terms of the contract, where, as the solicitors of the principal debtors, they had knowledge of the transactions upon which they relied for their discharge, and assisted in the preparation of the instruments for carrying into effect the arrangements of which they complained. The evidence of assent is much stronger here. The surety Busch had knowledge of the proposed change, and participated in effecting it, actually executing the instrument whereby it was consummated. These facts, in the absence of any counteractive circumstance, well warrant the implication of the surety's concurrence in the change. The inference is reasonable and just.

The situation, then, is this: One of the two sureties assented to the alteration of the contract; the other did not. In this state of affairs, the nonassenting surety is discharged, but the other remains bound as before. Wolf v. Fink, 1 Pa. St. 435; Crosby v. Wyatt, 10 N. H. 318. The assenting surety, in such case, in effect agrees that he will stand as surety for the whole liability, and that his cosurety shall be released. Id. Where one of the several defendants sued upon a joint contract sets up a defense personal to himself, the approved practice is to allow a nolle prosequi as to that particular defendant, and to proceed against the others by verdict or judgment after the verdict, as the case may be. Minor v. Bank, 1 Pet. 46; Kurtz v. Becker, 5 Cranch, C. C. 671, Fed. Cas. No. 7,951; Commonwealth v. Nesbitt, 2 Pa. St. 16; Freedly v. Mitchell, Id. 100; Woodward v. Newhall, 1 Pick. 500; Burke v. Noble, 48 Pa. St. 168. In the court below the question of the discharge of the defendant Sharp was raised by prayers for instructions for a verdict in his favor. The court reserved the question of law involved, and a verdict against all the defendants was rendered. After verdict, Sharp moved for judgment in his favor, non obstante veredicto, which motion was dismissed, and judgment on the verdict entered against the defendants generally. In this state of the record the proper course, it seems to us, to pursue is to reverse the judgment, and remand the cause for further proceedings in conformity with the views expressed in this opinion. Accordingly, the judgment is reversed, and the cause is remanded to the circuit court, with directions to allow the plaintiff to enter a nolle prosequi as to the defendant John M. Sharp, and thereupon to enter judgment on the verdict against the other defendants.

Sur Motions to Amend the Reversing and Remanding Order.

PER CURIAM. 1. The motion made by the plaintiff in error to amend our remanding order is denied, for reasons appearing in the opinion of the court heretofore filed.

2. Without meaning to intimate a doubt as to the right of the court, in the exercise of a sound discretion, to enter the judgment which the defendant in error now moves for, we must deny the application, for we are not satisfied that it would be proper for us to enter such a judgment, under all the circumstances of the case. We therefore adhere to our order reversing the joint judgment and remanding the cause for further proceedings in conformity with our conclusions.

KNIGHT v. INTERNATIONAL & G. N. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 116.

1. REMOVAL OF CAUSES—TIME OF APPLICATION—REVIEW.
It is too late, on appeal, to raise the question that the application upon which the cause was removed from the state to the federal court was not made in time.

2. FALSE IMPRISONMENT—WHAT CONSTITUTES.
Defendant procured, from a judge having jurisdiction, a warrant for plaintiff's arrest, which was directed to the sheriff of any county in the state. It was delivered to the sheriff of S. county, who arrested plaintiff outside of his county, and took him to a third county, to be identified, before bringing him to S. county. *Held*, that there was no trespass for which defendant could be held liable in an action for false imprisonment.

3. MALICIOUS PROSECUTION—PROBABLE CAUSE—CONVICTION.
In an action for malicious prosecution, the conviction of plaintiff upon the charge complained of is prima facie evidence of probable cause for the prosecution, notwithstanding a new trial was granted, and a nolle subsequently entered by the state.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action for malicious prosecution, brought by John Knight against the International & Great Northern Railway Company and the Missouri Pacific Railway Company, in which there was judgment for defendants, and plaintiff brings error.

Charles C. Leverett, for plaintiff in error.

Baker, Botts, Baker & Lovett, James Hagerman, and Farrar, Jonas & Kruttschnitt, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. The facts of this case appear to be that on January 19, 1885, in the nighttime, Robert Frazier, a conductor in charge of a passenger train of the International & Great Northern Railway Company, was murdered in Smith county, Tex., near Overton, in Rusk county, Tex. At Overton two men got on the forward end of the baggage car. One Hamp Riley, the porter of the train, saw them getting on, and went forward, and ordered them off. They each drew pistols, and refused to get off, whereupon Riley went back, and informed Ed. C. Powers, a brakeman. Both Riley and Powers then went forward to where the men were, and told them they would have to get off. The men refused to do so, pulled weapons, and threatened to shoot, whereupon Robert Frazier, the conductor, was informed, who then opened the door of the baggage car and stepped out on the platform where the two men were. The latter opened fire, shooting Frazier, who fell on the platform, and thence off into a ditch, dying of his wounds the next day. At the time of the shooting Powers was standing in the baggage car, just back of Frazier, and he received bullet wounds which, at the time, were considered fatal, but from which he subsequently recovered. Thomas Furlong, a special agent of the Missouri Pacific Railway