To the same general effect are the cases of Schroeppell v. Shaw, 3 N. Y. 446; Humphrey v. Hitt, 6 Grat. 509; Sawyer v. Bradford, 6 Ala. 572; Mundorff v. Singer, 5 Watts, 172.

The learned counsel for plaintiff in error have cited and relied upon a number of cases, including the cases of Burr v. Boyer, 2 Neb. 265, and Wulff v. Jay, L. R. 7 Q. B. 761. Most of them are distinguishable from the case in hand, but, in so far as they are in conflict with the cases cited and relied upon, it is enough to say that they do not meet with our approval, and are not in accord with the great weight of authority. The cases of Burr v. Boyer, supra, and Wulff v. Jay, supra, were cases in which an actual existing security was lost by the neglect of the creditor to register the instrument. Without stopping to consider these cases, it is enough to say that they are distinguishable from the one at bar by the fact that no existing lien has been sacrificed, and that the only fault of the creditor here complained of is that he did not reserve a lien when he might and should have done so in obedience to the order of the court.

There remains the defense of failure of consideration. This defense rests upon the averment that, among the assets of the McCarthy-Joyce Company, sold to James E. Joyce & Co., were certain promissory notes, then in possession of the defendant in error as receiver for the First National Bank of Little Rock, and that said receiver, though often requested, has refused to surrender same to said James E. Joyce & Co. The consideration which is sufficient to support the principal's contract is the consideration upon which that of the surety rests. It follows, therefore, that if the consideration upon which this note was executed by the principal makers was sufficient, there is no failure of consideration which can be available to the surety, unless his own engagement was entered upon under some other and independent agreement. This the answer attempts to show by the statement that the defendant became surety "only upon the understanding and faith" that all of the assets of the McCarthy-Joyce Company sold to his principals, James E. Joyce & Co., including the notes then in the possession of the bank or its receiver, would be delivered to said purchasers; and the failure to obtain said notes is relied upon as constituting a failure of consideration. This, if true, would constitute only a conditional obligation, and failure to comply with the condition would discharge the surety, without regard to its effect upon the obligation of his principals. It is manifest, however, that the averments of the answer are insufficient to discharge the surety; for it is not averred that either the court or its receiver, the payee of the note, accepted the note and delivered the assets for which it was in part executed with notice of any condition. The authorities for this conclusion have been already cited in disposing of the first defense.

Undoubtedly, a surety may, when the contract has not been assigned to a purchaser for value without notice, when called upon to perform, show either a total or partial failure of the consideration of his principal's contract. But such a defense, when made by the surety, must be one which would be available to the principal, if sued. Here, again, the averments of the answer are insufficient. This note in suit was not executed for any specific part of the property purchased

by James E. Joyce & Co., but was made in part consideration for a lumping sale of the entire assets of the McCarthy-Joyce Company, consisting of lands, a stock of merchandise, and a mass of choses in action. The averment is that among these choses in action were certain promissory notes, aggregating about $11,000, payable to that company, which had been placed by the payee in possession of the Little Rock Bank for collection, and which were so in possession of that bank, or its receiver, both when that company made its general assignment and when its assets were sold to James E. Joyce & Co. The ground upon which the bank's receiver, the defendant in error, refused to surrender these notes, is not stated, though, as it is stated that the bank was a large creditor of the said McCarthy-Joyce Company, it is most probable that it asserted a banker's lien thereon to secure its general account as a creditor. But if we assume, as probably we should, in view of the averments of the answer, that the defendant in error would be estopped to assert such a lien, the bank having been a party to the suit in which it is averred a decree was rendered directing the sale, we are driven to the inevitable conclusion that James E. Joyce & Co. obtained the superior title to said notes, subject to no incumbrance in the nature of a banker's lien. The purchasers obtained, upon this hypothesis, just what the surety asserts they bought. That the purchaser knew that the notes in question were not actually in the custody of the court or its receiver when this sale occurred sufficiently appears, for the claim to these notes is rested upon the averment that the receiver had scheduled them as assets "in possession of the bank for collection." So it is stated that, after the sale had been reported and confirmed, and the terms of sale complied with by the purchasers, an order was made directing the court's receiver to deliver to the purchasers the property so sold, including said notes so at the time in possession of the defendant in error. It further appears that all of the property so sold was delivered to said purchasers, and proper conveyance made, except these notes. It is then stated that the said purchasers had made repeated demands upon the said bank and its receiver, the defendant in error, for said notes or their proceeds, but that such demand had been refused, and that the defendant in error continues to withhold said notes or their proceeds. No objection was taken in the court in which the sale was made by reason of this refusal of one of the parties to the cause to deliver these notes to the purchaser. No effort was then made to rescind the contract, or to obtain any abatement of price, or to obtain an order of that court upon the defendant in error for these notes. Upon the contrary, the case as made by the answer establishes that the purchaser bought, along with the other assets, certain notes at the time in possession of the defendant in error, and by the decree obtained the title and right to same, or their proceeds. They have not yet secured same, though, on the facts stated, no good reason is shown why they may not assert their title through appropriate legal proceedings. Upon this view of the case, there can be no pretense that the consideration of the principal's contract has failed in whole or part. Subsequently the note in suit seems to have been assigned to the bank's receiver by Wittemore, the court's receiver. Inferably,

this was done in course of the distribution of the assets among the creditors.

It is averred that the defendant in error took the note with knowledge of the facts stated in the defendant's answer. We have therefore assumed that the note is subject to all defenses which could be made against the original payee. As the defense of failure of consideration would not be available to the principals in the note, in a suit against them by the payee, it is a defense not available to their surety. It may be that, upon the facts stated in this answer, there exists against the defendant in error a liability to account to the principals of the plaintiff in error for the notes in question, or their proceeds. But such liability constitutes an independent right of action to recover the notes themselves, or for damages for their detention or conversion. But that is a right of action which belongs to the principals, and cannot be claimed or asserted by their surety. It is certainly not a right of set-off belonging to the surety, for only mutual claims are the subject of set-off. That it might be asserted as a counterclaim by the principals, if sued, may be conceded. Even then they would be under no obligation to set it up by way of recoupment or counterclaim; for, if the facts do not constitute a failure of consideration, they might reserve their claim, and bring a separate action. Under section 5072 of the Ohio Revised Statutes, the counterclaim which a defendant may set forth in his answer "must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition." Manifestly, this is not a right of action in favor of the surety upon which "a several judgment might be had."

But, upon general principles, this liability of the defendant in error to account for the notes in question cannot be relied upon as either a set-off or counterclaim—First, because, if it be set up and allowed here, it must bar any future action by the principal makers of the note; and, second, the answer shows another note of like amount outstanding upon which a different person is liable as surety. One surety has no more right to appropriate this counterclaim for his own benefit than the other. If each should be sued, and make the same defense, how would their conflicting claims to control and appropriate this counterclaim be reconciled? In Gillespie v. Torrance, 25 N. Y. 306, the suit was, as here, against the surety upon a note, and the defense was a failure of consideration. The note was given for the price of timber sold to the principal maker of the note. The timber was in a raft, and the quantity and quality was estimated upon certificates of a surveyor. The defense was that there was a gross mistake as to quantity, and a breach of warranty in that respect, as well as in quality. The court held that the defense of failure of consideration was not made out, and that the surety could not avail himself of the breach of warranty as to quantity or quality. The court said that, though there seemed "a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty," it was an equity

in which Van Pelt was interested to even a greater extent than the defendant, and could not be disposed of without having him before the court. In Lasher v. Williamson, 55 N. Y. 619, the action was against the sureties of a lessee, who sought to defend by showing that the plaintiff, as part of the contract between himself and their principal lessee, had agreed "to furnish to him during the period of the lease a certain quantity of property, to be stored upon the leased premises at an agreed price," and that he breached this agreement. The court said:

"The breach of that promise gave [the lessee] a cause of action against the plaintiff, but this cause of action in favor of Gibbs [the lessee and principal maker of the bond] cannot be available to the sureties. It belongs to Gibbs and not to them. * * * The nonperformance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action, which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively, or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants have no control over him in this respect, and cannot borrow and avail themselves of his rights."

It is proper to observe that neither set-off nor counterclaim were set forth as distinct defenses in the answer. Without admitting that either defense could be made under the defense of failure of consideration, we have preferred to treat the defenses as if properly pleaded. There was no error in sustaining the demurrer to the answer, and the judgment will be affirmed.

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GRAVEN v. MacLEOD et al.

(Circuit Court of Appeals, Sixth Circuit. March 27, 1899.)

No. 609.

1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK AND LISTEN.

Where a carrier so operates its trains at a station that a passenger is impliedly invited to cross an intervening track in going to or leaving his train, he is chargeable only with the exercise of reasonable care to avoid danger, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing such track.

2. SAME — IMPLIED INVITATION TO CROSS TRACKS — EVIDENCE — QUESTION FOR JURY.

Deceased left a train, at a station, on the side opposite to the platform provided,—it being nearer to his residence,—and attempted to cross an intervening track, eight feet distant from the train, when he was struck and killed by another train, running in the opposite direction. Rain was falling at the time, which obscured vision; and deceased, as he left the car, pulled his hat over his face to shield it. The company's rules required trains to approach that station under full control, and prohibited trains from passing that station while other trains were receiving or discharging passengers. These rules were habitually disregarded, and the train which struck deceased was running at 15 miles per hour at the time. When the road was first built, cars were equipped with gates to prevent passengers from leaving, except on the platform side of the cars; but these had been taken off some time before the accident, and there was no notice or other warning forbidding passengers from alighting away from the platform. Deceased uniformly, and other passengers generally, without objection of the company, got off on either side, at their con-