

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

pay to plaintiff the said indebtedness of said T. Cohen when and as soon as the same should thereafter become due, viz. on or about May 19, 1892; that said defendant, although knowing full well that said T. Cohen had failed and neglected to pay said indebtedness, or any part thereof, when the same thereafter became due, and although often requested by plaintiff to pay such indebtedness of said T. Cohen, has failed and neglected and refused, and still fails, neglects, and refuses, to pay the same, or any part thereof."

The defendant has interposed a general demurrer as a defense. To sustain the demurrer, it is urged that plaintiff must allege in the complaint that he has used due diligence to collect his demand from the principal debtor, and that he has exhausted all his legal remedies against him without avail, or that he is insolvent and unable to pay the said indebtedness, or any part thereof. But, to charge the defendant under such a contract as is alleged in the complaint, the plaintiff is not required to allege or prove either that he has exhausted his legal remedies against the principal debtor, or his insolvency. The terms of the guaranty must always determine and fix the nature and extent of the guarantor's liability. In this case there is an absolute obligation for the payment of said indebtedness if Cohen failed to pay it as soon as due, not a guaranty that the money can be made out of him by due diligence. It is not a conditional obligation to be affected by contingencies, but a plain contract to pay the plaintiff for said goods, wares, and merchandise when payment therefor should become due. *Rand. Com. Paper*, § 850, makes this distinction very clear. "A guaranty," says this author, "may be absolute (that is, for the payment of the bill or note), or conditional (that is, a guaranty that it is collectible by due diligence). One who guaranties payment becomes absolutely liable on any default of payment by his principal." In the case of *City of Memphis v. Brown*, 20 Wall. 294, it is held that "upon guaranty of payment, and not collection merely, a suit may be commenced against the guarantor without any previous suit against the principal." Also, see *Whiting v. Clark*, 17 Cal. 407, and *Hanna v. Savage* (Wash.) 35 Pac. 127. But in this case, under the contract alleged in the complaint, I am not certain that the defendant stands in the relation of a guarantor to the plaintiff. It is alleged that, as a part of the transaction of purchasing the said goods, wares, and merchandise, the defendant promised he would pay to plaintiff the said indebtedness "when and as soon as the same should thereafter become due." Now, it seems to me that the effect of this contract is such as to make defendant the absolute debtor of plaintiff, or at least a joint and several debtor with said Cohen, if considered in connection with the other allegation of the complaint,—that, at the time of the purchase of the goods, Cohen promised to pay for them when payment therefor should become due,—in which case plaintiff might properly sue either one or both of them. But, whether defendant herein be considered as a guarantor or original debtor, the complaint shows a good cause of action, and the demurrer must be overruled.

**In re EZETA. In re BOLANOS. In re COLOCHO. In re CIENFUEGOS.
In re BUSTAMANTE.**

(District Court, N. D. California. Before MORROW, District Judge, sitting as a Committing Magistrate. September 4, 1894.)

Nos. 11,095-11,099.

INTERNATIONAL EXTRADITION—JURISDICTION OF MAGISTRATE.

By the treaty between the United States and Salvador, they agree to deliver up persons who, having been convicted or charged with certain specified crimes committed within the jurisdiction of one of them, shall seek an asylum or be found within the territories of the other. Rev. St. U. S. § 5270 (Act Aug. 12, 1848), provides that, whenever there is a treaty for extradition between the United States and any foreign government, any justice of the supreme court, circuit or district judge, etc., may, on complaint under oath charging any person found in any state, district, or territory with having committed, within the jurisdiction of such foreign government, any crime provided for by such treaty, issue his warrant for the apprehension of the person so charged, that he may be brought before him, to the end that the evidence of criminality may be heard and considered, etc. *Held*, that the jurisdiction of such justice or judge, sitting as a committing magistrate in a case in which citizens of and fugitives from Salvador are charged with extraditable crimes, is in no way affected by, and he will not inquire into, the manner in which the persons so charged came or were brought into the United States.

Applications for the extradition of Antonio Ezeta, Leon Bolanos, Jacinto Colocho, Juan Cienfuegos, and Florencio Bustamante, under the treaty between the United States of America and the republic of Salvador. Plea to jurisdiction. Plea overruled.

The defendants in the above cases sought refuge on June 6, 1894, on board the United States steamer Bennington, at the port of La Libertad, Salvador. They requested an asylum until the arrival of the steamer San Blas, on its way to Panama. Antonio Ezeta, one of the defendants, was the commander in chief of the government forces, and the acting president of the republic, by reason of the flight of his brother, Don Carlos Ezeta, who was the regularly constituted president. The other defendants all occupied military positions under General Antonio Ezeta. They had been unsuccessful in suppressing a revolution against the then existing government, and had retreated from the interior to the port of La Libertad, where they arrived with but a few hundred men, and closely pursued by the forces of the insurgents. Their request for an asylum was granted, and also as to 12 others who accompanied them, but these latter persons are in no wise connected with these proceedings. Three days later the steamer San Blas arrived at La Libertad, when the commander of the Bennington proceeded to make arrangements for the transfer of the fugitives on board the vessel. The arrangements were interrupted by commissioners, representing the successful revolutionary party, requesting that they should have an opportunity to make a demand for the extradition of the fugitives on charges of murder, arson, robbery, and rape. The fugitives were accordingly detained on board the Bennington, and, in view of the disturbed condition of affairs in Salvador, this concession was deemed by Capt. Thomas a courtesy to the new government, of some consequence, in the favorable influence it would probably have upon the authorities, in securing the safety of American citizens residing in that country. Upon the arrival of the next vessel at La Libertad, bound for Panama, the fugitives again requested permission to leave the Bennington, that they might take passage on the departing steamer; but the request was refused by Capt. Thomas, under instructions from the secretary of the navy. The Bennington remained at La Libertad until July 25, 1894, during which time no extradition proceedings, other than a demand by the government of Salvador for the surrender of the fugitives, appears to have reached Capt. Thomas. The vessel then pro-