

The Amendment applies to warrants under any statute; revenue, tariff, and all others. No warrant inhibited by it can be made effective by an act of Congress or otherwise.

It is argued that searches for goods smuggled into the United States in fraud of the revenue, based upon affidavits of suspicion or belief, have been sustained from the earliest times; that this practice was authorized by the Revenue Act of July 31, 1789, 1 Stat. 43, also subsequent like enactments. But we think nothing in these statutes indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.

Although relied upon, we find nothing in *Locke v. United States* and *Boyd v. United States* which upholds the view of the Circuit Court of Appeals. The first of these causes was a proceeding to forfeit a cargo of imported goods seized for violation of the revenue laws. It presented no question concerning the validity of a warrant. The second denied the right to compel production of private papers in a suit by the United States to establish a forfeiture of goods fraudulently imported.

Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Reversed.

TRAINOR CO. v. AETNA CASUALTY & SURETY CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 13. Argued October 12, 1933.—Decided November 6, 1933.

1. Upon default after partial performance of a building contract, the measure of damages recoverable by a mortgagee-obligee on a bond guaranteeing completion, is the difference between the value, at the

time of default, of the property with the buildings uncompleted and the value it would have had with the buildings completed; not exceeding, however, either the amount due on the mortgage or the amount of the bond. Pp. 53, 55.

So *held* although the value of the property with the buildings uncompleted, at the time of the guarantor's default, exceeded the sum of the mortgage and all prior liens; it appearing that the mortgagee-obligee, because its mortgage was not then due, was unable to protect itself by foreclosure; that thereafter the property steadily declined in value; and that its interest was subsequently wiped out by foreclosure of a prior lien.

2. This is the settled rule in Pennsylvania. P. 53.
 3. Even though the federal courts, in determining questions of general law, may exercise an independent judgment, yet, for the sake of harmony and to avoid confusion, they will lean, where the question is balanced with doubt, towards an agreement of views with the state courts. *A fortiori* where the decisions of the state courts are plainly right. P. 54.
- 62 F. (2d) 487, reversed.

CERTIORARI, 289 U.S. 718, to review a judgment affirming a judgment of the District Court, 49 F. (2d) 769, awarding nominal damages in a suit on a guaranty bond.

Mr. David L. Ullman, with whom *Mr. Joseph J. Brown* was on the brief, for petitioner.

There is a well-established distinction between an affirmative covenant for a specific thing and one of indemnity against damage by reason of the non-performance of the thing specified. *Purdy v. Massey*, 306 Pa. 288; *Weightman v. Union Trust Co.*, 208 Pa. 449; 3 Sutherland, Damages, 4th ed., § 765.

The basic question in this case is whether or not the bond in suit is one of guaranty or indemnity.

To the same effect are *Wheeler v. Equitable Trust Co.*, 206 Pa. 428; *Equitable Trust Co. v. National Surety Co.*, 214 Pa. 159; *Weightman v. Union Trust Co.*, 208 Pa. 449; *Union Trust Co. v. Citizens Trust Co.*, 185 Pa. 217; *Wicker v. Hoppock*, 6 Wall. 94; *Cudaback v. Hay*, 134

Fed. 120, s.c. 139 Fed. 369; *Belloni v. Freeborn*, 63 N.Y. 383; *Kidd v. McCormick*, 83 N.Y. 391; *United Real Estate Co. v. McDonald*, 140 Mo. 605. Distinguishing: *Schwartz & Co. v. Aimwell Co.*, 227 N.Y. 184.

Whether the case be regarded as presenting a question of suretyship or of the measure of damages, the decisions of the state court of last resort should be followed by the federal courts. No federal question is involved. The law invoked is of local character. *Community Bldg. v. Maryland Casualty Co.*, 8 F. (2d) 678; *Sturtevant Co. v. Fidelity & Deposit Co.*, 285 Fed. 367; *Mullins Lumber Co. v. Williamson & Brown Co.*, 255 Fed. 645; Hughes, Federal Practice, Jurisdiction & Procedure (1931), vol. 6, § 3735, p. 375; *McLain v. Provident Saving Life Assur. Society*, 110 Fed. 80, 91; *Warren County v. Southern Surety Co.*, 34 F. (2d) 168, 170.

This is not a case where a series of decisions have established a federal rule, opposed to a state rule, to which the federal courts feel bound by the principle of *stare decisis*.

Mr. Joseph W. Henderson, with whom *Mr. Thomas F. Mount* was on the brief, for respondent.

There is no substantial difference between the measure of damages recoverable by a mortgagee-obligee for the breach of a bond giving an absolute guarantee of completion and for the breach of a bond indemnifying against loss for failure to complete. *Purdy v. Massey*, 306 Pa. 288, 297.

If the contractor defaults and the building is not fully erected, the legal interest of the mortgagee which is adversely affected and which the law will be compelled to protect, and as to which compensation may be claimed, is the loss to the mortgagee of his security by reason of the contractor's default. Thus the mortgagee-obligee is entitled to recover as damages the amount by which the

security has been depleted by the failure of the contractor to perform, or so much of the difference between the value of the completed and uncompleted operation as would be necessary, together with the value of the property in the condition in which it is left by the contractor, to pay the mortgage debt and the interest thereon. *Province Securities Corp. v. Maryland Casualty Co.*, 269 Mass. 75. Distinguishing: *Purdy v. Massey*, 306 Pa. 288; *Weightman v. Union Trust Co.*, 208 Pa. 449; *Wicker v. Hoppock*, 6 Wall. 94; *Hay v. Cudaback*, 139 Fed. 369; *Belloni v. Freeborn*, 63 N.Y. 383; *Kidd v. McCormick*, 83 N.Y. 391. Cf. *Schwartz & Co. v. Aimwell Co.*, 227 N.Y. 184.

The measure of damages is limited to the difference between the value of the property in the condition in which it existed at default and the amount of principal and interest due on the mortgage and all prior liens. *Province Securities Corp. v. Maryland Casualty Co.*, 269 Mass. 75; *Norway Plains Savings Bank v. Moors*, 134 Mass. 129; *Longfellow v. McGregor*, 61 Minn. 494; *German American T. & T. Co. v. Citizens T. & S. Co.*, 190 Pa. 247; *Purdy v. Massey*, dissenting opinion, 306 Pa. 288, 297. Distinguishing: *Wicker v. Hoppock*, 6 Wall. 94.

Federal courts exercise an independent judgment, irrespective of the decisions of the local state courts, in matters of general jurisprudence and commercial law. *Swift v. Tyson*, 16 Pet. 1; *Butz v. Muscatine*, 8 Wall. 575, 582; *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 371; *Black & White Co. v. Brown & Yellow Co.*, 276 U.S. 518. Cf. the dissenting opinion in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349.

That the doctrine of *Swift v. Tyson*, *supra*, is recognized and applied by all of the Circuit Courts of Appeals is shown by the following decisions: *Sears v. Greater N. Y. Development Co.*, 51 F. (2d) 46; *Cole v. Pennsylvania R. Co.*, 43 F. (2d) 953; *Trainor Co. v. Aetna Cas-*

ualty & Surety Co., 62 F. (2d) 487; *Long v. Monarch Accident Ins. Co.*, 30 F. (2d) 929; *Home Insurance Co. v. Currie*, 54 F. (2d) 203; *Farmers' Bank v. Hayes*, 58 F. (2d) 34; *Aetna Life Ins. Co. v. Roewe*, 38 F. (2d) 393; *Odegard v. General Casualty & Surety Co.*, 44 F. (2d) 31; *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678; *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F. (2d) 488.

Questions of suretyship are matters of general jurisprudence, and those relating to the measure of damages are also.

The use of completion bonds throughout the Nation requires a national uniform law and, therefore, questions pertaining thereto are matters of general jurisprudence.

Irrespective of whether the question of measure of damages in this case be considered a matter of general jurisprudence, the federal courts below were entitled to exercise an independent judgment concerning it. *Burgess v. Seligman*, 107 U.S. 20; *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349; *Concordia Insurance Co. v. School District*, 282 U.S. 545; *Putnam Memorial Hospital v. Allen*, 34 F. (2d) 927; *Hart v. Adair*, 244 Fed. 897; *Dernberger v. Baltimore & Ohio R. Co.*, 243 Fed. 21.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On October 13, 1927, petitioner conveyed to a building company a tract of real estate consisting of fifty-two lots, with the result that the building company became indebted to petitioner in the sum of \$28,000, being part of the purchase price. The building company, in order to finance its operations, borrowed sums of money from two different corporations, to one of which it gave a first mortgage upon the real estate, and to the other a second mortgage. The building company then gave to petitioner its note for \$28,000, and assigned as collateral security there-

for its equity in the second mortgage. Petitioner accepted this security—in effect a third mortgage—upon the representation and warranty of the building company that a building and certain improvements would be erected, in accordance with plans and specifications, upon each of the fifty-two lots. The performance of this obligation was guaranteed by a bond in the sum of \$220,000, executed by respondent, conditioned, among other things, to become void if within ten months from the date thereof, October 13, 1927, each of the fifty-two lots should be fully improved with a building, together with certain other improvements, in keeping with, and as shown by, the plans, specifications, etc.; otherwise to remain in full force and effect. The property is located in Pennsylvania, and the contract and the obligations of the bond were to be performed within that state.

Suit was brought in a federal district court for the eastern district of Pennsylvania to recover damages for a breach of the bond. A jury was waived; and after a hearing, the trial judge found that on August 13, 1928, the date fixed for the completion of the buildings and improvements, twenty-four of the houses had been completed and twenty-eight had not been fully completed. The value of the lots with the twenty-eight uncompleted houses, as of the date last mentioned, was \$6,700 each, an amount slightly in excess of the sum of petitioner's mortgage on each and of all prior liens. Completed, they would, on that date, have been worth \$7,950 each. It is not disputed that at the time of the breach of the bond petitioner, under the terms of the mortgages, was powerless to protect itself by foreclosure; and the court found that thereafter the value of real estate, generally and in the locality, had steadily declined. On January 25, 1930, the first mortgage was foreclosed and the property bought in for the sum of \$50, thus wiping out the second mortgage and the equity of petitioner therein. Petitioner has

received on account of the indebtedness of \$28,000 the sum of \$13,026.02 only, leaving \$14,973.98 still owing on the principal.

Upon these facts the trial court held that while the owner of property, in case of a default after partial performance of a building contract, would be entitled to recover from the surety the difference between the value of the property with the uncompleted buildings and its value with the buildings completed, the rule is otherwise in the case of a *mortgagee-obligee*. Following this view, that court concluded that the measure of damages in the instant case "is so much of the difference between the value of the property as of August 13, 1928, with the houses uncompleted, and the value it would have had on that date had the houses been completed as would have been necessary to pay the plaintiff's mortgage debt as well as all prior liens. Since the value of the property as of August 13, 1928, was more than the sum of the plaintiff's mortgage and prior liens, the plaintiff is not entitled to any substantial damages." The court, therefore, awarded nominal damages only. 49 F. (2d) 769. This judgment the circuit court of appeals affirmed. 62 F. (2d) 487. With that conclusion we are unable to agree.

It is very clear that the settled rule in Pennsylvania is to the contrary. In *Purdy v. Massey*, 306 Pa. 288; 159 Atl. 545, where prior cases are reviewed, the court held that where there is an absolute undertaking to erect and complete a building, the surety in case of default is bound to take the place of the principal and erect the building, and the cost of doing that which should have been done is the measure of damages for which the surety is liable, not exceeding the amount of the bond. There the owner of a first purchase-money mortgage had subordinated her security to another mortgage in consideration of the giving of a bond in all substantial respects like the one here under consideration. The building provided for was not

erected, and the mortgagee brought suit against the surety on the bond. The court held that the bond was one of guaranty and awarded as damages the full cost of completion, such cost not exceeding the amount due on the mortgage. The applicable rule is thus stated (p. 295):

"In fixing compensation for damage resulting from breach of a contract the general rule is that the injured party should be placed in the same position as if there had been no breach. The object of the law is to place such party in as good position as if the contract had been kept. In the instant case the bond guaranteed the completion of the building; if there had not been a breach of the obligation of the bond, the building would have been erected. Since this was not done, the plaintiff can only be put in as good position as if the contract had been carried out by giving her the cost of construction, not exceeding, of course, the amount of the bond. The measure of damage on a bond guaranteeing completion is the cost of completion: . . . And in a case such as this, where the work was never begun, this cost will be the whole cost of construction."

See also *Mechanics Trust Co. v. Fid. & Cas. Co.*, 304 Pa. 526, 533, *et seq.*; 156 Atl. 146. A like rule obtains in other states. *United Real Estate Co. v. McDonald*, 140 Mo. 605, 612; 41 S.W. 913; *Kidd v. McCormick*, 83 N.Y. 391. Compare *Wicker v. Hoppock*, 6 Wall. 94, 99.

The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, "for the sake of harmony and to avoid confusion, the Federal

courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." *Burgess v. Seligman*, 107 U.S. 20, 33-34. And see *Sim v. Edenborn*, 242 U.S. 131, 135, where the authorities are collected; *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is "balanced with doubt," for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right. Compare *Messenger v. Anderson*, 225 U.S. 436, 444.

The petitioner here, not being willing to accept a third mortgage on the unimproved land to secure its debt, required the added security which would be afforded by completed improvements. These improvements the building company agreed to make within a definitely fixed time, and for the performance of that undertaking respondent, for a valuable consideration, stood sponsor. Plainly the obligation of the bond was one of guaranty and not indemnity, and could be fulfilled only by the erection of the buildings or payment of the penalty in case of default. It is no answer to say that the value of the property immediately after the default exceeded the sum of the mortgage together with all prior liens. Petitioner was then without remedy against the property because its mortgage was not in default. It was, therefore, obliged to sit by and await the action of others over which it had no control. In the meantime, the uncompleted buildings necessarily lay unrented, subject to expense in the way of taxes, insurance, accumulating interest, etc., deteriorating in quality and steadily declining in value. Petitioner is entitled to be put in as good position in respect of its debt as it would have occupied if the buildings had been completed in accordance with the terms of the undertaking; and this can be done here only by giving it the amount of the difference between the

value of the unfinished buildings and their value as it would have been if completed in accordance with the agreement—see *Kidd v. McCormick*, *supra*, p. 398—but exceeding neither the amount due on its debt nor the amount of the bond.

It appears from the findings that this difference would be about \$26,000, while the amount now due petitioner is \$14,973.98, together with interest thereon from August 13, 1928. It follows that the judgments of the courts below must be reversed and the cause remanded to the district court with directions to enter judgment for the last named sum.

Reversed.

GRISWOLD ET AL., EXECUTORS, *v.* HELVERING,
COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

No. 38. Argued October 19, 20, 1933.—Decided November 6, 1933.

1. Section 402 of the Revenue Act of 1921 provides that, in determining the value of the gross estate of a decedent for the purpose of the federal estate tax, there shall be included the value at the time of his death of all property "to the extent of the interest therein held jointly or as tenants by the entirety by the decedent and any other person." *Held*, the inclusion, in the gross estate of a decedent who died while the provision of this section was in effect, of one-half the value of property held by him and his wife as joint tenants, though the tenancy was created prior to the effective date of the statute, was not a retroactive application of the statute. P. 58.
 2. The cessation at death of decedent's interest in, and control over, half of property held with another as joint tenants presented a proper occasion for the imposition of a tax. *Gwinn v. Commissioner*, 287 U.S. 224. P. 58.
- 62 F. (2d) 591, affirmed.