Lanusse *v.* Barker.

Guarantee.—Interest.—Record.

B., a merchant in New York, wrote to L., a merchant in New Orleans, on the 9th of January 1806, mentioning that a ship belonging to T. & Son, of Portland, was ordered to New Orleans for freight, and requesting L. to procure a freight for her, aud purchase and put on board of her five hundred bales of cotton, on the owner's account; "for the payment of all shipments on owners' account, thy bill on T. & Son, of Portland, or me, 60 days sight, shall meet due honor." On the 13th of February, B. again wrote to L., reiterating the former request, and inclosing a letter from T. & Son, to L., containing their instructions to L., with whom they afterwards continued to correspond, adding, "thy bills on me, for their account, *for cotton they
*102] order shipped by the Mac, shall meet with due honor." On the 24th of July 1806, B. again wrote L., on the same subject, saying, "the owners wish her loaded on their own account, for the payment of which, thy bills on me shall meet with due honor, at 60 days sight." L. proceeded to purchase and ship the cotton, and drew several bills on B., which were paid; he, afterwards, drew two bills on T. & Son, payable in New York, which were protested for non-payment, they having, in the meantime, failed; and about two years afterwards, drew bills on B., for the balance due, including the two protested bills, damages and interest: *Held*, that the letters of the 13th of February, and 24th of July, contained no revocation of the undertaking in the letter of the 9th of January; that although the bills on T. & Son were not drawn, according to B.'s assumption, this could only affect the right of L. to recover the damages paid by him, on the return of the bills, but that L. had still a right to recover on the original guarantee of the debt.

It was also *held*, that L., by making his election to draw upon T. & Son, in the first instance, did not, thereby, preclude himself from resorting to B., whose undertaking was, in effect, a promise to furnish the funds necessary to carry into execution the adventure. Also *held*, that L. had a right to recover from B., the commissions, disbursements and other charges of the transaction.

Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place; in this case, therefore, the legal interest at New Orleans was allowed.[1]

An agreement of the parties, entered on the transcript, stating the amount of damages to be adjudged to one of the parties, upon several alternatives (the verdict stating no alternative), not regarded by this court, as a part of the record brought up by the writ of error; but a *venire de novo* awarded, to have the damages assessed by a jury, in the court below.

Lanuse *v.* Barker, 10 Johns. 312, overruled.

Error to the Circuit Court for the district of New York. This was an action of *assumpsit*, brought in the circuit court of New York, by the plaintiff in error, against the defendant, to recover the amount of 500 bales
*103] of cotton, shipped by the plaintiff, from New *Orleans, on account of John Taber & Son, of Portland, in the district of Maine, upon the alleged promise of the defendant to pay for the same, with the incidental disbursements and expenses. At the trial, a verdict was taken, and judgment rendered thereon for the defendant, and the cause was brought up to this court by writ of error.

On the 19th of December 1805, the defendant, a merchant in New York, wrote a letter to the plaintiff, a merchant in New Orleans, containing, among other things, the following passage: "I am loading the ship Mac, for Jamaica; she belongs to my friends, John Taber & Son, Portland, who, I expect, will order her from thence to New Orleans, to thy address, for a freight, and in that case, if thee makes any shipments for my account, to the port where she may be bound, give her the preference of the freight." This letter was received by the plaintiff, on the 6th of February 1806.

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[1] Boyle *v.* Zacharie, 6 Pet. 635; York *v.* Wistar, 16 Haz. Pa. Reg. 15. And see Scudder *v.* Union Bank, 91 U. S. 406.

On the 9th of January 1806, the defendant wrote to the plaintiff the following letter :

(Original per Mac.)

"New York, 1st month, 9th, 1806.

"Paul Lanusse, Esq.

"Esteemed Friend :—This will be handed you by Captain Robert Swaine, of the Portland ship Mac, which vessel is bound from this to Jamaica, and from thence to New Orleans, in pursuit of freight ; she will be to thy address ; she is a good ship, between three and four *years old, has [*104 an American register ; is of an easy draft of water, although rather large ; a freight for Liverpool will be preferred ; if not to be had, for such other port as thee thinks proper, send her. If no freight offers for Europe, send her to this, or some neighboring port, with all the freight that can be had, which I have not any doubt will be sufficient to load her ; if thee can get three-fourths as much for this port as for Europe, I should prefer it ; if not, I should prefer a freight to Europe. Immediately after her arrival, I wish thee to commence loading her, on owner's account, who wish thee to ship five hundred bales, on their account, but do not wish to limit the quantity, a few bales more or less, according as freight offers ; and for the payment of all shipments on owners' account, thy bills on them, John Taber & Son, Portland, or me, at 60 days sight, shall meet due honor ; all shipments on owners' account, if the ship goes for Liverpool, address to Rathbone, Hughes & Duncan ; if for London, Thomas Mullet & Co. ; if Bordeaux, to John Lewis Brown & Co. ; if Nantz or Cherbourg, Preble, Spear & Co. ; if Antwerp, J. Ridgway, Merting & Co. ; if Amsterdam, Daniel Cromelin & Sons. Captain Swaine will take a sufficiency of specie from Jamaica for ship's disbursements ; please write me often, and keep me advised of the state of your market, &c. Of thy shipments by the Mac, on owners' account, let as much go on deck, as can be safely secured, and have her dispatched from your port as soon as possible. Thy esteemed friend,

JACOB BARKER."

*And on the 26th of January 1806, the defendant wrote the plain- [*105 tiff as follows : "Since writing thee, under date of the 9th instant, I have engaged for the ship Mac, the freight of eight hundred bales of cotton, from New Orleans to Liverpool, agreeably to the enclosed copy of charter-party. I have, therefore, to request thy exertions in dispatching her for Liverpool, filling her up, either on freight, or owners' account, and particularly fill her deck and quarters on owners' account. Her owners wish large shipments of cotton made on their account, which, if bills can be negotiated on New York, I have informed them, thee would make : I, however, am clearly of opinion, that it will be more for their interest to have her filled up, on freight : on this subject, I shall write thee again more fully. Capt. Swaine will take with him, from Jamaica, eight thousand Spanish dollars, for my private account, which I wish invested in cotton." This letter was written on the same sheet of paper, and immediately following a duplicate of the preceding letter of the 9th of January, and was received by the plaintiff on the 18th of March, when he wrote an answer, saying, "On my part, nothing shall be wanting to satisfy the contracting parties, when the ship arrives, and your instructions shall be strictly observed, conforming my-

self to the latter you gave, and in case of necessity, I think, it will be easy to place bills."

On the 13th February, 1806, the defendant wrote to the plaintiff as follows: "Inclose, I hand thee a letter from the owners of ship Mac, to which
*106] I have only to add, that thy *bills on me for their account for the cotton they order, shipped by the Mac, shall meet due honor."

On the 29th of August 1806, the plaintiff wrote the defendant: "A few days ago, I was favored with a few lines from Messrs. John Taber & Son, importing that they wrote to you, to Captain Swaine, and me, such directions as you might think proper, but I have not as yet been favored with any of yours. The Mac remains precisely in the same situation: $4250 demurrage, have been paid on her account, and I only wait for further information from you, to act, in case demurrage is refused."

On the 24th of July 1806, the defendant wrote the plaintiff as follows: "Relative to the unfortunate situation of the Mac, I have to observe, that if she remains at your port, idle, Fontaine Maury, or his agent there, must pay the demurrage every day, or the master must protest, and end the charter; as long as the demurrage is paid, agreeable to charter-party, the ship must wait; as soon as that is not done, the captain or owners' agent can end the voyage, by protesting, and entitle the owners to recover their full freight: so that thee had better take the eight hundred bales, on account of Fontaine Maury, at a low rate, than to subject him to such a heavy loss: thee will, on receipt of this, be pleased to receive the demurrage daily, or end the charter, and dispatch her for Liverpool, on owners' account, taking all the freight that offers, and fill her up with as much cotton as possible (not less than five hundred bales), logwood and staves, as it will not answer
*107] to keep so valuable a ship there any longer, *without earning something for her owners. Although I say, fill her up with cotton, logwood and staves, on owners' account, thee will please understand, that I should prefer her being dispatched agreeable to charter-party; if that cannot be done, I prefer her taking freight for Liverpool, excepting about five hundred bales, the owners wish shipped on their account; yet rather than have her there, idle, the owners wish her loaded on their own account; for the payment of which, thy bills on me shall meet due honor, at 60 days sight, which I presume thee can easily negotiate."

On the 26th of September 1806, the plaintiff wrote the defendant: "Since my respectful last of 29th August, I am favored with your much esteemed of 24th July, the contents of which I have duly noticed. I have to inform you of the disaster which has befallen the Mac. On the night of the 16th and 17th inst., we experienced a most violent gale, which has done great injury to the shipping, and drove the Mac from her moorings, to a considerable distance from the town," &c. "Nor can I flatter you of procuring either freight for her, or accomplishing your order, before December," &c.

On the 6th of September 1806, the defendant wrote the plaintiff, as follows: "Since I last had this pleasure, ordering a protest against the charterers of the Mac, and that vessel dispatched on owners' account for Liverpool, with staves, logwood and cotton, I have not received any of thy
*108] acceptable communications. I now confirm *that order, and request, if a full cargo be not engaged for the Mac, on receipt of this, that

you ship two hundred bales of cotton, for my account, to the address of Martin, Hope & Thornley, and thy bills on me, at 60 days sight, shall meet due honor for the same. On receipt of this, lose no time in purchasing the two hundred bales, and what may be yet wanted for the ship on owners' account, as a very considerable rise has taken place in that article, at Liverpool; therefore, thee will not lose any time in making the purchase."

On the 10th of October 1806, the defendant wrote the plaintiff: "By thy letter of the 29th of August, to John Taber & Son, I observe, thee had an idea of sending the Mac here, if a freight did not soon offer, which I think thee would not (on reflection) do, if a freight from this port did not offer, as she had much better remain at New Orleans than be sent here in ballast. Therefore, request, if she is not dispatched agreeable to charter-party, that she remain at your port, until a freight can be obtained for her, with what thee can ship on owners' account. They wish at least five hundred bales of cotton. I hope thee did not ship logwood, as I find that article will not pay any freight; therefore, if thee has not made a shipment of that article, please omit it. Thee must, of course, keep the ship as long as demurrage is paid."

On the 26th of November 1806, the defendant wrote the plaintiff: *"I wish the Mac got off as soon as possible, and prepared for a voyage; when, I wish five hundred bales of cotton shipped, on [*109 account of her owners, for Liverpool, and the ship filled up with freight goods, even at a low rate: if freight should be scarce, and thee can purchase good flour, at about four and a half dollars per barrel, thee will please ship from five hundred to one thousand barrels, on account of the owners of the Mac, and on thy making any purchases for those objects, inform Rathbone, Hughes & Duncan, Liverpool, by letter, duplicate and triplicate, requesting them to have the full amount of thy shipment on owners' account insured, stating particularly when thee expects the ship to leave New Orleans, &c. If cotton falls to twenty cents, please ship five hundred bales of cotton for my account, by the Mac, consigned to Martin, Hope & Thornley, drawing on me at sixty days for the same. I do not wish a bale shipped, at a higher price than twenty cents, and I hope thee will engage the freight as low as 1½*d.* My only reason for ordering it in the Mac, is to assist her owners; therefore, if a full charter offers for her, or if anything should prevent her going, thee will ship five hundred bales by some other good vessel or vessels."

On the 25th of December 1806, the defendant wrote the plaintiff: "I am favored with thy letter of the 7th, by which I am pleased to observe the Mac was off, and likely to be dispatched for Liverpool. Her owners are desirous that she be dispatched for that place, without delay, as I mentioned to thee in my last letter on the *subject of the Mac's business. If thee has contracted for the cotton, or any part thereof, that I ordered, [*110 let all that has been contracted for be shipped, according to my last request, but do not purchase a bale, for my account, after this letter reaches thee, above sixteen cents, as that article has become very dull at Liverpool, and likely to be low, in consequence of the success of the French army on the continent. If thee can purchase at, or under, sixteen cents, before May, thee may purchase and ship such part of the five hundred bales as has not been purchased, before this letter reaches thee."

On the 22d of January 1807, the plaintiff wrote the defendant as follows: "I have now commenced the purchase of cotton for account of Messrs. John Taber & Son, and have paid hitherto twenty-two cents cash, at which price seventy-two bales were ready to be shipped, as I expect to find an opportunity of placing my bills upon you. I shall complete the purchase of 500 bales, which will be necessary, in order to get a full freight," &c. "I have now to inform you, that I have drawn on you, under date of the 15th of January, for $1800, say eighteen hundred dollars, payable sixty days after sight, to the order of Mr. A. Brasier, in Philadelphia, which draft goes on account of the 72 bales of cotton already purchased, and request you to honor the same."

And on the same day, he wrote the defendant: "The present merely serves to inform you, that I have this day valued upon you,

*111] *$1370 order Joseph Thebaud.
607 23 Declaire & Count.
1100 Stephen Zacharie.

$3077 23, sixty days after sight, and refer to my letter of this day."

On the 13th of February 1807, he wrote the defendant: "I have engaged 150 bales, for account of Messrs. John Taber & Son, at market price, which I expect in town in a few days, when I shall, without delay, ship the same on board the Mac, making the 220 bales in all. This commencement, I hope, will encourage shippers to give us some freight; at all events, I shall keep you duly advised of my proceedings. Under date of the 6th inst., I took the liberty of valuing upon you 301 dollars 22½ cents, sixty days after sight, to the order of Jacob D. Stagg; on the 12th inst., 573 dollars, to the order of Samuel Lord, and shall continue drawing as opportunity offers."

On the 16th of the same month, he wrote the defendant: "The present merely serves to inform you, that I have this day valued upon you 600 dollars, say, six hundred dollars, to the order of Benjamin Labarte, sixty days after sight, and request you to honor the same, and place to account of J. T. & S."

On the 20th of February 1807, the defendant wrote the plaintiff:

*112] *"I am in daily expectation of hearing of the Mac's progressing for Liverpool. Before this reaches thee, I hope she will have sailed; if not, please lose no time in dispatching her. That thee may be fully acquainted with her wishes of her owners, I annex a copy of the last letter I have received from them, and request thee to comply with their wishes in every particular."

The copy of the letter from John Taber & Son, referred to in this letter, is as follows:

"Portland, 2d mo. 9, 1807.

"Jacob Barker:

"By last mail, we received thy favor of the 2d inst. inclosing one from Captain Swaine to thee. We notice thy proposition for us to give liberty for the Mac to take freight for any port in Europe, but as we have got her and her freight insured in Liverpool, at and from New Orleans to that port, we wish to have her go there, even if we load on owners' account. We are well satisfied, that Lanusse hath not yet loaded her, as we have no doubt

cotton will be much lower in a short time. And as we apprehend that shippers of cotton will now turn their attention to other parts of Europe, we think the probability is, that cotton will be in demand in Liverpool, by the time the Mac will arrive there; we likewise think, it will answer to ship good flour, and probably some good staves can be purchased; we had rather have her loaded, on our own account, with those three articles, than to take freight for any other port, but we think, there can be no doubt, but that when she begins to load on owners' account, that some considerable *freight can be obtained. We really wish thee to write Lanusse to dispatch her, with liberty to take two thousand barrels of good fresh [*113 flour, if freight does not offer sufficient, with the five hundred bales of cotton before ordered, to load her without delay; as we have no doubt good flour will answer, and we cannot think of her being longer detained at New Orleans. We remain, thy assured friends,

(Signed) JOHN TABER & SON."

And on the 3d of March 1807, the plaintiff wrote the defendant: "The present merely serves to inform you, that I have this day valued upon you 10,000 dollars, say, ten thousand dollars, payable sixty days after sight, to the order of Mr. Thomas Elmes, and request you to honor the same, and place to account of J. T. & S."

On the 6th of March 1807, he again wrote the defendant: "I refer to my respectful last of 13th, 16th, 24th ult., and 3d inst., the contents of which I confirm. On the 16th, I valued upon you for 600 dollars, and on the 3d inst., for 10,000 dollars, making in all the sum of 16,351.3¾ cents, on account of the shipment *per* Mac, for account of Messrs. John Taber & Son. I have already bought 72 bales at 22 cents, 107 do. at 20¾ cents, 175 do. at 20½ cents, together 354 bales, and 30m. staves, amounting to about 22,000 dollars. There remains 146 bales more to be purchased, which I hope to get; the total amount, with charges and commission, *will be about 34,000 dollars—for which sum I shall order Messrs. Rathbone, Hughes & [*114 Duncan, to get insurance effected. I shall continue to draw on you as occasion presents."

On the 11th of March 1807, he wrote the defendant, informing him that he had drawn on the defendant to the order of Mr. F. Depau, for $6000, and to the order of Mr. J. P. Ponton, for $691.50.

On the 15th of April 1807, the defendant wrote the plaintiff: "I have this moment received the unpleasant information of the failure of John Taber & Son, therefore, beg the favor of thy taking every precaution to secure my claim on them, for the payment of the cotton thee has shipped for their account by the Mac. If that ship has not got clear of your river, take up the bills of lading and fill up new bills, consigning the cotton to my order, forwarding me several of the bills, and instruct Captain Swaine to hold the cotton, until he hears from me; and if part of the old set have gone on, let them go, but take a new set, and make all the freight-money payable to my order, and if she has got clear of the river, make an arrangement with the shippers of the cotton to pay thee the freight-money, and give them a receipt for it, forwarding that receipt to Liverpool, but for the consignee to keep as a secret, that the freight-money has been paid, until they get all the freight goods."

And on the 16th of April 1807, the defendant again wrote the plaintiff: *115] "'I have taken the best counsel, and find the goods per ship Mac can be stopped for thy account *in transitu*, and have, therefore, taken all the steps in my power to have that object effected; and shall succeed so far as to keep the property at thy disposal, until thy power reaches Martin, Hope & Thornley, which will enable them to hold the property for thy use; therefore, send the power by the packet, and send duplicates and triplicates by other vessels, and several copies by mail and packet to me, to be forwarded; also draw on Rathbone, Hughes & Duncan, for the whole amount of shipment, ordering Martin, Hope and Thornley to pay them 1000 pounds of the amount drawn for, if they accept the bills. Confirm what I have written, copies of which I inclose for thy government. Thy bills on me will all be protested for non-payment, that thee can say, thee has not received pay for the cotton, but shall endeavor to furnish money, that will prevent disappointment to the holders. This, my counsel tells me, is indispensable, to enable thee to benefit by *transitu*, which cannot be done by any other person, nor by thee, after thee gets pay for the goods shipped."

And on the same day, the defendant wrote to Martin, Hope & Thornley, of Liverpool, as follows: "I inclose a letter written as agent and friend of Paul Lanusse, to Rathbone, Hughes & Duncan, which you will have the goodness to hand them, and make a memorandum of the delivery, and endeavor to make the contract for Lanusse as therein mentioned, and I will indemnify you from all loss in so doing; if you cannot make an absolute *116] agreement *with R. H. & D., to receive all the property Lanusse has or may ship by the Mac, for account of Taber & Son, to be applied for the payment of the bills Lanusse has or may draw on them, excepting one thousand pounds, and the profits on the adventure, which they may place to the credit of Taber & Son, if they are so much indebted to R., H. & D.; if not so much, then such sum as may be due them. You will cause insurance on the cargo of ship Mac, to the amount of nine thousand pounds sterling, and proceed, as the agent of Lanusse, to get hold of the property; you certainly can stop it *in transitu*."

On the same day, the defendant also wrote to Rathbone, Hughes & Duncan: "As the agent of my friend Paul Lanusse, at New Orleans, I have, in consequence of the failure of John Taber & Son, to inform you, that the goods he is shipping on board the Mac, Captain Swaine, have not in any part been paid for, therefore, they are to be stopped *in transitu*, for the benefit of my said friend Paul Lanusse, who is by me represented; and as his agent, I charge you, on your peril, not to accept, or in any manner commit yourselves for said Taber & Son, on account of said shipment, but if you are willing to receive said consignment, sell the same, and apply the whole proceeds to the payment of such drafts as Lanusse may draw on you, which shall not exceed the amount of invoice."

On the 30th of April 1807, the defendant wrote the plaintiff: "I annex copy of my last respects, and have to request, in the most pointed manner, *117] thy particular attention *to my request therein. I have sent out many letters, in hopes of meeting the Mac; if any of them meet her in the Mississippi, Captain Swaine will return to New Orleans, with all his papers, for thee to alter the direction of the goods shipped by that vessel for account of Taber & Son; if not so successful as to meet her, but if any of them

meet her, after she leaves the Mississippi, she will stop at this port, when I will make the necessary alterations ; but if none of my letters meet her, my only chance for securing myself is, by thy stopping the property *in transitu.* To have that done, thee must immediately send out powers to Liverpool, therefore, I beg thee to confirm all I have written to Martin, Hope & Thornley."

On the 20th of May 1807, the plaintiff wrote to the defendant : "Your esteemed favor of the 15th ultimo has just reached me, and with much regret do I learn the failure of Messrs. John Taber & Son. I hope that you will not be a sufferer, and that you have taken timely precaution. Agreeably to your request, I have written on to Liverpool, but am afraid my letters will come too late, as the Mac sailed from the Balize, on the 23d of April, and as she is a good sailer, will, no doubt, have discharged her cargo, before the receipt of my letter. For your government, I inclose you invoice and bill of lading of the 500 bales cotton shipped per Mac ; also, my account current with Messrs. John Taber & Son, according to which a balance of $1251.28½, for which amount I shall value upon you as occasion offers. You will, I hope, have taken the necessary measures to meet my drafts dated March *20th, drawn direct on Messrs. Taber & Son, in Portland, payable in New York, of which I advised you. I am anxious to receive [*118 your further communications, and most sincerely hope that you have been able to cover your claim, and not be a loser by this unfortunate accident."

And the 9th of June 1807, he wrote the defendant : "I have only time to inform you of the receipt of your favor of 16th and 30th April, and to assure you that I shall punctually follow your instructions, and lose no time in forwarding to you, and to Liverpool, all necessary papers, relying on your integrity and honor. I feel no uneasiness respecting my concern in this unfortunate business ; at the same time, I most sincerely regret that you should be a sufferer, but hope things may yet result favorable."

On the 28th of August 1807, the plaintiff wrote the defendant: "The last mail brought me the non-acceptance, protest, &c., of the two bills of exchange drawn by me on the house of John Taber and Son, under date of the 20th of March 1807, in favor of Thomas Elmes, and indorsed by him to Messrs. Corp, Ellis & Shaw, each for $5000, making the sum of $10,000, and which I have been obliged to here to pay Mr. Elmes, together with ten per cent. damages, amounting to the further sum of $1000, giving a total of $11,000. It is unnecessary for me to dwell upon the serious inconveniences which have resulted from this circumstance, or to repeat how prejudicial the whole of the transaction with the house of John Taber & Son* [*119 has been to my affairs. I, however, rely upon you for the payment of this money, as it was entirely upon your recommendation, on the strength of your assurances, and the respectability of your guaranty, that I was induced to embark in this business, and to procure cotton for the cargo of the ship Mac ; but this subject has already been sufficiently enlarged upon, in my former letters to you, and I sanguinely trust, that you will not delay making the necessary arrangements for this reimbursement. No information has as yet been received by me from Liverpool, respecting the fate of the 500 bales of cotton shipped on board the Mac. I feel anxious to know the success of the steps which have been taken in that

quarter. I trust that you will communicate to me the earliest information that you may receive on this subject."

On the 30th of January 1806, John Taber and Son wrote to the plaintiff as follows: "We wrote thee, the 24th inst., since which, we have received a letter from Jacob Barker, informing that he had engaged eight hundred bales of cotton for the Mac, previous to her sailing from New York, from your port to Liverpool, which has fixed her route; as she hath so much freight engaged, we flatter ourselves that she will be filled up immediately. It is our wish to have two hundred bales of good cotton shipped on owners' account, and as much more as may be necessary to make dispatch, as we are not willing to have her detained in your port for freight. To reimburse thyself for the cotton purchased on owners' account, thou may draw bills, at
*120] sixty days sight, either on Jacob Barker, or on us. If thou *can sell bills on Rathbone, Hughes & Duncan, merchants, at Liverpool, at par, thou may, on them, taking care not to send the bills before she sails, and to write on timely to them to get insurance made on the amount of property shipped on our account."

On the 27th of March 1806, the plaintiff wrote J. Taber & Son: "Your much respectful favor of the 30th of January last, came duly to hand. I observe what you say respecting the purchase of cotton for your account to go by ship Mac, of which our friend Jacob Barker, likewise makes mention; this ship has not yet made her appearance, but as soon as she does, you may depend on my utmost exertions to follow your orders, and give the ship all dispatch that lays in my power. The mode of reimbursements for purchases made here, will be by drawing on our friend Barker, agreeable to his advice, as I think it will be less difficult for me to place bills on New York. Cotton is rising, and fetches now 26 cents. Notwithstanding, I shall follow your orders with respect to the Mac, unless anything to the contrary should reach me, before she arrives. As for drawing on Liverpool, it is altogether out of my power, for such bills are seldom asked for here. I shall advise Messrs. Rathbone, Hughes & Duncan, in due time, to effect insurance on the property I may ship on your account. Awaiting the pleasure of announcing you the Mac's arrival, I continue with respect," &c.

On the 5th of June 1806, the plaintiff wrote J. Taber & Son: "Cotton is pretty steady at 22 cents. Should circumstances authorize my purchasing
*121] for *your account, I shall, in preference, value for the amount on Mr. Jacob Barker."

On the 29th of June 1806, John Taber & Son wrote to the plaintiff: "We have not been favored with any of thy communications, since 4th month, 7th. We have been daily expecting to hear of our ship Mac being laden and ready for sea, as we had not the least idea but that the eight hundred bales that Jacob Barker contracted for, would be ready at the time agreed on, and expected thou would have purchased a sufficiency to fill up, on owners' account, provided freight did not offer in season. By last mail, we received a letter from Jacob Barker, informing that he feared the contractors would not furnish the eight hundred bales, and that in consequence thereof the Mac would be detained, until further orders from us. We, therefore, have this day wrote Barker, to give thee and Captain Swaine such directions as he may think proper. But we hope she will be dispatched for Liverpool, before this reaches thee, as it is our wish to have her go there."

On the 15th of July 1806, John Taber & Son wrote the plaintiff: "Thy favor of the 5th ultimo, by mail, was this day received, the contents noticed, we are very sorry to find that the Mac is so detained with you, we having flattered ourselves that she would have been at Liverpool by this. We wrote thee, 27th ultimo, by mail, directing thee to follow Jacob Barker's instructions respecting the Mac, which we now confirm, and *say that [*122 we wish the to follow his instructions at all times, the same as from us."

On the 29th of August, the plaintiff wrote J. Taber & Son: "Your esteemed favor of the 29th of June has duly come to hand, but I have in vain expected further directions from Mr. Barker, for the want of which I have experienced many difficulties."

On the 25th of July 1806, J. Taber & Son again wrote the plaintiff: "Thy favor of the 13th ultimo was this day handed us by Captain Webb, of the Phœnix. It had been broken open at sea, by an English cruiser. We have not received a copy of thy protest; we should like to see it. We are extremely sorry, that we had not, in the first instance, given thee orders to have laden our ship with staves, logwood and cotton, on our account, with what freight could be obtained; we should certainly have done it, if we had the least idea that we should have been disappointed of the eight hundred bales. We have this day received letters from Jacob Barker, informing he had given thee directions to load immediately as above; hope thou can make it convenient to put a large share of cotton on board, on our account, as we think that article will pay much more than staves; we trust thou will send to Jacob Barker such documents as will enable him to recover the freight and demurrage."

And on the 30th July 1806, Taber & Son wrote the plaintiff: "We hope that the Mac will sail for Liverpool before *this reaches thee, [*123 with a cargo on owners' account, and a large proportion of cotton."

On the 16th of September 1806, the plaintiff wrote J. Taber & Son: "I am successively favored with your much esteemed of 15th, 25th and 30th of July, and have taken due notice of their contents. Mr. Jacob Barker has likewise wrote me, and shall follow his instructions as far as lays in my power."

On the 3d of October 1806, Taber & Son wrote the plaintiff: "We observe that thou had thoughts of sending the Mac to New York, after a few weeks, if thou did not receive further instructions: but we trust that will not be the case, as we presume that thou received Jacob Barker's orders soon after, to load her on owners' account for Liverpool, except the demurrage was continued to be paid. If so, we are willing to let her lay, until the charterers procure the 800 bales freight. When that is the case, we presume thou will not let her be detained for the remainder part of the cargo, to the charterer's damage. We renew our request for thee to continue to follow Jacob Barker's instructions, from time to time, respecting the Mac, the same as from us. We are well satisfied with thy proceedings."

On the 12th of December 1806, the plaintiff wrote J. Taber & Son, acknowledging the receipt of their letter of the 3d of October, and saying, "I have not, as yet, commenced the purchase of cotton, only small parcels have as yet come to hand; as soon as I can *succeed, I shall value [*124 upon Jacob Barker for the amount," &c.

On the 9th of November 1806, J. Taber & Son wrote the plaintiff: "We do not pretend to give thee any positive order respecting the Mac, as we have heretofore directed thee to follow Jacob Barker's directions; but we will give thee a sketch of our wishes, viz: To have the Mac dispatched to Liverpool, as soon as possible, with about five hundred bales of cotton, on owners' account, and the remainder of her cargo on freight," &c.

On the 22d January 1807, the plaintiff wrote J. Taber & Son: "I have written this day to Mr. Barker, and keep him advised of the state of affairs here. Upon his remarks on the subject of demurrage, I have unconditionally passed to your account, the total sum paid in, and shall employ the funds for the expenses of the ship, and the surplus for the purchases of cotton for your account. I am happy to inform you, that I have already made a commencement, and purchased 72 bales at 22 cents, which are now ready to be shipped on board the Mac. I shall, as opportunity offers, draw upon Mr. J. Barker for the amount, and complete the 500 bales, to be shipped for your account, which will be absolutely necessary to procure a full freight. I valued upon Mr. J. Barker, $1800, which sum is passed to your credit. I need not recommend to you to take the necessary measures, in order to have my drafts duly honored by that gentleman."

*125] *On the 13th of February, the plaintiff wrote J. Taber & Son, and after mentioning a further purchase of cotton for their account, he states: "I add you a note of my drafts upon Mr. J. Barker, on account of this shipment, for your account, and shall keep you constantly advised of my proceedings."

On the 9th of February 1807, Taber & Son wrote the plaintiff: "We having, by last mail, received account, that the Mac had not begun to take in her cargo on New Year's day; we are well satisfied, that thou had not purchased cotton for us at the high price that we understood it was selling at, as we presume it will be much lower, by the time this reaches thee. If the Mac hath not taken in any of her cargo, before this reaches thee, we wish thee to commence loading her on owners' account, immediately; as we have ever found, that when our ship commenced loading on owners' account, that freight soon offered. Jacob Barker informed us, some time past, that he had given thee directions to ship five hundred bales of cotton, on our account, and liberty to ship some flour, which we think may answer well, provided it is good. If freight cannot be obtained, to fill her up with the flour and cotton that Barker hath ordered, we should like to have her filled up with good staves or timber, the growth of your country; but no log-wood or mahogany. We much wish to have the Mac dispatched for Liverpool as soon as may be."

On the 6th of March 1807, the plaintiff wrote J. Taber & Son: "On

*126] the 13th ultimo, I last had the pleasure of *addressing you. I have since procured a full freight for the Mac, at three cents per pound cotton, and she will be dispatched, in all this month, for Liverpool. I shall ship on board for your account, five hundred bales cotton and thirty thousand staves, of which you may now get insurance effected, the amount per invoice will be about $3400.

I have, since my last, valued upon Mr. J. Barker, for $600 and $10,000 on account of these purchases, and shall continue to draw as occasion offers.

As soon as the entire purchase is completed, I shall hand you the invoice and account-current, and shall acquaint Messrs. Rathbone, Hughes & Duncan with my proceeding respecting the above order for insurance, and shall have early opportunities of giving them timely information. I have communicated to Mr. Jacob Barker the present state of affairs."

And on the 20th of March 1807, the plaintiff wrote to J. Taber & Son: "The present merely serves to inform you, that I have this day valued upon you, payable in New York, the sum of $10,000, in two bills of $5000 each, say, ten thousand dollars, sixty days after sight, to the order of Thomas Elmes, Esq., which drafts go on account of cotton purchased for your account, and shipped on board the ship Mac. It is upon the particular respect of Mr. Elmes, that I have altered the mode of my drawing direct on Mr. Jacob Barker."

On the 17th of April 1807, the plaintiff again wrote J. Taber & Son: "I have now the pleasure of informing you, that *the Mac has sailed for Liverpool, having on board 500 bales of cotton for your own [*127 account, and 549 bales on freight. Inclosed, I hand you invoice and bill of lading of the former, amounting to $33,098.31, for which you will please credit my account. I have engaged 30m. staves, but they were of inferior quality, and I preferred not shipping them. With my next, I shall hand you account-current, &c. Capt. Swaine has taken along with him all the necessary documents to recover from the underwriters on the ship Mac; the amount of expenses incurred since the gale, until she was afloat, were $3042.25."

On the 24th of April, 1807, the plaintiff wrote to J. Taber & Son: "I refer to my respectful last of the 17th instant, and have now the pleasure of handing you account-current to this day, and other papers respecting our transactions, agreeable to which, there is yet a balance due me, of $1276.51½ cents, for which amount I shall value upon you, as occasion may offer."

Besides the above correspondence, the plaintiff produced in evidence an answer of the defendant to a bill of discovery, filed by the plaintiff in a suit formerly depending in the supreme court of the state of New York, which was commenced in April 1810, and discontinued in October 1813; of which answer the following is an extract:

And this defendant, further answering, says, that previous to the month of May 1807, he had large commercial dealings with the house or firm of John Taber & Son, of Portland, in the state of Massachusetts. *And that the said firm or house of John Taber & Son, having failed, prior [*128 to the said month of May 1807, and at the time of such failure, largely indebted to this defendant; and this said defendant visited Portland for the purpose of securing his demand against said firm or house of John Taber & Son; and soon after his return, he, about the first of May 1807, in conversation with Gabriel S. Shaw, of the firm of Corp, Ellis & Shaw, merchants, residing in this city, about the charter of a ship, mentioned to said Shaw, that he, Barker, had just returned from Portland, where he had been for the purpose of getting security from John Taber & Son, when he, said Shaw, informed him that they had, a few days previously, sent bills drawn at New Orleans, on said Taber & Son, under cover to the said Tabers, for acceptance, to the amount of $10,000; and inquired if he, this defendant,

supposed they would, in the deranged state of their business, return them regularly protested or accepted? From this defendant's knowledge of said Taber's business, he believed that those bills were drawn in payment for the ship Mac's cargo; this being the only information this defendant had of any bills being drawn at New Orleans, on said John Taber & Son, he was induced to accompany the said Gabriel Shaw to his office, to ascertain the particulars; who, at the instance of this defendant, exhibited to him either a letter, or one of the same sets of bills, by which this defendant learnt, they were drawn by Paul Lanusse, at New Orleans, on John Taber & Son, Portland, in part payment for the cargo of the Mac. That this defendant, acting
*129] *from the information so received, and from no other information or advice whatever, and also, from an apprehension that the said complainant, when he should hear of the failure of the said house of John Taber & Son, would claim from this defendant the amount for which the said bill or bills were drawn, and thereby expose this defendant to an expensive course of litigation, in resisting the said claim, if any should be made, he this defendant, wrote to the said John Taber & Son a letter on the subject of the said bill or bills, and which letter, he believes, is as follows, to wit:

"New York, 5 mo. 5th, 1807.

"John Taber & Son:—I am this day advised of Paul Lanusse's having drawn on you to the amount of $10,000, which bills were forwarded to you for acceptance; for the payment of those drafts, I am not liable, as I only promised to accept, in case of his drawing on me. You, undoubtedly, accepted those bills; if not, and you have them, be pleased, at all events, to accept them, as, if they are returned without acceptance, the charge will be, as at first, for the shipment, for which Lanusse may possibly think me answerable, but if the bills are accepted, he can only look to you. The debt, as to him, thereby becomes of another nature, but as to you, it is the same thing, and cannot place you in any worse situation. Therefore, let them be accepted, and if you have returned them without acceptance, authorize me to accept them, as your agent to this business; give immediate attention,
*130] *as I must not be made answerable for them; although injured, I am yet your friend,

JACOB BARKER."

And that, afterwards, this defendant wrote another letter to the said John Taber & Son, which he believes is as follows:

"New York, 5 mo. 15, 1807.

"John Taber:—This day's mail brought me thy letter, by which I am surprised to observe thee has refused compliance with my request. I cannot account for the strange advice your merchants gave respecting protesting those bills. I, however, admit, that in ordinary cases, there would not be much impropriety in protesting them, though I could not possibly alter the state of your business, the debt being indisputable, their being accepted only acknowledged the debt to be due; but I must insist, if thee has any regard to justice, that thee will, if not returned, accept them for account of John Taber & Son; if returned, authorize me to accept them for their account. I consider the argument, that I expected to secure the Mac and cargo, no excuse at all, particularly, as no attachment can be made in this

state for partial benefit, all attachments must be made for the benefit of all the creditors. So that, if I have property in my hands, the best possible step the creditors could take would be, for one of them to attach it in my hands; therefore, must pointedly insist on thy accepting, or ordering *me to accept those bills. As to advice from thy neighbors, it is [*131 one of those simple cases that do not require advice, and I say, expressly, when thee considers my situation, thee cannot honestly refuse my request. If I was in thy situation, and all the world advised me not to do it, I should not pay the least respect to such advice, but accept the bills, without a moment's hesitation. If thou thinks Paul Lanusse will be a more difficult creditor than I shall be, thee will, under present circumstances, be mistaken, to where I am thus forced into a monstrous loss, I shall be very difficult, although, in common cases, should be favorably disposed. Your friend,

JACOB BARKER."

The plaintiff further proved by Joseph Thebaud, of New York, the plaintiff's agent, that in the beginning of October 1807, he received from the plaintiff the following account, dated 1st September 1807, at New Orleans, which he showed to the defendant, and demanded payment of the same, which was refused by the defendant:

*Dr. Mr. Jacob Barker, of New York, for account of Messrs. John Taber & Son, of Portland, in acct. current with Paul Lanusse. Cr. [*132

1807.			1807.			
April 13.	To amount of 500 bales of cotton, as per invoice.	$33,098 31	Jan. 23.	By my draft fav. Brasier,		$1,800 00
24.	Disbursements of ship Mac, as per account....	5,943 69		do. Stephen Zacharie,		1,100 00
	My commissions on freight procured for the Mac, $5974.60 *a* 5 per cent.....	298 73		do. Delarie & Canut,		607 25
	Do. on demurrage collected, $5150 *a* 2½ per cent.....	128 75		do. Jos. Thebaud,		1,370 00
	My draft of March 20, on John Taber & Son, favor of Tho. Elmes....$5000 00		Feb. 6.	do. J. D. Stagg,		301 00
	Do 5000 00		12.	do. Samuel Lord,		573 00
	Damages paid, 10 per cent.....1000 00		16.	do. B. Labarte,		600 00
		11,000 00	Mar. 3.	do. Thomas Elmes,		5,000 00
		$50,469 48		do. do.		5,000 00
	To balance per cont.....	$12,251 28	10.	do. Francis Depau,		6,000 00
	Errors excepted.			do. J. Paul Poutz,		691 60
			20.	do. Thomas Elmes,		5,000 00
				do. do.		5,000 00
				Demurrage ship Mac, commencing 5th June, to the 16th Sept., being 103 days, at $50 per day.		5,150 00
			May 2.	1 junk cable from ship Mac.....		25 24
				Balance due Paul Lanusse,.....		12,251 28
						$50,469 48

New Orleans, 1st September 1807.

(Signed) PAUL LANUSSE.

The plaintiff further proved, that in the suit first above mentioned, which had been depending between him and the defendant, in the supreme court of the state of New York, the plaintiff suffered a nonsuit, on the 19th of December 1808, after the judge had charged the jury in favor of the defen-

dant. And the plaintiff further proved, that he did, on the 30th of January 1809, draw two new sets of bills upon the defendant, which were produced and read in evidence by the plaintiff's counsel, and are in the words and figures following:

*133] *New Orleans, 30th January 1809.

Exchange, for dolls. 10,055.35 cents.

Sixty days after sight of this my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, ten thousand and fifty-five dollars, thirty-five cents, value received, which place to account of

PAUL LANUSSE.

To Mr. Jacob Barker, merchant, New York.

New Orleans, 30th January 1809.

Exchange, for dolls. 2195.93½ cents.

Sixty days after sight of this my second of exchange (first and third of same tenor and date not paid), pay to Mr. Jos. Thebaud, or order, two thousand one hundred and ninety-five dollars, ninety-three and a half cents, value received, which place to account of

PAUL LANUSSE.

To Mr. Jacob Barker, merchant, New York.

That the said bills were protested for non-acceptance on the 11th of March 1809, and for non-payment on the 13th May 1809. The notary also proved, that at the time of presenting the said bills, he offered to the defendant the account and letters herein next stated, which the defendant refused to accept, and desired the notary to take them away, who refused, and threw them on his, the defendant's, counter. The bills were accompanied with a letter of advice, mentioning that the first bill was for the balance due for the purchase of the 500 bales of cotton, and the other for disbursements

*134] of the ship *Mac, and $1500 damages paid on the two drafts of $5000 each on Taber & Son, returned protested for non-payment.

The plaintiff further proved, that all the bills of exchange, drawn by plaintiff on the defendant, and contained in the above account, amounting to $23,042.96, had been paid by the defendant after the same had been protested for non-payment, excepting the last-mentioned bills for $5000 each, drawn in favor of Thomas Elmes, and forwarded as aforesaid to Corp, Ellis & Shaw. It was also admitted, that the plaintiff had received no part of the freight of the Mac's cargo, although it is mentioned in a letter of his, that he had received the freight or a part of it. The plaintiff then proved, that the ordinary interest of money in New Orleans was ten per cent. per annum, and the lawful interest in New York was seven per cent.

The plaintiff, having made the proofs on his part, here rested his cause. Wherenpon, the defendant then produced in evidence the following account, forwarded to him by the plaintiff, in his letter of the 20th of May 1807.

*Dr. Messrs. J. Taber & Son, in Portland, in account current with Paul Lanusse. Cr.

1807.			1807.		
April 13. To amount of 500 bales of cotton as per invoice		$33,098 31	Jan. 22. By my draft fav. Frasier,		$1,800 00
24. Disbursement of ship Mac, as per account....		5,943 69½	do.	Stephen Zacharie,	1,100 00
My commission on freight procured for the Mac, $5974.60 *a* 5 per cent ..		298 73	do.	Delaire & Canut,	607 25
Do. on demurrage collected $5150 *a* 2½ per cent ..		128 75	do.	Joseph Thebaud,	1,370 00
			Feb. 6. do.	Jacob D. Stagg,	301 21
			12. do.	Samuel Lord,	573 00
			16. do.	Labarte,	600 00
			Mar. 3. do.	Thomas Elmes,	5,000 00
			do.	do.	5,000 00
			do.	Francis Depau,	6,000 00
			do.	J. Paul Poutz,	691 50
			20. do.	Thomas Elmes,	5,000 00
			do.	do.	5,000 00
			Demurrage of ship Mac, commencing 5th of June, to 16th Sept., being 103 days *a* $50..		5,150 00
			April 24. Balance due me.....		1,276 52½
		$39,469 48½			$39,469 48½
April 24. To balance per contra due me.....		$1,276 42½			

Errors and omissions excepted.

New Orleans, April 24, 1807.

(Signed) PAUL LANUSSE.

Dr. Messrs. J. Taber & Son, of Portland, in account with Paul Lanusse. Cr.

1807.			1807.		
April 24. To balance per contra.		$1,276 52½	May 2. By 1 junk cable.....		$25 24
			20. balance.....		1,251 28½
		1,276 52½			1,276 52½
1807.					
May 20. To balance due me....		$1,251 28½			

E. & O. E.

New Orleans, May 20th, 1807.

(Signed) For Paul Lanusse, P. & H. AMELUNG.

The defendant then proved, by Gabriel Shaw, of the house of Corp, Ellis & Shaw, of New York, that the two bills of exchange, drawn by Paul Lanusse on John Taber & Son, dated the 20th of March 1807, were received by Corp, Ellis & Shaw, from Thomas Elmes, of New Orleans, in whose favor they were drawn, about the 27th or 28th day of April, in the same year, and were immediately forwarded by him to John Taber & Son, of Portland, *for acceptance; that they were protested on the 30th of the same month, at Portland, for non-acceptance, and were received [*136 by the witness, with the protests, about the 5th or 6th of May, about which day, and after the receipt of the said bills, he either met the defendant in the street, or called at his house, but which he cannot recollect, and showed him, he believed, the said bills and protest, having understood the said defendant had, in some way, some concern in the business. That the said

bills, at maturity, were protested, in New York, for non-payment, and were afterwards remitted to the said Thomas Elmes, at New Orleans. From the protest, it appeared, that the two bills of $5000 each, were protested for non-payment, on the 2d day of July 1807, in New York, and that the limited time mentioned in the said bills, with the days of grace, were then expired, since the bills were protested for non-acceptance in Portland.

The defendant then rested his cause; upon which the plaintiff claimed a verdict for the sum of $17,908.02, if the court and jury were of opinion, that interest was allowable at the rate of ten per cent.; but if they were of opinion, that interest at the rate of seven per cent. only was allowable, then the plaintiff claimed a verdict for the sum of $15,910.94; and the plaintiff exhibited the following statement, showing the manner in which the said several sums were calculated, viz:

1st.	1807.		
April 13.	To amount of 500 bales of cotton, as per invoice		$33,098 31
24.	To disbursements for ship, with commissions at 5 per cent		5,943 60
	To commissions on freight, $5974.60, at 5 per cent		298 73
	To do on demurrage collected, $5150, at 2½ per cent		128 75
			$39,469 39
	*Cr.		
*137] By bills paid		$23,042 96	
By demurrage received		5,150 00	
By one junk cable		25 24	
			28,218 20
			$11,251 19
To interest on $11,251.19, from 13th of May 1809 (protest of new bills), to 13th of April 1815 (day of verdict) at 10 per cent.—5 years, 11 months.			6,656 83
			$17,908 02
2d. To amount of damages as above		$11,251 10	
To interest on the above sum of $11,251.19, for the same period at 7 per cent		4,659 75	
		$15,910 94	

The plaintiff then prayed the judge of the circuit court to charge and deliver his opinion to the jury, that the plaintiff was entitled to the aforesaid sum of $17,908.02, if the interest was to be calculated at the rate of ten per cent., or to the sum of $15,910.94, if the interest was to be calculated at the rate of seven per cent. The defendant insisted, that the plaintiff was not entitled to any damages; and the judge so charged the jury, *pro formâ*. A verdict was thereupon taken for the defendant, and a bill of exceptions tendered. An agreement was entered into by the counsel for both parties, that the cause should be carried to the supreme court by writ of error, and that if the supreme court should be of opinion, that the plaintiff was entitled to a judgment for the principal sum of $11,251.19 with interest at the rate of ten per cent., then the judgment should be rendered for the sum of $17,908.02, with costs. Or if the court should be of opinion, that he was
*138] entitled to interest at the rate of seven per cent. only, that *judgment should be rendered for the sum of $15,910.94, with costs: or if the court should be of opinion, that any other sum, different from either of the

above sums, is recoverable by the plaintiff, that judgment should be rendered for such other sum as the court might direct. But if it should be of opinion, that the plaintiff is not entitled to recover any damages, then the judgment for the defendant should be affirmed.

February 9th. *Pendleton*, for the plaintiff, argued, that the defendant was liable, both for the bills drawn by the plaintiff on Taber & Son, and also for the bills drawn in January 1809, on the defendant. That the original undertaking of the defendant was a guarantee that all bills drawn by the plaintiff, on account of the ship Mac, should be paid, whether drawn on the defendant, or on Taber & Son. The learned counsel entered into a critical analysis of the opinion of the supreme court of the state of New York in this cause (10 Johns. 325), and contended, that the rules for construing contracts extend to all parties alike, whether sureties or principals: that they must be construed according to the intention of the parties, not according to the mere literal meaning of the words. If these are ambiguous, the intention must be ascertained by the context, by contemporaneous declarations, writings and transactions, and above all, by the purposes and objects to be answered. The principle is applicable to the undertaking of a surety. *Barclay* v. *Lucas*, 1 T. R. 291, note. It is by no means a well-established rule, that the *contract of a surety is to be construed more favorably than that of the principal. *Mason* v. *Pritchard*, 12 East 227. The law knows no favorites. The obligation of the surety is the inducement for the creditor to trust the principal, with whose affairs and circumstances the surety is presumed to be best acquainted. Formerly, nothing could discharge this liability, at law, but performance. If the creditor had discharged the principal, or extended the time of payment, by a new contract with the principal, without the surety's consent, the surety had no remedy. In latter times, the courts of law have interposed to protect the surety; but there is much contrariety in the numerous cases that have been decided, upon the question what transactions between the creditor and the principal shall discharge the surety. There is no doubt, that an absolute discharge of the principal, will discharge the surety also. But it is contended, that no new contract or transaction between the creditor and principal, shall discharge the surety, unless it deprive him of the right he always possesses of placing himself in the creditor's situation, by paying the debt according to the original contract, and thus getting into his own hands the means of securing himself. This principle is founded on the nature of the contract of suretyship, and is supported by the authorities, except one or two cases, which it will be found difficult to reconcile with the principle. *Bishop* v. *Church*, 2 Ves. 371; *Woffington* v. *Sparks*, Ibid. 569. All the cases decided in England in favor of sureties have been, where the creditor has taken away this right, by discharging the principal, or by *giving him a new extended credit. *Nesbitt* v. *Smith*, 2 Bro. C. C. 579; *Rees* v. *Barrington*, 2 Ves. jr. 540; *Smith* v. *Lewis*, 3 Bro. C. C. 1; *Phillips* v. *Astling*, 2 Taunt. 206; *Deming* v. *Norton*, Kirby 397. Mere delay and want of notice have been uniformly held insufficient to discharge a surety. *Cartlitch* v. *Eyles*, 2 Com. 558; *Peel* v. *Tatlock*, 1 Bos. & Pul. 419; *Trent Navigation Co.* v. *Harley*, 10 East 34; *Warrington* v. *Turbor*, 8 Ibid. 242; *O'Kelly* v. *Sparks*, 10 Ibid. 377; *Barnard* v. *Norton*, Kirby 193; *Meade*

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v. *McDowell*, 5 Binn. 195. But even if the law were otherwise, there has been no unnecessary delay or want of notice in the present case.

The *Attorney-General* and *Jones*, contrà, contended, that the defendant was to be considered in the character of a surety merely; that this was evinced by every part of the correspondence; and that, consequently, he was bound only according to the literal terms of his contract. That by the well-established doctrine of law and equity, a different rule was to be applied, in the construction of the contract of the surety, from that which was applicable to the contract of the principal. In regard to the principal, a liberal interpretation is to be indulged, to reach the substance and equity of the contract; whilst the undertaking of the surety is to be limited to its precise terms. The reasons of this distinction are, that there is a valuable consideration moving from the creditor, which creates an equitable obligation on the part of the principal, independent of the express contract; whilst, in respect to the surety, there is nothing but his express promise, acceding to that of the
*141] principal *debtor. Another reason is one of legal policy, to encourage suretyships, for the benefit of commerce, and the extension of credit, and at the same time to protect the sureties by every means consistent with morality. All the cases at law are consonant with this distinction. *Lord Arlington* v. *Merick*, 2 Saund. 411, and Sergeant Williams' note, 5, p. 415; *Wright* v. *Russell*, 3 Wils. 530; s. c. 2 W. Bl. 934; *Myers* v. *Edge*, 7 T. R. 254; *Barker* v. *Parker*, 1 Ibid. 287; *Ludlow* v. *Simond*, 2 Caines' Cas. 1; *Walsh* v. *Bailie*, 10 Johns. 180; *Russell* v. *Clarke*, 7 Cranch 90. The aid of the courts of equity has been invoked in vain, to effect a more enlarged construction of the undertaking of sureties. Maxims in Equity 71; *Simpson* v. *Field*, 2 Ch. Cas. 22; *Rees* v. *Barrington*, 2 Ves. jr. 540. Besides, whatever was the undertaking of the defendant, in the present case, the plaintiff considered the order contained in the letter of the 9th of January, as completely abrogated by the letter of the 13th of February, after which date, the principals step in, and the plaintiff acts under their orders, and corresponds with them only. By the last-mentioned letter, the defendant promises to answer bills, drawn on himself only, which was a new undertaking on his part, under which he could not be liable for bills drawn on Taber & Son. Nor did the plaintiff give the defendant any notice of those bills being drawn, which omission would alone be sufficient to discharge him from his liability.

D. B. Ogden, in reply, insisted, that though the surety could not be made responsible beyond the tenor of his engagement, he could not be dis-
*142] charged *by implication, still less, by studied ambiguity of language and artifice of conduct. That the great fundamental principle, in the interpretation of contracts, is to carry into effect the intention of the parties, and that this principle was peculiarly applicable to commercial contracts. That where there is a doubt, arising from the ambiguity of expressions, the acts of the parties may be resorted to, as supplementary evidence of their intention. That even supposing there had been a revocation, or modification, of the original contract, on the part of the defendant, he is still liable under his subsequent undertaking. No case can be found, where a mere attempt to recover of the principal will discharge the surety. All the authorities are the other way. The drawing the bills on Taber & Son was not a waiver of the defendant's liability. Nor was any notice to the defendant necessary,

any more than on a bill of exchange, where the want of funds in the drawee's hands dispenses with the necessity of notice. So, in this case, the defendant having no funds in the hands of Taber & Sons, notice to him would not have enabled him to get into his own hands the means of securing himself.

February 17th, 1818. JOHNSON, Justice, delivered the opinion of the court.—This case comes up on a bill of exceptions. This charge of the judge was given *pro formâ*, generally, against the plaintiff, and the verdict conforms to it. There are many counts in the declaration, and if on any one of those counts, the plaintiff was entitled to recover, the judgment below must be reversed.

*The first count is on a refusal to pay two sets of bills, drawn on Taber & Son, of Portland, payable in New York. These bills were [*143 duly protested and returned, and the amount, with damages, refunded by the plaintiff. In defence to this count, it is contended: that the undertaking of Barker, as expressed in his letter of the 9th of January 1806, relates to a different transaction from that upon which this cotton was purchased; that this transaction originated in the letters of the 26th of January, or 24th of July 1806, or of the 20th February 1807, and in neither of those letters is the undertaking, on bills to be drawn on Taber & Son, reiterated: that the letters alluded to contain, in fact, an implied revocation of the undertaking in the letter of the 9th, of which the plaintiff was bound to take notice.

To the correctness of these positions, this court cannot yield its assent. Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract, on the construction of a correspondence nowhere avowing that object. It was in the defendant's power to have revoked his assumption, contained in the letter of the 9th, at any time prior to its execution, but it was incumbent on him to have done so, avowedly, and in language that could not be charged with equivocation. In this case, we discover nothing from which such an intention can fairly be inferred. The whole correspondence refers to the same subject, and has in view the same object. The expediting of the ship *Mac on freight, if freight could be obtained, and if not, to be filled up (at least, to the quantity of cotton [*144 here purchased), on owners' account. This agency the plaintiff undertakes, expressly on the credit of Barker, for a house, with whose credit, except on his introduction, he is unacquainted; and so far from restricting the order contained in the letter of the 9th, there is not one from the defendant, in the subsequent correspondence, that does not enlarge the order as to quantity, upon the contingency of the ship not getting freight.

But it is contended, although the original assumption may not have been revoked, it was not complied with, according to the terms in which it was expressed, and therefore, was not binding to the defendant. And on this ground, so far as relates to the bills in this count, the court is of opinion, that the defence is supported on legal principles. The assumption is to guaranty bills, "drawn on Taber & Son, Portland, or me, at 60 days sight." These bills are drawn on Taber and Son, Portland, payable in New York. Now, although we cannot see why an honorable discharge of his contract did not prompt the defendant to accept these bills for the

honor of the drawer, when they were returned to New York for non-acceptance, yet as it is our duty to construe the contracts of individuals, and not to make them, we are of opinion, that these bills were not drawn in conformity to the assumption of the defendant. Merchants well understand the difference between drawing bills upon a specified place, and drawing them upon one place, payable in another. We are not to inquire into the
*145] *reasons which govern them in forming such contracts, or competent to judge, whether any other mode of complying with a contract may not be as convenient to them, as that which they have consented to be governed by. But it will be perceived, that this opinion can only affect the right of the plaintiff to recover the damages paid by him on the return of those bills, and has no effect in this view of the case, upon the plaintiff's right to recover upon the original guarantee of this debt; when legally demanded.

It is, however, contended, that the election to draw in this form, was conclusive upon the plaintiff, and he could not afterwards resort to a draft upon the defendant himself. And this brings up the question upon the plaintiff's right to recover upon the second count. This count is on a refusal to pay a bill drawn on Barker himself, for the exact balance of the invoice of the cotton, after crediting the defendant with the bills that he had paid. This bill was not negotiated and returned, but drawn in favor of an agent of the plaintiff, and of course, no damages are demanded on it. The defence set up to this count, to wit, that the plaintiff, by making his election to draw upon Taber & Son, is thereby precluded from resorting to Barker, we think, cannot be sustained. It is in vain that we look for any passage in the correspondence, that holds out this idea, nor is there anything in the nature of the transaction, that will sanction this court in attaching such a restriction to Barker's undertaking. It was, in effect, a promise to
*146] furnish the funds necessary to carry into execution this adventure. *Had it contained a mere guarantee of bills to be drawn on Taber & Son, there might have been some ground for this argument; but where the defendant confers the right to draw upon himself, and, in fact, clearly recommends a preference to such bills, he makes himself the paymaster, and we consider it an original substantive undertaking. In this view of the case, the law quoted on the subject of securityship undertakings cannot be applicable, and we think the plaintiff ought to recover on this count.

There are other items in the plaintiff's demand, on which, as the case will be sent back, it is necessary to express an opinion. The first is the charge of about $1200 for services and expenses incident to this agency; the other is the charge of interest. The first of these items we are clearly of opinion the plaintiff is entitled to, and that it is recoverable, under the counts for services performed, and money expended in the discharge of this undertaking. And as to the second, we are equally satisfied, that interest is recoverable under the second count, in nature of damages.

But some difficulty has arisen on the question, whether the plaintiff is entitled to recover the interest of New Orleans, or of New York. The former the bill of exceptions states to be ten per cent.; the latter, seven per cent. Where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place. Had this bill on Barker been negotiated, and returned, under

protest, the holder would have been entitled to demand of the drawer the interest of *New Orleans, and thus, incidentally, at least, the defendant would have been compelled to pay the plaintiff that interest. [*147
But it may be contended, that as the letter of the 26th appears to restrict the order for this purchase, so as to make it depend on the condition of the practicability of negotiating bills on New York, the undertaking of Barker was limited to payments to be made in New York. On this point, the court are of opinion, that, even though we attach this condition to Barker's undertaking, the liability to replace the money at New Orleans still continued; and any necessary loss on the bills, on account of the difference of exchange, would have been chargeable to the defendant; but we think, further, that the restrictive words in the letter alluded to, may justly be considered as enlarged into a general order, in his subsequent correspondence. The court is, therefore, of opinion, that as the money was advanced at New Orleans, and to be replaced at New Orleans, the plaintiff may claim the legal interest at that place.

This court is of opinion, that there is error in the judgment below, and that it must be reversed. But this court can do no more than order a *venire facias de novo*.

An attempt has been made to obtain from this court a mandate to the circuit court, to enter a judgment in conformity to an agreement of parties entered on the transcript, which states the amount to be adjudged to the plaintiff upon several alternatives. But we are of opinion, that this court can take no notice of that consent; the verdict presents no alternative; *and the consent entered on the transcript, or on the minutes of the circuit court, forms no part of the record brought up by this writ of [*148
error. Nor will this court be led into the exercise of a power so nearly approaching the province of a jury in assessing damages.

Judgment reversed.(a)

(a) Although contracts of guaranty are very familiar in the practice of the commercial world, comparatively few cases have been subjected to judicial decision in the English and American tribunals. It may not, however, be without use to the learned reader, to collect the principal adjudications on this subject, especially, as no attempt has yet been made to bring them before the public in a connected view.

Contracts of guaranty, like all commercial contracts, have received a liberal interpretation, in furtherance of the intention of the parties. But at the same time, they are not extended beyond the obvious import of the terms in their reasonable interpretation. Where, in a letter of introduction of a mercantile firm, the defendants used the following terms—"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," it was held, that the letter did not import a guarantee of such engagements; and that parol evidence was not admissible, to explain the terms so as to affect their import, with regard to the supposed guaranty. Russell *v.* Clarke, 3 Dall. 415; s. c. 7 Cranch 69. So, where B. wrote to C., "as I understand Messrs. A. & Co. have given you an order for rigging, &c., which will amount to 4000*l.* I can assure you, from what I know of A.'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no *objection to guaranty you against any loss, from [*149
giving them this credit;" it was held, that the writing did not import a perfect and conclusive guarantee, but only a proposition or overture tending to a guarantee;

and that to make it a guarantee, B. ought to have had notice, that it was so regarded, and meant to be accepted, or there should have been a subsequent consent on his part, to convert it into a conclusive guarantee. McIver *v.* Richardson, 1 M. & S. 557. But it is said, that the words are to be taken as strongly against the party giving the guarantee, as the sense of them will admit of. Therefore, where the defendant wrote to the plaintiff, "I hereby promise to be responsible to T. M. (the plaintiff) for any goods he hath or may supply my brother W. P. to the amount of 100*l.*," it was held, that this was a standing or continuing guarantee to the extent of 100*l.*, which might at any time become due, for goods supplied, until the credit was recalled. At the time the letter was written, goods had been supplied, to the amount of 66*l.*, and afterwards, another parcel was delivered, amounting, together with the former, to 124*l.*, all which had been paid for, and the sum now in dispute (and which by the judgment of the court, the plaintiff recovered), was for a further supply to W. P. Mason *v.* Pritchard, 2 Camp. 436; s. c. 12 East 227. So, where the defendant wrote to the plaintiff, "I have been applied to by my brother, W. W., to be bound to you for any debts he may contract, not to exceed 100*l.* (with you), for goods necessary in his business as a jeweller; I have wrote to say, by this declaration, I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100*l.*, after this date;" Lord Ellenborough said, that the defendant was answerable for any debt not exceeding 100*l.*, which W. W. might, from time to time, contract with the plaintiff, in the way of business; that the guarantee was not confined to one instance, but applied to debts successively renewed; and that if a party meant to be a surety only for a single dealing, he should say so. Merle *v.* Wells, 2 Camp. 413. So, where the defendant wrote,
*150] "I hereby undertake and engage to be answerable to the extent of *300*l.* for any tallow or soap supplied by Mr. B. (the plaintiff) to F. & B., provided they shall neglect to pay in due time;" Lord Ellenborough held it to be a continuing guarantee, while the parties continued to deal on the footing established when it was given; but that goods supplied, after new arrangements were made, were not within the scope of the guarantee; and he relied on the word "any," without which, he thought it might, perhaps, be confined to one dealing to the amount of 300*l.* Baston *v.* Bennett, 3 Camp. 220. But in debt on a bond entered into by A. and B. with the plaintiffs, reciting, that it was to enable A. to carry on his trade, and conditioned for the payment of all such sum or sums of money, not exceeding 3000*l.*, with lawful interest, which should or might, at any time or times thereafter, be advanced and lent by the plaintiffs to A., or paid to his use, by his order and direction," it was held, that it was a guarantee for the definite amount of 3000*l.*, and when an advance was made to that amount, the guarantee became *functus officio*, and was not a continuing guarantee. Kirby *v.* Duke of Marlborough, 2 M. & S. 18. And, where the defendants wrote to the plaintiff, "If W. & B., our sons, wish to take goods of you, on credit, we are willing to lend our names as security for any amount they may wish," the court held, that it was not a continuing guarantee, but was confined to the first parcel of goods sold to W. & B.; that it gave an unlimited credit as to amount, but was silent as to the continuance of the credit to future sales, and *expressio unius, est exclusio alterius.* Rogers *v.* Warner, 8 Johns. 119. And in a very recent case, where the defendants wrote to the plaintiff, "our friends and connections, S. & H. H., contemplate, under certain circumstances, making a considerable purchase of goods on the continent, and for that purpose, are about to send an agent to Europe; they wished a letter of credit from us, to increase their means and to be used or not as circumstances may require; as we are now indebted to you, and have no funds on the continent of Europe, we told them, we could not give
*151] a positive letter of credit for any sum, but that we had no doubt, you would *be disposed to furnish them with funds under our guarantee; the object of the present letter is, therefore, to request you, if convenient, to furnish them with any sum they may want, as far as $50,000, say, 50,000 dollars; they will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it; we shall hold ourselves answerable to you for the amount;" it was held, that this was a guarantee for a single advance to the amount of $50,000, and not a continuing

guarantee, *toties quoties*, to that amount, and that as soon as $50,000 were once advanced, the guarantee ceased to operate upon future advances, although by intermediate payments, the sum due at the time of such new advances, was below $50,000. Cremer *v.* Higginson, 1 Mason 323.[1] Where A. requested B. to give C. any assistance in the purchase of goods, by letter, or otherwise, adding, "you may consider me accountable with him to you, for any contract he may make; it was held, that A. was to be considered as a guarantor, and not a joint-debtor, and that a contract by C. with B. to pay him a premium for guarantying a contract of C. with a third person was within A.'s promise. Meade *v.* McDowell, 5 Binn. 195.

A guarantee to the plaintiffs, "that if they will credit D. a sum not exceeding $500, in case he shall not pay it in twelve months, the guarantor will pay it," does not imply a condition that the plaintiff may not advance more than $500, if the additional advance be on the general credit of D. Sturges *v.* Robins, 7 Mass. 301.

A guarantee, "we, jointly and severally, promise to guarantee a payment of 500*l.* at five per cent. say, by a bill drawn on G. H., by D. & F. for 500*l.*, dated 10th of January 1808," is to be construed as a general guarantee of the bill, not (as usual) a guarantee that the acceptor should pay, but a contract that either the drawer or the acceptor should pay. Philips *v.* Astling, 2 Taunt. 206. But upon such a guarantee (if it is to be construed as limiting the bill to the specific sum of 500*l.*), the guarantor would not be liable to the extent even of the 500*l.*, if the bill be drawn *for a larger sum; [*152
for the terms of the contract must be strictly complied with. Ibid. And a guarantee to A., for goods to be sold by him, on credit, to B., will not inure to the benefit of a third person, who shall actually furnish the goods to B., although at the request of A., for a surety is not to be held beyond the scope of his own engagement. Robbins *v.* Bingham, 4 Johns. 476; Walsh *v.* Bailie, 10 Ibid. 180. And see 1 M. & S. 557. So, if a letter of credit be addressed to A., and part of the goods are delivered by A., and part by C. & D., the latter cannot recover on the guarantee. Robbins *v.* Bingham, 4 Johns. 476. So, a letter of guaranty, addressed to J. & A. N., by mistake, for J. & J. N., will not cover advances made by the latter, on the faith of the letter. Grant *v.* Naylor, 4 Cranch 224.

Many cases analogous to this have been decided. As, where A. became surety, by bond, that B. should truly account to C. for all sums of money received by B., for C.'s use, and afterwards, B. took a partner, with C.'s knowledge, it was ruled, that the guarantee did not extend to sums received by B. and his partner, for C.'s use, after the formation of the partnership. Bellairs *v.* Elsworth, 3 Camp. 53. So, a bond conditioned to repay all sums advanced by five persons, or any of them, was held not to extend to sums advanced, after the decease of one of them, by the four survivors, the four then acting as bankers. Weston *v.* Barton, 4 Taunt. 674. And to the same effect will be found the following cases: Arlington *v.* Merritt, 2 Saund. 44; Wrightly *v.* Russell, 2 W. Bl. 934; s. c. 3 Wils. 539; Barker *v.* Parker, 1 T. R. 287; Myers *v.* Edge, 7 Ibid. 254; Strange *v.* Lee, 3 East 484. But if a bond be given to trustees, conditioned for the faithful service of a person, during his continuance in the service of a fluctuating or successive body of persons, not incorporated, as the Globe Insurance Company, it will extend to the whole time the party is in the service of such company, although the members may be continually changing. Metcalf *v.* Bruin, 12 East 400. An agent, in England, for merchants, the vendors of goods, in Russia, who guaranties "that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment *shall arise upon the importation thereof, or that, in default, the conse- [*153
quence shall rest with the sellers," makes himself personally responsible to the vendee. Readhead *v.* Cator, 1 Stark. 14. An impediment arising from non-compliance with the navigation act, is an impediment within the terms of the guarantee. And such a guarantee is not within the statute of frauds, if the terms of the agreement can be collected from the written correspondence between the parties. Ibid. A.

[1] Aldricks *v* Higgins, 16 S. & R. 212; Anderson *v.* Blakely, 2 W. & S. 237.

engages to guaranty the amount of goods supplied by B. to C., provided 18 months credit be given; if B. give credit for 12 months only, he is not entitled, at the expiration of six months more, to call upon A. on his guarantee. But B. having, after the commencement of the action, delivered an invoice, from which it appeared that credit was given for 12 months only, is at liberty to show that this was a mistake, and that, in fact, 18 months credit was given. Bacon *v.* Chesney, 1 Stark. 192.

In cases of guaranty, it has been made a question, whether the notice ought to be given to the guarantor of the advances made, and of the non-payment by the debtor. In Oxley *v.* Young, 2 H. Bl. 613, where the defendant, upon an undertaking of D. to indemnify him, guarantied to the plaintiff, an order sent to him by A. for certain goods, and the plaintiff informed the defendant, that the goods were preparing, but did not give him notice of the actual shipment, the court thought that the right to sue on the guarantee attached, when the order was put in a train for execution, subject to its being actually executed; and that the notice of such intended execution was sufficient; and the court further thought, that that right could not be divested, even by a wilful neglect of the plaintiff, though, perhaps, he might be liable to an action on the case, at the suit of the defendant, if any such neglect could be shown, contrary to all good faith, and by which a loss had been incurred. In Peel *v.* Tatlock, 1 Bos. & Pul. 419, Chief Justice Eyre appears to have been of opinion, that at least, in guarantees for good behavior, notice of any embezzlement or fraud ought to be given, within a reasonable time; but the case finally went off upon narrower grounds. In *Russell *v.*
*154] Clarke, 7 Cranch 69, 92, it was distinctly held by the court, that if the contract in that case had been a guarantee, it would certainly have been the duty of the plaintiff, to have given immediate notice to the defendant of the extent of his engagement. And the same doctrine was asserted in the circuit court, in Cremer *v.* Higginson, already cited.[1]

Where there is a guarantee of advances or supplies, it is necessary, in the first instance, to make a demand of payment from the original debtor, or, at least, to use reasonable diligence in endeavoring to make such demand, and notice of non-payment must be given in a reasonable time to the guarantor. This may be collected as the general result of the cases on this subject. But where an agent, in England, for merchants, the vendors of goods, in Russia, who guaranties "that the shipments shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that, in default, the consequence shall rest with the sellers," it was held, that the agent made himself personally responsible to the vendee, and that in a declaration upon such a guarantee, against the agent, it is unnecessary to allege any application for indemnity to the principals. Readhead *v.* Cator, 1 Stark. 14. And it is not necessary to sue the debtor, before the right attaches to sue on the guarantee. Bank of New York *v.* Livingston, 2 Johns. Cas. 409. And where the guarantee is of a note or bill, payable at a future time, although it is not necessary to pursue the same strictness, in order to charge a guarantor, as to charge the drawer; yet a due demand and notice of non-payment ought to be given to the drawer and guarantor; and if the necessary steps are not taken to obtain payment from the parties who are liable on the bill, and solvent, the guarantor is discharged. Phillips *v.* Astling, 2 Taunt. 206; Warrington *v.* Furber, 8 East 245. But it is a sufficient excuse for not making a demand, that the debtor cannot be found, or that he is insolvent. Warrington *v.* Furber, 8 East 245; Phillips *v.* Astling, 2 Taunt. 206. And if there be gross *laches* in
*155] securing the debt (Duval *v.* Trask, 13 Mass. 154; People *v.* Jansen, *7 Johns. 332; Hunt *v.* United States, 1 Gallis. 34); or if the creditor undertake to do anything whereby to lessen or postpone the responsibility of the debtor (Commissioners of Berks *v.* Ross, 3 Binn. 520); or if the right of the parties be altered, as, if any new debt have been incurred; or if the demand have been enlarged, to the prejudice of the guarantor (Peel *v.* Tatlock, 1 Bos. & Pul. 419; King *v.* Baldwin, 2 Johns. Ch. 554; Boultbee *v.* Stubbs, 18 Ves. 20); or if the creditor give time to his debtor, without the

[1] Kellogg *v.* Stockton, 29 Penn. St. 460.

knowledge of the guarantor (Skip *v.* Huey, 3 Atk. 91; 6 Ves. 809, note *a;* Rees *v.* Berrington, 2 Ves. jr. 540; Nisbet *v.* Smith, 2 Bro. C. C. 579; Moore *v.* Bowmaker, 6 Taunt. 379; s. c. 2 Marsh. 81); or if, upon a guarantee of a partnership debt, the partnership debt is discharged, by carrying the proportions of each partner to his separate account, without any notice to the guarantor (Cremer *v.* Higginson, 1 Mason 323); or if there be a fraudulent concealment, to the injury of the guarantor (Oxley *v.* Young, 2 H. Bl. 613, *semble*, EYRE, C. J.); in all these cases, the guarantor is discharged. And it has been held, in a recent case, that if the holder of a note is requested by the surety (being one of the joint-makers), to proceed without delay, and collect the money of the principal, who is solvent, and he omits to do it, until the principal becomes insolvent, the surety will be exonerated at law. (Paine *v.* Packard, 13 Johns. 174.) But this decision has been questioned by very high authority. (King *v.* Baldwin, 2 Johns. Ch. 563, 564.) Where there are several debts due, some of which are guarantied and some not, and payments are made by one debtor, the same general rule applies in this, as in other cases, that where the debtor makes no application of any payment, the creditor may apply it to any account he pleases. (Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Dawson *v.* Remnant, 6 Esp. 26; Field *v.* Holland, 6 Cranch 3; Hutchinson *v.* Bell, 1 Taunt. 558; Sturgis *v.* Robbins, 7 Mass. 301.)

Pothier, in his Treatise on Obligations, has discussed with great learning and ingenuity, the whole doctrine of suretyship and guarantee. *Traité des* **Obligations*, part 2, ch. 6, § 1 to 8. [*156 Among other things, he remarks, that care should be taken not to take for a promise to become surety, what one says or writes, unless there be a well-marked intention to do so. Therefore, he adds, if I wrote or said to you, that a man who asked you to lend him money, was solvent, this could not be taken for an agreement to become a surety, for I might well have no other intention than to inform you of what I believed to be the case, and not to bind myself. On this principle, it was adjudged, in a case reported in Papon, X. 4, 12, that these words in a letter to the keeper of a boarding-house, "A. B. intends to send his son to board with you; he is an honest man, and will pay you well," did not include an obligation. On the same principle, if I accompany a person to a woollen-draper's, where he buys cloth, the draper ought not to conclude, that I am security for him. The following distinctions and principles stated by this learned writer, seem worthy of notice, in reference to the subject of this note. 1. Where the surety has expressed the sum and cause for which he became surety, his obligation does not extend beyond the sum and cause expressed. As, if one become bound for the principal debt, he will not be liable for interest. 2. On the other hand, when the words of the suretyship are general and indeterminate, the surety is presumed to have bound himself for all the obligations of the debtor, resulting from the contract to which he acceded; and therefore, a surety, in general terms, is bound not only for the principal sum, but for interest; and not only for the interest due *ex rei natura*, but for that occasioned by the delay of the debtor. And this is conformable to the doctrine of the Roman law. 3. And in general, however unlimited the suretyship may be, it does not extend to the penalties to which the debtor may be condemned *officio judicis propter suam contumaciam.* 4. The obligation of suretyship is extinguished, by an extinction of the principal debt; by the creditor's disabling himself, by his own act, from ceding his action against his principal debtor, which the surety has an interest in having assigned to him; by the creditor's accepting in payment property, the title to which afterwards proves to be invalid, at least, if the principal debtor in *the meantime becomes insolvent. 5. And the principal debt may be extinguished, not only by payment, or a set-off, or release, but also by a [*157 novation of the debt, that is, by accepting a new obligation in discharge of the old one. 6. Pothier then puts the case, whether the surety be discharged, by the creditor's granting to the debtor a delay for the payment, and agrees with Vinnius, in holding the negative, for he says, the simple delay, not making the debt appear discharged, deprives the surety of no means of providing for his own safety, and the surety cannot pretend, that the delay prejudices him, since he himself derives an advantage from it. 7. According to the principles of the ancient civil law, the creditor could demand payment

from the surety, without first resorting for payment to the principal debtor. But Justinian altered that rule, and gave to the surety an exception or plea, which is called an exception of discussion, or of order, by which he may require the creditor to proceed, in the first instance, against the principal debtor. And this rule, with some exceptions, was adopted into the ancient jurisprudence of France. But at no time, either in the civil or French law, did the bringing of a suit by the creditor, against his principal debtor, discharge the surety, who, therefore, remained bound, until payment. And the omission of the creditor to institute a suit of discussion, against the principal debtor, notwithstanding a request of the surety, until after the debtor becomes insolvent, is not thought to discharge the surety. But if a surety had contracted only to pay what the creditor could not obtain from the principal debtor, an omission to sue, for a long time, and until after an insolvency, may discharge the surety. 8. To entitle the surety, after payment, to recover over against the principal debtor, it is necessary, that the surety should not have neglected, by his own fault, to plead any proper plea in bar of the creditor ; that the payment should have been valid, and should have discharged the principal debtor ; and that the principal debtor should not have paid a second time, by the fault of the surety. See Pothier, *Traité des Obligations*, part 2, ch. 6, § 1 to 8. The Code Napoléon, or civil code, adopts, for the most
*158] part, the *doctrines stated in Pothier. Liv. 3, tit. 14, art. 2011 to 2043. It declares, that a guarantee or suretyship (*cautionnement*) ought not to be presumed; it ought to be express; and ought not to be extended beyond the limits of the contract itself. An indefinite guarantee of a principal obligation extends to all the accessories of the debt. The guarantor is not bound to pay, but upon the default of the debtor, who ought, in the first instance, to be sued by discussion, against his goods. In a suit against the guarantor, he may enter the same exceptions to the debt (except they are purely personal) as the principal debtor may. The surety is discharged, when, by the act of the creditor, the guarantor cannot have the benefit of a substitution to the rights, hypothecation and privileges of the creditor. A simple postponement of the time, granted by the creditor to the debtor, does not discharge the guarantor, who may, however, in that case, pursue the debtor to enforce payment. Code Napoléon, *ubi supra.*

See also, the Digest of the Civil Laws of Louisiana, p. 429. Erskine's Institutes of the Laws of Scotland, 10th ed., 326. The coincidences between the doctrines of the common law, and those of the civil law, and the codes derived from it, are very striking; and the differences in particular cases, seem to result rather from the difference of the remedies of guarantors and sureties, under the various systems (which, of course, require a corresponding change as to their liability), than from any theoretical opposition in principles.