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We are of opinion, that there is error in the judgment of the Court below, in refusing to let the grant be read to the jury.

Judgment reversed.

[SURETY.]

MILLER V. STEWART and others.

The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms.

Where a bond was given, conditioned for the faithful performance of the duties of the office of Deputy Collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties, *held*, that the surety was discharged from his responsibility for moneys subsequently collected by his principal.

THIS was a case certified from the Circuit Court for the District of New-Jersey, upon a certificate of a division of opinion of the Judges of that Court. It was an action of debt upon bond, and the material facts disclosed in the pleadings were, that the plaintiff, Ephraim Miller, being Collector of the direct taxes and internal duties for the fifth Collection District of New-Jersey, by an instrument of appointment, under seal, and pursuant to law, appointed Stephen C. Ustick his Deputy Collector, for eight townships within his

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district. Upon that occasion, the defendant, Thomas Stewart, and certain other persons, as sureties, executed a writing obligatory, with Ustick, to Miller, in the penalty of 14,000 dollars, upon the following condition, viz. "The condition of the foregoing obligation is such, whereas Ephraim Miller, Esquire, Collector, as aforesaid, hath, by authority vested in him by the laws of the United States, appointed the said Stephen B. Ustick, Deputy Collector of direct taxes and internal duties, in the fifth Collection District of New-Jersey, for the townships of Nottingham, Chesterfield, Mansfield, Springfield, New-Hanover, Washington, Little Egg Harbour, and Burlington, in the county of Burlington; now, therefore, if the said Stephen C. Ustick, has truly and faithfully discharged, and shall continue truly and faithfully to discharge, the duties of *the said appointment*, according to law, and shall particularly faithfully collect and pay, according to law, all money assessed upon said townships, then the above obligation to be void, and otherwise, shall abide and remain in full force and virtue." After the execution of this bond, and before Ustick had, in any manner, acted under this appointment, or collected or received any moneys under the same, Miller, with the assent of Ustick, but without the assent or knowledge of the defendant, Stewart, altered the same instrument of appointment, by interlining in it another township, called, "Willingborough," thereby making it an appointment for *nine* instead of *eight* townships; and under the appointment, so altered, Ustick received, within the original

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eight townships, certain moneys, as taxes, which he omitted to account for, and this omission was the breach stated in the declaration. The question for the opinion of the Court, upon the special pleadings and demurrer, was, whether the alteration so made, without the consent of Stewart, discharged him from any responsibility for the moneys so subsequently collected by Ustick.

Mr. *Wood*, for the plaintiff, admitted the general doctrine, that where the contract is annulled without the assent of the surety, there is an end of the guaranty. So, if the contract is, in any material respect, changed by the contracting parties, (whether advantageously for the surety or not,) in respect to that part of it to which the guaranty extends, the surety is discharged: for he may, then, well say, *non hæc in fœdera veni*. But, if a change is made in the original contract, by the contracting parties, in a part of the contract to which the guaranty does not extend, such change will not discharge the surety, unless it disadvantageously affected the other part of the contract to which the guaranty does extend. Thus, where the defendant was surety to the plaintiffs, for the performance of duties by a clerk in their *banking house*, a change of partners was held not to discharge the surety, because, though such change had an important bearing upon the establishment, it did not come within the scope of the guaranty.^a A mere *diminution* of that part of

^a *Barclay v. Lucas*, 1 *T. R.* 291.

the contract to which the guaranty extends, as a release of part, would not discharge the surety from the part remaining, it being a part of the thing guaranteed, though not the whole. *Omne majus in se continet minus*: the surety, in such a case, could not say that he might be prejudiced by the diminution, for it is settled law, that a part payment of the debt is for the benefit of the obligor, and prejudicial to the obligee, and, therefore, it cannot be pleaded as an accord and satisfaction.^a

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1. There was no *surrender* by Ustick of his appointment as Deputy Collector, over the first eight townships. If there was a surrender, it must have been either in fact, or in law, that is, implied in the alteration of the instrument. There was no such surrender in fact; and the alteration of an instrument with consent of parties, does not, in law, imply such a surrender. There are no authorities to warrant the position, that such an alteration implies a surrender. On the contrary, they all say, an alteration of an instrument, with consent, does not vitiate it.^b In *Pagot v. Pagot*,^c when blanks in a deed were filled up after execution, the deed was held good, though not read again, nor re-executed. In *Markham v. Gonaston*,^d and *Wooly v. Constant*,^e the Court went on the ground not only

^a Johnson v. Branna, 5 Johns. Rep. 270.

^b Touch v. Clay, 2 Lev. 35. Shep. Touch. 68. Smith v. Crooker, 6 Mass. Rep. 539.

^c 2 Ch. Rep. 187.

^d Moore, 547.

^e 4 Johns. Rep. 54.

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that an altered deed or instrument was good, but that there was no surrender and redelivery implied in the alteration, to divest the property.

There is nothing in principle to warrant the idea, that an alteration of an instrument implies a surrender and redelivery. A surrender is an executed contract. To constitute a surrender of an instrument by a vendee or obligee, to a vendor or obligor, two things are necessary: 1. An actual delivery of possession to the latter; and, 2. An understanding or agreement to part with the property in the instrument. The act and the intent must concur. A mere delivery of possession by the vendee of the deed, for a special purpose, to the vendor, or any other person, as to *keep* for him, or to do any other particular act in relation to it, is not a surrender. The vendee still has the property in the deed himself. The vendor, in such case, is only his bailee. Admit, for the sake of argument, that the alteration of a deed required a new delivery, in respect to the part altered, the vendee might then deliver possession of the deed to the vendor, for that particular purpose, viz. to enable the vendee to deliver it anew, to give effect to the altered part; but not surrender his property in the deed in respect to the parts not altered. Such an absolute surrender of the whole deed, is not essential; and if not essential, it should not, by a fiction of law, be required. Suppose the vendee should hand the deed to the vendor, to subjoin on a blank under it a new and distinct deed for another tract of land, which is done, does such a delivery of the deed, for such a purpose,

amount to a surrender of the old deed? If not, is there any difference, in reason and common sense, whether the conveyance of the second tract is contained in a distinct and separate deed subjoined on the same paper, or whether it is effected by an interlineation, with consent of parties, in the old deed? Fictions and subtleties should never be introduced into the law, which is a practical science, unless to subserve the purposes of justice. *In fictione juris semper subsistit equitas.* This fiction of a surrender is unnecessary; it may be injurious. A., pursuant to contract, conveys a tract of land to B.; they afterwards discover, that by mistake, a lot was omitted, and, by consent, it is interlined. Upon this doctrine of surrender, the deed and property, upon the interlineation, reverted to the vendor, and continued in him until the *new* delivery; and, of course, it is subjected to the intermediate judgments of other liens of the vendor. The rule of law may, and ought to correspond, in such cases, with the real fact; considering the lands originally contained in the deed as passing at the date, and the land inserted by interlineation, as passing at the time of the interlining.

2. There was no *cancellation* of the original instrument of appointment. An *alteration* affects an instrument in part; a cancellation destroys it altogether. When cancelled, a deed must be resealed and redelivered, to revive it.^a It is nowhere

^a *Shep. Touch.* 69.

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said, that a redelivery is necessary, in case of an *alteration* by consent.

3. The alterations did not cause a revocation of the old appointment. It is admitted, that the appointment to, and acceptance of, a new office, *incompatible* with the old, is a revocation of the latter, as, if a Coroner accepts the office of a *Sheriff*. So, if there had been an intermediate office, between the Collector and his Deputy, incompatible with the latter, its acceptance, by Ustick, might have been a revocation of his office of Deputy. In the present case, the alteration created no office. It continued the same office, only extended over an additional territory. Ustick had the same office and same power over the first eight townships *after*, as *before* the alteration. It is said, his sphere of action was enlarged. Be it so: it was enlarged only in respect to *territory*; his sphere of action over the first eight townships continued the same. It is said, that after the *alteration*, the nine townships constituted but *one office*, and that there was a *new* appointment consequently. The interlineation, as before shown, did not destroy or cause a surrender of the first appointment, with respect to the eight original townships. If, then, there was a new appointment of an office, it extended only to the ninth township, and that is a distinct office from the other eight. If there were not a new appointment, but simply an enlargement of the old office, and still constituting one office, it is an office consisting of different parts in respect to territory, which parts are easily *distinguished*, and were created at *different* times; the

former part, composing the first eight townships, being in no wise impaired by the latter, and of course, the *guaranty* is in no wise impaired by it. It is said, that it is impossible to distinguish the moneys paid in from the ninth township, from those collected in the other eight. The same objection might have been raised, and to the same effect, if the appointments had been by distinct instruments. The jury will distinguish; it is a question for them. It is said, that the responsibility of Ustick was increased; and so is the responsibility of every debtor increased, who contracts new debts; but that does not discharge a surety.

4. Though where, in a bond, a previous instrument is recited, the contents thus recited are a *part* of the bond; yet the instrument recited is no part of the bond. Suppose A. conveys a tract of land to B., and in order to explain the boundaries, a deed from A. to C. for a tract of land adjacent is recited, does the latter deed become a part of the former; and if destroyed, does it destroy the other? The dependency, or connexion between the instruments recited, and the obligation in which it is recited, must always depend upon the nature and object of the instruments, and the intent of the parties.

Again; if this alteration, as contended on the other side, amounted to a surrender of the instrument of appointment, it was necessarily a *revocation* of the appointment. Such a revocation cannot be made under the act of Congress, without public notice being given in the district.^a No such

^a 4 U. S. L. 557, 558. 520.

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notice was given in this case. If this alteration amounts to a revocation of the instrument, in law, and as such revocation cannot be made without public notice, the alteration must be void, and the original instrument stand good.

Mr. *Coxe*, contra, argued, (1.) That the alteration in the original instrument of appointment, by the interlineation in a material part, destroyed the bond as against such of the obligors as were not parties to the act. The appointment, being recited in the bond, became incorporated into it, and they, together, form *quasi* one instrument. The condition of a bond or defeasance, need not be contained in the same paper, but, though written on a distinct and separate piece, they together constitute but one instrument.^a

If the condition of a bond, thus engrossed on a separate piece of paper, becomes invalidated by any act having that legal operation, the whole instrument, though disconnected, becomes void. As in the case put by Sheppard, if the obligation depend upon, or be necessary to, some other deed, and that deed become void, the obligation is become void also: as, if the condition of the obligation be to perform the covenants of an indenture, and, afterwards, the covenants be discharged, or become void, by this means the obligation is discharged and gone for ever.^b The common case of arbitration bonds will illustrate this position:

^a *Shep. Touch.* 367. 370. *Cro. Eliz.* 657.

^b *Ib.* 394.

if the award made be void in itself, or become void, or be performed, the obligee cannot recover upon the bond, but that becomes void. Had the plaintiff made such an interlineation in the body of the obligation itself, inserting the name of another township, the legal effect cannot be disputed. The whole bond would have been invalidated.^a

The consequence, then, appears to be irresistible, that such must be the effect here. The appointment, originally made, became a nullity, and could only be revived by a new execution and delivery, and take effect only from that time. As to the original instrument to which the sureties of Ustick made themselves parties, by inserting it in their bond, it was wholly nullified.

It may, indeed, be said, that, the alteration in the appointment having been made with the consent and acquiescence of Miller and Ustick, who alone were parties to it, it remains a valid instrument of deputation.

But the appointment is to be regarded in two entirely distinct aspects: (1.) As the instrument of deputation solely. (2.) As made a part of the bond, by being incorporated into it.

1. As a simple instrument of deputation, like any other deed, it could operate only between the parties to it, and could affect no others. The alteration, made and concurred in by all those interested in it, would not avoid it, perhaps, according to the current of modern authorities, though even

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^a *Shep. Thouch.* 68, 69. 71. 1 *Dall.* 67. 2 *Bac. Abr.* 650.

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2. As being made a part of the bond by being incorporated into it. By this circumstance, the sureties of Ustick became parties to the act of appointment, and to the instrument of deputation. It became a part of their bond. By no act of the appointor and appointee could the interests of third persons be even incidentally affected. A. makes a bargain and sale to B., which cannot operate, because no pecuniary consideration is inserted. C. acquires, by a judgment, or in any other manner, a lien upon the property as belonging to A. The deed cannot be altered by the parties so as to divest any intervening right. As an original instrument, carrying its original date, it can have no operation. As a deed bearing the original date, it is void; its future validity can be only upon the idea of a surrender of the instrument, and a new delivery and execution.^b

We contend, then, that by the alteration made in this instrument of deputation, it ceased to have any validity by virtue of its original execution and delivery; as such, it was annulled.

But, whether annulled or not by this act of interlineation; whether it continued to operate as from the time of its original delivery, or from the period of its second delivery, after the alteration was made; if it have any validity, even between the parties, it cannot operate as the appointment

^a 2 Roll. Abr. 29. u. pl. 5.

^b Eppes v. Randolph, 2 Call, 125. 4 Binn. 1. 4.

recited in the bond. It is another and distinct appointment from that to which the bond referred, and these sureties are not responsible for any deficiencies existing under it. By the 20th section of the act of Congress, "Each Collector shall be authorized to appoint, by an instrument of writing under his hand and seal, as many deputies as he may think proper, assigning to each such deputy, by that instrument of writing, such portion of his collection district as he may think proper; and, also, to revoke the powers of any deputy, giving public notice thereof in that portion of the district assigned to such deputy." The power of appointment thus given, was exercised by the original instrument of deputation for the eight townships. It is recited in the bond, and, therefore, each party is estopped from denying it. This instrument must have been made prior to the execution of the bond, because it is recited as already executed, and one of the conditions is, that he hath performed the duties of it. It must have been an appointment, bearing the date, and specially embracing the townships therein enumerated, and nothing more; otherwise it would be an appointment differing from that for the faithful performance of which this defendant became responsible. Supposing, then, it should now be made to appear that the original appointment included the township of Willingborough,

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^a Shelley v. Wright, *Willes*, 9. 1 *Phillips*, 356. 1 *Powell* on *Cont.* 236, 237.

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and that it was accidentally omitted in the recital of the bond, could a recovery be had in this action? The answer of the surety is *non hæc in fædera veni*. The language of the Court, in *Clifton v. Walmesley*, (5 *T. R.* 564. 567.) would be conclusive against the plaintiff. This was the doctrine also in *Ludlow v. Simond*, (2 *Caines' Err.* 33. 42. 57.) The plea avers, and the demurrer admits, that the deficiency sought to be recovered, arose under an appointment including the township of Willingborough. The surety became responsible for the faithful performance of the duties of no such appointment; he, consequently, cannot be called on to respond them. But there is no pretence that any omission was made by fraud or mistake. Under the appointment thus made, Ustick did hold his office at the time the bond was executed. This office was as extensive as the eight townships enumerated in the appointment, but restricted within them. This limitation was of the very essence of the appointment, by the express terms of the statute.

The act of the 22d of July, 1813, ch. 16. s. 20. requires that the assignment of the portion of the collection district within which the deputy is to act, should be contained in the instrument of appointment. Such an appointment, then, being made, it could only lawfully cease, (1.) by the death of Ustick, the deputy; (2.) by surrender of the appointment; (3.) by a revocation without his consent; (4.) by a new appointment; (5.) by cancellation.

The act which did take place, was, in substance, a surrender of the original appointment, and the acceptance of a new one. The appointment, being altered by the appointor, by inserting another assignment of a portion of the collection district; and after this alteration, being accepted and acted under by the appointee, became, from the date of such alteration and acceptance, a new and distinct instrument. A new and distinct office was created, the duties and responsibilities of which differed essentially from the former; the instrument of appointment included the entire portion of the collection district assigned to the deputy, as required by the statute. The legal inference is clear: the first appointment merged in the subsequent and more extensive one.^a If it operated as a new appointment, it operated also as a complete revocation of the former one.^b Here was, then, an appointment perfectly valid, complying with all the requisitions of the law under which the officer acted, under which his duties were performed, under which his responsibilities attached. This, however, was a totally distinct appointment from that which the bond in question was given to cover. The appointment recited in, and covered by the bond, was for eight townships; the appointment under which the delinquency occurred, was for nine. The defendant and his co-sureties never did undertake to become responsible for one cent,

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^a 5 *Bac. Abr.* 204.

^b *Bowerbank v. Morris, Wallace*, 125. 129.

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under any other appointment than that set forth in their bond. The recital restricts the operation of the bond to that identical instrument of deputation therein specified.^a

It can scarcely be necessary to cite the various cases which go to fix and limit the responsibilities of sureties, but a few of the most prominent may be referred to. *Lord Arlington v. Merrick*, (2 *Saund.* 411.) is a leading case, and establishes the principles, that a surety cannot be bound beyond the scope of his engagement; that the generality of the language is restrained by the recital; and that when a particular appointment is recited in the condition of the bond, the obligation covers only that appointment. So, where a bond was given to secure the faithful performance of the duties of collector of the society of musicians, and afterwards the society was incorporated, the obligor was held not liable for any default after the incorporation.^b "The old obligation does not, in point of law, extend to the new corporation, and a surety has a right to avail himself of the objection." "A surety can only be held liable according to the plain and clear force of his contract."

The condition of a bond recited, that A. was, on such a day, appointed Collector, &c., and bound the sureties for his duly accounting, &c.: held, that the sureties were only answerable for that single appointment, and not for his appointment in the

^a *Pearsall v. Summersett*, 4 *Taunt.* 593.

^b *Dance v. Gridler*, 4 *Bos. & Pull.* 34, 41, 42.

ensuing year.^a Other cases go to the establishment of the same principles.^b

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3. It is no answer to the objections that have now been considered, that the surety is not damaged. He says, this is not the contract into which I entered, and it is immaterial whether it be a more favourable one than that to which I became a party or not. I have no wish to speculate upon the subject of the relative duties and responsibilities. The question is simply what I have become responsible for. And, when you designate the deficiency sought to be recovered, and the office in which it occurred, my answer is, it is not in the bond. But the ground of increasing the duties and responsibilities, is another equally conclusive both in point of fact and law. If the original appointment be considered as still subsisting, if the words of the obligation would cover this deficiency, the surety is entitled to judgment in his favour, on the single ground that the duties and responsibilities are increased without his concurrence. Every enlargement of the duties of the Deputy Collector, by enlarging the sphere of his authority, increases his responsibility, and adds to the danger of the surety. The amount of moneys received is increased, and the consequent danger of defalcation augmented.^c

^a Wardens of St. Saviours v. Bostock et al. 5 *Bos. & Pull.* 175. 179.

^b Wright v. Russel, 3 *Wils.* 530. Strange v. Lee, 3 *East*, 484. Rees v. Berrington, 2 *Ves. jr.* 540. Commonwealth v. Fairfax et al. 4 *Hen. & Munf.* 208.

^c Rathbone et al. v. Warren, 10 *Johns. Rep.* 587. 591. 2 *Caines' Err.* 33. 35.

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Can it be contended that, in point of fact, the defalcation would not have been less, if the deputy's authority had not been extended to the township of Willingborough, and, consequently, if none of the moneys arising from that township had been received by him? Did the deficiencies now sought to be recovered occur, in whole or in part, in reference to the money received from Willingborough? Can we, in any manner, be called upon to meddle with the accounts of that township, by an act to which we never assented? If the accounts are intermingled, as they necessarily must be, and in fact are, we cannot be called on to disentangle them. In point of fact, then, the responsibility and duties of the principal have been increased, without the assent of the surety, and, in point of law, that operates to discharge him from any responsibility.

Mr. *Sergeant*, on the same side, stated, that the question presented upon the pleadings was, whether the defendant, Stewart, who was a *surety* for Ustick, had become liable for any default or neglect of Ustick, as a deputy of Miller, the Collector?

The bond recited an appointment, *previously made*, and the defendant was bound for the fidelity of Ustick, under the *said appointment*. By the terms of the contract, therefore, the appointment, antecedently made, was a part of the contract, as between Miller and Stewart, as completely as if it had been contained in the bond. The appointment, thus made, was by *deed*, and so re-

quired to be by law. If it had been made under colour of law, and not according to law, it would have been void. The appointment, moreover, was entire, not divided, or in parts; nor, as respected the bond, was it susceptible of division. The obligation of the bond, therefore, was, that as long as Ustick should continue to act under that identical appointment, under the very deed which had been sealed and delivered by Miller to Ustick, so long, and no longer, Stewart would be responsible for Ustick's conduct.

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What is the legal import and meaning of the contract thus entered into?

1. As the appointment was by deed, and was required by law to be by deed, and as it is recited to have been already made, it follows, that it had already all the requisites of a perfect legal deed; that it had been signed, sealed, and delivered, and all was executed and done. This is not denied to be as true in fact, as it is in law.

2. That nothing remained to be done. The whole terminated in the execution of the bond; the state of the appointment was irrevocably fixed by it. If blanks had been left, to be afterwards filled, it might be deemed evidence of authority to fill them, from *all concerned*, and, therefore, prove consent, and relate back.

3. That, the reference in the bond being to the identical deed, thus perfected, Stewart became a party to the deed, as much as if he had signed it; had an interest in it; and it was a part of his contract, that it should not be altered, because it was *his contract*.

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These, then, are the rights of the parties, and their obligations towards each other, as established by themselves.

The plea avers, that after all this, and before Ustick had acted under the deed of appointment, Miller, with the assent of Ustick, altered the appointment, in a material part, and that Ustick acted under such altered or new appointment; all which is confessed by the demurrer.

1. We contend, that Miller was discharged, by the alteration of the deed being made without his consent. A deed is avoided by rasure, interlineation, or alteration, *in a material part*,^a unless a memorandum thereof be made at the time of execution and attestation.^b This is unquestionably the rule; and it is for those who claim the benefit of an exception, to show that it is an excepted case. Now, it is clear that the deed in question was altered, after the execution, in a *material part*; and it follows, of course, that it is *avoided*. If the deed is avoided, the obligation is at an end. It may be supposed, that the alteration here is *not material*; a suggestion, the value of which, as regards a surety, will be considered hereafter. But the inquiry, in such cases, is not whether the alteration is *material*, but whether it is in a *material part*. The inquiry never can be, whether the alteration is material; for no alteration can be

^a 1 Dall. 67.

^b 2 Bl. Com. 308. Bul. N. P. 267. Shep. 68, 69. Chitty on Bills, 130. and cases there cited.

said to be material, if you can perceive that it has been made, and how. An interlineation can never be material, for it may always be rejected. It is never incumbent upon the party, therefore, to show that he has been injured, or might have been injured; or that, in the particular case, the alteration is material. The principle in question is founded in policy, and intended to preserve the solemn evidences of transactions among men, by denouncing every alteration, as unhallowed and forbidden.

But it is contended, that an alteration, by consent of the parties, does not vitiate.^a

Suppose the position, for the present, to be correct; then, as it is consent which neutralizes the poison of the alteration, the effect will only be co-extensive with the cause. It is not vitiated as to him who consents; but how stands it as to others? It produces its ordinary legal consequence.^b It is, indeed, conceded, that if the contract is put an end to, or *altered*, the surety is discharged. It is conceded, too, that if the guaranty extends to part only, and that part is altered, the surety is discharged. But, it is contended, that if the guaranty be for part only, and other parts be altered, that does not discharge the surety. For this, no authority is cited, but the case in 1 *T. R.* 391. (note,) which has no analogy. That was simply

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^a 2 *Lev.* 35. *Shep.* 68. 6 *Mass. Rep.* 539. 2 *Cr.* 626.

^b *Moore*, 547. 2 *Lev.* 35. 4 *Johns. Rep.* 54. 58, 59. 4 *Cranch*, 60.

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a question of *intention*, or of the *true interpretation* of the surety's undertaking.

We answer, then, (1.) That the proposition is a very questionable one. If there be one contract, consisting of parts, and, the whole contract being recited in the engagement of the surety, as the ground and consideration of his undertaking, he engages for a part, the whole is to stand, or he cannot be charged. Else the Court must, in every case, undertake to decide, not only upon the dependence and connexion of the parts, but how far they entered into the views of the surety. (2.) It is not the case here. The undertaking was for the *whole deed*, as it originally stood, and an addition is afterwards made to it. If the appointment had been for nine townships, and the bond for eight of them, it would have been somewhat such a case. But could the deed, in that case, have been *altered* by striking out the ninth? The only question, then, is, whether this alteration was in a *material part* of the deed; for it is admitted, that it was done without the consent or knowledge of Stewart. It was evidently a material part, and, indeed, the *most* material part, of the appointment. It was, therefore, avoided as against all but those who consented.

2. Admitting the consent of Miller and of Ustick to be good, and binding between themselves, what is the legal operation of their conduct? We contend, that it put an end to the deed which previously existed, and created a new deed. Was the deed, after the alteration, the same

deed as before the alteration, or was it a different deed? If it was a different deed, then, what took place was equivalent to a surrender, a new acknowledgment, and a new delivery. That it was a different deed, is manifest, because it comprehended more than the first. Yet it was an entire deed, and the whole was one single appointment, undivided and indivisible. The first was also an entire deed, and, as we have seen from the pleadings, was consummated by delivery, and was in the possession of Ustick. What was the date of the deed after the alteration? Suppose it had been done on two different days, which would have been the date? It cannot have two dates, because it is one deed. A return for alteration, and an acceptance after alteration, is a surrender, for there must be a surrender, to enable a second execution. It may be admitted, that the deed might be put in his hands for a special purpose, and then it would not be a surrender; as, to read it, or to take a copy, or the like. And this may be done by parol.^a A re-acknowledged deed dates from re-acknowledgment.^b It cannot be divided, because it is an entire deed. The latest act, therefore, will give date to the whole. The appointment after the alteration, then, is not the appointment for which the defendant was bound.

3. This is the case of a surety.

^a *Co. Litt.* 232. (a.)

^b *Eppes v. Randolph*, 2 *Call*, 125.

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It is no answer to a surety, to say that the alteration is not material. He has a right to determine for himself whether he will or will not consent to the alteration; whether HE *thinks* it material or immaterial. Suppose he had been consulted, and refused his consent, no matter from what motive. Not consulting him, is, at least, equivalent to refusal. Who can tell what considerations might have *justly* influenced him? But the great objection to any latitude is this, that if the narrow limits, defined by numerous and uniform decisions, be not adhered to, there will be no limit at all. The limit is this: no power of man, or circumstances, can alter your engagement. You know exactly the extent of the engagement you enter into. There will be no equity against you, no intendment or legal construction. A surety cannot be held beyond the *precise terms* of his agreement.^a It is upon the basis thus established, that suretyship stands, and it would not stand without it. It is a needful, but it is always a perilous undertaking; and its perils most frequently overwhelm those whom one could wish to see saved, the generous and the humane. It cannot be necessary or politic to increase its dangers.

March 10th.

Mr. Justice STORY delivered the opinion of the Court, and, after stating the case, proceeded as follows:

Nothing can be clearer, both upon principle and

^a 1 *Caines' Err.* 1. 10 *Johns. Rep.* 180.

authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And Courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases which have been cited at the bar, where persons have been bound for the good conduct of clerks of merchants, and other persons, illustrate this position. The whole series of them, from *Lord Arlington v. Merrick*, (2 *Saund.* 412.) down to that of *Pearsall v. Summersett*, (4 *Taunt.* 593.) proceed upon the ground, that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners, by name, it has constantly been held, that the undertaking stopped upon the admission of a new partner. And the only case, that of *Barclay v. Lucas*, (1 *T. R.* 291. note *a.*) in which a more extensive construction is supposed to have been given, confirms the general rule; for that turned upon the circumstance, that the security was given to the house, as a banking-house, and thence an intention was inferred, that

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the parties intended to cover all losses, notwithstanding a change of partners in the house.

Now, what is the purport of the terms of the present condition? The recital stated a special appointment, which had then been made by Miller, of his deputy for eight townships, particularly named. It was not a case of several distinct appointments for each township, but a single and entire appointment for all the townships; and the condition is, that Ustick has, and "shall continue, truly and faithfully to discharge the duties of *said appointment*, according to law." Of what appointment? Plainly the appointment stated in the recital, to which the condition refers, and to which it is tied up; that is to say, the appointment already made and executed for the eight townships. If this be the true construction of the condition, and it seems impossible to doubt it, then the only inquiry that remains is, whether any money unaccounted for was received under that appointment. To this the plea answers in the negative, unless the subsequent alteration of the instrument created no legal change in the appointment. To the consideration of this point, therefore, the attention of the Court will be addressed.

And, in the first place, upon principle, how does the case stand? Can it be affirmed, that the alteration wrought no change in the appointment? This will scarcely be pretended. In point of fact, the first appointment was for eight townships only; the alteration made it an appointment for nine townships. It is not like the case where an appointment is made for eight townships, and an-

other distinct appointment is made for the ninth; for then there are, in legal contemplation, two distinct and separate appointments. But here, the original appointment is extended; it was one and entire, when it included eight townships; it is one and entire, when it includes the nine. Can it then be legally affirmed to remain the same appointment, when it no longer has the same boundaries? An appointment for A. is not the same as an appointment for A. and B. In short, the very circumstance, that there is an alteration in the appointment, *ex vi termini*, imports that its identity is gone. If an original appointment is altered by the consent of the parties to the instrument, that very consent implies, that something is added to or taken from it. The parties agree, that it shall no longer remain as it was at first, but that the same instrument shall be, not what it was, but what the alteration makes it. It shall not constitute two separate and distinct instruments, but one consolidated instrument. A familiar case will explain this. A. gives a note to B. for 500 dollars; the parties afterwards agree to alter it to 600 dollars. In such case, the instrument remains single; it is not a note for 500 dollars, and also for 600 dollars, involving separate and distinct liabilities, but an entire contract for 600 dollars; and the obligation to pay the 500 dollars is merged and extinguished in the obligation to pay the 600 dollars. To bring the case nearer to the present: suppose there was a bond given, as collateral security, to pay the note of 500 dollars; it will scarcely be pretended, that the alteration would not extinguish

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the liability under the bond. The instrument would, indeed, remain, but it would no longer possess its former obligation and identity. Nothing can be better settled, than the doctrine that, if an obligation be dependent on another obligation, (and, by parity of reasoning, upon the legal existence of another instrument,) and the latter be discharged, or become void, the former is also discharged. *Sheppard*, in his *Touchstone*, (p. 394.) puts the case, and illustrates it, by adding, "as, if the condition of an obligation be, to perform the covenants of an indenture, and afterwards the covenants be discharged, or *become void*; by this means, the obligation is discharged, and gone for ever." It is not denied at the bar, that the same would be the legal operation in the present case, if there had been an actual revocation of the first appointment, or an extinguishment of the instrument of appointment. But the stress of the argument is, that here there was an enlargement, and not an extinguishment, of the appointment; that, the consent of the immediate parties being given to the alteration, it remained in full force, with all its original validity, as to the eight townships. We cannot accede to this view of the case. After the alteration was made, it is, as between the parties, to be considered by relation back, either as an original appointment for the nine townships; or as a new appointment for the nine townships, from the time of the alteration. It is immaterial to the present decision, whether it be the one or the other, for in either case it is not that appointment which the defendant, Stewart, referred to in

the condition of the bond, and in respect to which he contracted the obligation. It is no answer, to say, that it is not intended to make him liable for any money, except what was collected in the eight townships. He has a right to stand upon the terms of his bond, which confine his liability to money received under an appointment for eight townships; and the pleadings admit, that none was received, until the appointment was altered to nine. It will scarcely be denied, that if, upon the agreement to include the ninth township, the original instrument had been destroyed, and a new instrument had been executed, the obligatory force of the bond would, as to the surety, have been gone. And, in reason or in law, there is no difference between that and the case at bar. The alteration made the instrument as much a new appointment, as if it had been written and sealed anew. It is not very material, to decide whether the alteration operated by way of surrender, or as a revocation, or as a new appointment superseding the other. It was, to all intents and purposes, an extinguishment of the separate existence of the appointment for the eight townships.

This point is susceptible of still farther illustration, from considerations of a more technical nature. The act of Congress of the 22d of July, 1813, ch. 16. sec. 20. under which this appointment was made, provides, "that each Collector shall be authorized to appoint, by an instrument of writing under *his hand and seal*, as many deputies as he may think proper," &c. The appointment must, therefore, be by deed; and the

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effect of an alteration or interlineation of a deed, is to be decided by the principles of the common law. Now, by the common law, the alteration or interlineation of a deed, in a material part, at least, by the holder, without the consent of the other party, *ipso facto*, avoids the deed. It is the consent, therefore, that upholds the deed after such alteration, or interlineation. The reason is, that the deed is no longer the same. The alteration makes it a different deed; it speaks a different language; it infers a different obligation. It must, then, take effect as a new deed, and that can only be by the consent of the party bound by it. Whether by such consent, the deed takes effect by relation back to the time of original execution, or only from the time of the alteration, need not be matter of inquiry, because such relation is never permitted to affect the rights or interests of third persons, and cannot change the posture of the present case. If the deed, after the alteration, is permitted to have relation back, it is not the same deed of appointment recited in the condition, and to which the obligation is limited, for that is an appointment for eight townships. If it has no such relation, then it is a deed of appointment made subsequent to the bond, and of course not included in its obligation. It cannot be, at one and the same time, a deed for eight, and also a deed for nine townships; and the very circumstance, that it is the one, excludes the possibility of assuming it as the other. In truth, the assent of the parties to the alteration, carries with it the necessary implication, that it shall no longer be deemed an ap-

pointment for eight townships only ; and the same consent of parties which created, is equally potent in dissolving the deed, and changing its original obligation. It is no objection, that to constitute a new deed, a redelivery is necessary ; for if it be so, the consent to the alteration is, in law, equivalent to a redelivery. Nor is it necessary, that a surrender or revocation should be by an instrument to that effect. It may be by matter in pais, or by operation of law. Every erasure and interlineation in the deed, by the obligee or appointee, without consent, is a surrender ; and a revocation may be implied by law. The passage cited at the bar, from *Co. Lit.* 232. (a.) establishes, that if the feoffee, by deed of land, grants his deed by parol to the feoffor, it is a surrender of the property, as well as of the deed. And if, in this case, the deed of appointment had been delivered up to the Collector, it would, at once, have operated as a surrender by the Deputy, and a revocation by the Collector.

An objection has been urged at the bar, against this doctrine, that the act of Congress, giving the authority to the Collector, to appoint deputies, also authorizes him "to revoke the powers of any deputy, giving public notice thereof in that portion of the District assigned to such deputy." Hence it is argued, that no revocation can be, unless by public notice. But this is certainly not the true interpretation of the act. The very terms suppose, that the revocation is already made, as between the parties, and the notice is to be given of the fact. The object of the Legislature was,

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to protect the public from the mischief of payments to the deputy after his powers are revoked. It requires public notice to be given of the revocation, so that no future imposition shall be practised; and if the Collector should make a private revocation, without any public notice, the legal conclusion would be, that all payments made to his deputy, in ignorance of the revocation, ought to be held valid; for no man is entitled to make his own wrongful omission of duty a foundation of right. But, as between the parties, a revocation or surrender, if actually made, would be, to all intents and purposes, binding between them, and release the sureties to the bond from all future responsibility.

Upon the whole, the opinion of the Court is, that the fourth plea in bar is good, and that the demurrer thereto ought to be overruled; and this opinion is to be certified to the Circuit Court.

Mr. Justice JOHNSON. My brother TODD, and myself, are of opinion, that the merits of this cause have been misconceived, the points on which it turns misapprehended, and the law of razures, if correctly laid down according to the law of the present day, erroneously applied to this cause.

The condition of Stewart's bond to the plaintiff, recites no particular deed of appointment, under which Ustick was constituted Deputy Collector; nor is there an iota in the bond, or in the declaration, that can identify the deed set forth in the plea, with the deed under which Ustick held his deputation. The condition of the bond simply

states, "Whereas E. M., Collector, as aforesaid, hath, by virtue of authority vested in him by the laws of the United States, appointed U. Deputy Collector," &c. It is the *plea* that specifies a deed of a particular date, and then proceeds to set forth a rasure in avoidance of that deed, but it contains no averment that the deed; so set forth is the same under which U. held the deputation under the plaintiff, referred to in the condition. That the plea is faulty, and, even with the averment, might have been the subject of a special demurrer, cannot now be doubted; for it amounts to the general issue; and the general issue was the legitimate plea in this case. (*Pigot's case*, and *passim*.) But, we also hold it bad, in its present form, upon a general demurrer; for, unless the deed, so pleaded, was duly identified by the pleadings, with that under which Ustick was constituted deputy, the plaintiff was not bound to answer it. We cannot conceive how the defendant can have judgment in the present state of the pleadings, unless under the idea that the demurrer cures the failure to identify the deeds. This, however, cannot be sustained, since the want of identification is, in itself, a sufficient ground of demurrer.

Indeed, we see no sufficient ground for admitting that the condition of the bond implies a deputation *by deed* at all. It is true, that the 20th section of the act under which this Collector was appointed, authorizes him to appoint deputies, under his hand and seal; and, as far as was necessary to enable the deputy to act against individuals, unquestionably the solemnities of a deed

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were requisite to constitute him a Deputy Collector. But the demand in this action is for money received by him, and not paid over; and, surely, a deputation of a less formal kind, would have enabled him to bind his principal as to the actual receipt of money; so that the words of the condition do not necessarily imply a deputation by deed. He is expressly authorized, in this 20th section, to act for himself in collecting the revenue, and he could, therefore, act by his servant or deputy, constituted in a less solemn way than by deed, so far as to involve himself with the government.

But if a deed is to be implied from the condition, surely not this particular deed; and though a deed, of a date *antecedent* to the bond, is to be implied, it may have preceded it by a month, and yet the act and the condition of the bond both be complied with. But what form shall be presumed or implied to the deed? Why may it not have been several as to each county, or have comprised two or more? and why may not a dozen deeds, of the very date and form of this, have been in existence at the same time? A defendant who, like the present, places his defence upon the very highest stretch of legal rigour, cannot complain, if he has the same measure meted out to himself.

But if this ground is to be got over, and we are to consider the bearing of the facts pleaded, upon the law of the case, we then say that they imply no revocation of the deputation to Ustick, against which this defendant entered into the contract of

indemnity. It is the intent that gives effect to the acts of parties; nothing was farther from the minds of the parties here, than the distinction of the power of Ustick, as to the eight counties, at the time of this interlineation. *The plea avers no such intent*, and as well might a delivery of a deed for perusal be tortured into a surrender and extinction of it, and its return into a revocation, as the acts of these parties respecting this interlineation, be construed into a revocation and redelivery. *Non constat*, from any thing that appears in the plea, that the paper ever passed from the hands of the party legally holding it. It was unnecessary, upon the facts stated, that it should so pass; in fact, no redelivery is averred, in the plea, nor any one of the formalities necessary to re-execution. It cannot be denied, that this part of the defence savours too much of a perversion of the solemnities and rules of the law. It is a catch upon the unwary, an effort to attach to men's acts consequences which are directly negated by their intentions.

As to the idea of the identity of this instrument being destroyed by the interlineation, we consider it as springing out of an incorrect view of the nature of the instrument and of the circumstances that fix its identity. It is not one entire thing, but a several deed for each county. A deputation as to the county of A., is not a deputation as to the county of B., although written on the same paper, and comprised within the same words; it is as much a several deed, as to each county, as if writ-

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ten on several sheets of paper; as much as a policy of insurance is the several contract of each underwriter, or as a bond would be the several deed of as many individuals as executed it, if it be so expressed, making them, if such be the letter of it, severally liable, and for various sums, no one for another. Interlining another county, then, left it still the original deed, as to each county taken severally, and only operated as the creation of a new power as to another county, if, in fact, as there is no averment of a subsequent delivery, it was any thing more than a mere nugatory act. Such is certainly the good sense of the law upon the subject; and it is supported, we conceive, by respectable opinions, and by adjudged cases. Chief Baron Gilbert, in treating on this topic observes, "but if any immaterial part of the contract be added after sealing and delivery, as, if A., with a blank left after his name, be bound to B., and after C. is added as a joint obligor, this does not avoid the bond, because this does not alter the contract of A.; for he was bound to pay the whole money without such addition."^a And the case of *Zouch v. Clay*, which he quotes, as reported in *Ventris*, undoubtedly sustains his doctrine; for there the Court overruled the plea of *non est factum* on the interlineation, on the ground that the bond remained the same as to him.

In this case, the bond emphatically remained

^a 1 *Loft's Gilb.* 111. *Ventris*, 185. The note at the end of Pigot's case, 11 *Coke*, also recognises this distinction.

the same as to this defendant, for he was still liable only as to the eight counties, and no more; and was so guarded, as to make it impossible that the interlineation of a thousand other counties could alter or increase his liability, since the names of the counties are inserted in the condition specifically. As to *his* liability, and as to its influence upon the power conferred in the eight counties, this interlineation was altogether insignificant, no more than a dash of the pen, and could have done him no more injury.

There is nothing in the argument which would attach importance to it, on the ground of producing difficulty and confusion—it has been said, even impracticability, in rendering the accounts of this Deputy. It is begging the question, and urging the very thing as a difficulty, which the plaintiff proffers to execute. He claims a sum collected in the eight counties specified, and no more; and unless he can prove so much collected in the eight original counties, it is very clear, that he cannot have a verdict. But is he to be prejudged? is he not to be permitted to make out the case which he offers to prove?

Nor is there any more weight in the argument, that, “although the defendant may have been willing to indemnify against eight counties, it does not follow, that he would undertake to indemnify against nine.” No one pretends to charge him with nine counties. Surely there was nothing in the contract, to preclude the plaintiff from extending his deputation to this individual over his whole

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district, had he thought proper. Could a separate deed, as to the ninth county, have been pleaded as a defence?

There is no charge of positive injury in this plea, it will be observed; nor do the facts admit a suspicion of fraudulent intention. The sole effect of the interlineation, was to confide in U., to collect in another county, without giving security. The defence rests upon certain inferences from, or consequences imputed to, the naked act of interlining the word "Willingborough," without even averring the acts necessary to make the instrument a deed as to that county, or the intent to revoke or re-execute the deed as to the residue.

To us it appears, that it ought no more to affect the rights of the parties, than interlining the name of a region beyond the Atlantic, or a mere dash of the pen.

On the subject of razures we would remark, it is to be regretted that this plea had not been specially demurred to, that the question might have been taken from the Court and sent to the jury. There is no doubt, that they might have found this deed several in its nature as to each county, and, therefore, unaffected by the addition of another. The tendency of the decisions has been, to carry such questions to that tribunal; and, notwithstanding some contrariety of *dicta*, it is now clearly settled, that a rasure must make a deed void, or it is immaterial; and, therefore, *non est factum* is held to be the proper plea. Chief Justice Holt has declared any other form of taking advantage of a rasure impertinent; (6 *Mod.* 215.)

and the rule is not now to be doubted. But as to the principle upon which a rasure avoids a deed, it is not too much to say, that the law of the subject appears to have got into some confusion. Modern decisions, particularly of our own Courts, lean against the excessive rigour with which some writers and some cases disfigure it. In the case of the *United States v. Cutts*, (1 Gall. 69.) a bond, that had been cancelled and mutilated, the seal torn away by the joint act of the defendant and the plaintiff's bailee, was still held, and rightly held, to be sustainable as the deed of the party. In the case of *Speak et al. v. United States*, (9 Cranch, 28.) a bond was sustained, notwithstanding the striking out of one joint and several co-obligor, in the absence of the others, and the insertion of another. And so, as to revenue bonds, there is not a Court of the United States which has not sustained them against the plea of *non est factum*, notwithstanding that both sum and parties have been inserted after the execution by one of the obligors, and this, in his absence, because the contract was not altered, and the good sense of the law prevailed against its technicalities.

There is a great paucity of decisions, in modern times, on the subject of razures and interlineations. If we mount to its origin, we find it, in the Year-Books, and in *Perkins*, who cites them, given as the ground of suspicion and inquiry. And so, unquestionably, it ought to be, and frauds or mutilations, to which the parties having the custody of deeds are privy, cannot be taken too strongly

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against them. But when we encounter the doctrine, as laid down in *Pigot's* case, "that when a deed is altered in a point material, by a stranger, without the privity of the obligee, even by drawing a pen through the midst of a material word, that it shall be void," without reference to the fraud, privity, or gross negligence of the obligor, it certainly is time to pause; and I highly approve of the hesitation of my brother STORY, in *Cutt's* case, as to the authority of *Pigot's* case. As an adjudication, the value of that case should be limited to the single point, "that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond." The case does not call for the decision of another point, for it is upon a special verdict, and that the only question submitted. Yet, the Reporter, who seldom lets an opportunity escape him, that furnishes an apology for exemplifying his indefatigable research, makes it authority for a score of positive decisions, and the introduction to a mass of law, upon questions totally distinct. But it should be noted of this learned Judge, that his reports, like the text of Littleton, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day, and expressing his opinions upon juridical topics.

It is certainly true, that some of the decisions in the books have carried this doctrine a great way. As, for instance, the case of the lease of the Dean of Pauls, in which the counterpart expressed a rent of 27 pounds, and the tenant al-

tered his deed from 26 to 27 pounds, to make it accord with the counterpart and the true contract. Yet it was held to avoid his lease. (1 *Roll.* 27. *Cro. Eliz.* 627.) But the utmost that can be made of these cases is, that they apply to those instances in which the deed is, necessarily, an entire thing; and the reason assigned is, that the witness can no longer testify to the deed, as the deed which he saw delivered. Surely this reason is not applicable to the present case; for, let the witness be examined upon this instrument, as to the county of A., as introductory to the proof of the money collected in A., and so on as to the counties B., C., and D., and what is to prevent his proving the execution of this deed? That which may just as well have been executed in as many detached sheets of paper as there are counties, certainly has nothing of necessary entirety or indivisibility in its nature. Any other rule, as applied to this case, would, we conceive, be permitting frauds to be covered by a principle which was intended to prevent frauds.

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Certificate for the defendant.