principals did not perform their agreement for opening the canal according to its terms, and the government accepted the work with a channel only 18 feet in depth. The sureties of the contractor were released by the change in the terms of the contract.

In U. S. v. Tillotson, 1 Paine, 305, Fed. Cas. No. 16,524, a person made a contract with the war department to build a fort, in which it was provided that the fortification was principally, as to the revetment walls, to be built of brick, and thereafter there was an auxiliary contract, by which it was agreed that, in place of brick, a certain composition, called "tapia," which was a species of artificial stone formed by a union, in proper proportions, of sharp sand, fresh lime, and oyster shells, with water sufficient to produce adhesion, should be used in such portions of the walls as should be designated by the superintending engineer, and the contractor stipulated to receive $10 for every cubic yard of tapia, instead of $11 for every cubic yard of brickwork as mentioned in the agreement. This was held to be a material alteration, and released the contractor's surety.

In U. S. v. Case (U. S. Cir. Ct. 2d Cir. 1879) 25 Int. Rev. Rec. 56, Fed. Cas. No. 14,743, the guarantors undertook that a bidder for a contract to furnish stone about to be let by the plaintiff would, in case the contract was awarded to him, enter into the contract, with sufficient sureties, to furnish the material in conformity to the terms of the advertisement under which the bid was made. It was held, under the facts presented, that the undertaking was that a contract should be executed to furnish stone of a description designated by a sample which was to accompany the proposal, and that the guarantors were released when the bid was to furnish a different kind of stone from certain quarries.

In Mundy v. Stevens, 9 C. C. A. 366, 61 Fed. 77, sureties for the payment by a contractor to a subcontractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement, whereby the right secured to the original contractors to deduct from the monthly payments 3 cents per yard for material dredged subsequently was modified so that payments of 2½ cents per cubic yard should be made monthly.

In U. S. v. Boecker, 21 Wall. 652, it was held that where a distiller's bond recited that a person is about to be the distiller at one place, to wit, "at the corner of Hudson street and East avenue, situate in the town of Canton," his sureties are not liable for taxes in respect of business carried on by him at another, as "at the corner of Hudson and Third streets," in the same town, even though he had no distillery whatever at the first-named place, about four squares from the last-named place.

In Grant v. Smith, 46 N. Y. 93, it was decided that a change of a contract to purchase a steam engine and two boilers of a given capacity and power, at an agreed price, by which an engine with three boilers, and of greater capacity and power was substituted, at an additional price, released the sureties.

In Ludlow v. Simond, 2 Caines, Cas. 1, it was held that, where a surety agreed to make good a deficiency in the sale of property at a

particular place, he was released if the sale was had at a different place, by order of the agent of the principal.

In Rowan v. Manufacturing Co., 33 Conn. 1, a contract provided that rifles should be made "with all possible dispatch"; but a supplemental contract, made before performance, provided that 300 rifles per week should be delivered for a certain period, and 600 per week afterwards. The surety was discharged.

In Bethune v. Dozier, 10 Ga. 235, the obligee bound himself to furnish 800 acres of pine land to furnish stock for a saw mill, and the principal accepted of 680 acres in fulfillment of the contract, without the surety's consent, and it was held that the surety was discharged.

In Zimmerman v. Judah, 13 Ind. 286, it was decided a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

In Morgan Co. v. McRea, 53 Kan. 358, 36 Pac. 717, the sureties on a bond, conditioned for the erection in accordance with certain plans and specifications, and keeping in repair of bridge abutments, were released from liability by a change in the plans of the work made by the principals, and accepted by the obligee of the bond, without their knowledge or consent. In the opinion it is said:

> "The specification as to the west abutment, which is the one that fell, is that it shall be 7x20 feet at the base, 3x16 feet at the top, 26 feet high, and containing 90 cubic yards. It is definite as to dimensions and form, and calls for a four-sided structure, sloping in presumably on all sides. The structure actually erected and accepted by the plaintiff had wing walls at the ends, the stone of which were interlocked with those of the main part of the abutment. The bond executed by the defendants requires them to keep the work in repair."

It was held that to repair such a work was not the same thing as to repair the abutment of the form and dimensions specified in the contract.

In Beers v. Wolf, 116 Mo. 187, 22 S. W. 620, there was a change of six inches in the depth of the basement, and in the depth of the closets, and these changes made an additional cost in plastering alone of $221.61. The change in the depth of the basement added the cost of a bulkhead to secure sewer connection, and there was a different arrangement of the closets. The primary work was an addition to an hotel, at the price of $31,070. The sureties were released.

In Erickson v. Brandt (Minn.) 55 N. W. 62, it was held that the sureties on a bond of indemnity against liens arising in the course of construction of a building under a contract between the owner and contractor were released by a departure from the plans and specifications involving different materials and additional labor, which are included in the lien claims.

In Whitcher v. Hall, 5 Barn. & C. 269, 11 Eng. Com. Law, 225, the surety engaged for another to the plaintiff, for the milking of 30 cows, at a given price each per annum. Subsequently an agreement was concluded without the surety's consent, whereby the hirer was to have 28 cows for one-half the year, and 32 for the remainder, and it was held that the surety was released.

Pursuant to the foregoing views, the demurrer must be sustained.

CHICAGO G. W. RY. CO. v. KOWALSKI.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1899.)

No. 1,089.

1. RAILROADS—INJURY AT CROSSING—QUESTIONS FOR JURY.
In an action for an injury at a railroad crossing, where the evidence shows that the crossing was on one of the principal business streets of a city, constantly traveled by large numbers of people, and on which was a street-car line, the question whether the railroad company was negligent in failing to maintain a flagman or gates at the crossing is one of fact for the jury.

2. NEGLIGENCE—INJURY TO INFANT—CONTRIBUTORY NEGLIGENCE OF PARENTS.
In an action by an infant in its own right for personal injuries resulting from the negligence of a third party, the fault or negligence of its parents, contributing to the injury, cannot be imputed to the child.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was an action by Frank Kowalski, an infant, by his next friend, against the Chicago Great Western Railway Company, to recover for personal injuries. There was judgment on a verdict for plaintiff (84 Fed. 586), and defendant brings error.

D. J. Lenehan (D. E. Lyon, on the brief), for plaintiff in error.

N. E. Utt (Alphons Matthews, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a railroad crossing case which originated in the city of Dubuque, Iowa. Frank Kowalski, the plaintiff below and the defendant in error here, at the time of the injuries complained of, was an infant about three months old, and was riding in a two-horse wagon with his father and mother along Rhomberg avenue, in the city of Dubuque. The track of the Chicago Great Western Railway Company, the plaintiff in error, crosses this avenue in a busy part of the city; and, as the wagon in which the Kowalskis were riding reached the crossing, it was struck by one of the defendant company's trains which was at the time moving backward from the northwest across the avenue. The petition specified various acts of negligence on the part of the railway company,—among others, that the train was moving at a dangerous rate of speed; that there was no lookout or brakeman at the rear end of the train; that no warnings of its approach were given by sounding the bell or blowing the whistle; and that the company also failed to maintain a watchman at the crossing as it should have done, in view of the location of the crossing, the amount of travel over the same, and its dangerous character. At the conclusion of the case, the trial court charged the jury, in substance, that the plaintiff below had failed to produce any evidence in support of any of the charges of negligence contained in the petition, save the charge that the defendant company should have maintained a watchman at the crossing; and it left the jury at liberty to determine, in view of all the facts and circumstances in evidence, whether that charge was well founded,