There was no period from the entry and patent of the New Madrid claim in which that claim was valid. The location was not only voidable, but it was absolutely void, as it was made on land subject to a prior right. And under the act of 1822, all New Madrid warrants not located within a year from that date, were declared to be void.

Whether we look at the confirmatory act of 1836, which vested the title in the confirmee, or to the New Madrid title asserted against it, it is clear that the New Madrid title is without validity, and that the fee is vested in the grantee of Bell.

JULIAN MCCARTY AND JOHN WYNN, ADMINISTRATORS OF ENOCH MCCARTY, DECEASED, PLAINTIFFS IN ERROR, *v.* GUERNSEY Y. ROOTS, ERASTUS P. COE, AND JOHN H. AYDELOTTE.

Where an accommodation bill of exchange was paid by one of the endorsers, and there was no special agreement that they should be bound to pay in equal proportions as co-sureties, the endorser who took it up had a right to assign it as collateral security for a pre-existing debt; and the assignee can maintain a suit against the original payee, who was also an endorser.

The endorser who took up the bill was a trustee; but the plea was defective in not averring that there remained sufficient funds in the trust estate to pay this bill after discharging the trust.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was a suit brought by Roots, Coe, & Aydelotte, citizens of Ohio, against Enoch McCarty, a citizen of Indiana.

It was upon a bill of exchange drawn by Tyner & Childers, upon Richard Tyner, of New York, in favor of Enoch McCarty, for $4,500. Tyner accepted the bill, and McCarty endorsed it to George Holland, who endorsed it to Ezekiel Tyner, who endorsed it to Roots, Coe, & Aydelotte. It was alleged that Holland took it up when past due at the Richmond Bank, and that Holland delivered the bill to the plaintiffs as collateral security for a pre-existing debt of Richard Tyner.

The nature of the pleas is set forth in the opinion of the court, and the following reference to them will be sufficient:

Defendant filed eight pleas.

1. The general issue, withdrawn by defendant after the judgment of the court upon the demurrers.

2. Plaintiffs filed replication; issue joined; defendant withdraws plea.

3. Plaintiffs demurred to this plea; joinder in demurrer; demurrer sustained.

4. Plaintiffs filed replication; issue joined; defendant withdraws plea.

5. Plaintiffs demurred to this plea; joinder in demurrer; demurrer sustained.

6. Plaintiffs demurred; joinder in demurrer; demurrer over-ruled; plaintiffs obtained leave to withdraw their demurrer and reply; replication filed; defendant demurred to it; joinder in demurrer; defendant's demurrer to replication over-ruled.

7. Plaintiffs demurred; joinder in demurrer; demurrer sustained; defendant obtained leave to withdraw his joinder in demurrer, and to amend plea; amended plea filed; plaintiffs demurred to it; joinder in demurrer; demurrer sustained.

8. Plaintiffs demurred; joinder in demurrer; demurrer sustained.

Upon these rulings of the court, the case was brought up here, and was submitted on printed argument by *Mr. O. H. Smith* for the plaintiffs in error, and argued by *Mr. Gillet* for the defendants.

Mr. Smith's points were the following:

1. That as the bill was received by the appellees after it was due, and dishonored, they took it with notice that it was subject to all prior equities between the parties. (Byles on Bills, 129, 130, and numerous authorities, tit. Transfer.)

2. That this case rests upon the same legal defence that could be set up in a suit between the endorsers of the bill as to their equities, if the action had been brought by one of them, after paying the bill, against the defendants. (The same authorities as above.)

3. That co-sureties are liable to contribution as between

themselves, after the payment of the bill. (Byles on Bills, 199; Kemp *v.* Finder, 12 M. and W., 421; and authorities cited to fourth position.)

4. That if one co-surety takes up the bill, he cannot maintain an action upon it against a co-surety, but may use it as evidence of the amount paid, in an action of assumpsit for money laid out and expended, in which he may recover in contribution the equitable *pro rata* proportion of the money he has actually paid, from his co-surety. (Done *v.* Whalley, 17 L. J., 225; Exch. 2 Exch., Rep. 198, S. C.; Gale *v.* Wash, 5 T. R., 239; Rogers *v.* Stephens, 2 T. R., 713; Orr *v.* Maginnis, 7 East., 359.)

5. That although the endorsers are *prima facie* liable to each other, in the order in which their names stand upon the bill, yet it lies in averment in the pleadings that they are co-sureties, and parol proof is admissible, as between them, to show the true state of their liability. The same principle applies in suits brought by an endorsee of the bill against a remote endorser, when the bill was taken after it was due and dishonored. (14 Vesey, 170; Byles on Bills, 192, and notes, Ed. 1853; 9 Met., 511; 7 Cush., 404; 4 N. H., 221; 5 Denio, 307; 9 Ala., 949; 28 Maine, 280; 34 ib., 549; 5 How., 278; 21 Pick., 195; 2 Selden, N. Y., 33; 2 Ired., 597; 18 Ohio R., 441.)

6. That if the principal places funds or property in the hands of one co-surety, sufficient to pay the bill in trust for that purpose, and such co-surety takes up the bill from the holder, he cannot sue his co-surety on the bill, nor for contribution, until he has exhausted the assets in his hands of the principal. (8 Pick., 155; 16 Ala., 455; 21 ib., 779; Adams's Equity, Ed. 1855.)

7. That time given by the holder to one co-surety for the payment of the bill, to the prejudice of another co-surety, upon a contract binding upon the holder, without the assent of the other co-surety, discharges such other co-surety from liability upon the bill. (9 Conn., 261; 2 Wheaton, 253; 2 Story, 416; 21 Wendell, 108; 2 McLean, 111; 10 N. H., 359; 18 Conn., 361; 3 McLean, 74.) It is admitted that these authorities

speak of principal and surety, but we maintain that the principles decided apply to the holder and a co-surety, the case before this court.

8. That after a bill is taken up from the holder by a co-surety, it is no longer available in the hands of such co-surety, or his endorsee, who takes it with notice, after due and dishonored, so as to enable such co-surety taking up the bill, or such endorsee, to maintain an action on the bill against any other co-surety. (7 N. H., 202; 2 Ired., 417; 24 Maine, 336.)

9. That a plea can only be demurred to specially for duplicity, in which case the demurrer must point out the duplicity specially; and if the plaintiff, instead of demurring, replies to the plea, his replication must answer so much of the plea as it assumes to answer; and if it assumes to answer the whole plea, and only answers a part, it is bad on demurrer. (1 Chitty Plead., 228, 229; ibid, 668, Ed. 1855; 2 Johns., 433; 20 Pick., 356; 10 East., 79; 1 Saunders, 100, note 1, title Qualities of Replication; 1 Chitty Plead., 643; and authorities, Ed. 1855.)

10. It is no ground of even special demurrer, that a plea contains surplusage; the doctrine of *utile, per in utile non vitiatur*, (1 Chitty Plead., 547,) applies.

Mr. Gillet's point were the following:

1. The legal liability of the drawer, acceptor, and endorsers, of a bill, is determined by the act of drawing, accepting, endorsing, demand, and notice.

If these things have occurred in the ordinary mode of such matters, the legal liability is fixed, and can only be avoided by showing some fraud or illegality in the creation of the bill, or some positive act of discharge.

2. Contracts in writing, binding between the parties to them, cannot be changed by parol understandings or agreements made at the time of making such contracts. (Thompson *v.* Ketchum, 8 Johns. R., 192; Robishat *v.* Folse, 11 Louisiana; Barthet *v.* Esterbene, 5 La. Annual, 315; Brochemore *v.* Davenport, 14 Texas R., 602; Bank of the United States *v.* Dunn, 6 Pet., 56; Brown *v.* Wiley, 20 How., 442.)

3. If the endorsers had an agreement, valid between themselves, as to sharing equally the loss occasioned by their endorsements, such agreement only affected themselves, and did not run with the bills so as to affect their legal liabilities, as to the holders of the bills in question.

If there had been such an agreement as the defendant wishes to have *inferred*, which he does not aver, and it had been binding among themselves, and Holland, or any one of the parties to it, had refused to carry it into effect, the defendant could not take advantage of it in the mode now attempted, but must enforce it by action against the refusing party.

There is no intimation in the plea that Holland agreed to take up the bill, and discharge it, and look either to the trust fund or to the other endorsers for contribution. Nor is it pretended that the plaintiffs knew of such an agreement. If defendant shall pay the whole bill, then he can look to the parties to that agreement to refund their proportions.

But if the agreement assumed to have been made runs with the note, then the defendant would still be responsible for his share as one of the endorsers. In that event, the plaintiffs must recover the one-fourth thereof, upon the defendant's own theory, though it is clearly an incorrect one.

But the defendant has not set out an agreement, either with or without consideration, by which Holland relinquished and changed his rights, as subsequent endorser, to call upon the defendant as a prior endorser for the full amount of his liability.

On the face of the contract, (the bill, non-payment, and notice,) defendant was liable for the whole amount thereof. He can enforce this contract, unless it has been discharged by payment, or by a new valid agreement changing the original liability. To make such an agreement, it must be in writing, and be upon a lawful and sufficient consideration. No such agreement is even hinted at in the pleadings, much less averred, so as to be issuable. It follows, that there was no change of the original contract or liability, and consequently the defendant is liable, and the plaintiffs are entitled to recover.

It is therefore clear that the eighth plea is bad, and the demurrer to it must be sustained.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the District Court of Indiana.

The action was brought on a bill of exchange for $4,500, dated October 16, 1854, drawn by Tyner & Childers, of Peru, Indiana, on Richard Tyner, of New York, and made payable to the defendant sixty days after date, at the office of Winslow, Lanier, & Co., in the city of New York; which bill, at sight, was accepted by the drawee, and afterwards by the payee assigned to one Holland, who subsequently assigned it to Ezekiel Tyner, by whom it was afterwards assigned to the plaintiffs. Payment of the bill was refused at maturity, and it was protested for non-payment. Due notice was given.

The defendant pleaded eight pleas in bar of the action; the first, second, and fourth, being withdrawn, it is only necessary to notice the third, fifth, sixth, seventh, and eighth.

The third plea states that George Holland, who is one of the endorsers and co-sureties thereof, before the commencement of this suit, on the 21st day of December, 1854, fully paid the bill to the Richmond branch of the State Bank of Indiana, who was then and there the holder and owner of the same; and that the plaintiffs received the same after they became due, and were so paid.

This plea assumes that one of the endorsers and co-sureties paid the bill. In McDonald *v.* Magruder, (3 Peters, 470,) and in Wilson *v.* Blackford, (507,) the doctrine was laid down that co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. The liabilities must arise from the endorsements, and not from a distinct agreement to pay the face of the bill jointly; the plea does not necessarily import a joint undertaking; the facts on which the joint liability is founded must be stated. On the payment of the bill by the endorser, it does not cease to be assignable.

The allegations in the fifth plea are not sufficient to bar the action. Several of the matters so stated have no direct bearing on the points made. The various parties to an accommodation bill, where no consideration has passed as among themselves, are not, unless by special agreement, bound to pay in

equal proportions as co-sureties. The averments of the plea are defective in not stating there was an agreement between the drawers and endorsers of the bills of exchange to contribute equally in paying them.

Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt, impair the plaintiff's right to recover.

The sixth plea alleges that no consideration passed between said drawer, acceptor, or endorsers, for said bills, and that the same remained in the hands of R. Tyner until negotiated by him to the Richmond Bank, for his benefit. And afterwards, and before said bills became due, to wit: on the 1st of October, 1854, R. Tyner, Tyner & Childers, and E. Tyner & Co., failed, and made a general assignment of their property, rights, &c., to Holland, Abner McCarty, and R. H. Tyner; and Holland accepted the trust, and became the active trustee; that the assignments were made for the debts and liabilities, first, to indemnify and save harmless Abner McCarty; second, to indemnify and save harmless Holland, said plaintiff, and N. D. Gallion, in proportion to their respective liabilities, and next for the payment of other debts and trusts. The property so assigned is averred to have been of the value of one hundred and fifty thousand dollars, and amply sufficient to pay the bills in suit, &c., and that Holland, on July 1, 1855, delivered said bills, endorsed in blank to said plaintiff, as collateral security for a pre-existing debt of Richard Tyner to said plaintiff, all of which was known to the plaintiff.

To this plea the plaintiff replied, that the said E. Tyner & Co. did not, each nor either of them, make an assignment of their property, rights, credits, or effects, to the said Holland, McCarty, and Tyner, as stated in sixth plea of the defendant; but it is true that the said Richard Tyner, in 1854, made an assignment of said property, rights, and effects, to the said Holland, McCarty, and Tyner, and in trust: first, to indemnify and save harmless the said Abner McCarty as a creditor and surety of the said Richard Tyner; second, to indemnify and save harmless the said Holland, N. D. Gallion, Ezekiel Tyner, and the said plaintiff, as creditors and securities; but the plain-

tiff says the property, rights, credits, and effects, so assigned to the said Holland, McCarty, and Richard H. Tyner, were and still are wholly insufficient in value to indemnify and save harmless the said McCarty as such creditor and surety, so that there are now no effects or money of the said R. Tyner from which the bill could be paid, or any part thereof.

This replication was demurred to, but it was sufficient, and the demurrer was properly overruled.

In the seventh plea, which was amended, an agreement is alleged between the bank and Holland, that if Holland would give his notes to the bank, bearing six per cent. interest, with real and personal security, payable by instalments on the 1st day of January, 1856, 1857, and 1858, the bank would extend the times of payment as above stated, which was agreed to by Holland, the bank being then the holder of the bills; and that this was done without the consent or knowledge of defendant. And it is further alleged that the above bills were, after due, delivered to said plaintiff by said Holland, as collateral security for a pre-existing liability of said Holland, and for no other consideration.

To this plea there was a demurrer on the ground that there was no agreement between Holland, E. Tyner & Co., and the defendant, that on the failure of Richard Tyner to pay the bills of exchange, Holland, E. Tyner & Co., and the defendant, jointly or in equal proportions, should pay them. There was no sufficient averment to this effect. The delivery of the bills to the plaintiff, as collateral security for a pre-existing debt, under the decision of Swift *v.* Tyson, was legal. The demurrer was properly sustained.

In his eighth plea, the defendant says that the bills of exchange, in the declaration mentioned, are one and the same identical bills, and not other or different; that defendant never endorsed but one bill of the amount and date stated. He further says, that the firm of Tyner & Childers consisted of Richard Tyner, James N. Tyner, and William Childers; and that of E. Tyner & Co., of Richard Tyner, and Ezekiel Tyner, and Childers, and that said R. Tyner drew said bill in the name of Tyner & Childers, and accepted the same in his own name, and

endorsed the same in the name of E. Tyner & Co.; that each of the parties, with the said George Holland and this defendant, were, at the time of drawing, accepting, and endorsing, citizens of Indiana; that the bill of exchange was discounted by the said bank, and the proceeds paid to Richard Tyner; that said endorsers were co-sureties thereon; and it was understood the said defendants, the said George Holland and Ezekiel Tyner, were each to be co-sureties, and liable to pay a *pro rata* share of said bill; and each of said parties have, since the endorsing of said bill, admitted a liability, with the others, in case of insolvency of prior parties, for whose benefit said bill was so made to contribute towards payment.

And the defendant further says, that, before the bill became payable, the said Tyner & Childers, and the said R. Tyner and E. Tyner & Co., failed, and each of said firms made made a general assignment of lands, goods, property, and effects, of the value of $1,000 to $5,000, to one H. J. Shirk: first, to pay depositors; second, debts for which A. McCarty and Holland were liable; and also for the payment of debts to plaintiffs, and liabilities to them, the said R. Tyner assigned property and effects, amounting in value to between $60,000 and $150,000, to Holland, McCarty, and R. Tyner, in trust: first, to indemnify and save harmless Abner McCarty; and, second, this defendant and George Holland, the said plaintiffs, and N. D. Gallion, in proportion to their respective liabilities for him, and then for payment of other debts upon other trusts; and Holland became active for the execution of the trust, and took up of the Richmond Bank the bill of which it was holder, and by giving new notes of the said Holland for this and other debts of the said Tyner and Holland, and others, amounting to over $20,000, which sums were payable subsequently, with interest, and secured by mortgage on real estate conveyed by Holland to the bank, all of which was done without the consent or knowledge of the defendant.

And the defendant says that Holland, still being one of the trustees of said R. Tyner, and having property in his hands upon the trust aforesaid of greater value than the amount of the bills, afterwards, on the 1st of July, 1855, at the county

aforesaid, delivered said bills to the plaintiffs as collateral security for a pre-existing debt of the said R. Tyner, on which the said Holland was endorser. And the defendant says the moneys in said bills of exchange have not yet been paid by the said Holland, or any one on his behalf. To this plea there was a demurrer.

This plea but reiterates in effect the same defences which have already been disposed of in deciding upon the demurrers before noticed, and it is not perceived how any additional force can be given to them by being grouped together in one plea.

The fact that these parties were accommodation endorsers does not make them co-sureties, bound to contribute equally to the payment of the bills, without a special agreement to that effect; and there is no sufficient averment that any such agreement existed.

The averments in regard to the assignment are also defective, for they nowhere show that Holland had, at any time, sufficient funds in his hands, after complying with the terms of the trust—viz: to save Abner McCarty and others harmless—to pay this bill; and unless such a state of fact existed, there could be nothing in his hands made available for the bills.

If the fact should appear that these parties are bound to each other by a separate and distinct agreement, other than that which appears by the endorsements upon the bills, the plaintiff in error will have his remedy in an action of *indebitatus assumpsit* against the other parties to the bills. But we think the averments in the pleas noticed are wanting in precision, and do not bring the case within the rule of special agreements, which impose a joint obligation.

The demurrers are sustained, and the judgment is affirmed.

SAMUEL PEARCE, PLAINTIFF IN ERROR, *v.* THE MADISON AND INDIANAPOLIS RAILROAD COMPANY AND THE PERU AND INDIANAPOLIS RAILROAD COMPANY.

Where two separate corporations were created to make railroads, they had no right to unite and conduct their business under one management; nor had