

I have not overlooked *Bank v. Dowd*, 38 Fed. 172. If that case can be distinguished from *Knatchbull v. Hallett*, as the judge who decided it believes, then it can as readily be distinguished from this. If it cannot, with all my respect for that distinguished judge, I must disregard it.

There is a class of cases—to which *Bank v. Beal*, 49 Fed. 606, and *Bank v. Armstrong*, 148 U. S. 50 [13 Sup. Ct. 533], belong—in which it is held that although the relations of the parties there involved, were in the beginning fiduciary, they ceased to be so when the agent commingled the money with its own. These, however, were cases where commercial paper was delivered for collection and credit, and where the collection and credit consequently terminated the agency. The commingling and use of the money were in pursuance of the understanding; and upon this construction of the transaction these decisions rest. The distinction is noticed in *Knatchbull v. Hallett*, 13 Ch. Div. 702.

The bill is therefore sustained and a decree may be drawn accordingly.

AMERICAN & GENERAL MORTG. & INV. CORP., Limited, v. MARQUAM
et al.

(Circuit Court, D. Oregon. August 13, 1894.)

No. 2,110.

1. ACCOMMODATION INDORSER—EXTENSION—RELEASE.

Where a note secured by a mortgage is signed by one of the makers as an accommodation maker, and the payee, with the knowledge of the fact, extends the time for the principal obligor, the extension of time works his discharge from liability.

2. PAROL EVIDENCE.

The liability of the accommodation signer as a surety may be shown by parol in an action by the payee to foreclose the mortgage.

3. CROSS BILL—DISMISSAL.

A cross bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed.

Bill by the American & General Mortgage & Investment Corporation, Limited, against U. S. G. Marquam and others, to foreclose a mortgage.

Zera Snow, for plaintiff.

Milton W. Smith and U. S. G. Marquam, for defendants.

BELLINGER, District Judge. This is a suit to foreclose a mortgage to secure promissory notes made by Marquam and wife and Campbell. On April 5, 1890, Campbell owned the entire mortgaged premises, and on that date he conveyed an undivided one-half thereof to Marquam. On April 10th following, Marquam conveyed an undivided one-half of his undivided one-half to Livingstone; and, on June 25th, Livingstone reconveyed the same to Marquam. About June 28, 1890, Marquam and wife and Campbell executed the mortgage in suit, to the tract, to the complainant, to secure their promissory notes for \$5,500, to become due July 1, 1893. On Sep-

tember 11, 1890, Marquam reconveyed to Livingstone an undivided one-half of the undivided half held by him in the premises. Livingstone assumed one-half of the mortgage in suit. On December 29, 1892, Campbell conveyed his remaining one-half interest to Stratton, trustee. On November 17, 1893, Marquam, Livingstone, and Stratton partitioned the land by deed; Marquam and Livingstone taking the west half of the tract, and Stratton the east half. Campbell and Stratton filed their answers, alleging that Campbell signed the note and mortgage sued on for the accommodation of Marquam, and without consideration, of which fact the complainant had notice when it took its mortgage, and that, having this notice, the complainant, after the maturity of the note, for a valuable consideration, gave extensions of time for payment of the note and of installments of interest; and this alleged conduct on complainant's part is relied upon to discharge Campbell's liability, and the lien of the mortgage executed by him. The defendant Lardner answers the bill, alleging the execution by Campbell of a mortgage upon Campbell's interest in the land to him for \$1,000, subsequent to complainant's mortgage, and praying that the west half be first sold, and applied on such mortgage, before resorting to lands mortgaged to said defendant. Campbell filed his cross bill, alleging that Livingstone assumed payment of one-half of the complainant's mortgage, and praying that personal liability for any deficiency there may be, be adjudged solely against Marquam and Livingstone. Lardner files a cross bill against Campbell, Livingstone, Stratton, and Drugan, in which he alleges the execution of the mortgage subsequent to that of complainant; the agreement of Livingstone to pay one-half of the complainant's mortgage. Lardner's cross bill also alleges that Stratton assumed and agreed to pay his (Lardner's) note and mortgage. Lardner prays the court to decree that Livingstone pay one-half of the mortgage, according to his agreement, and that in the event of his failure to do so, and of the defendant Lardner being compelled thereby to pay anything to protect his interest, he have a decree against Livingstone for the amount so paid by him. Exceptions to these answers, and demurrers to the cross bills, are filed, and upon these the questions to be decided are raised.

It is claimed in support of the demurrers that the defendants cannot show that Campbell is merely an accommodation maker of the note in question, and hence stands in the relation of a surety, because this is to establish by parol a relationship and obligation different from that expressed in the writing. The rule is otherwise. It is competent for one of two makers of a promissory note, in an action on the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal, with knowledge of the suretyship. Such evidence does not vary the written contract. It merely operates when the creditor has knowledge of it, to prevent him from changing the contract with the principal debtor without consent of the surety, and thus prevents him from impairing the rights of the latter. *Hubbard v. Gurney*, 64 N. Y. 459; *Irvine v. Adams*, 48 Wis. 468, 4 N. W. 573; *Stillwell v. Aaron*,

69 Mo. 539; Bank v. Kent, 4 N. H. 221; Perry v. Hodnett, 38 Ga. 104; Brown v. Rathburn, 10 Or. 158.

The allegations that Campbell's relation was that of a mere surety; that complainant had knowledge of such fact, and with such knowledge, for a valuable consideration, extended the principal creditor's time for payment,—is a good defense as to Campbell's liability, both on the note and mortgage, and this defense is available to Campbell's grantee, or a subsequent mortgagee of the mortgaged premises.

The cross bills present mere matters of defense. Such is not their office. Such a bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed, with costs. 2 Daniell, Ch. Pr. 1552, note.

The alleged agreements of Livingstone to pay half of complainant's mortgage, and of Stratton to pay Lardner's mortgage, are not matters of defense to the complainant's complaint. These agreements were made with the principal debtor. They cannot affect the rights of the complainant. The exceptions to the answers are overruled, and the demurrers to the cross bills are sustained.

ESBERG-BACHMAN LEAF-TOBACCO CO. v. HEID.

(District Court, D. Alaska. July 21, 1894.)

AGREEMENT TO PAY ANOTHER'S DEBT—SUFFICIENCY OF COMPLAINT.

In an action on a contract whereby defendant agreed to pay to plaintiff an indebtedness of a third person for goods sold such third person "when and as soon as the same should thereafter become due," executed at the time of the sale, and as a part of the same transaction, plaintiff need not allege either that he has exhausted his legal remedies against such third person, or that he is insolvent.

Action at law by the Esberg-Bachman Leaf-Tobacco Company against John G. Heid on a written contract. Defendant demurred to the complaint. Demurrer overruled.

Bugbee & Blackett and Lytton Taylor, for plaintiff.
Johnson & Heid, for defendant.

TRUITT, District Judge. This is an action brought on a written guaranty by defendant to pay an indebtedness of one T. Cohen for certain goods, wares, and merchandise, of the price and value of \$427.79, sold and delivered by plaintiff to said Cohen, for which he agreed to pay at the expiration of four months from the 19th day of January, 1892,—the date of the sale of said goods, wares, and merchandise. After alleging the sale and delivery of the goods, the promise to pay, and that the whole of the purchase price still remains due and wholly unpaid, the complaint sets out the following to show defendant's liability herein:

"That said defendant, for and in consideration of said sale and delivery of said goods, wares, and merchandise to said T. Cohen at the times aforesaid, and as a part of the same transaction, promised and agreed, by his certain instrument in writing bearing date December 15, 1891, that he would