

"\$2,500.

BELTON, TEXAS, February 1, 1882.

"Twelve months after date we promise to pay to the order of Miller Bros. twenty-five hundred dollars at their office in Belton, Texas, with interest at the rate of eight per cent. per annum from maturity until paid, value received.

"C. H. BOND & Co.

"Indorsed: S. E. RIDGELY."

(2) When the note was due, it was protested for non-payment, and notice was sent to the defendant at Memphis, Tennessee, where he resided.

(3) There was no other consideration for the note than the balance due the plaintiffs, as bankers, from C. H. Bond & Co., merchants, on an account arising out of dealings previously had between them, and the extension of the debt for the 12 months the note had to run to maturity. The defendant in no way participated in that consideration, or received any benefit from it.

(4) C. H. Bond was a nephew of defendant, and doing business in Texas as a cotton merchant. At the date of the note he owed the plaintiffs a balance of \$2,500 on a banker's account, aggregating some \$300,000, from May 12, 1881, to the date of the note, which balance plaintiffs had demanded that he should secure before any further facilities would be extended. He expressed the belief that his uncle at Memphis "would go on a note" at 12 months, and thereupon opened negotiations with him by mail. He informed the plaintiffs, just previous to the date of the note, that his uncle "would go his security on the note," and thereupon the plaintiffs, in their banking office, on the day of its date, prepared the note sued on, and it was signed by Bond in the name in which he did business, and by him sent in the mail to his uncle at Memphis, where it was indorsed and returned by mail to Bond, who, about February 11, 1882, delivered it to the plaintiffs.

(5) The plaintiffs expected and intended that the defendant would sign as maker, jointly with C. H. Bond & Co., but they had no distinct understanding with Bond or the defendant to that effect. Their only agreement with Bond was that they would take a 12-months note with his uncle "as security." They accepted the note, as it was handed to them by Bond, without complaint as to its form, and subsequently, in their correspondence and otherwise, treated it as an indorsement by Ridgely.

(6) The defendant at first refused his aid to his nephew, but being assured by his letters that "he had received a sacred promise from plaintiffs that he should never be called on for payment, except in case of Bond's death without paying it, and that their only purpose was to provide against that event, as he had made arrangements to continue business with plaintiffs, who promised to extend all necessary facilities," he indorsed the note with no other intention than to make that contract.

(7) Bond did continue business with plaintiffs until August 30,

1882, when his account was again in balance against him, and, plaintiffs refusing further credit, he made an assignment and left the state.

(8) The note has never been paid, Bond being unable, and the defendant unwilling, to pay it.

H. C. Warinner, for plaintiff.

L. Lehman, for defendant.

HAMMOND, J. On the facts of this case, very much against my own opinion, and with a sense of its injustice, I feel constrained by authority to pronounce judgment for the plaintiffs. Outside the statute of frauds, the defendant would, under the ordinary law of contracts, be held liable only to the extent of his agreement, or else the contract would wholly fail for want of that consent of the two minds necessary to make a contract effective as between the parties to it. I am unable to see any sound and satisfactory reason why this transaction is not within the statute of frauds, which enacts that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debts, default, or miscarriage of another person, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." Code Tenn. (T. & S. Ed.) § 1758.

If the defendant had taken the precaution to write his actual contract above his signature, he could not be held beyond it, whatever may have been the plaintiffs' intentions or expectations; and why should he now be so held? If he had thus written it, and the plaintiffs accepted it, both would have been bound by it; if it were not in accordance with the agreement or understanding with Bond, they could have refused acceptance, and been in no worse situation than they already were, or could have insisted on a compliance with that agreement. Here were creditors anxious to secure an antecedent debt on an insolvent man; anything they could get in the way of security was better than nothing. The defendant was in no sense, legal or moral, bound to become liable for it; nor was he, in becoming surety, limited to any particular form, but could prescribe his own terms. He sought to fix those terms, and signed the note in the confident belief that he had done so. And yet, in aid of these creditors, we find the courts ignoring the statute of frauds,—ignoring the actual intention of the surety, and, by a system of judicial legislation, binding him to an arbitrary contract he never made, and that the creditors never supposed he had made, until advised, perhaps, by their lawyers to that effect; for the plaintiffs always treated it as an "indorsement," as no doubt the defendant thought it was. It is just the case that falls within the letter and policy of the statute of frauds, and illustrates its wisdom.

In my judgment, there is nothing in the commercial law of nego-

liable instruments demanding that this case shall not be governed by the statute of frauds. Such is the law of England, whence we derive our own, and where the defendant could not be held as maker or indorser, for the obvious reason that he was in fact neither, but only as a guarantor,—no matter what the terms of the guaranty may have been, whether of absolute payment at maturity as plaintiffs insist, or conditionally as defendant intended to be bound,—which liability could not be enforced because the contract is not expressed in writing. “He is not liable at common law as a surety, because of the statute of frauds; and he is not liable by the law-merchant, because he has not followed the law-merchant.” 1 Daniel, Neg. Inst. (3d Ed.) § 714a; 1 Ames, Bills & Notes, 243; 2 Ames, Bills & Notes, 839; *Steele v. McKinlay*, L. R. 5 App. Cas. 754, 772, 783; *Macdonald v. Whitfield*, L. R. 8 App. Cas. 733, 748.

In *Steele v. McKinlay*, *supra*, is a very instructive statement showing how the English commercial law has modified the old foreign law-merchant as to the liability called an *aval*, which held any stranger, who lent his name to the paper, bound as an *underwriter* in the capacity in which he so lent it, whether he placed his name on the paper itself or on a separate paper; and he incurred his liability by writing his name under that of the drawer, acceptor, or indorser, and was held according to the place where he put it; owing, however, to the statute of frauds, this never operated in English law between the original parties to the paper, but “*solely for the benefit of those who take subsequently;*” and the cases holding otherwise are pronounced unsound. Hence, under the English law, the defendant here could be held only as a second indorser to one who took the note from the plaintiffs with their name written above it, and he could not rely upon the statute of frauds, for the reason that his indorsement would then appear to be regular, and he could be justly held according to its import. But the English law goes no further than this; and if our American courts, in their struggles with this question, had so confined themselves, there would not now exist the pitiable confusion exhibited in having neither the old law-merchant, nor the English modification of it, but a nondescript law-merchant, which differs so materially in the several states that there are almost as many rules of decision as there are states, that no two writers agree upon a classification of them, and that scarcely any state court of last resort has uniformly adhered to any given rule of decision. Mr. Daniel has boldly suggested a new way out of these bogs of the commercial law, which is interesting because new. 1 Daniel, Neg. Inst. (3d Ed.) §§ 707–716, 714; 4 South. Law Rev. (N. S.) 539; 20 Amer. Law Reg. (N. S.) 331; 16 Amer. Law Reg. (N. S.) 649.

Those “who do not follow the law-merchant” should not expect any aid from it, and these *irregular* indorsements are not in accordance with it until they have assumed the regular form of the well-defined contracts of the law-merchant. Any attempt to assimilate

them to the regular forms of contract leads to confusion, as our American authorities abundantly illustrate. The regular contract, whether in blank or not, is as well understood as if it were written out word for word, and though blank as to form, is, in legal effect, written in full. It is not, therefore, within the statute of frauds, and is protected against parol evidence as other written contracts are. But the same treatment cannot be applied to these irregular blank indorsements, unless the legislature or the courts can write a uniform and well-understood contract above them; the former might, but certainly the latter have not been able to agree on such a contract, and we have the remarkable exhibition of a variety of artificial and wholly arbitrary rules of decision as perplexing as it is possible to make them. If parol testimony is to be at all admitted to show a contract, I cannot comprehend why it shall not be admitted at large to prove the real contract, or that there was, in fact, no agreement of the minds; nor why it should not be enforced or fail according to the proof. But this is not what the courts do; they admit parol proof only for the limited purpose of enabling them to make a choice as to the form of the liability. If they choose to hold him as indorser, he may defend by showing that there was no demand and notice; if they conclude to hold him as a guarantor, he is not permitted to show the actual terms of his guaranty, but held to an absolute one, except, perhaps, in some states, he may show that he was only a guarantor of solvency; and if they decide to hold him as maker, there is no escape for him, although he had no more intention of becoming a maker of the note than he had of becoming the architect of a new system of commercial law.

Where the object is to prevent one from escaping his contract, who actually intended to become a first indorser or a maker, but by a blunder did not sign a proper paper in the proper place, there may be some excuse for a wish "to baffle such a defense," though Lord BLACKBURN, in the opinion before cited, thinks it better, even in such cases, to adhere to the law. But this desire to impose some liability upon the irregular indorser has led the courts to an exaggeration of that doctrine. For example: in this case it may be true, as stated by Mr. Justice COOPER in one of the Tennessee cases, that the defendant intended to be bound in some form, and that he should be held to some liability; but it does not follow from this that he should be held bound to one of the three, or at most four, forms of contract, namely, as maker, as second indorser, as guarantor of payment at maturity, or as guarantor of payment when the holder fails to collect of the maker. Why may he not be held to the contract he made, namely, that he would pay if the maker should die without payment, or according to any other condition he might attach? If it be said that this was not the plaintiff's contract, the reply is, that, if he accepted the indorsement, such was his contract; for the indorser's consent is as necessary as his own, which will be implied from his acceptance, or else

there was, in fact, no contract, because the parties did not, in fact, agree to anything.

As I understand the class of cases to which *Boyer v. Boogher*, 11 Mo. App. 130, belongs, this may be done if the indorser can prove that the payee of the note had knowledge of the particular conditions attached by him to the indorsement, but not otherwise; but I am unable to see why the payee should be more under the protection of the law than the other party to the contract, or why he may fill the blank space above the signature with a more absolute and a different agreement than that which the party signing intended to write therein. No man should be bound, beyond his actual intention, upon an arbitrary implication of some other intention, unless the law, as in the case of regular indorsements, fixes an invariable contract to be always implied from a blank signature. Confessedly, it does not do this; and while it opens the case to parol proof of intention, it illogically denies to him the privilege of proving any intention different from that of the other party, and often implies one wholly foreign to himself. In the effort to make efficacious that which, in itself, expresses nothing in particular, the cases build, upon facts and circumstances surrounding the transaction, some contract which does not express the actual intention of the surety, but that of the court which tries his case, according to its view of what ought to have been expressed; and scarcely any two agree about this on the same state of facts. Parol proof is admitted to aid the courts in determining what they shall make the blank mean, but not to help the parties in showing what it means in fact.

Still more illogically, some cases hold that the defendant here could not prove his conditional guaranty because *that* would be within the statute of frauds, while the courts may imply an absolute guaranty which the defendant did not make, and *that* is not within the statute. No such distinction exists in the terms of the statute, and if one be within it, I do not comprehend why the other is not. Such confusion cannot be beneficial to commercial intercourse, and the policy of the statute for preventing frauds and perjuries is reversed for one encouraging them.

On my independent judgment, I should hold that according to the common law, which is the substratum of all our laws, this contract would either fail for want of mutual understanding of the contracting parties, or be enforced as an acceptance by the payee of the terms attached to his contract by the guarantor, and that effect could not be given to any guaranty not expressed in writing, because the statute of frauds has forbidden it; and that until the payee had indorsed this note and transferred it to some stranger to the original contract, the blank indorsement of the defendant would not fall within the law-merchant. This was originally the law of Tennessee, but it has been changed by later decisions which would now hold the defendant as a guarantor. *Cahal v. Frierson*, 3 Humph. 411; *Comparree v. Brock-*

way, 11 Humph. 355; *Clouston v. Barbieri*, 4 Sneed, 338; *Newell v. Williams*, 5 Sneed, 212; *Talley v. Courtney*, 1 Heisk. 718; *Brinkley v. Boyd*, 9 Heisk. 152; *Iser v. Cohen*, 1 Baxt. 423; *Rivers v. Thomas*, 1 Lea, 649; *Taylor v. French*, 2 Lea, 257; *Harding v. Waters*, 6 Lea, 324. So would he be held in Texas, as I understand the cases there. *Cook v. Southwick*, 9 Tex. 615; *Carr v. Rowland*, 14 Tex. 275; *Chandler v. Westfall*, 30 Tex. 477.

But, according to the rulings of the supreme court of the United States, which follow the Massachusetts rule, somewhat regretted in *Essex Co. v. Edmands*, 12 Gray, 273, the defendant is to be held as a joint maker of the note, the case falling within the first category enumerated by Mr. Justice CLIFFORD, in the two cases cited from that court. *Rey v. Simpson*, 22 How. 341; S. C. Law Pub. Co. Ed. 260, and note; *Good v. Martin*, 95 U. S. 90.

Judgment for plaintiffs.

CLEMENS v. ESTES and others.

(Circuit Court, D. Massachusetts. February 10, 1885.)

AUTHORS—CONTRACT TO SELL BOOKS BY SUBSCRIPTION—SALE BY AGENTS TO PUBLISHER AT REDUCED RATE—INJUNCTION.

In the absence of notice of the terms of the contract between an author and the agents employed by him, for the sale of his books by subscription at a certain price, a publisher may buy or contract to buy such books from agents who have lawfully obtained them by purchase from the author or his publishers, and may advertise for sale and sell them at any price he may see fit. *Prince Albert v. Strange*, 1 Macn. & G. 25, distinguished.

In Equity. Motion for injunction *pendente lite*.

S. Lincoln and *G. L. Huntress*, for complainant.

S. J. Elder, for defendant.

COLT, J. This is a motion for a preliminary injunction. The material facts, as disclosed in the bill and affidavits, are as follows:

The defendants, Estes & Lauriat, are a firm of book-sellers and publishers located in Boston. In their last holiday catalogue appeared an advertisement in which a new work, entitled "Huckleberry Finn," written by the plaintiff under the name of Mark Twain, was offered for sale at a price reduced from \$2.75 to \$2.25. The book is sold on what is known as the subscription plan, and the regular subscription price is \$2.75. The canvass for the book has been in progress for some months. The advertisement to sell the work for less than the subscription price is working great injury to the regular sales by subscription. The book is not yet published, and will not be before February. On December 3, 1884, the title of the work was deposited with the librarian of congress to secure a copyright. Charles L. Webster & Co., of New York, are the general managers and authorized agents of the plaintiff in the publication and sale of the book. Numerous canvassing agents are appointed in different parts of the country. These agents purchase the books, but bind themselves by contract to sell only to subscribers, and not to the