SMITH ET AL. v. UNITED STATES.

1. Where several persons sign a bond to the Government as surety for a Government officer, which bond, statute requires shall be approved by a judge, before the officer enters on the duties of his office, an erasure by one of the sureties of his name from the bond—though such erasure be made *before the instrument is submitted to the judge for approval*, and, therefore, while it is uncertain whether it will be accepted by the Government, or ever take effect,—avoids the bond, after approval, as respects a surety who had not been informed that the name was thus erased; the case being one where, as the court assumed, the tendency of the evidence was, that the person whose name was erased signed the bond before or at the same time with the other party, the defendant.
2. Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him.

AN act of Congress, relating to marshals of the United States,* provides, that "*before*" the marshal enters on the duties of his office, he shall become "bound" for the faithful performance of the same, before the judge of the District Court of the United States, jointly and severally, with sufficient sureties, "*to be approved by the district judge.*"

With this act in force, Pine was appointed marshal, and gave bond on which the name of *Smith* and others had been signed, and appeared as sureties. Suit having been brought against the marshal, *Smith*, and the others, his sureties, in the Circuit Court for the Northern District of Illinois, upon this bond, Smith pleaded that the bond was not *his* deed.

On the trial the United States offered the bond in evidence. The instrument showed on the face that it *had* been signed by a certain Hoyne as one of the sureties; but that his name was now erased. The defendants, accordingly, objected to the admission of the bond in evidence, on the ground that there was an erasure and alteration thereon, which it was the duty of the plaintiff to explain. The plaintiff then called the district judge, who had approved the bond. The learned justice testified that when it was brought

* Act of 24th of September, 1789; 1 Stat. at Large, 87.

to him for approval, it presented the same appearance exactly as it did now at the trial, except that the names of the sureties were inserted by him in the first part of it; that it was brought either by one McGill or by the defendant, Pine; that Pine had difficulty in getting sureties, and had, some time before, told him, the witness, that Hoyne had objections to having his name on the bond, and Hoyne afterwards told him the same thing. The judge had not then seen it. Afterwards it was brought to him, with Hoyne's name erased. Not knowing the signatures of all the parties, he held the bond several days, and all the sureties came in and acknowledged the execution of it before him, *except the defendant, Smith.* He then approved the bond, and being personally acquainted with Smith's writing, certified to the genuineness of the signatures. The bond was then admitted in evidence, under objection.

At a subsequent stage of the trial the defendant, Smith, called the district judge as a witness, when he testified that some time before the approval of the bond by him, Hoyne stated to him that he had signed the bond, with others, for Pine, but that he had become dissatisfied, and that McGill and Pine had both agreed that his name should be taken off;—that he wanted it off, and was not willing it should remain on the bond. The witness said, further, that when the sureties who acknowledged the execution of the bond appeared before him, he might have called their attention to the erasure of the name of Hoyne, but was not positive; was inclined to think he did; thought he handed it to each one of them, and asked them if they signed it; he didn't know that they read it.

Hoyne himself testified that "he signed the bond,—*which was circulated for signatures*,—with others;" but that soon after, and before its approval, he became dissatisfied, and requested McGill and Pine to have his name erased; and that they promised to do this. Not being able himself to get the bond to do it, and knowing that it would have to be approved by the district judge, he went to that officer and informed *him* of his wish; said he had signed it, and wanted

to have his name erased, &c. The judge told him, that in justice to *the other signers*, he should tell them that he wanted his name off; that accordingly, in a very short time, he, the witness, spoke to *all* the parties who had signed, *except Smith*, who was absent, and told them that he wanted his name off. A few days after, in response to his inquiry, the judge told him that his name had been erased. When it was done, and by whom, he did not know.

On this state of facts, the counsel of the defendant, Smith, requested the court below to charge, among other things, as follows:

1. That if the jury believed, from the evidence, that the name of Hoyne was erased from the bond in suit, without the knowledge or consent of him, the defendant, Smith, and that he, Smith, did not acknowledge the bond as his, subsequently to such erasure, the jury should find in his favor.

2. That the law places the burden of proving such consent upon the plaintiffs, and if they have failed to make such proof, they are not entitled to a verdict.

The court refused so to charge, and the defendants excepted. Verdict and judgment having gone for the United States, the defendants took this writ of error.

Mr. Coffey, special counsel for the United States, defendant in error: There is no evidence in this case that Smith, or any of the signers of Marshal Pine's bond, made any condition when signing as to what persons, or what number of persons, should unite with them. Indeed, it is quite evident not only that there was no agreement or condition made by any of them on signing, but that each signed independently of the others, and without knowing, except so far as they had signed, who their co-sureties were to be. For Hoyne testifies that he "signed the bond, which was *circulated for signatures*, with others;" and the district judge testifies that when he approved the bond he inserted the names of the sureties in the first part of it. It was the common case of

a person carrying around an official bond, and getting any persons whatever who are willing to oblige, to a certain extent, the principal. When, therefore, the sureties signed, they must have done so without knowing who were to be their co-sureties, and, of course, without any agreement as to who or how many were to sign. This, then, we think may be assumed as part of our case.

The erasure of Hoyne's name, of which Smith now seeks to avail himself,—the first point, and one which, if decided as we think it ought to be, will render the others unimportant on the proofs,—was made, not only before the delivery of the bond to the plaintiff, but before the essential preliminary to its execution of approval by the United States district judge; and it was evidently made by Marshal Pine himself, or at his instance, and before the plaintiff had any connection with it. Certainly it was not made by or at the instance of the plaintiff. The explicit direction of the act of Congress relating to marshals, that the marshal shall "become bound" before the judge of the District Court, with "sureties to be *approved* by the district judge," shows that the bond is in no manner executed until it is brought to the judge and approved by him. That approval is as essential to its valid execution as is the acknowledgment made in court to a valid recognizance. Before it is given, the signatures do not bind the sureties, for one important element to a good contract is wanting, viz., the agreement of the United States to accept them; that agreement being, by the law, expressed by the judicial approval. When, therefore, Hoyne's name was stricken off the bond, the erasure left him, as to the obligation which the sureties were about to assume, precisely where he would have stood if he had only promised to sign it, and had not done so. And surely if, having promised to sign it, he had never done so, it could not be pretended that his failure to sign would discharge the sureties who had signed and been approved, even though he and they had previously agreed that unless all signed, none should be bound; unless, indeed, the United States had been a party to that agreement. Such an agreement might bind all the sure-

ties who made it, but could not affect the obligee, who was not a party to it, nor furnish any of them with a good defence to the bond, whatever right of action, in the event of loss, it might give to the sureties who signed, against one who did not sign. If, then, the erasure of Hoyne's name before approval, and without the connivance of the United States, no more affected the obligation of the other sureties than his failure to keep a verbal promise to sign would have done, it follows that it cannot relieve Smith from the bond. And this result follows, if Smith, when his name was approved, had no knowledge of the erasure, as it would follow if he had had a special agreement with Hoyne that one was not to sign without the other.

But even if the erasure be treated as a material alteration of the bond, after it was so far executed as to bind the signers, still, if it was made by or at the instance of Marshal Pine, without the knowledge or consent of the United States, it does not discharge Smith from liability. In such case the alteration must have been made by or with the knowledge or consent of the obligee. And, however, in the absence of evidence, that knowledge or consent might be inferred, where the bond had been delivered and was in his possession, in a case like this, where the alteration was made before it was delivered or came into possession of the United States, the knowledge or consent of the obligee to the alteration must be affirmatively proved by the party alleging and availing himself of it. To this effect is *United States* v. *Linn et al.*, in this court,* an action on Linn's official bond. Duncan, a surety, pleaded as special matter in bar that he had signed and delivered it to Linn to be transmitted to the plaintiff, and *after* the sureties had been approved by the district judge, it was, without the consent or authority of Duncan, materially altered in this, that scrawls by way of seals were affixed to the signatures of Duncan and the other signers, whereby the instrument was materially changed and vitiated, &c. In considering this plea, the court said:

* 1 Howard, 104.

"The plea does not indicate in any manner by whom the alteration was made. It does not allege that it was done with the knowledge or by the authority or direction of the plaintiff, nor does it even deny that it was done with the knowledge of the defendant, Duncan. The plea does not contain any allegation inconsistent with the conclusion *that it was altered by a stranger, without the knowledge or consent of the plaintiff; and if so, it would not have affected the validity of the instrument.* The demurrer admits nothing more than that the seals were affixed after the instrument had been signed by the parties and delivered to Linn, to be transmitted to the plaintiff, and that this was done without the consent, direction, or authority of him, the said Joseph Duncan. Is this enough to avoid the instrument and bar the recovery? It certainly is not, *for the seals might have been affixed by a stranger, without the knowledge or authority of the plaintiff, and would not have affected the validity of the instrument.*"

If this principle be true of an alteration made *after* the bond is judicially approved, it certainly is true where the alteration is made by the principal co-obligor *before* the judicial approval, which, as we have seen, is the legal method of expressing the consent of the United States to the contract, and before which the obligation involved in signing does not begin.

But it is settled that even where the face of a joint and several bond shows that it was intended to have been executed by others, in addition to those whose names are appended to it, and those others have not united in signing it, still it is the valid and binding deed of those who do sign, unless they show an express reservation or condition at the time that it was not to be binding on them, without being also executed by the others.

In *Pawling* v. *United States*, in this court,* where the sureties in an official bond *proved expressly* that they signed on condition that others should sign, who did not sign, this court held that it was evidence for a jury to infer a delivery as an escrow. It is evident that without proof of that condition they would have been held bound.

* 4 Cranch, 219.

Argument for the surety.

To relieve the defendant, Smith, under these circumstances, would enable the obligors, in an official bond like this, to practice an easy fraud upon the Government. For it would only be necessary for those who sign such a bond to make a collusive arrangement with some one who did not sign, and, when sued on the bond, prove that arrangement in discharge of themselves.

Mr. E. S. Smith, contra: The assumption that Smith signed without knowing who else was to sign is not according to the evidence. It is obvious that each party in signing expected certain others would sign. Their names, we can hardly, in the nature of things, doubt, were stated. Any man in signing such a bond would naturally ask who else was to sign it, and according as responsible or irresponsible persons were named, might consent or refuse. This is plain. Hoyne may have signed with Smith. There is nothing to disprove that theory. At all events, the direction of the district judge to Hoyne, that he must notify to all the others his wish to have his own name erased, makes it obvious that all the others did know that his name was there, and did rely, as the condition of their putting their own there, on the fact.

Smith never personally appeared before the district judge and acknowledged his signature at all. The spirit of the statute requires the sureties to acknowledge the bond before the judge; to do under his eye, or else to acknowledge before him that they have done, whatever they ought to do. Signing and sealing alone does not bind them. Acknowledgment before the judge, and his approval after that, are superadded requisites to give efficacy to the sureties' act. This position is, in reality, taken by the other side to show that Hoyne's signature was a nullity, and, therefore, its erasure no alteration of a deed. But it is an argument that cuts two ways. It operates quite independently of Hoyne, and goes to destroy the whole ground of suit against Smith.

The taking away of Hoyne's name, therefore, was a material alteration; one going to the foundation of the obligation. It is said that the alteration was made without the know-

ledge of the United States, without the knowledge of the obligee, therefore; that the alteration accordingly does not affect the validity of the instrument. But the district judge was the representative of the United States. It was made with his knowledge. His acts and consents are those of the Government.

These principles would decide the case against the Government in any case; but in this one it is to be observed that Smith and others were but sureties. The rule of law in regard to this class of persons is settled. Standing in no equity to the plaintiff, a surety will be bound only to the extent and in the manner set out in the words of his contract. No implication can be made against him. The case, therefore, is to be decided with special reference to this fact.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the Northern District of Illinois. Suit was instituted by the United States, and the record shows that it was an action of debt on the official bond of Charles N. Pine, late marshal of the United States for the district where the suit was brought. Service was not made on the principal in the bond, nor on four of the sureties as named in the declaration. Of those served, three were defaulted, and the remaining three, Thomas Hoyne, William B. Snowhook, and Ezekiel S. Smith, appeared and made defence. First two pleaded,—1, non est factum; 2, performance by principal. Smith filed separate pleas,—1, Nil debit; 2, non est factum. Issue was joined upon those several pleas, and the parties went to trial. Verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error.

I. Record shows that the plaintiffs, at the trial, offered the bond described in the declaration in evidence, to prove the issue on their part, but the defendants objected to the reading of the same as inadmissible, because, as they alleged, it had been altered by the erasure of the name of one of the sureties. Yielding to that objection, the plaintiffs called the

district judge, and examined him as a witness. He testified to the effect that the bond, when it was brought to him for approval, was precisely as it appeared when offered in evidence, except that the names of the sureties were inserted by him in the introductory part of the instrument. His statement was, that it was brought to him for approval either by the marshal or his principal deputy, and that the erasure as described was there, just as it appeared at the time the witness was examined. Witness did not see the bond till it was brought to him for approval with the name erased; but he had previously been informed, both by the marshal and the person whose name was erased, that the latter had objections to having his name remain on the bond. Signatures of some of the parties not being known to the witness, he held the bond for several days after it was presented, and during that time all of the sureties, except the defendant, Smith, came in and acknowledged its execution. Whereupon the witness approved the bond agreeably to the certificate in the record, which is under his signature. Substance of the certificate is that all of the parties to the instrument, except the defendant, Smith, acknowledged the genuineness of their signatures; and that the district judge, being satisfied from his own knowledge and from evidence that the signature of Smith also was genuine, approved the bond. Being asked by the defendants if Smith had ever consented to the erasure, the witness answered that he had no knowledge upon the subject. Relying on the explanations given by the witness, the plaintiffs again offered the bond in evidence, and the court, overruling the objections of the defendants, admitted the same to be read to the jury, which constitutes the first exception of the defendants.

Certain treasury transcripts were also produced by the plaintiffs, exhibiting the official settlement of the accounts of the marshal at the Treasury Department, together with the statement of certain treasury warrants and drafts in his favor, showing a balance due to the plaintiffs. Evidence was then offered by the defendants tending to show that the settlement of the marshal's account as stated in the treasury

transcripts, was not correct. Most of the documents offered for that purpose were objected to by the plaintiffs, and were excluded by the court. Defendants excepted to the rulings in that behalf, but in the view taken of the case it will not be necessary to examine the questions which the exceptions present.

Having offered evidence upon the merits, they recalled the district judge, and examined him again as to the erasure. Among other things, he testified that before he approved the bond, the person whose name was erased told him that he had signed it with others for the marshal, and that he had become dissatisfied, and wanted his name taken off; that the marshal and his deputy had both agreed that his name should be erased, and that he was not willing that it should remain.

Same parties also called and examined Philip A. Hoyne, whose name was erased from the bond. Material statements of the witness are that the bond was circulated for signatures by the principal deputy of the marshal, and that the witness signed it with others at that time; that he, the witness, became dissatisfied some days before it was approved, and requested to have his name erased, and that the marshal and his deputy promised to do it; that not being able to get hold of the bond, he mentioned the subject to the district judge, and explained to him that he "could not consent to have it there at all." Suggestion of the judge was that he, the witness, in justice to the other signers of the bond, should see them and tell them what he wanted, and the witness stated that in a short time he spoke to all of them except defendant, Smith, who was then absent, and told them that he wanted his name erased, and that he was not willing to let it remain there as one of the sureties. Erasure was made before the bond was approved, but when, or by whom, the witness did not know.

II. Theory of the defendant, Smith, was, that he was discharged from all liability on the bond in consequence of the erasure, and he accordingly wished the court to instruct the jury in substance and effect as follows: 1. That if the jury

believed from the evidence that the name of P. A. Hoyne was erased from the bond in suit, without the knowledge or consent of the defendant, and that he did not acknowledge the bond as his, subsequent to such erasure, the jury should find the issue in his favor. 2. That the law places the burden of proving such consent upon the plaintiffs, and if they have failed to make such proof they are not entitled to a verdict. 3. That notice of the erasure to the district judge who approved the bond was notice to the Government. But the court refused so to instruct the jury, and the defendant excepted.

III. Principal question for decision arises upon the exception of the defendant to the refusal of the court to instruct the jury as requested in the first prayer presented by the defendant.

Tendency of the evidence plainly was to show that the person, whose name was erased, signed the bond before or at the same time with the defendant. Nothing else can be inferred from his own testimony, in which he states that he signed with others at the time the bond was circulated for signatures; and his ready acquiescence in the suggestion of the district judge, that in justice to the other signers he ought to see them and tell them what he wanted, strongly favors the same view. Testimony of the district judge also confirms that theory, and makes it certain that all had signed before the erasure and before any interview had taken place between him and the person whose name was erased. Record does not show who made the erasure, but the proof is satisfactory that the marshal and his deputy agreed to do it, and that it remained in the possession of one of them, until it was presented to the district judge for approval.

Defendant insists that the erasure from the bond of the name of one of the sureties after Smith had signed it, and without his knowledge or consent, and before the approval of the bond, was sufficient to discharge him from all liability.

On the other hand the plaintiffs, although they concede

that the erasure was after the defendant had signed the bond, and that it was done without his knowledge or consent, yet insist, that inasmuch as the erasure was made before the bond was approved by the district judge, it left the liability of all concerned precisely as it would have stood, if the person whose name was erased had only promised to sign and had not fulfilled his engagement.

Proposition as stated may be correct as applied to all the sureties who subsequently appeared before the district judge, and acknowledged the bond as altered to be their deed, and it certainly is correct as to the person whose name was erased. Liability cannot attach to the person whose name was erased before the instrument was approved, and all those who subsequently consented to remain liable, notwithstanding the alteration, are estopped under the circumstances to interpose any such objection. They have waived the effect which the alteration in the instrument would otherwise have had, and consented to be bound, and therefore have suffered no injury. *Volenti non fit injuria.* Granting all this, still it must be borne in mind, that the alteration in this case was made without the knowledge or consent of the defendant, and the case shows that he never appeared before the district judge and acknowledged his signature, or in any manner ever waived the right to insist that the instrument was not his deed. Materiality of the alteration is not denied, and the plaintiffs admit that it is apparent on the face of the instrument, but still they insist that inasmuch as the marshal, before he enters on the duties of his office, is required by law to become bound before the district judge with sufficient sureties for the performance of the conditions, it is clear that the bond is in no manner executed, until it is presented to the district judge and is by him approved.* Approval, say the counsel, is as essential to its execution, as is the acknowledgment made in court to a recognizance, and the argument is that no alteration made in the instrument before such approval, can have the effect to

* 1 Stat. at Large, 87.

discharge any one of the sureties, unless it be shown that it was made with the knowledge or consent of the obligees. Reason for the conclusion, as suggested by the plaintiffs, is that, where the alteration precedes the approval, the presumption is, that it was made by a stranger, and not by the party seeking to enforce the obligation.

Support to the proposition, as stated, is attempted to be drawn from the case of *United States* v. *Linn et al.*,* and it must be confessed that there are expressions in the opinion of the majority of the court which give some countenance to that view of the law. Question in that case arose upon the demurrer of the plaintiffs to the plea of the defendants, and the judgment of the court was in fact based upon the ground that the allegations of the plea were insufficient to establish the defence. Alteration charged in that case was that the seals had been attached to the signatures after the instrument was signed and before it was delivered, and the allegations of the plea were, that the alteration was made without the consent, direction, or authority of the surety, but it was not alleged that it was done *without his knowledge*, or by whom it was done.

Referring to those omissions in the plea, the court say, that in view of those circumstances, it was not an unreasonable inference, that if the plea had disclosed by whom the alteration was made, it would have appeared that it did not affect the validity of the instrument. Much stress also was laid upon the fact, that there was nothing upon the face of the instrument indicating that it had been altered, or casting a suspicion upon its validity, and the court held, that the burden of proving when and by whom the alteration was made under the state of facts alleged in the plea, was properly cast upon the defendants. But the court admitted that a party claiming under an instrument, which appears on its face to have been altered, was bound to explain the alteration, and show that it had not been improperly made. Reference was also made by the court, at the same time, to

* 1 Howard, 112.

two decided cases as asserting that doctrine, and it is clear that both the cases cited* fully sustain the position.

General rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or is made so by extraneous evidence, the party producing the instrument and claiming under it, is bound to remove the suspicion by accounting for the alteration.† Exceptions to the rule undoubtedly arise, as where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title under the instrument; but the case under consideration obviously falls under the general rule.‡ Every material alteration of a written instrument, according to the old decisions, whether made by a party or by a stranger, was fatal to its validity if made after execution, and while the instrument was in the possession and under the control of the party seeking to enforce it, and without the privity of the party to be affected by the alteration.§ Grounds of the doctrine, as explained in the early cases and by text writers, were twofold. First. That of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without running any risk of losing by the event in case of detection. Secondly. To insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned.‖ Courts of justice have not always adhered to that rule, but the decisions of recent date in the parent country, show that her courts have returned to the old rule in all its vigor.¶ Judge Story, in *United States* v. *Spalding*,** condemned so much of the rule

* Henman *v.* Dickinson, 5 Bingham, 183; Taylor *v.* Mosely, 6 Carrington & Payne, 273.

† 1 Greenleaf on Evidence, 564.

‡ Knight *v.* Clements, 8 Adolphus & Ellis, 215; Newcomb *v.* Presbrey, 8 Metcalf, 406.

§ Pigot's Case, 11 Coke, 27; Master *v.* Miller, 4 Term, 330.

‖ 2 Taylor on Evidence, § 1618.

¶ Davidson *v.* Cooper, 11 Meeson & Welsby, 778; Same *v.* Same, 13 Id. 343; 2 Taylor on Evidence, § 1624.

** 2 Mason, 482.

as holds that a material alteration of a deed by a stranger, without the privity of the obligor or obligee, avoids the deed, and the weight of authority in this country is decidedly the other way. He objected to the rule as repugnant to common sense and justice, because it inflicted on an innocent party all the losses occasioned by mistake or accident, or by the wrongful acts of third persons.*

IV. Present case, however, does not depend upon that rule; nor, indeed, is it necessary to express any opinion as to what is the true rule upon the subject, except to say that where the alteration is apparent on the face of the instrument, the party offering it in evidence and claiming under it is bound to show that the alteration was made under such circumstances that it does not affect his right to recover.†

Defence in this case, as exhibited in the prayer for instruction, was based not only upon the ground that there was a material alteration in the bond, but also upon the ground that the defendant was a surety, and, consequently, both considerations must be kept in view at the same time. True inquiry, therefore, is, what is the rule to be applied in a case where it appears that the contract of a surety has been altered without his knowledge or consent, and where it appears that the effect of the alteration is to augment his liability? Mr. Burge says, that an alteration in the obligation or contract, in respect to which a person becomes surety, extinguishes the obligation, and discharges the surety, unless he has become, by a subsequent stipulation, a surety for, or has consented to the contract as altered.‡ Same author says, if there be any variation in the contract made without the consent of the surety, and which is, in effect, a substitution of a new agreement, although the original agreement

* 2 Parsons on Bills, 574; 1 Greenleaf on Evidence (10th ed.), § 567, p. 749.

† Parsons on Bills, 577; Greenleaf on Evidence (10th ed.), § 564; Knight *v.* Clements, 8 Adolphus & Ellis, 215; Clifford *v.* Parker, 2 Manning & Granger, 909; Wilde *v.* Armsby, 6 Cushing, 314.

‡ Burge on Suretyship, p. 214.

may, notwithstanding such variation, be substantially performed, the surety is discharged.*

Authorities are not necessary to show that the alteration, in this case, was a material one, as it obviously increased the liability of the defendant; and in case of the default of the principal and payment by the defendant, diminished his means of protection by the way of contribution; and the rule is universal that the alteration of an instrument in a material point by the party claiming under it, as by inserting or striking out names without the authority or consent of the other parties concerned, renders the instrument void, unless subsequently approved or ratified.†

Responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority, it becomes a new contract, and is invalid, because it is deficient in the essential element of consent. Where, after the execution of a bond by the principal and the surety, conditioned for the performance by the former of his duty as collector in certain townships, the name of another township was added with the consent of the principal, but without that of the surety, this court held, in *Miller* v. *Stewart*,‡ that the latter was discharged from all obligation, because the duties imposed by the instrument in its altered state were not those for the performance of which he had made himself responsible, and that the defect could not be cured by declaring on the condition as it originally stood. Opinion of the court was given in that case by Judge Story, and his remarks upon the subject are decisive of the question under consideration. Indeed, nothing can be clearer, both upon principle and 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. He has

* Evans *v.* Whyte, 5 Bingham, 485; Archer *v.* Hale, 4 Id. 464; Eyre *v.* Bartrop, 3 Maddock, 221; Bonser *v.* Cox, 6 Beavan, 110; Archer *v.* Hudson, 7 Id. 551.

† Boston *v.* Benson, 12 Cushing, 61.

‡ 9 Wheaton, 702.

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.

When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle, says Chancellor Kent, is well settled, that the case must be brought strictly within the guaranty, and the liability of the surety cannot be extended by implication.* Liability of a surety, say the court, in *McClusky* v. *Cromwell*,† is always *strictissimi juris*, and cannot be extended by construction; and this court, in the case of *Leggett et al.* v. *Humphrey*,‡ adopted the same rule, and explicitly decided that a surety can never be bound beyond the scope of his engagement.§

Argument is unnecessary to show that a variation of the contract was made in this case, because it is admitted, and it is equally certain, that the person whose name was erased is fully discharged, and, consequently, that the plaintiffs cannot declare upon the original obligation as it stood before the alteration was made. Neither a court of law or equity, said this court, in *McMicken* v. *Webb et al.*,‖ will lend its aid to affect sureties beyond the plain and necessary import of their undertaking, nor add a new term or condition to what they have stipulated. Sureties must be permitted to remain in precisely the situation they have placed themselves; and it is no justification or excuse with another for attempting to change their situation to allege or show that they would be benefited by such change. Such, say the court, in that case, is the doctrine in England, in this court, and in the State courts, and the authorities cited fully justify the remark. Whenever the contract is varied, whether by giving time to the principal or by an alteration of the contract, it presents

* 3 Commentaries (10th ed.), 183; Birkhead *v.* Brown, 5 Hill, 635.
† 1 Kernan, 598.
‡ 21 Howard, 76.
§ United States *v.* Boyd et al., 15 Peters, 208; Kellog *v.* Stockton, 29 Pennsylvania State, 460.
‖ 6 Howard, 296.

a new cause of action, to which the surety has never given his assent, and with which, therefore, he has nothing to do.*

Evidence shows that the alteration was made without the knowledge of the defendant, and there is neither fact nor circumstance in the case from which to infer any subsequent assent. Undoubtedly, he knew when he signed the bond that the law required that it should be approved by the district judge; but his knowledge of the law in that behalf furnishes no ground of inference that he authorized the alteration, or that he consented to be bound in any other manner, or to any greater extent, or under any other circumstances than what was expressed in the instrument. Supreme Court of Massachusetts held, in the case of the *Agawam Bank* v. *Sears*,† that a surety did not authorize the principal to make a material alteration in the note, by permitting him to take it to the bank for discount, and that such an unauthorized alteration discharged the surety; and where two sureties signed a probate bond, subject to the approval of the judge of probate, and it was subsequently altered by the judge of probate by increasing the penal sum, with the consent of the principal, but without the knowledge of the sureties, and was then signed by two additional sureties, who did not know of the alteration, and then was approved by the judge of probate, the same court held that the bond, though binding on the principal, was void as to all the sureties. See, also, *Howe* v. *Peabody*, 2 Gray, 556; *Burchfield* v. *Moore*, 25 English Law and Equity, 123. Analogous as those cases are, however, they are not as directly in point as that of *Martin et al.* v. *Thomas et al.*,‡ which is the latest decision upon the subject pronounced by this court. Suit in the court below, in that case, was against the sureties in a replevin bond. Statement of the case shows that the bond was given by the defendant in replevin with sureties, to obtain the return of the property which was the subject of the replevin suit. Defendant subsequently erased his name from the bond with the consent of the marshal, but without the knowledge or

* Gass *v.* Stinson, 3 Story, 452. † 4 Gray, 95. ‡ 24 Howard, 315.

consent of the sureties; and this court held, that the bond was thereby rendered invalid against the sureties. Principle of these decisions is, that the alteration varies the terms of the obligation, and that the contract thereby ceases to be the contract for the due performance of which the party became surety, and wherever that appears to be the fact, and the surety is without fault, he is discharged.

Correct rule, we think, is stated by Lord Brougham in *Bonar* v. *Macdonald*,* and which is substantially the same as that adopted by Mr. Burge in his treatise on surety. Substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni.* Intentional error cannot be imputed to the district judge, but the undisputed facts show that the erasure was made after the defendant signed the instrument, and before its approval, and without the knowledge or consent of the defendant.

For these reasons, we are of the opinion that the first prayer for instruction, presented by the defendant, should have been given.

JUDGMENT of the Circuit Court, therefore, is REVERSED, and the cause remanded, with direction to issue a new *venire.*

MILLER *v.* SHERRY.

1. A creditor's bill, to be a *lis pendens*, and to operate as a notice against real estate, must be so definite in the description of the estate, as that any one reading it can learn thereby what property is the subject of the litigation. If it is not so, it will be postponed to a junior bill, which is.
2. A party entitled to a homestead reservation under the laws of Illinois,—

* 1 English Law & Equity, 1.