court be reversed and annulled, and that the cause be rendered to the said circuit court, with directions to award a *venire facias de novo.*(*a*)[1]

---

*520] *LENOX *et al. v.* PROUT.

Indorsement.—Answer in chancery.

The indorser of a promissory note, who has been charged by due notice of the default of the maker, is not entitled to the protection of a court of equity, as a surety; the holder may proceed against either party, at his pleasure, and does not discharge the indorser, by not issuing, or by countermanding, an execution against the maker.[2]

By the statute of Maryland, of 1763, ch. 23, § 8, which is, perhaps, only declaratory of the common law, an indorser has a right to pay the amount of the note or bill to the holder, and to be subrogated to all his rights, by obtaining an assignment of the holder's judgment against the maker.

The answer of a defendant in chancery, though he may be interested to the whole amount in controversy, is conclusive evidence, if uncontradicted by the testimony of any witness in the cause.[3]

Appeal from a decree of the Circuit Court for the district of Columbia. The facts of this case were as follows: William Prout, the plaintiff in the court below, on the 29th of July 1812, indorsed, without any consideration, a promissory note made by Lewis Deblois, in his favor, for $4400, payable in thirty days after date. This note was discounted by the defendants, as trustees for the late bank of the United States, for the accommodation and use of the maker, and not being paid, an action was brought against him, and another against the indorser, in the name of the trustees, and judgment rendered therein, in the same circuit court, in the term of December 1813.

*521] In the April following, Prout, fearful of Deblois' *failure, called on the defendant Davidson, who was agent of the other defendants, and requested him to issue a *fieri facias* on the judgment against Deblois, promising to show the marshal property on which to levy. On the 16th of April, or thereabouts, Davidson directed an execution of that kind to issue, and Prout, on being apprised thereof, offered to point out to the marshal property of the defendant, and to indemnify him for taking and selling the same. But before anything further was done, Davidson countermanded this execution, and on the 2d of May 1814, or thereabouts, a *ca. sa.* was issued against Deblois, by the clerk, through mistake, and without any order of Davidson or the other defendants. This was served on Deblois on the 10th of May, who afterwards took the benefit of the insolvent laws in force within the district of Columbia, the effect of which was, to divide all his property among his creditors, whose demands were very considerable. It appeared, from the evidence, probable, that if the *fieri facias* had been prosecuted to effect, a great part of the money due on the judgment against Deblois, which had been recovered on the note indorsed by Prout, would have been raised, and the latter, in that case, would have had to pay but a

---

(*a*) See Appendix, Note II.

[1] For a further decision in this case, see 3 W. C. C. 443, affirmed in this court, 7 Wheat. 356.

[2] S. P. Sterling *v.* Marietta and Susquehanna Trading Co., 11 S. & R. 179; Beardsley *v.* Warner, 6 Wend. 610; s. c. 8 Id. 194; Rose *v.* Jones, 22 Wall. 576.

[3] Higbie *v.* Hopkins, 1 W. C. C. 230.

small sum on the one against him. But as matters stood, little or nothing was expected from the estate of Deblois; and of course, no part of the judgment against Prout could be satisfied in that way, but the whole still remained due and unpaid. The *fieri facias* appeared to have been countermanded *the day after it was received by the marshal, of which Prout had notice soon after. [*522

On these facts, the circuit court decreed, that the appellants should be perpetually enjoined from proceeding at law on the judgment which they had obtained against Prout, and that they should also pay him his costs of suit, to be taxed. From this decree, the defendants below appealed to this court.

March 6th. *Key*, for the appellants, argued, that this being a negotiable instrument, the liability of the plaintiff below, after notice of non-payment by the maker, was no longer conditional, and depending on the default of the maker; so that the holders of the note could proceed agains him alone, without taking any steps against the maker. That, therefore, they were not bound to issue the *fieri facias* against Deblois, on the application of the plaintiff. That having issued it, they had a right to countermand it, provided they did not place the plaintiff in a worse situation than he was in, before it was issued. That the *fi. fa.* was not countermanded, with any view to injure the plaintiff, but because the agent had ascertained that the trustees of the bank were not bound to issue the *fi. fa.*, in the first instance, and that it was neither right nor safe for the bank to give thereby a preference to the plaintiff over other indorsers of Deblois. And that the plaintiff was not placed in a worse situation by countermanding the *fi. fa.*; but had it in his power, under the act of assembly of Maryland, of 1763, ch. 23, to tender the amount of the note to the agent of the bank and obtain an assignment of the judgment, *by which he might have secured himself, by levying on the property still in the possession of Deblois. [*523

Jones and *Law*, for the respondent and plaintiff below, argued, that the plaintiff being a mere gratuitous surety, was entitled to the protection of a court of equity. That even in a court of law, it had been determined, that where the holder of a bill gave an indulgence to the acceptor, after judgment, the indorser was discharged. *English* v. *Darley*, 2 Bos. & Pul. 61. That of all forms of suretyship, that by indorsement emphatically entitles the surety to protection. The relative obligations between the holder and indorser require the former, in the first instance, to look to the drawer for payment, and to give notice of his default to the indorser. The relief given by courts of equity to sureties on a bond, is derived from the common-law principles in favor of indorsers. A surety has a right to come into equity, and compel the creditor to proceed against the principal debtor. *Nisbet* v. *Smith*, 2 Bro. C. C. 573; *Rees* v. *Berrington*, 3 Ves. jr. 540. If the party for whose benefit a contract is made prevent its execution, the contract is rescinded. The contract between the holder and indorser is, that the former shall seek payment of the maker, before he resorts to the indorser. If he disable the maker from paying, the indorser is discharged. If the holder of the bill or note give time to the acceptor or maker, in prejudice of

the indorsers, without *their concurrence, they will be discharged from all liability, although they may have been previously charged by notice of non-payment. Chitty on Bills 300 (Am. ed. 1817). The doctrine of equity, that a surety is discharged by any indulgence shown to the principal by the creditor, in prejudice of the surety, is applicable to every species of suretyship, whether absolute or collateral; and whether the liability of the co-obligors, sureties or indorsers, has been fixed by judgment or not. *Nisbet* v. *Smith*, 2 Bro. C. C. 578; *Rees* v. *Berrington*, 2 Ves. jr. 540; *Law* v. *East India Co.*, 14 Ves. 824. If giving time, staying execution, or taking new security, in consideration of indulgence, releases the surety, how much more ought he to be discharged by the countermand of an execution on which the money might have been levied. The statute of Maryland is only in affirmance of the pre-existing rules of equity. Nor does it apply to this case; the issuing of the *fieri facias*, at the plaintiff's solicitation, being a waiver of all right to demand a compliance with the act.

Key, in reply, insisted, that a court of equity would not relieve in such a case as this, even if the plaintiff was to be considered as a gratuitous surety. That the cases cited of co-obligors, or sureties in bonds, were not pertinent. This is a commercial contract. The maker of the note having made default, and the indorser having had legal notice of non-payment, becomes liable absolutely. His engagement ceases to be collateral and contingent, and he is converted into a principal debtor. The punctuality of
*525] *commercial dealings, and the preservation of paper credit, requires that it should be so. An indulgence given to the maker can no more discharge the indorser, when thus fixed, than an indulgence to him will discharge the maker. The law does not require that the holder should take any active measures of diligence; nor can a single case be found, where a court of equity has compelled him to take any such measures.

March 9th, 1818. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—The only ground on which this decree can be sustained is, that the countermand by Davidson of the *fieri facias* which had issued on the judgment against Deblois, absolved the complainant from all liability on the one which had been recovered against him on the same note; and this has been likened to certain cases between principals and sureties: but it does not fall within any of the rules which it has been thought proper to adopt for the protection of the latter. Although the original undertaking of an indorser of a promissory note be contingent, and he cannot be charged, without timely notice of non-payment by the maker, yet, when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the indorser; or if he issues an execution, he is at liberty to make choice of the one which he thinks will be
*526] *most beneficial to himself, without any consultation whatever with the indorser on the subject; nor ought he to be restrained, by any fear of exonerating the indorser, from countermanding the service of any execution which he may have issued, and proceeding immediately, if he chooses, on the judgment against the indorser. And the reason is obvious;

for by the judgment, they have both become principal debtors, and if the indorser suffer any injury by the negligence of the judgment-creditor, it is clearly his own fault, it being his duty to pay the money, in which case, he may take under his own direction the judgment obtained against the maker. By an act of Maryland, it seems expressly provided, which is, perhaps, only declaratory of the common law, that an indorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note, and obtain an assignment of it.

But, it is alleged, that in this case, there was a positive agreement on the part of Mr. Davidson with Mr. Prout, to issue a *fieri facias*, and proceed therein, and that by not doing so, the latter was thrown off his guard, and lost the opportunity of an indemnity out of the estate of Deblois. Without deciding what might have been the effect of such an agreement, it is sufficient to say, that there is no evidence of it. Mr. Davidson expressly denies that he agreed with the complainant, or even promised him to issue a *fieri facias* against the estate of Deblois, and that he went no further than to say, that he would consult his lawyer. Not being able immediately to find his lawyer, *and not knowing whether some advantage might not be taken, if he refused to comply with the complainant's request, he directed a *fieri facias* to be issued, which, for reasons assigned by him, was afterwards recalled. To this answer of Mr. Davidson, it is supposed by the complainant's counsel, no credit is due, because his commission on the sum in question gave him an interest in the controversy, and he might be answerable over to his principal for his conduct in this business. *Non constat*, that he would be entitled to any commission on this sum. It is quite as probable, he was acting under a fixed salary, which would not be affected by the event of the suit; and as to his responsibility, none could exist, if he had acted within the scope of his authority; and if he had transcended his power as agent, it would hardly be fair, that his constituents should suffer by his act. But admitting both objections, and they will not affect the verity of his answer; for if he had a direct interest in the event of the suit, and to the extent of the whole sum in controversy, still, his denial of a fact directly alleged in the bill, would be entitled to full credit, according to the rules of a court of equity, where not a single witness has been produced to disprove it, and where the circumstances of the case, and his own conduct, render his account a very probable one. If he had not been made a defendant, which was not a very correct course, he might have been examined as a witness for the other defendant, or for the complainant; but having been made a defendant, and being the only one acquainted with the transaction, the court is of *opinion, that his answer, uncontradicted as it is, is proof against the complainant of the non-existence of any such agreement as he alleges was made between them in relation to the issuing of the *fieri facias*.

[*527

[*528

Nor would Mr. Prout have suffered by the withdrawing of the *fieri facias*, which is the burden of his complaint, if he had done what he might and ought to have done. He had sufficient notice of this fact, before the *ca. sa.* was served, to have called and paid the judgment against him, and thus have obtained a control over the one which had been recovered against Deblois. If he had done this, instead of censuring the conduct of Davidson, he might have issued a *fieri facias* himself, and secured a property, which, if it has not been applied towards his relief, is owing more to his own neg-

lect, in not paying, in time, a debt justly due from himself, than to any other cause whatever. A person so regardless of his interest, as well as duty, as Mr. Prout has been, who has not only refused to pay a note indorsed by him, when due, but has put the holders to the trouble, delay and expense, of proceeding to judgment against him, has but little right to be dissatisfied, if a court of equity shall not think itself bound, by any extraordinary exertions of its powers, to extricate him from a difficulty and loss which he might so easily have avoided.

The decree of the circuit court is reversed, and the complainant's bill must be dismissed, with the costs of that court, to be paid by the complainant to the defendant.

Decree reversed.(*a*)

---

*529] *Burton's Lessee *v.* Williams *et al.*

Lands in Tennessee.

The state of North Carolina, by her act of cession of the western lands, of 1789, ch. 3, recited in the act of congress of 1790, ch. 33, accepting that cession, and by her act of 1803, ch. 3, ceding to Tennessee the right to issue grants, has parted with her right to issue grants for lands within the state of Tennessee, upon entries made before the cession.

But, it seems, that the holder of such a grant may resort to the equity jurisdiction of the United States courts for relief.

Error to the Circuit Court of East Tennessee. This was an action of ejectment, brought by the plaintiff in error, to recover the possession of 5000 acres of land, lying in Maury county, in the state of Tennessee, and granted to the lessor of the plaintiff, by the state of North Carolina, on the 14th of July 1812.

The grant was founded on an entry, made on the 27th of October 1783, in the land-office of North Carolina, commonly called John Armstrong's office; on a warrant of survey, issued from the same office, on the 10th of July 1784; and on a survey made on the 26th of February 1812, under an act of the legislature of North Carolina, passed in 1811. The lands lay in that part of Tennessee in which the disposition of the vacant and unappropriated lands was reserved to the United States, by the act of congress of
*530] the 18th of April 1806, ch. 31. This title was offered *in evidence by the plaintiff, at the trial, and was objected to by the defendant, who claimed under a grant from Tennessee. The evidence was rejected by the court below; on which the plaintiff excepted, and the cause was brought by writ of error to this court.

March 2d. *Harper*, for the plaintiff, argued, that the state of North Carolina, under the conditions of her act of 1789, ch. 3, for ceding the western lands to the United States, had a right to perfect grants on all such entries as this, at any time after the cession, and not merely within the time which was limited by the then existing laws of North Carolina; the conditions of the cession being recited and confirmed in the act of congress of the 2d of April 1790, ch. 33, accepting that cession. That the act of North Carolina of 1803, ch. 3, for ceding this right to the state of Tennessee, with

---

(*a*) See note to Lanusse *v.* Barker, *ante*, 148.