The opinions of the supreme court referred to by counsel are not, we think, in point. The case of Wicker v. Hoppock, 6 Wall. 94, was a suit at law, and the question was as to the measure of damages for the nonperformance of an agreement to bid in certain property which was to be sold under a decree obtained by the party who subsequently sued, the agreement being that the party there sued would bid in the property for the amount of the judgment, with interest and costs. The court below allowed the amount of the judgment, with interest and costs, as the measure of damages, and in the supreme court Justice Swayne says:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

It is evident the learned justice was considering the question only from a legal standpoint.

The case of Mills v. Dow's Adm'r, 133 U. S. 424, 10 Sup. Ct. 413, was a case at law, and the obligation of the covenant was not only to save harmless, but directly to pay the contracting party's obligation.

The case of Johnson v. Risk, 137 U. S. 308, 11 Sup. Ct. 111, is equally without application. There the question was whether or not there was a federal question, and whether the Tennessee statute of limitation applied.

The case of Refeld v. Woodfolk, 22 How. 318 (not cited by counsel), is in principle more applicable to the question under consideration. The facts in that case are, briefly, these: A man named Notrebe sold to Woodfolk a plantation in Arkansas. At the time of the purchase, there was an incumbrance arising out of Notrebe's subscribing 300 shares of the Real-Estate Bank of Arkansas, and mortgaging the land for $30,000. Notrebe and wife obligated themselves to Woodfolk that, upon the payment of the purchase money, they would convey to him by good and sufficient deed, with general warranty of title duly executed according to law. Woodfolk, the purchaser, paid all of the purchase money. Notrebe died, and, in winding up the Real-Estate Bank of Arkansas, there was a danger of a heavy liability upon the original mortgage to the bank. Woodfolk filed his bill for indemnity against the mortgage, and the court below gave him a decree requiring that the heirs of Notrebe "remove the incumbrance whenever it can be done, and then to convey the land by a deed with warranty, and with the relinquishment of dower by the widow, and meanwhile that they should deposit with the clerk of the court bonds of the state of Arkansas, for the amount of Notrebe's note and the interest ($61,500) to be held and appropriated under the order of the court as an indemnity, or that the executors might, in part, or for the whole, convey to the clerk unincumbered real estate of the same value, for the same object, and under the same conditions." The

supreme court reversed the case, holding that as the transaction between the parties was bona fide, and the purchaser knew of the existing incumbrance, he must rely upon the covenants of his deed, and could not get the indemnity in advance; but I do not understand this case deciding that a court of equity had not jurisdiction to grant indemnity, but merely that the facts in that case did not authorize the relief granted, and that, by the terms of the contract between the parties, the purchaser was to rely upon the general warranties of his deed.

The recent English case of Wolmershausen v. Gullick [1893] 2 Ch. 514, is one in which the court, in a very elaborate opinion, sustained the jurisdiction to give indemnity to a surety against a co-surety. In that case the court (Justice Wright) reviewed the English authorities, and held that a court of equity would grant relief for indemnity to a surety although he had not paid. The case is a very elaborate one, and all of the English authorities seem to be reviewed.

It is conceded by counsel for the demurrant that there are cases where sureties have been protected by a court of equity against liability before payment; but it is insisted that it is only in cases where the defendant is liable directly on the debt, or where by the agreement he has agreed to pay as well as indemnify. The case of Wolmershausen v. Gullick was one of surety, in which the indemnity was granted without payment, but no such distinction was taken by the court; and the jurisdiction was put entirely upon equitable grounds, and not because of the liability of the surety on the original contract. In some of such cases the original creditor was not before the court at all; and in none where the relief was granted was it because of any right of the original creditor, or because of a contract by the defendant with a creditor. If relief is given to a surety, it is given upon the equitable principle of equality. If given to party holding a contract of indemnity, and not directly liable to the original creditor, the relief is given upon the contract of indemnity, and the equity arising therefrom. Thus, in Stirling v. Forrester, 3 Bligh, 575, in the house of lords, Lord Redesdale, said: "The principle established in the case of Dering v. Lord Winchelsea, 1 Cox, Ch. 318, is universal, that the right and duty of contribution is founded upon doctrines of equity. It does not depend upon the contract." And in the case of Lacey v. Hill, L. R. 18 Eq. 182, Jessel, M. R., said:

"Whatever be the case at law, it is quite plain in this court that any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have the sum paid to him, or whether it must be paid directly over to the creditor. If the creditor is not a party, I believe it has been decided that the party seeking indemnity is entitled to have the money paid over to him."

This, of course, would be with proper security that the money thus paid over would be properly applied.

Our attention has not been called, in the very elaborate briefs of counsel, to a case like the one at bar in which the relief now sought had been refused. It must not be overlooked that the com-

plainant in this case was a trustee for the defendant bondholders; that, by the terms of the mortgage, complainant was not bound, except upon the request of the holders of a majority of the bonds, with an indemnity by them or others against all costs or expenses, to foreclose the mortgage; that the action of the complainant was entirely in the interest and for the benefit of the bondholders in thus instituting the suit and foreclosing the mortgage; that there was neither a direct nor an implied obligation upon the part of the trustee that it should advance the expenses of the litigation, and look alone to the mortgaged property, but, on the contrary, if there had been no provision for indemnifying the trustee for the expenses of the litigation, and the foreclosure had been at the request of the cestuis que trustent under the mortgage, there would be an implied obligation to repay to the trustee, if the mortgaged property was insufficient, the expenses of the litigation. Here, if this procedure be considered as one for a specific performance, the language of the contract justifies the payment by defendants of the liability which has accrued in the mortgage foreclosure, since the obligation is not only to indemnify, but "to hold harmless the trustee from any loss or damage on account of costs, counsel fees, or other expenses in such litigation." It cannot be said that these bondholders are holding the complainant harmless from any loss on account of counsel fees or other expenses of the litigation, if the complainant is required, as indicated by the argument for the demurrant, to pay counsel fees, and then litigate with the signing bondholders the reasonableness of the compensation thus paid.

We have concluded, therefore, under the circumstances, that a court of equity has jurisdiction to grant the relief prayed. It is not intended to indicate an opinion as to whether or not the allowance made in the foreclosure suit is binding upon the defendants, or whether or not the scope of the order making such allowance is to bind the complainant. We are considering the demurrer as it must be upon the facts as stated in the bill. It follows from this view that the demurrer must be overruled, and it is so ordered

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PINE MOUNTAIN IRON & COAL CO. et al. v. BAILEY et al.

(Circuit Court, D. Minnesota. March 12, 1898.)

AGENT OF SELLER AND BUYER — AGENT'S KNOWLEDGE — EFFECT ON BUYER'S TITLE.

An agent and director of a trust company sold a mortgage belonging to the company to one for whom he sometimes acted as agent in similar transactions, and who was depending on his judgment as to the safety of the investment. *Held*, that the agent's knowledge of defects in the title should not be imputed to the purchaser.

Richards, Boskin & Ronald and Keith, Evans, Thompson & Fairchild, for complainants.

Wilson & Van Derlip, for defendants.

LOCHREN, District Judge (orally). The evidence shows that the plaintiffs, corporations of the state of Kentucky, on August 10,