11FED.CAS.—28

Case No. 6,024.

HANK v. CRITTENDEN.

[2 McLean, 557.][1]

Circuit Court, D. Ohio. July Term, 1841.

GUARANTY OF DIVIDEND—INSOLVENCY OF PRINCIPAL—RESPONSIBILITY OF GUARANTOR.

1. The defendant guarantied to the holder of certain certificates of stock in the Portage Hydraulic Manufacturing and Land Company, ten per cent, on moneys paid for two years. Held that an averment that, within the time specified, the company neither made nor declared a dividend was insufficient.
2. The undertaking was collateral, and in all such cases a demand and notice are necessary to be averred and proved, or an excuse alledged, to charge the guarantor.
3. The total insolvency of the principal supersedes the necessity of a demand of the principal and notice to the guarantor.

At law.

Brush & Gilbert, for plaintiff.

Mr. Andrews, for defendant.

LEAVITT, District Judge. The declaration in this case is in assumpsit; and sets forth, in four special counts, the issuing of four several certificates, by the Portage Hydraulic Manufacturing and Land Company, dated February 21, 1837, in the following form: "This is to certify that Hank and Niles have ten shares in the capital stock of the Portage Hydraulic Manufacturing and Land Company, on which one thousand dollars have been paid, transferable on the books of said company, by Hank and Niles, or their attorney, on the surrender of this certificate." It is then averred, that the defendant, on the same day, made an indorsement, on each of said certificates, as follows: "I here by guarantee unto the holder or holders of the within shares, an annual dividend or income of ten per cent, for two years, from the 13th inst, for value received." Then follows an averment that said company, for two years after the said 13th of February, 1837, "neither declared nor paid any dividend or income whatever, of which the defendant had notice," &c. The defendant has filed a demurrer to the declaration; and the first objection urged is, that no sufficient consideration for the promise or guaranty is alledged.

The principle is well settled, that in declaring on promises or contracts, which do not import consideration, it is necessary to aver a good and sufficient consideration. Specialties, and bills of exchange and promissory notes, imply a consideration; and in such cases none need be averred. The promise or guaranty in this case, not being embraced in either of these classes, it is necessary that a consideration should be stated. The only question is, whether this is sufficiently set forth in the declaration. It is not averred with the formality and precision usual in such cases; but the promise or guaranty, on which the action is

founded, is copied in the declaration; and from this it appears to have been made "for value received." These words, it may be assumed, were not used without some design; and they clearly amount to an acknowledgment by the guarantor of a benefit received from the other party, as the moving cause of the execution of the guaranty. And in this aspect of the case, we are of the opinion that a sufficient consideration for the promise, stated in the declaration, does appear. It is, also, insisted, by the demurrant, that the declaration is deficient, because it does not aver a demand on the company for the payment of the dividends on the shares transferred to the plaintiff, and a notice to the defendant of such nonpayment

The inquiry which must be decisive of this point is, whether the promise on which this action is founded is to be regarded as absolute or collateral. If it can be viewed as an unconditional promise to pay the plaintiff ten per cent for two years, on the stock transferred, it is not necessary to aver a demand upon the company, for the dividends, as no such demand can be required to fix the liability of the defendant; but, if it is to be regarded as a promise to pay ten per cent on the stock transferred to the plaintiff, in the event that the company shall fail to do so, it is clearly one of those collateral undertakings, in which it is the right of the promisor, before his liability attaches, that a demand should be made of the party for whom he undertakes, and that notice should be given of the failure of that party to pay. In this latter aspect the promise, under consideration, must be viewed. And thus considered, the principles applicable to it are the same that have been long and uniformly sanctioned by courts, in the numerous cases of commercial guaranties, here to fore decided, both in this country and in England. If an individual guarantee the payment of a note or bill, although the same strictness in regard to the time of making demand, and giving notice is not required as in the case of an indorsement of commercial paper, yet the demand and notice are held to be indispensable, unless an excuse, such as the insolvency of the maker or acceptor, be averred. And it is, also, settled by repeated adjudications, that to make the writer of a letter of credit responsible for goods sold or advances made upon such letter, he must be duly notified of the acceptance of the letter, and of the amount of sales or advances made; and in default of such notice he is not liable. The position is believed to be sustainable upon principle and authority, that in all collateral undertakings, where the liability of the guarantor depends on the doing of some act by a third person, notice of a demand upon him, or an excuse for not making it must be alledged. The averment in the declaration that the company neither declared

nor paid any dividend within the two years, mentioned in the guaranty, does not supersede the necessity of a demand. The undertaking of the defendant in its legal effect is, that a profit on the stock transferred, equal to ten per cent, per annum, for two years, shall be made; and that if no profit be made the guarantor will be responsible for ten per cent; or, if a less profit than ten per cent is made, he will pay the guarantee the difference between that rate and the profit actually made. An averment therefore, that the company neither declared or paid any dividend or profit is not equivalent to an averment that no profit was made during the two years; and nothing short of this allegation, or, that the company was actually and notoriously insolvent, will excuse a demand on the company, and notice to the guarantor.

In this view of the promise or guaranty on which this action is founded, the assignment of the breach, as stated in the declaration, is defective. The rule on this subject is, that the breach should be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with the import and effect of it And if the breach vary from the sense and substance of the contract and be either more limited or larger than the contract it will be insufficient In the case before the court the words of the guaranty as set forth in the declaration are: "I here by guaranty unto the holder or holders of the within shares, an annual income or dividend of ten per cent for two years from the 13th Feb., inst." The breach assigned is: "That the company, within the two years, neither declared or paid any dividend or income whatever." This averment does not negative the contract or promise, either in its words or according to its legal import. To make the averment coextensive with the promise or contract according to its sense and substance, it should have alleged not only that the company did not pay or declare any dividend, but that it made no profit during the two years referred to The allegation contained in the declaration may be strictly true, namely, that the company neither paid or declared any dividend; and yet, in entire consistency with that averment a profit even exceeding ten per cent may have been made by the company. If, instead of declaring and paying a dividend, the officers had deemed it more expedient to set aside the profits as a surplus or contingent fund; or, if such profits had been added to the capital stock, it cannot be doubted that this would have been a substantial compliance with the terms of the guaranty, although the company "neither declared nor paid any dividend whatever." It seems clear to us, therefore, that the averment of the breach of the guaranty in question is not coextensive with the contract; and that on this ground the declaration is defective. The demurrer to the declaration is, therefore, sustained.

[1] [Reported by Hon. John McLean, Circuit Justice.]