to his agents through whom the application was made, who delivered it to the employee upon the payment by him of the premium thereon.

Among other conditions, appearing on the face of the bond, are the following:

"And the said employee doth hereby, for himself, his heirs, executors, and administrators, covenant and agree to and with the said company, that he will save, defend and keep harmless the said company from and against all loss and damage of whatever nature or kind, and from all legal or other costs and expenses, direct or incidental, which the said company shall or may, at any time, sustain, or be put to (whether before or after any legal proceedings by or against it to recover under this bond and without notice to him thereof) or for or by reason or in consequence of the said company having entered into the present bond."

The employee did not sign the bond but forwarded it, without his signature thereto, to the plaintiff who, when he received it, examined it no further than to ascertain the amount, which was satisfactory, and accepted it without knowing that the employee had not signed it or that his signature thereto was required.

This is an action on the bond brought by the plaintiff against the defendant to recover for money, securities and other personal property of the plaintiff which, it is alleged, the employee unlawfully converted to his own use.

The bond is made a part of the petition, and in avoidance of the omission of the employee's signature from the bond the plaintiff alleges:

"That said bond was not so signed and witnessed by said Frank L. Kelsey the employee, but that said defendant corporation had full knowledge that said bond was not so signed and witnessed and, with full knowledge thereof, the president and secretary of said corporation signed the same and (caused) to be affixed thereto

the seal of the corporation, delivered said bond to the plaintiff, who then and at all times herein mentioned was a resident of the city of Des Moines, Iowa, and from him received and has ever since retained the premium required to be paid therefor. That, by reason of the foregoing acts and conduct of the defendant, it has waived said stipulations and provisions of said bond and is therefore estopped to deny its liability to plaintiff on said bond by reason of said omission."

The defendant answered, putting in issue the allegations of the petition in avoidance of the omission of the employee to sign the bond. The answer also contains the following allegations:

"The defendant further alleges that the plaintiff had full knowledge of the delinquencies of the said Frank L. Kelsey, long prior to the first day of May, 1901, that the bank account of the plaintiff, kept by the said Kelsey in the city of Lincoln, was frequently overdrawn by said Kelsey with the full knowledge of the plaintiff, although from exhibit "A" hereto attached he was not authorized to draw against said bank account except for the purpose as shown by the weekly reports.

"The defendant further alleges that the statements made and subscribed to by the defendant in Exhibit "A" were warranties. That the answers to questions 9 C, 10 A, 11, 12 A & B, 14, 15 in said exhibit "A" are wholly false and were known to be false by the plaintiff at the time the same were made, and that the duties of and check upon the said Kelsey were not as set out in said answer, and that the liability under said bond was enlarged and varied from that contained in said written statement, and that no check whatever was had upon the said Kelsey during the life of said alleged bond, that he was authorized to and did draw checks upon the said bank account, that settlements were not made once a week as warranted, that there was not a perfect report system or any other system which would ascertain the condition of the accounts of the said Kelsey once a week. That there has been a breach of all of said warranties and that instrument is absolutely void."

The foregoing allegations were put in issue by the reply.

There was a verdict for the plaintiff, and judgment was given accordingly. The company brings error.

At the close of the testimony the company asked the court to direct a verdict in its favor, and the overruling of its motion in that behalf is now assigned as error. There are, perhaps, technical objections to a consideration of that particular assignment, but as the same questions are presented in some other form, in

other parts of the record, the objections that might be urged against their consideration under this assignment will be disregarded.

It is tacitly conceded that the omission of the employee's signature from the bond is fatal to a recovery in this case, unless it appear that the defendant has waived this omission or is estopped to urge it as a defense. The plaintiff contends that, by the delivery of the bond to the employee without requiring him to sign it, the defendant thereby made him its agent for the delivery of the bond to the plaintiff, and that such delivery, taken in connection with the receipt and retention by the defendant of the premium, was a waiver of the condition that the bond should be signed by the employee. In support of this contention the plaintiff cites *Billings* v. *German Ins. Co.*, 34 Neb. 502; *Burlington Voluntary Relief Department* v. *White*, 41 Neb. 547; *German American Ins. Co.* v. *Hart*, 43 Neb. 441; *German Insurance & Savings Institutions* v. *Kline*, 44 Neb. 395; *Rochester Loan & Banking Co.* v. *Liberty Ins. Co.*, 44 Neb. 537. These cases are all insurance cases, and the rule underlying them and which is invoked in the present case is that, where an insurer is informed of defects in the contract of insurance which would avoid the policy but thereafter continues to treat it as binding and thereby induces the insured to act in the belief that it is binding, it will be held to be a waiver of such defects. This rule is founded on the doctrine of estoppel and its application is by no means limited to insurance cases. The same principle underlies the rule that a bond, perfect on its face, apparently duly executed by all whose names appear therein and actually delivered to the principal without stipulation, reservation or condition, cannot be avoided by the sureties on the ground that they signed it on the condition that it should not be delivered unless executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition and that he had been induced, on the faith of such bond, to act to his prejudice. A surety who signs a note upon an agreement with the maker that it shall not be delivered to the payer [payee] until signed by other sureties cannot plead, against an innocent payer [payee] without notice of the agreement, the fraud of the maker in delivering it without the additional sureties. It will be observed that one of the essential elements of the rule, whether applied to a policy of insurance, a bond or commercial paper, is a lack of knowledge on the part of the person for whom the indemnity was intended of the defects in the contract. The importance of this element will be better understood in the light of other rules of the

law of suretyship, one of which is that, if the surety signs an obligation in the body of which another is also named as surety, on the condition that he shall not be bound unless such other also sign, and delivers the bond to the principal who delivers it to the obligee without complying with the condition, the surety is not bound. Another is that, if the instrument in its body purports to be signed by the principal but is not so signed, this is sufficient notice to the obligee that it is imperfect, and the sureties may show as defense that they signed on condition that the principal should also sign. 2 Brandt, Suretyship and Guaranty, secs. 408, 409, 411. The importance of this element of the rule is further shown by the following cases: *Nash* v. *Baker,* 40 Neb. 294; *Brant* v. *Virginia Coal & Iron Co.,* 93 U. S. 326; *Pettit* v. *Johnson,* 15 Ark. 55; *Huse* v. *Den,* 85 Cal. 390; *Rockwell* v. *Coffey,* 20 Colo. 397; *Carroll* v. *Turner,* 54 Ga. 177; *Holcomb* v. *Boynton,* 151 Ill. 294; *Wolfe* v. *Sullivan,* 133 Ind. 331; *Clark* v. *Coolidge,* 8 Kan. 189; *Mountain Lake Park Ass'n* v. *Shartzer,* 83 Md. 10; *Norman* v. *Eckern,* 60 Minn. 531; *Blodgett* v. *Perry,* 97 Mo. 263. There is a total lack of evidence in this case that the defendant had knowledge that the employee had failed to sign the bond. The plaintiff contends that knowledge of that fact is to be imputed to the defendant because its agents delivered the bond to the employee without requesting him to sign it, and he was thereby made the agent of the defendant to deliver the bond to the plaintiff. We do not think the transaction will admit of that construction. It is true a contract of this character is a form of insurance, as was held in *People* v. *Rose,* 174 Ill. 310; *People* v. *Fidelity and Casualty Co.,* 153 Ill. 25; *Shakman* v. *United States Credit System Co.,* 92 Wis. 366; *Robertson & Sons* v. *United States Credit System Co.,* 57 N. J. Law 12. But it is something more than a contract of insurance. A contract of insurance is usually based on the application of the insured who pays the premium, and is between him and the insurer alone. The bond in suit was issued on the application of the employee who paid the premium, and, as drawn, contemplates not only a contract of indemnity between the plaintiff and the defendant but also a contract between the defendant and the employee. By the express terms of the instrument the validity of the defendant's undertaking to the plaintiff is made to depend on the formal execution of the instrument by the employee also. When the defendant delivered the bond to the employee, duly signed and completed so far as it was then in its power to complete it, the obligation of the defendant to the employee to furnish him the bond in consideration of the premium paid was fully dis-

charged. By the delivery of the bond to the employee the defendant did not make him its agent with authority to change the terms of the bond, or for the delivery of the bond in its then condition to the plaintiff, but merely gave him what he had bought and paid for, with the authority to make it effective by the addition thereto of his signature and its delivery to the plaintiff. Such authority was limited by the express provisions of the instrument itself, and the instrument therefore carried with it notice to the plaintiff of such limitation. When it was tendered to the plaintiff it showed on its face that it was incomplete and not a binding contract. That he omitted to read it and for that reason failed to discover its defects does not relieve him from the consequence of such defects. To hold otherwise would be to place a premium on willful ignorance. Much stress is laid on the fact that the defendant retained the premium. It is argued that the defendant thereby waived the signature of the employee to the bond. The premium was paid by the employee, and in consideration thereof the bond was delivered to him as completely executed as it was within the power of the defendant to execute it. The fact that the employee did not see fit to sign the bond and thereby make it effective would not, of itself, entitle him to a return of the premium. To hold otherwise would be to say that a party to a contract, upon changing his mind, is entitled to a return of the consideration paid by him. Besides, there is no evidence tending to charge the defendant with knowledge of the failure of the employee to sign the bond. In the absence of such knowledge there could be no waiver, because the term waiver implies knowledge of the thing waived on the part of the person bound by the waiver. *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240; *Shaw* v. *Spencer*, 100 Mass. 382, 97 Am. Dec. 107; *Stewart* v. *Crosby*, 50 Me. 130; *Dawson* v. *Shillock*, 29 Minn. 189. The court should have directed a verdict for the defendant. What has been said seems to dispose of this case, but it may not be out of place to notice some other questions raised. It is conceded that the statements made by the plaintiff in support of the employee's application for the bond are in the nature of warranties, and that a breach of any of such warranties would defeat a recovery on the bond. See *Rice* v. *Fidelity & Deposit Co.*, 103 Fed. 427, and cases cited. One of such warranties is that the employee should not be authorized to sign checks on behalf of the plaintiff. There is evidence at least tending to show that the employee had such authority, and the defendant tendered the following instruction based on such evidence:

"You are instructed that the statements made by the plaintiff

to the defendant on May 28, 1900, as a basis for the issuing of this bond amount to warranties. If you find from the evidence that the employee Kelsey was authorized to sign checks on behalf of the plaintiff, said authorization would be a breach of the warranties made by plaintiff and he could not recover on this bond."

The court refused to give the instruction, and its refusal is now assigned as error. The plaintiff insists that the statements of the plaintiff show that the employee had authority to draw checks on the bank for remittance to him, and that the instruction is therefore too broad. We are unable to find anything in the plaintiff's statements that shows that the employee was to have authority to draw checks for any purpose. One of the statements is to the effect that the employee would be allowed to indorse checks drawn to the plaintiff's order, "only for remmittance" to the latter. But when it comes to the specific question, whether the employee would be authorized to sign checks in the name of the plaintiff, the answer is an emphatic negative. But the plaintiff contends that the defendant must have known from the statements, taken together, that the employee was authorized to sign checks in behalf of the plaintiff for remittance to him, because they show that the funds were to be deposited in a bank by the employee, who was required to make remittances thereof from time to time to the plaintiff. We are unable to adopt that view. The authority to sign checks on behalf of the plaintiff for any purpose, would be almost if not quite equivalent, in the hands of a dishonest person, to authority to sign checks for all purposes, and would materially increase the risk the defendant intended to assume, and we do not think it can reasonably be inferred from the statements that the defendant understood that such authority was included.

It may be true, as plaintiff claims, that the parties must have contemplated that the remittances should be made by draft, and that the bank would issue such draft only on a check drawn against the plaintiff's account. But it does not follow that it was contemplated that this particular employee should draw the checks. The plaintiff may have had, or the defendant may have supposed he had, some other person in his employ whom he was willing to trust with authority to draw checks in his name, or that some other plan would be adopted which would not require this particular employee to sign the plaintiff's name. The instruction, in our judgment, should have been given.

A number of other questions are discussed but it does not seem that they are necessary to a disposition of the case either

in this court or the court below and, for that reason, they will not be considered.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

Reversed.

SECTION 3. COMPARED WITH THE CONTRACT OF PRIVATE SURETYSHIP.

137. TEBBETS, et al., v. MERCANTILE CREDIT GUARANTEE CO., 73 Fed. 95, 19 C. C. A. 281.

Circuit Court of Appeals, Second Circuit, 1896.

The compensated surety is an insurer and not a favorite of the law.

In error to the Circuit Court of the United States for the Southern District of New York.

This case comes here on writ of error to review a judgment of the circuit court, Southern dictrict of New York, in favor of defendant in error, who was defendant below. The action was brought on a policy of insurance against business losses or "uncollectible debts," issued by the defendant to the plaintiffs. The total amount of uncollectible debts for which it was claimed the defendant was liable under the policy, without deducting the "initial loss" to be borne by the plaintiffs, was $8,016.56, and they were adjusted by defendant at that sum. The total gross sales and deliveries made by the plaintiffs during the period covered by the policy amounted to $778,015.08. Plaintiffs contended that the initial loss to be borne by them was one-half of 1 per cent. of that sum, which amounts to $3,890.07, and they asked judgment for the balance of loss, *viz.* $4,126.29. The defendant insisted that the initial loss, under the terms of the policy, was $9,000,—a sum greater than the total loss, as adjusted. The circuit court sustained defendant's contention, and directed a verdict in its favor.

Albert Stickney, for plaintiffs in error.

A. J. Dittenhoffer, for defendant in error.

Before PECKHAM, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above.) One question only is presented under this writ of error, and it arises upon the construction of a written instrument. Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation.

One of these policies, differing in many respects from the one under discussion in this case, was before this court in *Guarantee Co.* v. *Wood,* 15 C. C. A. 563, 68 Fed. 529. Of a clause ambiguous in its phraseology and contradictory of other paragraphs in the contract, the court said:

"As that contract is a voluminous document, prepared by the company, any ambiguity in its phraseology should be resolved against the draftsman. * * * If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument considered as a whole is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured."

In *Wallace* v. *Insurance Co.,* 41 Fed. 742, the United States Circuit court for the district of Iowa expresses the same principle in this language:

"A contract drawn by one party, who makes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured."

In *Wadsworth* v. *Tradesmen's Co.,* 132 N. Y. 540, 29 N. E. 1104, the court says:

"If this policy is so framed as to promise a payment of $4,000, and then to impair the promise by the introduction of subsequent and obscure clauses, difficult to be understood, or requiring expert knowledge for their comprehension, we should adopt that con-

struction which we think the insurer had reason to suppose was understood by the insured."

In the light of the well settled principle of law expressed in these authorities, the contract under consideration must be construed. The cases cited by defendant in error holding that a surety is "a favorite of the law," and that a claim against him is *strictissimi juris,* have no application. Corporations entering into contracts like the one at bar may call themselves "guarantee" or "surety" companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such.

The material parts of the contract under consideration are as follows. First comes the application of the assured:

"No. 2,008. Amount, $15,000.

"The Mercantile Credit Guarantee Company of New York.

"Head Office, 291 Broadway, New York.

"Contract expires *Dec. 31, 1893.*

"Indemnified stands ½ of 1%.

"Fee, $472.50.

"The undersigned hereby applies to the Mercantile Credit Guarantee Company of N. Y. for a contract to purchase from him uncollectible accounts in the sum of fifteen thousand dollars, for one year from *Dec. 31, 1892,* in the usual form of contract issued by the company, and upon the terms and conditions therein specified, and for that purpose selects the Bradstreet Co. Mercantile Agency as his informant and guide, as designated in said contract, and states that he is engaged in the business of *cottons and woolens, at 72 Bedford St., Boston, Mass., and 75-77 Worth St., N. Y.,* and that the amount of his gross sales and deliveries of merchandise for cash and on credit, and the percentage of losses on the same, for the *14 months* preceding the *1st day of Dec., 1892,* were, respectively, as follows:

"Gross sales for year ending.....day of.....$
"Gross losses not exceeding.....$
"Gross sales for year ending.....day of.....$
"Gross losses not exceeding.....$
"Gross sales for year ending.....day of.....$
"Gross losses not exceeding.....$

"Remarks.

"Cotton sales, Sept 1, '91, to Dec. 1, '92, $662,835.65.

"Gross losses, Weis Bros., Galveston, Texas, $479.69.

"Gross losses, M. J. Henry, N. Y., $844.03.

"Goods sold 2%, 10 days and 30 days; special a/c, 4 months.

"This contract to cover all goods billed since Oct. 1, '92, not provable under U. S. Credit System Co.'s contract No. 3,909, Series H., Class E. Have proved no excess on either cotton or woolen goods under the U. S. Credit System Co. contract in 1892. Our woolen sales in 1892 were small and form no basis for an estimate of probable losses in 1893.

"Boston, Dec. 13, 1892. TEBBETS, HARRISON and ROBINS."

This application is a printed form. The parts italicized and all subsequent to the word "Remarks" were originally blank, and have been filled in with ink, presumably before the application was finally presented for action. On the reverse side of the application are a number of so-called "Special Terms and Conditions." In the record they cover 3½ printed pages. The first few lines are all that are material here. They read as follows:

"(Gum this margin to the contract.)
"Form No. 7. Special Terms and Conditions of Contract. No. 2,008.
"(1) This contract is issued on the basis that the yearly sales and deliveries of the indemnified are between *$1,800,000* and *$2,500,000 dollars,* and shall only," etc.

The parts italicized were originally blank, and have been filled in with ink. The material parts of the policy itself are as follows:

"No. *2,008.* *$15,000*
"The Mercantile Credit Guarantee Company, in consideration of the sum of *$472.50,* hereby agrees to purchase from *Tebbets, Harrison & Robins, of* ....., an amount not exceeding *fifteen thousand* dollars of uncollectible debts owing for merchandise, sold and delivered in the regular course of business between *Dec. 31, 1892,* at 12 o'clock noon, and *Dec. 31, 1893,* at 12 o'clock noon, on the total gross sales and deliveries made during said period in excess of one-half of one per cent., subject to the terms and conditions printed below and attached hereto."

The italicized parts were originally blank. Then follow, in the body of the policy, 13 terms and conditions and the execution clause. Upon a blank space left in the body of the contract is pasted an exact copy of the special terms and conditions, of form No. 7, as above set forth.

The opening statement of what the consideration is, and of what the company agrees to do in return for such consideration, is awkwardly phrased, but, without resort to anything outside of the policy, expresses the following agreement: The company will buy of the assured—i. e. will pay to the assured— the amount of certain uncollectible debts. These uncollectible debts must be such as are owing for merchandise sold and delivered during the year 1893. The amount of such debts which the company will pay must be a part of the whole amount of debt arising on the total gross sales and deliveries made during the year. It must also be debt in excess of one-half of 1 per cent. on such total gross sales; and in no event will the company pay more than $15,000. In other words, of the total uncollectible debts arising on sales and deliveries during the year, the assured is first to bear an initial loss to the amount of one-half of 1 per cent. on his total sales, and

deliveries during the year; and the residue of uncollectible debts the company is to buy from the assured, up to the limit of $15,000. It is not disputed that this is precisely what the first clause of the contract provides, nor that, if it stood alone, such would be the obligation which the company assumed. Moreover, it is unambiguous. Crude and complicated though its phraseology is, it is susceptible of no other construction. It is, however, qualified by the words "subject to the terms and conditions printed below, and attached hereto." This clause imports into the contract both the 13 general terms and conditions printed in the body of the policy, and also the special terms and conditions of form 7, which are attached to it. The only question presented here is whether these terms and conditions, or any of them, so qualify the contract expressed in the opening sentence of the policy as to change the amount of the initial loss from one-half of one per cent. of the total gross sales during the year to some other sum. The only clause which it is contended has this effect is the special condition above quoted and which reads as follows:

"This contract is issued on the basis that the yearly sales and deliveries of the indemnified are between $1,800,000 and $2,500,000 dollars."

The defendant insists that this is a stipulation on the part of the insured that during the year 1893 his total gross sales and deliveries shall be, at least, $1,800,000, and that the one-half of one per cent. of initial loss shall be calculated at least on that sum. The plaintiffs insist that this is merely an estimate as to the amount of the plaintiff's probable sales in the future, and supplies a basis for an estimate of plaintiffs' probable losses in the future. It will be noted that the form of application contains blanks manifestly intended to be filled with statements of the total sales and total losses for three years preceding the application. These, as plaintiffs contend, would furnish data from which to make an estimate of probable sales and losses for the ensuing year. These blanks are not filled in plaintiffs' application, possibly because the firm had not been in business for three years. A statement of their sales and losses in the cotton business for 14 months is given, with the addition that their woolen sales in 1892 were small, and form no basis for an estimate of probable loss in 1893.

In support of their respective contentions, counsel have presented arguments based on the grammatical structure of the special condition. On the one side, it is urged that the clause reads "on the basis that the yearly sales 'are' between," etc.: not "have

been." On the other side, it is urged that the phrase beginning, "this contract is issued on the basis," etc., refers to the issuance or inception of the contract, rather than to its construction; that the word "yearly" carries the idea of a series of years; that the use of the word "are," instead of "shall be" or "are to be," imports a present expectation, not a future stipulation. Arguments based merely upon grammatical construction, however, are of little aid towards the interpretation of this contract. If its draftsman possessed any appreciation of grammatical niceties, he has left no trace of it apparent upon the face of the document. The special condition is so phrased that it is susceptible of interpretation either way; and there are difficulties about accepting either interpretation. If it be construed as a statement of what it was estimated would be the range of total sales for the year, it is manifestly an arbitrary estimate, greatly in excess of what the experience of the 14 prior months apparently warranted; and no good reason is suggested why any such mere "estimate" should be inserted in the body of the contract at all. The representations of the insured as to what his past sales and losses had been were already made a material part of the contract, by a general condition providing that "fraud, concealment, or misrepresentation in obtaining this contract * * * shall render this contract absolutely void." On the other hand, while it is manifest that, in order to make insurance business of this kind practicable, some definite initial loss must be borne by the insured, it nowhere appears that such initial loss may not with perfect safety be proportioned to the total gross sales, for presumably, the gross losses would vary as the gross sales. And, in fact, even on defendant's construction of the phrase, the initial loss is a variable quantity. The basis provided for is that the yearly sales are "between $1,800,000 and $2,500,000." If they be $1,800,000, the initial loss would be $9,000. If they be $2,000,000, the initial loss would be $10,000. If they be $2,500,000, the initial loss would be $12,500. Moreover, if the clause be construed so as to import a stipulation that the business done shall not be less than $1,800,000, it must be construed as importing also a stipulation that the business done shall not exceed $2,500,000,—a most extraordinary agreement for any business man to enter into, and certainly one not to be read into this contract by any doubtful language. Under defendant's interpretation, if the initial loss is to be in no event, however small the sales, less than $9,000, the initial loss can in no event, however great the sales, exceed $12,500. The result would be that, although the sales should run up to $4,000,000, the insured would

be required to bear an initial loss not of $20,000 (one-half of 1 per cent. of the gross sales), but of $12,500 only, the same amount he would be required to bear if his sales were only $2,500,000, although the increase in total sales necessarily increased the total losses. It is hardly conceivable that an insurance company would enter into such a reckless stipulation, and no such meaning is to be given to the policy upon any doubtful language.

We have, then, in the contract, a positive and unambiguous agreement on the part of the company to pay losses (to the amount of $15,000) in excess of one-half of 1 per cent. on total sales. The only other sentence in the policy which it is claimed modifies this definite agreement is one which is itself ambiguous, equally susceptible of a construction favorable to the company and of one favorable to the insured. Under the rule laid down in the authorities above quoted, the ambiguous sentence is to be given the meaning which the insurer had reason to suppose the insured would attach to it; and that is such a meaning as would not operate to contradict or modify to his disadvantage the precise and unambiguous promise that the initial loss should be one-half of 1 per cent. of the total gross sales and deliveries for the year 1893, or, as expressed in the very beginning of the application, "Indemnified stands ½ of 1%."

The judgment of the circuit court is reversed, and new trial ordered.

INDEX

ABSOLUTE GUARANTY,
see guaranty.
ACCEPTANCE,
guarantor entitled to notice of, when, 129, 131, 400.
not liable without notice of, by guarantee, 397.
one who offers his name as guarantor to whomsoever may accept offer is entitled to notice of, 400.
notice of, when necessary, 143-147.
reasonable time for notice of, 172-174.
ACT,
married woman's, of New York, contract under, 188.
ACTION,
cause of, accrues as against surety, when, 241.
existing in favor of principal, surety entitled to set off against demand by creditor, 333.
surety cannot set up, by way of counterclaim, when, 335.
construction of "no action shall be brought," 6-23.
for contribution, against whom, 114.
arises from implied undertaking, 273.
when lies against principal, promise of third person within statute, 104.
none lies against party undertaken for, promise of third person, original, 102.
none lies upon promise not in writing, 88.
ADDRESSEE,
in special guaranty, a particular firm, 150.
ADJUDICATION,
against principal, effect upon surety, 302.
AGREEMENT,
construction of, how reached, 40.
word "agreement," 27-49.
coupled with word "promise," *note* p. 27.
distinction between, and promise, 27.
embraces consideration for promise as well as promise itself, 27.
import of, 35, 36.
meaning of, as used in fourth section of statute of frauds, 27.
oral, to share commissions and losses on stock exchange transactions not within statute, 72.
to assume and pay debt, when not within statute, 65.

AGREEMENT—*Continued.*
to convert a separate into a joint debt is not within the statute, 59, 61.
pay debt of another may be proved by parol, 3.
use of, in English statute, 37.
what constitutes new agreement, 70, 71, 293, 294.
see, also, contract.
ALIQUOT-PART,
basis of determining in actions for contribution, 271.
measure of recovery, 273.
when surety may compel co-sureties to exonerate him to extent of their, 287.
ALTERATION,
if change in original contract from its nature is beneficial to surety, surety not discharged, 296.
of bond by act of legislature, effect of, 301.
when a defense, 392.
of contract, defense founded upon, 293.
surety not released, when, 301.
of principal's contract, effect on surety, 114, 220, 224, 296, 298, 301, 302, 304, 306, 307.
AMBIGUOUS WORDS,
employed by surety, effect of, 224.
interpretation of, 215.
view that they should be construed most strongly against promisor, 215.
when not binding, 212-214.
ANOTHER PERSON,
debt of, oral promise to pay within statute, 123.
promise to answer for, void if not in writing, 107.
promise to pay, 56.
made to creditor, 26.
BANK,
a debtor to depositor, 360.
absolute owner of money, 360.
right of, to apply depositor's account to satisfaction of debt, 360.
BLANKS,
in bond, authority to fill, 392.
BOND,
alteration of, by statute, effect on surety, 301.
when a defense, 304, 392.
blanks in, authority to fill, 392.
delivery of, by sureties to principal, sufficient to make their obligation complete, 205.
for security for public work, statute concerning, function of, 114.
form of, 314.
condition, 387.
guardianship, married woman as surety on, 188.

BOND—*Continued.*
official, right of legislature to alter, 301.
penalty of, as limit of liability, 119.
signer bound to know contents unless prevented by fraudulent devise, 324.
surety on, not holden, when, 314.
of obligee's employee, how released, 298.
verified copy of, may be delivered in lieu of original, lost or destroyed, 205.
CLASSIFICATION,
of guaranties, 139-187.
COLLATERAL,
see promise; securities.
COLLECTION,
guaranty of, what amounts to, 181.
COMPENSATED SURETYSHIP,
compared with contract of insurance, 430
private suretyship, 437.
see suretyship.
COMPETENT PARTIES,
to contract, 188-192.
see, also, contract.
CONCEALMENT,
of material facts ground for invalidating contract, 400.
CONDITION,
dehors his written contract, surety signing upon, 209.
of bond, form of, 387.
precedent to guarantor's liability, what constitutes, 181, 183.
CONSENT,
subrogation not resting in, but in conscience, 252.
CONSIDERATION,
assumption of responsibility a sufficient, 86.
contract of guaranty must be for a, 192.
difference between past and future, 143-146.
failure of, may be shown by surety, when, 335.
for promise to pay debt of another provable by parol, 48.
need not be expressed in writing, 46.
forbearance sufficient to support oral promise of executor to pay debt of testator, 2.
if any part illegal, whole is void, 198-202.
money paid on oral agreement for purchase of lands is paid without, 20.
mutual obligations of parties as, 224.
nature of, required, 196.
need not be recited in promise to pay debt of another, 32.
not required by statute to be set forth upon the written contract; may be proved otherwise, 20.

CONSIDERATION—*Continued.*
of general guaranty, 143.
parol evidence in proof of, inadmissible, 27.
promise without, made by father for minor son not actionable, 125.
sufficiency of, to support oral promise to pay debt of another, 1.
what constitutes, 143.
when new, required to support guaranty, 194.
no proof of distinct, necessary, 192.
promisor is beneficially interested in, 77.
where moving consideration for promise is liability of third person, there promise must be in writing, 70, 71.
see, also, contract.

CONSTRUCTION,
of general guaranty, 143.

CONTINUING GUARANTY,
see guaranty.

CONTRACT,
alteration of, defense founded upon, 293.
effect on surety, 301, 306, 307.
competent parties to, 188-192.
construction of, 114, 116, 212-230.
in absolute guaranty, 163.
in conditional guaranty, 185.
in continuing guaranty, 158.
promise to answer for default of another, 220.
contribution among co-sureties not founded on, 277.
effect of change in original, on surety, 296.
execution and delivery necessary, when, 204.
for contribution, no express, for, 269.
if, of principal is illegal, assuring is equally so, 313.
interpretation of correspondence forming, in continuing guaranty, 161.
nature and form of, at common law, 1, 2, 3.
not enforceable as such, not the foundation of legal obligations, 20.
of assurer when binding, 204, 215.
of compensated surety essentially one of insurance, 422.
of compensated surety on fidelity bond may be not only between insurer and insured, but also between insurer and employee, 430.
of guaranty and that of indemnity distinguished, 72, 74.
collateral, 126.
how differs from other, 143, 144.
of indemnity, not within statute, 84, 95, 100.
when tainted by illegality of transaction, 198.
of infant, see infant.
of insane person, see lunatic; insane person.
of married woman as surety, 188.
of surety and guarantor contrasted, 126, 131, 137-139.

CONTRACT—*Continued.*
of surety companies, contract of insurance, 419.
of suretyship, direct, 126.
execution and delivery, 204-211.
of guaranty and suretyship distinguished, 129.
requisites of, 188-211.
right of surety to be subrogated not dependent upon, when, 245.
subrogation does not rest in, 252, 260.
suretyship indicated by joint, 131.
to secure faithful performance of, function of bond of contractor for public works, 114.
under statute of frauds, 6.
void under statute of frauds, a mere nullity, 20.
when principal and assuring, executed at different times, 194.
concurrently, 192.

CONTRACTOR,
for public work, bond required of, 114.
surety liable on bond of, 119.

CONTRIBUTION,
action for, arises from implied undertaking, 269.
not by force of express contract, 269
among co-sureties, what is, 277.
as a rule in equity, 277.
at law each co-surety is liable to contribute only his proportionate share, 271.
co-sureties entitled to, 282.
equitable before payment, 287.
founded on equality and established by law of all nations, 277.
liability for, in action at law, 273.
suits in equity, 273.
measure of recovery in action at law, 271.
no express contract for, 269.
origin of doctrine of, 269.
results from maxim that equality is equity, 269.
right of, 269-283.
when right to, accrues, 271.
see, also, contract.

CORPORATION,
commercial or industrial, contract of guaranty or suretyship of, 191.

CORRESPONDENCE,
interpretation of, forming the contract of continuing guaranty, 161.

CO-SURETIES,
contribution between, of equitable origin, 269.
indorsers may be, *inter-sese*, 273.
what constitute, 277.

CO-SURETIES—*Continued.*
when parol evidence admissible to prove agreement to be liable as, 273.
sureties bound severally are, 282.
surety may compel, to exonerate him to extent of their aliquot part 287.
see also, surety.

COUNTERCLAIM,
surety cannot set up, by way of, cause of action existing in favor of principal against plaintiff creditor, 335.

COUNTER-SECURITY,
right of creditor to benefit of, 407.

COVENANT,
when surety liable on, notwithstanding covenant of principal void, 321.

COVERTURE,
effect on surety if covenant of principal is void for, 321.

CREDITOR,
bound to diligence to exonerate surety, 365.
exercise only ordinary care to prevent loss, 351.
dealings of, with succeeding partner discharges surety, when, 231.
diligence required of, 183.
entitled to benefit of any collateral securities which debtor has given to surety, 411.
failure of, to sue debtor at surety's request, 340.
to use money within his control in payment of his claim, effect of, 360.
how bound to respect rights or equities of surety, 231.
if information is withheld by, respecting principal, creditor must suffer and not surety, 372.
must show notice of acceptance, when, 400.
not entitled to be subrogated to mortgages given by co-sureties, when, 413.
refusal of, to sue principal debtor does not discharge surety, 366.
right of subrogation to surety's securities, 407, 411, 413.
to benefit of counter-security given by debtor to, 407.

DEBT,
future, guaranty of, within statute, 113.
none against principal, none against surety, 325.
of another, promise to answer for, not dependent upon form of expression, 77.
promise to answer for, 77.
to pay, within statute, 91, 112, 123.
right of surety to be subrogated on payment of, 245.
to charge person with, undertaking must be clear and explicit, 212.
when volunteer cannot be subrogated by paying, 264.

DEBTOR,
transfer of property to third person in consideration of agreement of, to pay debt, 65.

DEFALCATIONS,
future, liability of surety for, 387.

DEFAULT,
notice of, in absolute guaranty, 172.
of principal not essential to recovery from surety, 404.
of another, construction of contract for promise to answer for, 220.

DEFENSE,
founded upon absence of liability of principal debtor to creditor, 313-325.
absence of notice of acceptance of guaranty and of default of principal, 397-406.
extinguishment or suspension of liability of principal debtor to creditor, 325-333.
failure of creditor to sue debtor at surety's request, 365-368.
failure of creditor to use money within his control to pay debt, 354-364.
fraud or misconduct of principal toward surety, 390-396.
lack of notice to guarantor of principal's default, 172.
material alteration of contract, 293-313.
non-disclosure by obligee of facts he ought to reveal to surety, 368-377.
principal debtor's right of set-off or counter-claim against creditor 333-339.
retention of principal in service after knowledge of his dishonesty, 377-389.
surrender or loss of securities by creditor, 340-354.

DELIVERY,
of contract essential, 204.
principal empowered to make, effect of, 209.

DEMAND,
of payment, must be made, when, 192, 193.

DILIGENCE,
exercise of, by creditor required, when, 183.
of creditor cannot be demanded when, 166.
what constitutes due, 181, 182.

DURESS,
a personal defense, 324.
to principal will not avoid obligation of surety, 324.

EMPLOYEE,
retention of, after knowledge of his dishonesty, 387.

EQUITIES,
surety's must be respected, 231.

EQUITY,
contract of married woman may be enforced in, under what circumstances, 188-190.
contribution between sureties originated with courts of, 269.
solvent sureties must divide loss between them in, 271.
subrogation the creation of 260.
surety can compel principal to exonerate him, in, 284.
when subrogation is an, 252-254.
EVIDENCE,
parol, admissible to prove agreement to be liable as co-sureties, when, 273.
when may be received, 317, 318.
EXONERATION,
right of, 284-292.
see, also, surety.
FICTION
of a promise to contribute is employed by common law courts to obtain jurisdiction, 269.
FORBEARANCE,
effect of, upon surety, 137-138.
sufficient consideration to support promise, 2, 3.
FORFEITURE,
agreement for, within statute, when, 20.
FRAUD,
creditor chargeable with, must suffer and not surety, 372.
in absence of, when surety is liable, 317.
of principal cannot be set up by surety as defense, when, 390.
towards surety, 392.
surety is released if obligee has knowledge that surety's signature was secured by, 394.
on bond of employee who had previously defrauded employer cannot avoid liability on bond because of non-communication of facts, if unknown to obligee, 374.
FUTURE LIABILITY,
guaranty of, within statute, 113.
GENERAL GUARANTY,
see guaranty.
GUARANTIES,
classification of, 139—187.
commercial, 143, 150.
see also guaranty.
GUARANTOR,
absence of notice to, of acceptance of guaranty, 172.
and surety distinguished, 126—139.
cannot be sued with his principal, 163.
contract of, contrasted with surety's, 126.

GUARANTOR—*Continued.*
defined, 126.
discharged by laches, when, 183.
engagement of, individual contract, 163.
entitled to notice, when, 129, 131, 400.
liability of, distinct from principal's, 163.
not liable without notice of acceptance by guarantee, 397.
notice to, in special guaranty, 150.
of collection, obligation of, discharged, when, 183.
payment contrasted with guarantor of collection, 183.
payment, position of, that of surety, 166.
undertakes to perform contract if principal cannot, 137.
see, also, surety.

GUARANTY,
absolute, defined, 163, 166, 172.
form of 166.
what constitutes, 166—171.
addressed to no person in particular is general, 139.
collateral, contract of, 126.
concealment of dishonesty of servant—discharge of surety, 377.
conditional, 181, 183, 185.
construction of, 143, 185.
continuing, construction of the contract, 158.
contract of, must be for a consideration, 192.
interpretation of correspondence forming contract, 161.
limited as to amount, 158, 159.
what does not amount to, 154, 155.
contract of, as regards commercial or industrial corporaiton, 191.
differs how from other contracts, 143.
incomplete without acceptance, 397.
made only by mutual assent of parties, 397.
defined, 163, 164, 166-169.
distinguished from contract of surety, 126, 131.
from indemnity, 72, 74.
for single dealing, form of, 154.
general, consideration, notice, construction, 143.
general, may be enforced by any one who acts upon it, 139.
limited as to amount, 156, 158.
parties, 157.
time, 153.
transactions, 154.
rule of construction, 154.
not enlarged by construction, 224.
notice of, when necessary, 129.
of collection distinguished from guaranty of payment, 183.
what amounts to, 181.
of future liability within statute, 113.

GUARANTY—*Continued.*
of payment defined, 183.
form of, 163, 166.
not discharged by neglect to fix liability of indorser, 404.
not discharged by principal's failure to take proceedings against creditor, 404.
scope of, 163.
undertaking without condition, 404.
offer or proposal, when, 397.
right to revoke, 131.
special, as to persons, 150.
undertaking of, contrasted with that of surety, 166.
what amounts to, 161.
when a complete obligation, 172.
new consideration required to support, 194.
obligation matures, 183.
see, also, contract.
IMPLICATION,
nothing can be added by way of, 137, 138.
INDEMNITY,
action for, when accrues, 241.
contract of, given to surety by third person does not relieve principal of liability, 243.
made in furtherance of an unlawful scheme illegal and void, 198.
not within statute, 84, 95, 100.
principal with surety to indemnify him, takes effect, when, 240.
distinguished from guaranty, 72, 74.
law implies promise on part of principal debtor to indemnify surety, 238.
no, implied if consideration for suretyship is illegal, 198.
oral promise for, valid when, 91.
promise to indemnify, 84-102.
to indemnify implied, 238.
promisor's right of against principal, 238.
retiring partner's right to, 231.
right of, 238-245.
securities taken for, trusts, 411.
surety who has paid debt of principal has claim upon him for, 241.
view that contract of, must be in writing, 88.
when right arises, 240.
see, also, contract; guaranty.
INFANT,
contract of, as surety voidable, *note* p. 188.
surety on contract of, liable, 319.
INSANE PERSON,
not liable on contract as surety, *note* p. 188.
INSURANCE,
contract of, compensated surety one of, 422.
contracts of surety companies are contracts of insurance, 419.

INSURER,
compensated surety is, and not a favorite of the law, 437.
contract of compensated surety may be not only between, and insured, but between insurer and employee, 430.
INTENTION,
governs, when, 205.
see, also, contract; promise.
INTERPRETATION,
of correspondence, in continuing guaranty, 161.
JOINT DEBTORS,
sureties stand in relation to each other of, 283.
JOINT LIABILITY,
if promisor is jointly liable for debt with principal his contract to pay is not within statute, 59.
JUDGMENT
against principal, how far binds surety, 302.
JURISDICTION,
fiction of promise to contribute employed by common law courts to obtain, 269.
LACHES,
sufficient to discharge guarantor, 183.
LETTER OF CREDIT,
effect of, when general, 157.
special, defined, 143.
LIABILITY,
absence of, of principal debtor to creditor, 314.
penalty named in bond, limit of, 282.
LIMITATIONS,
see statute of limitations.
LIMITED GUARANTY,
see guaranty.
LUNATIC,
surety on contract of, liable, 319.
MARRIED WOMAN,
surety on contract of, liable, 321.
MEMORANDUM OR NOTE,
construction of words "memorandum or note" 49.
one having remedy against principal cannot have action against assurer save upon, 104.
MERCANTILE GUARANTIES,
either general or special, 150-152.
see, also, guaranty
MERCANTILE LAW AMENDMENT,
when adopted in England, *note* p. 27.
MINOR,
promise without consideration and not in writing made for, not actionable, 125.

MISCARRIAGE,
as used in statute, meaning of, 123.
of another, promise to answer for collateral, 123.
MISREPRESENTATIONS,
see fraud,
MISCONDUCT,
of principal, how affects surety, 390, 392.
see, also, surety.
MONEY,
paid under oral agreement for purchase of lands may be recovered back, 20.
MORTGAGE,
vendor of land, subject to, which vendee agrees to pay is in position of surety, 235.
when not security for payment of principal debt, 413.
MOTIVE,
inducing concealment of obligee not material, 368.
MUNICIPALITY,
surety on obligation of, liable when, 317.
NOTICE,
absence of, when defense to guarantor, 172.
guarantor entitled to, when, 129, 150, 400.
necessary when, 172.
of acceptance, see acceptance.
of default in absolute guaranty, 172.
of principal is not essential to recovery from surety, 404.
of general guaranty, 143.
of non-payment, when to be given, 192, 193.
when obligee not put on, effect of, 209.
OBLIGATION,
none implied against surety, 220.
of surety not avoided by duress of principal, 324.
ORIGINAL UNDERTAKING,
basis of collateral or secondary promise, 59.
see, also, promise.
PAROL EVIDENCE,
no resort can be had to, to add to incomplete writing, 19.
see, also, evidence.
PARTNER,
co-partners as sureties, when, 314.
continuing, bound to indemnify retiring partners, 231.
dealings of creditor with, discharges surety, when, 231.
retiring, cannot give note in partnership name after dissolution, 231.
entitled to indemnity, 231.
surety, when, 231.
signing as principal without authority of firm, 314.

PAYMENT,
by surety not new consideration, 241.
of debt, right of surety to be subrogated on, 245.
PENALTY,
stated in bond limit of liability, 119, 282.
PRINCIPAL,
absence of liability of, to creditor, defense to surety, 314.
being presumptively liable, the assurer's promise is void unless in writing, 107.
cause of action existing in favor of, surety entitled to set off against demand by creditor, 333.
claim barred as against, by statute of limitations, not necessarily barred as against surety, 327.
barred as against surety also, 325.
compelled to exonerate surety, when, 284.
contract of, see contract.
duress of, no defense to surety, when, 324.
duty of, to exercise good faith toward surety, 387.
fraud of, towards surety, 390, 392.
on part of, to withhold knowledge of employee's previous dishonesty, 387.
if creditor withholds information respecting, creditor and not surety must suffer, 372.
running of statute of limitations is suspended as to, it is suspended as to surety also, 329.
implied promise of, to indemnify surety, 241.
judgment against, not *res judicata* against surety, 302.
not relieved of liability, when, 243.
one having remedy against, cannot have action against assurer save upon memorandum or note in writing, 104.
retention of, in service after knowledge of his dishonesty, 387.
surety of, not bound unless principal is, 314.
upon promissory note given by school district as, liable when, 317.
undertakes to perform contract of, if principal does not; guarantor if principal cannot, 137.
whenever discharged on note, surety is also, 319, 320.
PROMISE,
assurer's, void unless in writing, when, 107.
beneficial participation by promisor in consideration sufficient to make original, 77.
collateral, 125, 126.
declaration is required to be special, 70, 72.
within statute, 102.
consideration for, what sufficient, 46, 86.
coupled with word "agreement," *note* p. 27.
distinction between, and agreement, 27.
doctrine of *Green* v. *Cresswell*, 88.

PROMISE—*Continued.*
fiction of a, to contribute, employed by common law courts to obtain jurisdiction, 269.
for reimbursement, within statute, 91.
guaranty of future liability within statute precisely as it would be if liability existed when promise was made, 113.
how to determine whether original or collateral, 109.
implied by law, not within statute, 23.
in writing, to pay debt of another, not valid unless it show whole terms of contract, 19.
interest in transaction as affecting character of, 77.
joint, to pay debt of one is original undertaking between promisors and promisees and not within statute, 59.
made to creditor to pay debt of third person, when original, 65.
not within statute, 55-103.
on part of principal debtor to indemnify surety, implied by law, 238.
oral, evidence required to establish, 3.
invalid when debt remains payable by debtor, 107.
of executor to pay debt of testator good at common law, 2.
to pay debt of another, good at common law, 1.
not a valid consideration for a subsequent promise in writing, 19.
out of property of debtor placed in hands of promisor for that purpose not within statute, 70.
valid and enforceable where made, not enforceable under statute, 15.
original and collateral contrasted, 59, 61, 77, 82, 95; 109.
what constitutes, 65.
special, construction of words "special promise," 23-26.
to answer for another, construction of, 23.
to answer for another, not within statute if made to debtor, 26.
debt of another, within statute, 112-114.
default of another, 114-123.
construction of contract, 220.
to answer for miscarriage of another, within statute, 123-126.
to become answerable for debt may be shaped as an indemnity, 88, 90.
to indemnify, 84-102.
is implied, 238.
one for becoming guarantor for third person not within statute, 86.
to pay for goods supplied to third person not within statute, 56.
to pay for work already done without previous contract with or by promisor is within statute, 112.
when one person induces another to indemnify him, not within statute, 100.
when party for whom made, liable, 104-112.
not liable, 102, 103.

PROMISE—*Continued.*
within statute, 104-126.
without consideration and not in writing made by father for minor son not actionable, 125.
written, to pay debt of another good without recital of consideration, 32.

PROMISOR,
original, what constitutes, 55-65.
undertaking to pay for work already done without previous contract with, is within statute, 112.
when beneficially interested in consideration, 77.
virtually discharging his own debt, 65-77.

PROMISSORY NOTE,
guarantor of payment of, not jointly liable with maker thereof, 163.
where surety entitled to recover full amount of, although he had not paid, 285.

RELEASE OF SURETY,
see surety.

REMEDIES,
distinction between legal and equitable, 273.

RESOLUTION
of common council entered upon record constitutes a memorandum or note, 49.

SEAL,
effect of addition to surety's contract, 306.

SECURITIES,
collateral, creditor entitled to, when, 411.
when mortgages are not, 413.

SIGNATURE,
no consideration for, 196, 197.
time of, effect of, 194, 195.
without authority, effect of, 317.

SPECIAL GUARANTY,
can only be enforced by the one to whom addressed, 150.
see, also, guaranty.

SPECIAL PROMISE
to answer for debt of another, void if not in writing, 107.
see, also, promise.

STATUTE OF FRAUDS,
applies only to promises made to a person to whom another is answerable, 26.
only to promises which are in the nature of guaranties for some original or primary obligations to be performed by another, 59, 61.
by whom drawn, 27.

STATUTE OF FRAUDS—*Continued.*
construction of, applies only to promises made to the person to whom another is answerable, 26.
applies only when contract is executory, 6.
not intent of, to enforce a promise before invalid, merely because it was put in writing, 27.
operates only to prevent enforcement of contract by suit, 6.
surety having paid debt in pursuance of his oral promise may recover from original debtor, 9.
words "no action shall be brought," 6-23.
words "special promise," 23-26.
word "agreement," 27-49.
words "memorandum or note," 49.
contemplates the mere promise of one man to be responsible for another and cannot be interposed as a cover and shield against the actual obligations of defendant himself, 77, 82.
contract of indemnity, not within, 95, 100.
void under, a mere nullity and cannot be used for any purpose, 20.
doctrine of *Thomas* v. *Cook,* as to an oral promise of indemnity against liability as surety, 84.
fourth section of, applies only to procedure, 15.
guaranty of future liability, within, 113.
has no operation as between original debtor and his guarantor, 9.
if promisor is jointly liable for debt with principal his contract to pay is not within, 59.
in Michigan Compiled Laws, *notes* pp. 19, 21.
joint promise to pay debt of one not within, 59.
not applicable to promise of third person who receives money or property of debtor, 65.
not operative as between original debtor and his guarantor, 9.
operates upon contract only while it is executory, 11.
to prevent enforcemeent of oral promise though valid and enforceable where made, 15.
oral agreement for purchase of lands, void under, 20.
to share commissions and losses, not within, 72.
to answer for default of another within, 112.
to pay debt of another out of property of debtor placed in hands of promisor for that purpose, not within, 70.
parol promise not to be performed within a year from its making, not enforceable by reason of, 15.
prohibits suits upon certain contracts, but does not make them void, 11.
promise for reimbursement, within, 91.
promise, not within, when, 56-103.
to answer for default of another, within, 107.
to answer for miscarriage of another, within, 123.
to indemnify does not fall within either the words or the policy of the statute, 84.
to pay for goods supplied to a third person not within, 56.

STATUTE OF FRAUDS—*Continued.*
compensated, essentially one of insurance and not ordinary suretyship, 422.
to pay for work already done without previous contract with or employment by promisor, within, 112.
secondary or collateral promises, within, 59.
text of fourth section—*note* 4, p. 6.
true test whether statute applies or not, 95.
when agreement to assume and pay debt not within, 65.
within, when, 104-126.
STATUTE OF LIMITATIONS,
begins to run, when, 243.
claim barred as against principal by, is not necessarily barred as against surety, 327.
debt barred as to principal, barred as to surety, 325.
if running of is suspended as to principal, it is to surety also, 329.
runs against what claim, 241.
STATUTE OF UNITED STATES,
providing for security for public works 114.
STRICTISSIMI JURIS,
liability of surety is, 298.
meaning of, 224.
SUBROGATION,
creation of equity, 260.
creditor's right of, to surety's securities, 407, 411, 413.
creditors not entitled to, when, 413.
definition of, 260.
does not rest in contract, 252, 260.
right of, 245-268.
when volunteer not entitled to, 264.
why enforceable in equity, 252.
SURETY,
ambiguous words not binding on, when, 212-214.
and guarantor distinguished, 126-139.
cannot recover back money voluntarily or coercively paid by him, 6.
set up fraud as defense, when, 390.
claim barred as against principal by statute of limitations is barred as against, also, 325.
not necessarily barred against, 327.
of, against principal debtor, not barred by latter's discharge in insolvency, 241.
collateral securities taken by, are for benefit of creditor, when, 411.
companies, contracts of, are contracts of insurance, 419.
compensated, is an insurer and not a favorite of the law, 437.
concealment of facts will discharge, when, 400.
construction of contract of, 212, 220.
contract of, at common law construed most strongly against obligee, 212.
alteration of, by addition of seals, effect, 306.

SURETY—*Continued.*
indemnity given to, by third person, does not relieve principal of liability, 243.
married woman, as, 188.
must be strictly construed, 114-116.
not binding until delivered, 204.
not enlarged by construction, 220.
to be construed according to rules that apply to all contracts, 215.
contract with, to indemnify principal, takes effect, when, 240.
creditors right of subrogation to securities of, 407, 411, 413.
defenses of, 293-406.
see, also, defense.
defined, 231.
delivery of bond by, to principal, sufficient to make obligation complete, 205.
discharged, when, 131, 296, 297, 306, 319, 320, 340, 387, 394.
effect of ambiguous language employed by, 224.
on, if creditor withholds information respecting principal, 372.
of release by creditor of lien upon another security, 340.
entitled to benefit of securities taken by creditor, 340.
notice of employee's dishonesty, 387.
pro rata share of dividend derived from assets of principal, 335.
recover full amount of note although he had not paid note, 285.
remedies of creditor against principal debtor, 269.
securities held by principal, 407.
set-off against demand by creditor, 333.
stand in place of principal creditor, 269, 407.
equities of, must be respected, 231.
exonerated by compelling principal to perform, 284.
from liability on failure of creditor to file for record mortgage, 354.
in like manner with guarantor, 356-358.
to extent of their aliquot part by co-sureties, 287.
to extent to which he is prejudiced by an omission of creditor to act, 356-358.
for honesty of servant, effect on, if master continues to employ servant with knowledge of his dishonesty, 377.
fraud of principal towards, 390, 392.
grantor of land sold subject to assumption and payment of mortgage thereon stands in relation of, 23.
how affected by alteration of principal's bond, 301.
bank's failure to apply depositor's account on principal's debt, 360.
creditor's failure to use money within his control in payment of his claim, 360.
principal's loss or surrender of securities, 340.
how affected if principal fails to sue, 365.
how far bound by judgment against principal, 302.

SURETY—*Continued.*
if running of statute of limitations is suspended as to principal, it is as to, 329.
in equity, solvent sureties must divide loss between them, 271.
law implies promise on part of principal debtor to indemnify, 238.
liable on contractor's bond for unpaid labor and materials, 119.
covenant for faithful performance of principal's covenant, when, 321.
liability of, amount stipulated the limit, 282.
is *strictissimi juris*, 298.
may recover from debtor amount paid in pursuance of his oral promise, 9.
not bound unless principal is, 314.
not discharged, when, 137, 138, 296, 366.
not released on alteration of contract, when, 301, 302.
notice of default of principal not essential to recovery from, 404.
obligation of, not avoided, by duress of principal, 324.
on bond for fidelity of agent to his employer, the obligee, when bound, 368.
employee who had previously defrauded employer cannot avoid liability, when, 374.
for public work, liability of, 119.
not holden if instrument is not executed by person named as principal therein, 314.
of obligee's employee is released by total change in position and duties of employee, 298.
one who signs as, void contract of insane person bound, unless fraud is shown, 319.
position of guarantor of payment, as between him and maker of note, is, 166-169.
relation of one to another, that of joint debtors, 283.
released, when, 114, 224, 304, 307, 343, 345, 346.
relieved of liability if creditor refuses tender of amount of debt, when, 356.
retiring partner, when is, 231.
right to contribution, 269-283.
exoneration, 284-292.
indemnity, 238-245.
subrogation, 245-268.
to expedite proceedings against principal, 365.
to perform oral undertaking, 9.
rights of, 238-292.
several obligation of, 282.
signing upon condition *dehors* his written contract, effect of, 209.
subrogated to principal's right of set-off, 335.
undertakes to perform contract if principal does not, 137.
undertaking of, contrasted with that of guarantor, 166.
upon bond of testamentary trustee, privy to all proceedings against principal, 205-208.

SURETY—*Continued.*
upon promissory note, given by school district as principal, is liable, when, 317.
vendor of land subject to mortgage which vendee agrees to pay is in position of, 235.
see, also, contract; guaranty; suretyship.
SURETYSHIP,
by operation of law, 231-237.
compensated, 419, 422, 430, 437.
compared with contract of insurance, 430.
compared with private, 437.
nature and construction of contracts, 419, 422.
construction of contracts of, 224.
contract of, as regards commercial or industrial corporation, 191.
compensated surety, essentially one of insurance and not ordinary, 422.
consideration, 192-203.
nature and form at common law, 1-6.
when becomes binding, 131.
indicated by joint contract, 131.
obligation in, will not be implied, *note* p. 231.
subrogation not dependent upon contract, privity or strict, 260.
see contract.
SURRENDER,
defense founded upon, or loss of securities by creditor, 340.
TENDER,
effect on surety if creditor refuses, 356.
THIRD PERSON,
promise to pay for goods supplied to, 56.
see, also, debt; promise; statute of frauds.
UNDERTAKING,
must be clear and explicit to charge one person with debt of another, 212.
VARIATION
of surety's risk, 301, 304.
VENDOR
of land subject to mortgage which vendee agrees to pay is in position of surety, 235.
VOLUNTEER
cannot be subrogated, when, 264.
WRITING,
contract of indemnity need not be in, 84, 95, 100.
principal being presumptively liable, assurer's promise is void unless in, 107.
promise not in, made by father for minor son and without consideration not actionable, 125.
view that contract of indemnity must be in, 88.
see, also, statute of frauds.